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'Fundamental Constitutional Truths'

**The constitutional jurisprudence of Justice Deane,
1982-1995**

**A thesis submitted for the degree of
Doctor of Philosophy of
The Australian National University**

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ANU College of Law**

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however, that it was during a conversation with her in late 1998 that I first became interested in the constitutional vision of Deane. Not once through the 'process' of this PhD did I regret this conversation.

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ABSTRACT

Justice Deane was a member of the High Court from 1982 until 1995. This thesis examines Deane's constitutional jurisprudence during this period and argues that his decisions were permeated by themes and principles forming a coherent vision of the Constitution and its interpretation. Although voiced most fully in *Theophanous v Herald and Weekly Times* (1994) 182 CLR 104, Deane's constitutional vision was evident from his earliest High Court decisions.

Central to Deane's constitutional philosophy was his concept of 'the people'. Deane regarded 'the people' as the source of legal authority of the Constitution, and the Constitution as ultimately concerned with their governance and protection. Although Deane recognised the importance of representative democracy as a fundamental commitment of the Constitution, it was the Court, and judicial process, that for Deane was the most important guarantee of individual liberty. Consistent with this understanding of the role of the Court, Deane's jurisprudence favoured rights-sensitive interpretations of the Constitution's text, including the development of a number of innovative, and controversial, implied constitutional rights. These features of Deane's constitutional jurisprudence, matched with his reliance on broad and flexible interpretive principles in constitutional interpretation, challenged orthodox assumptions of the legitimate limits on judicial review in the Australian constitutional system.

In the years since Deane's departure from the Court the concept of 'the people' as the source of the Constitution's authority has gained wide acceptance. Few have also accepted Deane's bold vision of the Court's duty to protect the fundamental rights of 'the people' from legislative interference. Until this aspect of Deane's constitutional vision is adopted, some of his more controversial interpretations of the Constitution are unlikely to gain the acceptance of a majority of the Court. However, much of Deane's jurisprudence displays his reliance on his distinctive concept of 'the people' to support the application of both established principles of constitutional interpretation and a

number of innovative interpretive principles to derive moderate conclusions on the meaning and effect of the Constitution. For this reason, Deane's jurisprudence contains many fresh and compelling answers to questions regarding the meaning of the Constitution in contemporary Australia.

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INTRODUCTION

At his swearing-in as a Justice of the High Court of Australia, in July 1982

Deane¹ said:

The source of law and of judicial power in a true political democracy such as Australia is the people themselves; the governed: the strong and the weak, the rich and the poor, the good and the bad: 'all manner of people.' As the Australian Constitution itself makes clear, the Federation, in pursuance of which this Court was established, was not a federation between the States of the Commonwealth. It was a federation between the peoples of the States. Under that Federation, the grant of judicial power by the people was subject to what I see as fundamental constitutional guarantees, namely, that the power granted must primarily be exercised by an independent judiciary and that those exercising the power must act judicially.²

A glance across Deane's constitutional jurisprudence reveals the presence of 'the people', 'equality' and guarantees flowing from the separation of federal judicial power as themes in many of Deane's most controversial decisions. Deane's jurisprudence also displayed his consistent commitment to the judicial protection of the rights and interests of the disadvantaged and vulnerable in Australian society, including the 'weak', the 'poor' and 'the bad'.³ Three months before his retirement from the Court, Deane confirmed the significance of these topics in his constitutional philosophy. Observers of his jurisprudence, Deane reflected, would see 'two constant themes':

One is ... that the source of all authority is *the people as a whole*. The other is something related to that, and that is the *intrinsic equality of all people*.⁴

¹ In this thesis, Deane J is referred to as 'Deane'.

² Transcript of the Ceremonial Sitting of the Occasion of the Swearing-in of the Honourable Mr Justice Deane as a Justice of the High Court of Australia at Canberra, Tuesday 27 July 1982, 17-18.

³ As Governor-General, Deane would relate his concern for the disadvantaged to his Christian faith. For example, at the launch of 'Visions of Rottenberry Hill' at the Australian Centre for Christianity and Culture, in Canberra, Deane said:

there is no ambiguity about the constant relevance of the Christian message that the ultimate test of the worth of each of us as individuals and of all of us as a nation is how we have treated and treat the most disadvantaged and vulnerable of our fellow human beings.

Quoted in Sir William Deane, *Directions: A Vision for Australia* (2002) 87. It is beyond the scope of this thesis to do more than note that it is likely that Deane's faith informed his commitment to the protection of the disadvantaged in his constitutional jurisprudence.

⁴ Deane, quoted in Tony Stephens, *Sir William Deane: The Things that Matter* (2002) 94 (emphasis added). See also Malcolm Farr, 'Last Past the Post', *Daily Telegraph-Mirror* (Sydney), 23 August 1995, 11.

This thesis explores the principles and values which infuse Deane's constitutional jurisprudence and the persuasiveness of his vision of the Constitution.

Although twenty-five years have passed since Deane's swearing-in as a Justice of the Court, an examination of his jurisprudence has contemporary significance. Deane was a particularly controversial member of the Mason Court; a Court itself regarded as having 'revolutionised' the nature of judicial review in Australia.⁵ For example, Deane's decisions in cases such as *Mabo v Queensland (No 2)*,⁶ *Leeth v Commonwealth*⁷ and the implied freedom of political communication cases⁸ have been lightning-rods for criticism of the 'activism' of the Mason Court.⁹ An analysis of Deane's constitutional philosophy locates these, and other key decisions, within the broader context of his High Court constitutional decisions. Analysis of this kind is essential if descriptions of Deane's judicial contribution are to move beyond the 'activist' label attached most frequently to his implied rights decisions of the 1990s. In addition, through its assessment of the persuasiveness of Deane's constitutional jurisprudence, this thesis provides a different perspective on decisions that continue to frame debate on the 'proper' role of the Court in the interpretation of the Australian Constitution.¹⁰

The remainder of this introduction outlines the framework for this examination of Deane's constitutional vision. It begins with an overview of the debate stimulated by the Mason Court regarding the appropriate role of the Court in constitutional interpretation. It then outlines the criteria employed in this thesis to assess the persuasiveness of Deane's constitutional jurisprudence. Finally, it

⁵ The Mason Court's 'revolutionising' effect is examined in Jason L Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (2006).

⁶ (1992) 175 CLR 1 ('*Mabo (No 2)*').

⁷ (1992) 174 CLR 455. ('*Leeth*').

⁸ These five cases were: *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 ('ACTV'); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 ('*Nationwide News*'); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 ('*Theophanous*'); *Stephens v West Australian Newspapers Limited* ('*Stephens*') (1994) 182 CLR 211; and, *Cunliffe v Commonwealth* (1994) 182 CLR 272 ('*Cunliffe*').

⁹ For a recent example, see Janet Albrechtsen, 'Inside Judges' Secret World', *The Weekend Australian* (Sydney), 14 July 2007, 21.

¹⁰ See further Andrew Lynch, 'The Once and Future Court? A Review of Jason L Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed*' (2007) 28 *Federal Law Review* 145, 146-7.

concludes with an overview of the research methodology and structure of this thesis.

A *Deane's jurisprudence in context: legalism, realism and the Mason Court's 'activism'*

When Deane was appointed to the Court in 1982, the most influential statement on the 'proper way'¹¹ to interpret the Constitution was the *Engineers' Case*.¹² There the Court described its 'manifest duty' in constitutional interpretation as that of giving effect to 'the words of the compact' according to their 'ordinary' or 'literal' meaning.¹³ That meaning was to be found by 'pure legal construction', applying the 'settled rules'¹⁴ of statutory construction.

In the *Engineers' Case*, the Court applied these principles to reject two constitutional doctrines adopted by the Griffith Court, the reserved powers and intergovernmental immunities doctrines.¹⁵ Infused with a commitment to preserving the federal balance between the Commonwealth and the States, the doctrine of intergovernmental immunities required that the Commonwealth and the States could not be subject to laws made by the other level of government. The reserved powers doctrine required that in construing the grants of Commonwealth legislative power under s 51 the Court should bear in mind that the Constitution impliedly reserved the unenumerated powers to the States.¹⁶ The Court in the *Engineers' Case* rejected these doctrines on the basis that they applied:

an interpretation of the Constitution depending on an implication which is formed on a vague, individual conception of the spirit of the compact ...

¹¹ Haig Patapan, *Judging Democracy: The New Politics of the High Court of Australia* (2000) 10.

¹² *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 ('*Engineers' Case*').

¹³ *Ibid* 142. For a discussion of 'literalism', and its place within theories of constitutional interpretation, see, for example, Sir Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 13, 16 and Jeremy Kirk, 'Constitutional Interpretation and a Theory of Evolutionary Originalism' (1999) 27 *Federal Law Review* 323.

¹⁴ *Engineers' Case* (1920) 28 CLR 129, 143.

¹⁵ See *D'Emden v Pedder* (1904) 1 CLR 91 and *Huddart Parker and Co v Moorehead* (1909) 8 CLR 330.

¹⁶ See discussion in Keven Booker and Arthur Glass, 'The *Engineers Case*' in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003) 34, 35.

arrived at by the Court on the opinions of the Judges as to hopes and expectations respecting vague external conditions.¹⁷

A further consequence of the Court's emphasis on 'legal' reasoning in the interpretation of the Constitution in the *Engineers' Case* was its support for a 'judicial philosophy designed to underpin parliamentary supremacy.'¹⁸ In the *Engineers' Case* the Court accepted a deferential attitude towards Parliament's decision-making.¹⁹ Distinguishing between legitimate legal and political roles, the Court also emphasised that it was to Parliament, and the democratic process, that 'the people' should turn for the protection of their interests.²⁰ Thus, the Court argued:

If it be conceivable that the representatives of the people of Australia as a whole would ever proceed to use their national powers to injure the people of Australia considered sectionally, it is certainly within the power of the people themselves to resent and reverse what may be done. No protection of this Court in such a case is necessary or proper.²¹

As Galligan has observed, the 'genius' of the *Engineers' Case* was as both a 'technical method and a public rhetoric'.²² This method 'disguised' the inherently political nature of the Court's judicial review function, by claiming that legal reasoning was immune from political and personal values.²³ It also 'disguised' the nationalising effect of a literalist interpretive method when applied to a Constitution under which Commonwealth heads of power are expressly enumerated.²⁴

Sir Owen Dixon's 'strict and complete legalism' solidified the emphasis of the *Engineers' Case* on the established principles of 'legal reasoning' as a guide to

¹⁷ *Engineers' Case* (1920) 28 CLR 129, 145.

¹⁸ George Williams, 'Engineers and Implied Rights' in Michael Coper and George Williams (eds), *How Many Cheers for Engineers* (1997) 105, 106.

¹⁹ See Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17 *Federal Law Review* 162. Gageler's analysis of the *Engineers' Case* is discussed in Keven Booker and Arthur Glass, 'The *Engineers Case*' in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003) 34, 52.

²⁰ George Williams described this philosophy, matched with its commitment to textualism, as the 'twin symbolism' of the *Engineers' Case*. George Williams, 'Engineers and Implied Rights' in Michael Coper and George Williams (eds), *How Many Cheers for Engineers* (1997) 105, 107.

²¹ *Engineers' Case* (1920) 28 CLR 129, 152.

²² Brian Galligan, 'The Australian High Court's Role in Institutional Maintenance and Development' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions* (1996) 184, 201.

²³ *Ibid.*

²⁴ *Ibid.*

constitutional interpretation.²⁵ Dixon J's decision in *Melbourne Corporation v Commonwealth* confirmed that his approach went beyond the interpretation of the text alone, to include the drawing of implications from 'the very frame of the Constitution'.²⁶ However, according to Dixon only by 'strict and complete legalism' could the Court 'maintain the confidence of all parties in Federal conflicts'.²⁷

Sir Owen Dixon's extra-curial speeches also confirmed two foundational principles of his vision of the Constitution and its interpretation. First, in his view the Constitution was 'not a supreme law purporting to obtain its legal force from the direct expression of the people's inherent authority to constitute a government'.²⁸ Rather, the Constitution was properly regarded as 'a statute of the British Parliament enacted in the exercise of its legal sovereignty over the law everywhere in the King's Dominions'.²⁹ The form of the Constitution was itself a reminder of its Imperial heritage.³⁰ Second, Sir Owen Dixon famously remarked extra-curially on the Constitution's silence on the topic of individual rights, stating:

We did not adopt the Bill of Rights or transcribe the Fourteenth Amendment. It is, as it appears to me, a striking difference. It goes deep in legal thinking.³¹

This 'striking difference' flowed from a faith in parliamentary democracy, and the common law, as the true source of the protection of individual liberty.³²

These principles informed Sir Owen Dixon's understanding of the basic nature of the Constitution, and its interpretation.

²⁵ 'Swearing-in of Sir Owen Dixon as Chief Justice' (1952) 85 CLR xi, xiv. That is not to suggest that *Engineers'* literalism and Sir Owen Dixon's legalism are synonymous, only that underlying both approaches was the principle that the Constitution's meaning is to be found by interpreting its text, in context, according to established legal method.

²⁶ (1947) 47 CLR 1, 83 ('*Melbourne Corporation Case*'). Note also Dixon J's earlier remarks on the legitimacy of constitutional implications in *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657, 681 and *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29, 85.

²⁷ 'Swearing-in of Sir Owen Dixon as Chief Justice' (1952) 85 CLR xi, xi.

²⁸ Sir Owen Dixon, 'The Law and the Constitution' (1935) 51 *Law Quarterly Review* 590, 597.

²⁹ *Ibid.*

³⁰ This fact was emphasised by Lindell in his seminal article G. J. Lindell, 'Why is Australia's Constitution Binding? The Reasons in 1900 and Now, and the Effect of Independence' (1986) 16 *Federal Law Review* 29, 30.

³¹ Sir Owen Dixon, 'Concerning Judicial Method' (1956) 29 *Australian Law Journal* 468, 469.

³² On the attitudes of the framers in this regard, see further John Williams, 'The Emergence of the Commonwealth Constitution' in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003) 1, 22-7.

Sir Owen Dixon's 'strict and complete legalism' continues to exercise considerable influence on the 'Australian legal psyche'.³³ However, by the time of Deane's retirement from the Court in November 1995, legalism's status as the sole legitimate approach to judicial review had been extensively challenged.³⁴ For example, in a paper presented before his elevation to Chief Justice, Sir Anthony Mason stated extra-curially that:

it is impossible to interpret any instrument, let alone a constitution, divorced from values... . The ever present danger is that 'strict and complete legalism' will be a cloak for undisclosed and unidentified policy values.³⁵

Sir Anthony therefore urged that, to the extent that values were taken into account in legal reasoning, they must be 'acknowledged and should be *accepted community values*' rather than the 'mere personal values' of the individual judge.³⁶

As is well known, in 1992 in *Mabo (No 2)* and *Dietrich v The Queen*³⁷ the Court famously, and controversially, referred to 'community values' in the development of the common law. These cases spoke to the politically sensitive subjects of native title and the role of legal aid in the conduct of a fair criminal trial. The Court's decisions were committed to fairness in the treatment of the disadvantaged and vulnerable in Australian society. In their striking, and much criticised, judgment in *Mabo (No 2)*, Deane and Gaudron JJ went further than the rest of the Court, controversially 'apportioning shame'³⁸ for past injustices perpetrated on Indigenous Australians. However, in both outcome and

³³ Michael Kirby, 'Judicial Activism? A Riposte to the Counter-Reformation' (2004) 24 *Australian Bar Review* 219, 221. For a recent defence of legalism, see John Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 23 *Australian Bar Review* 110.

³⁴ See discussion in Sir Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 13, 13. On the particular contribution of Murphy J to this change in interpretive methodology, see Tony Blackshield, 'Lionel Murphy and Judicial Method' in Michael Coper and George Williams (eds), *Justice Lionel Murphy: Influential or Merely Prescient?* (1997) 224.

³⁵ Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16 *Federal Law Review* 1, 5. Sir Gerard Brennan observed with like effect that 'the rhetoric based on strict and complete legalism masked the truth of the judicial method': Sir Gerard Brennan, 'A Critique of Criticism' (1993) 19 *Monash University Law Review* 213, 213.

³⁶ Mason, above n 35, 5 (emphasis added). The Mason Court's openness on the nature of judicial reasoning was mirrored by an increase in the extra-curial speeches of members of the Court in this period, although not by Deane. See further discussion below n 96.

³⁷ (1992) 177 CLR 292 ('*Dietrich*').

³⁸ Haig Patapan, *Judging Democracy: The New Politics of the High Court of Australia* (2000) 125. Patapan's remarks related particularly to statements made by Deane and Gaudron JJ at *Mabo (No 2)* (1992) 175 CLR 1, 104, 109.

reasoning, the Court's decisions in *Mabo (No 2)* and *Dietrich* were representative of the Mason Court's movement from under the protective cloak of legalism into the realm of legal realism, and, for some commentators, into the heartland of legal 'activism'.³⁹

A further development during the Mason Court era was the Court's explanation of the legitimacy of the Constitution. Under Sir Owen Dixon's vision, the Constitution derived its authority from its status as an Act of Imperial Parliament. As his swearing-in speech attested, Deane was firmly of the view that the Constitution's legitimacy resided in 'the people', as the 'source of law' in the Australian constitutional system.⁴⁰ Twelve years later, in *Theophanous v Herald & Weekly Times* Deane elaborated on this point, explaining that:

The present legitimacy of the Constitution as the compact and highest law of our nation lies exclusively in the original adoption (by referenda) and subsequent maintenance (by acquiescence) of its provisions by the people.⁴¹

A number of practical and doctrinal limitations attend Deane's identification of 'the people' as legal sovereigns. The effect of these limitations on the legitimacy of Deane's constitutional philosophy is a recurring question in this thesis. Despite these limitations, however, a majority of the Mason Court judges,⁴² and a number of current Justices of the High Court,⁴³ have acknowledged that legal sovereignty must now be said to reside with the Australian people.

³⁹ For example, Pierce observed that the language of Deane and Gaudron JJ's reasons in *Mabo (No 2)* 'angered many of [his] informants because Australian judges historically avoided writing in moralizing tones'. One of Pierce's informants reflected that Deane and Gaudron JJ's judgment was 'over the top – way over. That wasn't logical thinking. It was anger, emotion. Judges don't write that way!' Quoted in Jason L Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (2006) 69.

⁴⁰ Justice Keith Mason observed extra-curially that Deane's swearing-in speech 'would have surprised' Sir Owen Dixon: Keith Mason, 'Citizenship' in Cheryl Saunders (ed) *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 35, 36.

⁴¹ (1994) 182 CLR 104, 171 ('*Theophanous*').

⁴² See, for example, *ACTV* (1992) 177 CLR 106, 137-8 (Mason CJ); *Nationwide News* (1992) 177 CLR 1, 70-2 (Deane and Toohey JJ); and *McGinty v Western Australia* (1996) 186 CLR 140, 230 (McHugh J). See also 'Swearing-in of Sir Gerard Brennan as Chief Justice' (1995) 183 CLR ix, x. The similarity between the swearing-in speeches of Deane and Brennan CJ was observed in 'Justices for All', *Sun Herald* (Sydney), 27 August 1995, 22.

⁴³ See, for example, Michael D. Kirby, 'Deakin: Popular Sovereignty and the True Foundation of the Australian Constitution' (1996) 3 *Deakin Law Review* 129 and Murray Gleeson, *The Rule of Law and the Constitution* (2000) 6. Evans reflects on the significance of these statements, and those of the Mason Court judges listed above n 42: Simon Evans, 'Why is the Constitution Binding? Authority, Obligation and the Role of the People' (2004) 25 *Adelaide Law Review* 103, 106-8.

This challenge to the foundational assumption of the Australian Constitution during the Mason Court era stimulated discussion of the range of theories and principles of interpretation that might be applicable in the Australian context. Through his High Court jurisprudence, Deane was a prominent contributor to, and catalyst for, this debate. For example, Deane's famous 'living force' theory, articulated in *Theophanous*, applied an evolutionary approach to constitutional interpretation, and emphatically rejected the role of the framers' intentions in constitutional interpretation.⁴⁴ Deane's theory invigorated debate on the legitimacy of 'originalist' and 'non-originalist' approaches to constitutional interpretation, and the limits of an evolutionary approach consistent with the power vested in 'the people' to amend the Constitution by referenda under s 128.⁴⁵

Deane also adopted a broad approach to the derivation of constitutional implications, described in this thesis as Deane's 'fundamental concepts' reasoning. Under this approach, constitutional implications, including broad constitutional rights, could be derived from the Constitution's underlying doctrines of government or common law rights that were manifested by the text.⁴⁶ This approach raised questions of the limits of the Court's power to protect the fundamental rights of 'the people' in a constitutional system lacking a formal Bill of Rights. A final and distinctive interpretive principle utilised by Deane in his constitutional jurisprudence was proportionality analysis, through which the Court weighed policy considerations and the impact of legislation on individual rights. Deane applied these three signature interpretive principles to increase the judicial protection of 'the people' under the Constitution. For Deane, this outcome was a consequence of his belief that the Constitution's 'central thesis' was the principle that all governmental power flowed from 'the people' and must be exercised for their benefit.⁴⁷

⁴⁴ *Theophanous* (1994) 182 CLR 104, 171.

⁴⁵ See, for example, Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1 and Jeremy Kirk, 'Constitutional Interpretation and a Theory of Evolutionary Originalism' (1999) 27 *Federal Law Review* 323. On the 'taxonomy' between originalist and non-originalist theories, and for a recent assessment of Deane's theory see John Dyson Heydon, 'Theories of Constitutional Interpretation: A Taxonomy' (2007) Winter *Bar News* 12.

⁴⁶ Ironically, this approach was best summarised by Deane in his joint judgment with Toohey J in *Nationwide News* (1992) 177 CLR 1, 69-70.

⁴⁷ *Theophanous* (1994) 182 CLR 104, 180.

Deane was not alone in the Mason Court era in envisioning the Court's role in constitutional interpretation as extending to the protection of 'the people'. For example, Sir Anthony Mason observed extra-curially that the Australian democratic process involved more than an 'exclusive emphasis on parliamentary supremacy and majority will'.⁴⁸ Instead it involved:

A notion of responsible government which respects the fundamental rights and dignity of the individual and calls for the observance of procedural fairness in matters affecting the individual.⁴⁹

In 1992, amidst the debate sparked by *Australian Capital Television Pty Ltd v Commonwealth*⁵⁰ and *Nationwide News Pty Ltd v Wills*,⁵¹ Justice John Toohey remarked in his controversial extra-curial paper that:

the will which judicial review may frustrate is that of a current majority of members of the legislature, which does not necessarily coincide with the will of a majority of citizens. Hence when judicial review occurs pursuant to a written constitution which was adopted and can be amended by means reflective of the popular will, it may be regarded as not even anti-majoritarian.⁵²

For Deane also, the Constitution guaranteed more than a system of majoritarian democracy. Thus, as he had signalled in his swearing-in speech, Deane's decisions reveal an understanding of the Constitution as an instrument designed to protect the sovereign people – 'all manner of people' – through the judicial enforcement of individual rights.

These, and other, changes in the Court's method and its vision of its role were given dramatic effect in 1992. In that year, the Court delivered judgment in *Mabo (No 2)*, *Leeth*, *ACTV*, *Nationwide News* and *Dietrich*.⁵³ As Lynch has observed, the strength of responses to the Mason Court decisions (from its 'passionate supporters' to 'fierce detractors') continues to frame debate on the 'proper' role of the court in constitutional interpretation.⁵⁴ As this range of responses applied equally, and at times particularly, to Deane's reasoning, this debate informs contemporary evaluations of Deane's constitutional jurisprudence. Indeed, the debate surrounding the free speech cases is

⁴⁸ Sir Anthony Mason, 'Future Directions in Australian Law' (1987) 13 *Monash University Law Review* 149, 163.

⁴⁹ *Ibid.*

⁵⁰ (1992) 177 CLR 106.

⁵¹ (1992) 177 CLR 1.

⁵² John Toohey, 'A Government of Laws, and Not of Men?' (1993) 4 *Public Law Review* 158, 172.

⁵³ A list of the key constitutional cases of 1992 is contained in Appendix A.

⁵⁴ Andrew Lynch, 'The Once and Future Court? A Review of Jason L Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed*' (2007) 28 *Federal Law Review* 145, 146-7.

particularly significant as this thesis demonstrates that the trends exhibited in Deane's reasoning in his free speech cases are present throughout his jurisprudence.

A unique snapshot of the varied responses to the Court's free speech cases was a collection of commentaries published in the 1994 *Sydney Law Review* Symposium titled 'Constitutional Rights for Australia?'.⁵⁵ For example, at one end of the spectrum, Detmold wrote of the free speech cases, and Deane and Toohey JJ's decision in *Leeth*, with 'unqualified enthusiasm'.⁵⁶ Detmold regarded these cases as signalling the Court's 'new constitutional law', premised on the concept of 'the people' as 'owners' of the Constitution.⁵⁷ These cases, Detmold argued, were welcome innovations in Australian constitutional law, providing the Australian people with 'everything that a written Bill of Rights could give us'.⁵⁸ However, the possibility that these cases might signal the emergence of an implied bill of rights was a cause for serious concern amongst other participants of the Symposium. Fraser, for instance, feared that the free speech cases enabled the Court to strike down legislation on the basis of idiosyncratic, and paternalistic, concepts of justice and fairness, inconsistent with the democratic commitment of the Constitution.⁵⁹ Falling between these positions, commentators such as Zines responded to the free speech cases with cautious optimism, recognising the legitimacy of an implied freedom of political communication in a moderate form. However, Zines also warned that the Court's interpretive approach, particularly its reliance on the concept of popular sovereignty, could conceivably open a 'Pandora's box of implied rights and freedoms',⁶⁰ heavily influenced by the judge's 'personal philosophy'.

The varied responses of these commentators to the Court's free speech cases reinforces the point that an evaluation of Deane's constitutional jurisprudence will depend on the theory of judicial review against which Deane's decisions are assessed. In a recent extra-curial commentary on 'judicial activism', Justice

⁵⁵ 'Symposium: Constitutional Rights for Australia?' (1994) 16 *Sydney Law Review*.

⁵⁶ Wojciech Sadurski, 'Foreword' (1994) 16 *Sydney Law Review* 145, 145 commenting on M.J. Detmold, 'The New Constitutional Law' (1994) 16 *Sydney Law Review* 228.

⁵⁷ M.J. Detmold above n 56, 248.

⁵⁸ *Ibid.*

⁵⁹ Andrew Fraser, 'False Hopes: Implied Rights and Popular Sovereignty in the Australian Constitution' (1994) 16 *Sydney Law Review* 213.

⁶⁰ Leslie Zines, 'A Judicially Created Bill of Rights?' (1994) 16 *Sydney Law Review* 166, 177.

Michael Kirby remarked that without clear identification of standards or criteria, assessments of judicial reasoning can result in purely 'visceral reactions to particular outcomes.'⁶¹ Debate of this nature devalues the contribution of jurists, including Deane, to Australian constitutional theory and offers little insight into the nature and legitimacy of their constitutional philosophy. It is therefore vital to identify at the outset of this discussion the criteria for evaluating Deane's constitutional jurisprudence.

B *Criteria for evaluating Deane's jurisprudence*

As Justice Michael Kirby acknowledged, identifying the criteria against which a judge's jurisprudence and interpretive philosophy is to be assessed is no easy task.⁶² One approach can be to isolate a single comparator, a benchmark theory or principle of constitutional interpretation. The 'literalism' of the *Engineers' Case* could provide such standard. In 1996, for example, McHugh J framed his stinging critique of Deane and Toohey JJ's reasoning in *Nationwide News* as illegitimate 'top-down reasoning' that was inconsistent with the principle in the *Engineers' Case*.⁶³ The hold of the *Engineers' Case* in Australian constitutional theory would ensure that such a comparison was both fair (as Deane himself frequently embraced the principle in the *Engineers' Case* in his jurisprudence) and relevant (as the principle continues to guide the Court in its approach to constitutional interpretation). However, utilising the *Engineers' Case*, or any other identified theory or principle of constitutional interpretation as the benchmark or comparator in this thesis presents three descriptive and analytical challenges.

The first challenge is that of labelling a judge's constitutional philosophy.⁶⁴ For example, Justice Keith Mason observed extra-curially that 'top-down reasoning'

⁶¹ Michael Kirby, 'Judicial Activism? A Riposte to the Counter-Reformation' (2004) 24 *Australian Bar Review* 219, 231.

⁶² *Ibid.*

⁶³ *McGinty v Western Australia* (1996) 186 CLR 140, 231-2 ('*McGinty*').

⁶⁴ This was a concern raised by Saunders in her evaluation of the constitutional philosophy of Gaudron J: Cheryl Saunders, 'Interpreting the Constitution' (2004) 15 *Public Law Review* 289, 291.

as an approach to constitutional interpretation has 'become a term of abuse.'⁶⁵ In such circumstances, as Saunders reflected, theories of constitutional interpretation can be utilised as 'weapons ... [in] an ideological war.'⁶⁶ As Deane has been labelled as an 'activist' judge on an 'activist' Court,⁶⁷ critiquing Deane's approach against the standard of the *Engineers' Case* may perpetuate this unhelpful characterisation of Deane's constitutional jurisprudence.

The second challenge is that of description. McHugh and Heydon JJ have highlighted difficulties in the taxonomy of constitutional theory. In *Eastman v The Queen*, for example, McHugh J raised the issue of the correct classification of the approach of the Court in the *Engineers' Case*, highlighting the nuances of meaning encompassed within the theories of 'textualism' and 'literalism'.⁶⁸ In his 2007 Sir Maurice Byers Lecture, Justice Dyson Heydon also explored extra-curially the 'difficult task' of classifying those theories of constitutional interpretation that explore 'the relationship between the meanings of constitutional words and the times at which the search for those meanings is conducted.'⁶⁹ Before a single theory of constitutional interpretation may be utilised as the foundation for evaluating Deane's constitutional jurisprudence, the nuances of that theory would first have to be carefully identified.⁷⁰ As Saunders indicated, however, without detailed explanation and qualification, a comparator theory may be 'too simplistic' to be of value.⁷¹ At the other extreme, however, too close a definition of the 'proper' theory of interpretation removes the value of comparison in articulating the distinctiveness of Deane's constitutional vision. Identifying a comparator theory with this degree of precise-generality would also divert attention from Deane's constitutional vision, the subject of this thesis, into the larger disputes of constitutional theory.

⁶⁵ Keith Mason, 'What is Wrong with Top-Down Legal Reasoning?' (2004) 78 *Australian Law Journal* 574, 574.

⁶⁶ Cheryl Saunders, 'Interpreting the Constitution' (2004) 15 *Public Law Review* 289, 291.

⁶⁷ See, for example, the many references to Deane in the interviews conducted by Pierce of Australian judges and high ranking legal officers in Jason L Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (2006) 204-6.

⁶⁸ *Eastman v The Queen* (2000) 203 CLR 1, 47.

⁶⁹ John Dyson Heydon, 'Theories of Constitutional Interpretation: A Taxonomy' (2007) Winter *Bar News* 12, 12.

⁷⁰ Compare, for example, Zines' discussion of the variety of methods and outcomes reached by the Court in its overt application of 'legalism': Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 424-33.

⁷¹ Cheryl Saunders, above n 66, 291

The final challenge associated with establishing a single comparator theory for this study of Deane's constitutional philosophy is normative. The purpose of this thesis is both to explore the recurring themes and threads of Deane's jurisprudence, and to assess the persuasiveness of his vision. Consistent with this purpose, examining Deane's constitutional jurisprudence against an identified constitutional theory, or set of principles, will not achieve this result unless it is first accepted that that theory provides the only 'proper' approach to constitutional interpretation. However, as Chief Justice Murray Gleeson observed, extra-curially, there is 'no single problem of interpretation raised by the Commonwealth Constitution; and there is no single solution.'⁷² For this reason, this thesis employs a series of criteria identifying key attributes or qualities of judicial reasoning as its framework for assessing Deane's constitutional jurisprudence.

Although the qualities of 'proper' judicial reasoning are themselves matters of dispute, as Coper has acknowledged, a number of propositions may now be taken to 'command common consent' concerning the nature of judicial reasoning.⁷³ These propositions assist in distancing the debate over Deane's constitutional jurisprudence from the 'ideological war'⁷⁴ and the 'visceral'⁷⁵ responses that his decisions may excite. Coper's four propositions are:

1. that it is unhelpful to assert that final appellate courts, such as the High Court, do not make law;
2. that in making law within the confines of judicial process the High Court's decisions are rarely compelled by authoritative legal materials but involve hard choices between competing principles and their underlying policy considerations;
3. that the need for certainty and stability is an important, but not the only relevant, policy consideration; and

⁷² Murray Gleeson, 'Foreword' in Michael White and Aladin Rahemtula (eds), *Queensland Judges on the High Court* (2003) vii, ix. See also, Gummow J's observation that '[q]uestions of construction of the Constitution are not to be answered by the adoption and application of any particular, all-embracing and revelatory theory or doctrine of interpretation.' *SGH Limited v Federal Commissioner of Taxation* (2002) 210 CLR 51, 75.

⁷³ Michael Coper, 'Concern About Judicial Method' (2006) 30 *Melbourne University Law Review* 554, 572.

⁷⁴ Cheryl Saunders, 'Interpreting the Constitution' (2004) 15 *Public Law Review* 289, 291.

⁷⁵ Michael Kirby, 'Judicial Activism? A Riposte to the Counter-Reformation' (2004) 24 *Australian Bar Review* 219, 231.

4. that in weighing these competing considerations, judges may honestly and reasonably, with no lack of probity, differ.⁷⁶

Although not specific to constitutional interpretation, Coper's four propositions provide a useful starting point for an evaluation of Deane's constitutional jurisprudence. These propositions recognise that the text of the Constitution may not always compel a single answer to constitutional meaning. The Court may therefore legitimately turn to precedent and history, as well as policy, to assist it in its task. However, Coper's propositions also recognise that judicial choice is not unlimited. Consistent with the separation of powers effected by the Constitution, proper judicial reasoning requires that the tools and principles the Court utilises in divining constitutional meaning are 'standards, touchstones or reference points' independent of the personal values of the decision-maker.⁷⁷

Against this 'common ground', what qualities distinguish compelling answers to the interpretation of the Constitution? In his discussion of the development of a jurisprudence of constitutional rights in Australia and the United Kingdom, Allan observed that principled judicial interpretation in this direction requires:

imagination as well as rigorous analysis, judicial creativity as well as appropriate deference to government and Parliament on matters within their proper, legally defined, competences.⁷⁸

Allan's normative argument, that the constitutional protection of rights and freedoms should be extended, may be disputed. However, his proposition that innovation in constitutional interpretation must be accompanied by a high standard of 'rigorous analysis' and 'appropriate deference', provides two criteria against which Deane's constitutional jurisprudence, renowned for its innovation and imagination, can be assessed.⁷⁹

⁷⁶ These four propositions, with minor modification for tense and format, are taken directly from Michael Coper, 'Concern About Judicial Method' (2006) 30 *Melbourne University Law Review* 554, 572.

⁷⁷ *Ibid* 567.

⁷⁸ TRS Allan, 'The Common Law as Constitution: Fundamental Rights and First Principles' in Cheryl Saunders (ed) *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 146, 166.

⁷⁹ Compare Allan's criteria with Justice Michael Kirby's observation of the tension between 'the creative role of the contemporary judge – especially in higher appellate courts – and the ever present need that such creativity be tethered to a legal rule – one based on legal principle and policy as well as the already stated rules of existing authority.' Michael Kirby, 'Judicial Activism? A Riposte to the Counter-Reformation' (2004) 24 *Australian Bar Review* 219, 220.

The first criterion, 'rigorous analysis', scrutinises the manner in which the Court identifies constitutional meaning in a particular case. It examines the clarity, precision and accuracy of the Court's analysis of the text, and its use of external sources, such as precedent, history and policy.⁸⁰ For example, considered analysis of the Convention Debates as a tool in constitutional interpretation recognises that, although a potentially rich historical resource, the Debates may offer limited, or inconsistent, insights into the meaning of a particular constitutional provision. In addition, as commentators such as Coper and Saunders have indicated, 'there is much to be said' for the proposition that judicial choice in constitutional interpretation should be explicit. In this way, 'rigorous analysis' requires openness in the identification, balancing and application of policy considerations.⁸¹ A further consideration is the consistency and coherence with which principles of interpretation are applied to resolve the meaning of the Constitution. Although it may be accepted that one constitutional theory or method may not be appropriate across all aspects of the Constitution,⁸² inconsistent use of such principles may indicate that the Court was motivated by 'whatever approach produces a desired outcome.'⁸³ Such reasoning is inconsistent with the 'confines of judicial process' and displays a lack of 'rigorous analysis.'⁸⁴

The second criterion, 'appropriate deference', examines the consequences of an interpretation of the Constitution for the relationship between, and roles of, the Court and Parliament. This criterion recognises that constitutional interpretation is not only restrained by the limits of language or logic. The High Court interprets the Constitution within a legal system premised on the separation of powers. The legitimacy of constitutional interpretation therefore depends on the Court's respect for the limits of its role. As foreshadowed in the

⁸⁰ See, to like effect, Justice Michael Kirby's reliance on legal authority, legal principle and legal policy to guide judicial choice. Ibid 219. Kirby pursued this topic at length in his 2003 Hamlyn Lectures, published as Michael Kirby, *Judicial Activism: Authority, Principle and Policy in the Judicial Method* (2004).

⁸¹ Cheryl Saunders, 'Interpreting the Constitution' (2004) 15 *Public Law Review* 289, 292. Compare Coper, who did, however, acknowledge that openness would not be universally accepted as an attribute for proper legal reasoning: Michael Coper, 'Concern About Judicial Method' (2006) 30 *Melbourne University Law Review* 554, 572-3.

⁸² Compare above n 72.

⁸³ *Cheng v The Queen* (2000) 203 CLR 248, 81 (Kirby J).

⁸⁴ Compare Michael Coper, above n 81, 572.

context of the 1994 Symposium, definitions of 'appropriate deference' will clearly vary. However, it may be agreed that 'appropriate deference' is a matter of substance, not of 'form', and so will not be satisfied merely by the ritual invocation of the virtues of 'legalism' in constitutional analysis. Rather, the Court's assessment of the validity of legislation must be made in the context of a genuine consideration of the intentions and policy objectives of Parliament and recognition of the limits of the judicial power to scrutinise legislative decision-making.

Applying these criteria, this thesis argues that Deane's constitutional jurisprudence was unified by common themes and methods (particularly his three signature interpretive principles) and informed by his vision of the role of 'the people'. In cases such as *Leeth*, where Deane and Toohey JJ's implication of an equality guarantee rested heavily on the concept of 'the people', Deane's reasoning failed to display a compelling analysis of text, history or principle sufficient to support the extensive transfer of power to the Court to 'censor'⁸⁵ the legislature. This does not mean, however, that Deane's reliance on 'the people' throughout his jurisprudence lacks a legitimate or compelling foundation. Rather, through his jurisprudence, the persuasiveness of Deane's application of his three signature interpretive principles ('fundamental concepts', 'living force' and proportionality reasoning) varies, influenced by factors including Deane's reliance on the Constitution's text and the grounding of his reasoning in history, precedent and principle. These variations reinforce that Deane's contribution to Australian constitutional law, and the insight of his constitutional vision, should be assessed by reference to his thirteen years of service on the High Court, not simply the iconic rights cases of 1992.

C *Methodology and structure of this thesis*

While a member of the High Court, Deane participated in over 120 decisions in which he commented on the meaning of the Constitution.⁸⁶ As undisputed expressions of Deane's constitutional vision, his single judgments are the

⁸⁵ Leslie Zines, 'A Judicially Created Bill of Rights?' (1994) 16 *Sydney Law Review* 166, 182.

⁸⁶ Deane's constitutional cases are listed in Appendix C.

primary focus of this thesis. Nevertheless, Deane's joint reasons in *Leeth*, *Nationwide News*, *ACTV*, *Cheatle v The Queen*⁸⁷ and *Grollo v Palmer*⁸⁸ are particularly important decisions of this period. The significance of these decisions, and a number of other joint judgments, are addressed in this thesis, as is the challenge posed by extracting Deane's vision from joint judgments.

Deane's thoughts on the nature of the Constitution did not begin with his swearing-in as a Justice of the High Court in 1982. Deane was a member of the New South Wales Bar between 1957 and 1977. He gave advice in matters relating to the 1975 constitutional crisis and appeared in major High Court challenges such as the *Seas and Submerged Lands Case*.⁸⁹ In this period, Deane also delivered a commentary on a paper presented by Gareth Evans at the 'Australian Lawyers and Social Change' conference in 1974.⁹⁰ In addition, as a member of the Federal Court, between 1977 and 1982, Deane delivered judgments in a number of important constitutional cases.⁹¹ However, the decision to focus on Deane's High Court jurisprudence in this thesis has been carefully made. In an interview with Stephens, Deane explained his understanding of his different roles as a Federal Court and High Court judge:

The general view in the legal profession would be that I was a lawyer's lawyer on the Federal Court and went through a seachange when I was appointed to the High Court. There is a bit of truth in that. The function of a Supreme Court or Federal Court judge is different to that of a High Court judge. You don't regard it as your function to do anything other than apply the law. Your task is to try to ascertain *what the law is*. ... To some extent, that involves trying to guess what the High Court would hold the law to be. ... On the High Court, the question of what the law *should be* is likely to be more relevant than on the Supreme Court or the Federal Court.⁹²

In light of these views, Deane's High Court decisions may be regarded as reflecting his most open and direct thoughts on the meaning of the

⁸⁷ (1993) 177 CLR 541.

⁸⁸ (1995) 184 CLR 348.

⁸⁹ *New South Wales v Commonwealth* ('*Seas and Submerged Lands Case*') (1975) 135 CLR 337.

⁹⁰ W.P. Deane, 'Commentary' in A.D. Hambly and J.L. Goldring (eds), *Australian Lawyers and Social Change: Proceedings of a Seminar held at The Faculty of Law, The Australian National University, 23-25 August 1974* (1976) 76.

⁹¹ See, for example, *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* (1978) 22 ALR 621 and *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577. Deane was also briefly a member of the Supreme Court of New South Wales.

⁹² Deane, quoted in Tony Stephens, *Sir William Deane: The Things that Matter* (2002) 45-6 (emphasis added).

Constitution. The significance of Deane's work at the Bar and his Federal Court decisions must await a broader work on Deane's life story.⁹³

An interesting feature of Deane's time on the High Court was the growth in extra-curial remarks published by its serving members; a phenomenon that accelerated during the Mason Court era.⁹⁴ In such publications judges may feel at liberty to reflect at large on the current state of the law, including the meaning of the Constitution, without the restrictions of the facts of a particular case.⁹⁵ Although Deane embraced many of the jurisprudential changes brought about by the Mason Court, Deane was notable in his extra-curial silence. At a press conference in 1995 announcing his retirement from the Court to take up vice-regal office, Deane candidly explained:

I've taken the view ... that for me, the best way of performing my judicial functions was to confine what I had to say in my judgments, and quite frankly I found writing the judgments quite often exhausting.⁹⁶

The absence of extra-curial publications by Deane increases the significance of an analysis of the constitutional philosophy that emerges through his High Court decisions.

This examination of Deane's constitutional jurisprudence is in six chapters. The first two chapters of this thesis explore aspects of Deane's vision of Australian federalism. Chapter 1 begins with Deane's broad and dynamic approach to defining Commonwealth legislative power in his decisions on ss 51(xx), (xxix) and (xxxv). The focus of this chapter is on Deane's decisions in three cases: *Commonwealth v Tasmania* ('Tasmanian Dam Case');⁹⁷ *New South Wales v Commonwealth* ('Incorporation Case')⁹⁸ and *Re Federated Storemen and Packers*

⁹³ For (some) biographical discussion see: Rosalind Atherton, Tony Blackshield, Bruce Kercher and Cameron Stewart, 'Deane, William Patrick' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 195 and Tony Stephens, *Sir William Deane: The Things that Matter* (2002).

⁹⁴ For an overview of this phenomenon, see James Thomson, 'Extra-judicial Writings of the Justices' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 265.

⁹⁵ Note, in particular, John Toohey, 'A Government of Laws, and Not of Men?' (1993) 4 *Public Law Review* 158. See further discussion below chapter 5 n 119.

⁹⁶ Deane, quoted in Peter Charlton, 'Clear Views from the Top', *Brisbane Courier Mail* (Brisbane), 23 August 1995, 15.

⁹⁷ (1983) 158 CLR 1.

⁹⁸ (1990) 169 CLR 482.

Union of Australia; Ex parte Wooldumpers (Victoria) Limited.⁹⁹ These cases are particularly insightful illustrations of Deane's reliance on a range of interpretive tools, including the role of precedent and policy. This chapter also introduces two of Deane's signature interpretive principles, each tied to his understanding of the role of 'the people': proportionality reasoning; and one component of his 'living force' theory, that is, Deane's explanation of the role of the framers, and the Convention Debates, in constitutional interpretation. Deane's use of these tools reflected a distinctive stream in his reasoning in both his s 51 decisions and his wider constitutional jurisprudence.

Chapter 2 continues the discussion of Deane's federal vision by drawing together his views on an unusual mix of constitutional provisions and implications. This chapter explores Deane's decisions on ss 90 and 109, and the implications he drew from the nature of the Federation in *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd*;¹⁰⁰ *Queensland Electricity Commission v Commonwealth*;¹⁰¹ and *Breavington v Godleman*.¹⁰² Through this discussion, Deane's commitment to equality and the influence of his understanding of the constitutional significance of 'the people of Australia', as distinct from the people of the States, begins to emerge. This chapter also introduces the third of Deane's signature interpretive principles, his 'fundamental concepts' reasoning. The cases explored in this chapter display Deane's derivation of constitutional implications limiting the legislative power of the Commonwealth and of the States from the nature of Australian federalism and its connection to 'the people'. Against this pattern of consistency and coherence, however, was Deane's variety in the treatment of precedent: defending '*fundamental constitutional truth*'¹⁰³ rather than adhering to precedent in the context of s 118 while accepting the demands of precedent over the correct, or preferable, interpretation of s 90.

Chapter 3 turns from intergovernmental relationships to the separation of federal judicial power guaranteed by Ch III of the Constitution. This topic

⁹⁹ (1989) 166 CLR 311 ('*Wooldumpers*').

¹⁰⁰ (1983) 158 CLR 535 ('*Duncan*').

¹⁰¹ (1985) 159 CLR 192 ('*QEC*').

¹⁰² (1988) 169 CLR 41 ('*Breavington*').

¹⁰³ *Stevens v Head* (1993) 176 CLR 433, 461 (emphasis added).

contains a particularly rich collection of Deane's decisions. This chapter argues that Deane's distinctive interpretation of the separation of powers principle, particularly his implication of a core of individual rights, flows from his conviction that the Constitution's '*most important*'¹⁰⁴ guarantee of individual liberty was the requirement that only Ch III courts may exercise federal judicial power. Although the allied principle – that federal courts may not exercise non-judicial power – was not one to which Deane devoted considerable attention, his decisions in this context displayed an underlying assumption that judges, as individuals, were inherently well-suited to protect individual liberties, through their '*professional experience and cast of mind*.'¹⁰⁵ This assumption underlies Deane's commitment to the judicial protection of the rights of 'the people' under the Constitution throughout his constitutional jurisprudence.

One of Deane's most famous statements on the Australian Constitution's commitment to the protection of individual rights was his declaration in *Street v Queensland Bar Association* that it was '*misleading or deceptive*' to suggest that the Constitution '*contains no bill of rights*.'¹⁰⁶ This statement provides the framework for a discussion in chapter 4 of Deane's approach to the Constitution's express rights. This chapter examines Deane's decisions on three express rights, ss 80, 51(xxxi) and 117 and argues that Deane employed similar principles and methods to interpret each provision in a manner that extended the reach of those guarantees. However, this chapter also explores Deane's recognition that ss 51(xxxi) and 117 were not absolute guarantees and examines how Deane balanced those rights against competing social and community interests. The chapter concludes with a discussion of the manner in which Deane used the Constitution's express rights to support his implication of broad constitutional guarantees.

Chapters 5 and 6 examine Deane's reasoning in *Leeth* and the five free speech cases, *ACTV*, *Nationwide News*, *Theophanous*, *Cunliffe* and *Stephens*. These chapters demonstrate that in these controversial decisions Deane applied principles of interpretation well-established in his jurisprudence. Deane derived

¹⁰⁴ *Street v Queensland Bar Association* (1989) 168 CLR 461, 521 (emphasis added) ('*Street*').

¹⁰⁵ *Grollo v Palmer* (1995) 184 CLR 348, 367 (Brennan CJ, Deane, Dawson, and Toohey JJ) (emphasis added).

¹⁰⁶ *Street* (1989) 168 CLR 461, 521 (emphasis added).

both guarantees by applying his 'fundamental concepts' reasoning. Across these cases, Deane emphasised the role of 'the people' and the Court's duty to imply guarantees to protect them from interference by Parliament.

Deane and Toohey JJ's implication of a constitutional guarantee of legal equality in *Leeth*, examined in chapter 5, was described by Kirk as 'the most radical constitutional case in the Court's history'.¹⁰⁷ Deane and Toohey JJ's reasoning clearly manifested the 'two constant themes' Deane identified as representing his values, and his jurisprudence, at his press conference in 1995: the sovereignty of 'the people', and their inherent equality.¹⁰⁸ Despite the significance of *Leeth* as a marker of Deane's constitutional vision, chapter 5 argues that *Leeth* was one of Deane's least compelling constitutional decisions. Ironically, this was because Deane's concept of 'the people' was, of itself, an insufficient foundation for a guarantee of the scope derived by Deane and Toohey JJ.

Deane's free speech cases, explored in the final chapter of this thesis, also demonstrated the pervasive influence of Deane's concept of 'the people' and his commitment to the judicial protection of minority rights. Although Deane's analysis in the free speech cases was at times perfunctory, much of his reasoning in this context remains of value in the development of the Court's approach to constitutional interpretation. For example, Deane's articulation of a 'living force' theory in *Theophanous* utilised the concept of the legal sovereignty of 'the people' to explain the continuing role of history in an evolutionary interpretive theory. These cases were also particularly significant in the development of Deane's jurisprudence as it was in this context that Deane explicitly linked his three key interpretive principles – 'living force', 'fundamental concepts' and proportionality reasoning – to the sovereignty of 'the people'. The free speech cases therefore present the logical point at which to reflect on the internal consistency and coherence of Deane's constitutional

¹⁰⁷ Jeremy Kirk, 'Constitutional Implications (II): Doctrines of Equality and Democracy' (2001) 25 *Melbourne University Law Review* 24, 24. See also Sir Anthony Mason's description of Deane and Toohey JJ's decision in *Leeth* as the 'high water mark reached in the effort to imply human rights in the Australian Constitution': Anthony Mason, 'The Role of the Judiciary in Developing Human Rights in Australian Law' in David Kinley (ed) *Human Rights in Australian Law* (1998) 26, 42.

¹⁰⁸ Malcolm Farr, 'Last Past the Post', *Daily Telegraph-Mirror* (Sydney), 23 August 1995, 11.

philosophy and his contribution to Australian constitutional thought. From this foundation, an assessment of the persuasiveness of Deane's constitutional vision can be made.

Chapter 1 FEDERALISM (I): FRAMING COMMONWEALTH-STATE RELATIONSHIPS THROUGH S 51

Introduction

In *Nationwide News Pty Ltd v Wills* Deane and Toohey JJ explained that three 'general doctrines of government ... underlie the Constitution and are implemented by its provisions.'¹ Federalism was the first of these doctrines and one of the 'fundamental concepts' that pervaded and informed Deane's constitutional jurisprudence. This is the first of two chapters exploring Deane's vision of federalism under the Constitution. This chapter examines the principles and values shaping Deane's approach to the interpretation of Commonwealth legislative power under s 51 of the Constitution. The next chapter considers aspects of the fiscal relationship between the Commonwealth and the States, and Deane's approach to implications affecting the legal relationships between the Commonwealth and the States, and amongst the States. These chapters argue that Deane's federal jurisprudence was informed by his understanding of the nature of the Constitution as the compact of 'the people', that is, as designed to ultimately serve the interests of 'the people of Australia', not the entities of government it created.

Deane's High Court decisions displayed a strong commitment to expanding Commonwealth power through a flexible and broad interpretation of s 51.² In this regard, Deane quickly found himself as a member of a majority of the judges on the High Court, most often alongside Mason, Murphy and Brennan JJ. For example, in his first year on the Court, Deane extended the reach of the corporations power in cases such as *State Superannuation Board v*

¹ *Nationwide News* (1992) 177 CLR 1, 69-70.

² A list of Deane's decisions on s 51 is contained in Appendix B.

Trade Practices Commission,³ *Fencott v Muller*,⁴ and most notably in his judgment in the *Tasmanian Dam Case*.⁵ Likewise, in *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd*,⁶ and *R v Coldham; Ex parte Australian Social Welfare Union*,⁷ two decisions handed down in 1983, Deane adopted an approach to s 51(xxxv) significantly expanding the Commonwealth's power over industrial relations.

The majority decisions in these cases, and others expanding Commonwealth legislative power during Deane's time on the High Court, were frequently criticised for their impact on the 'federal balance' between the Commonwealth and the States.⁸ For instance, Sir Daryl Dawson, speaking extra-curially three months after the decision in the *Tasmanian Dam Case*, reflected on the 'major overhaul' of the Constitution and federal relations effected by the Court's interpretation of s 51.⁹ In his view:

Notwithstanding the careful division of legislative ... power between the States and the Commonwealth which the Constitution apparently makes, there are now few significant limits upon Commonwealth legislative ... powers.¹⁰

The picture emerging from Deane's decision-making, however, was of a judge not concerned with the creep of Commonwealth legislative power or the impact of this expansion on State interests. Rather, Deane's decisions in this field emphasised the benefits to the nation, and the people of the nation, of an extension of Commonwealth legislative power.

In order to highlight the key elements of Deane's understanding of the federal division of legislative power, this chapter focuses on three discrete aspects of Deane's s 51 jurisprudence. Part 1 explores the Commonwealth's power with

³ (1982) 150 CLR 282.

⁴ (1982) 152 CLR 570.

⁵ (1983) 158 CLR 1.

⁶ (1983) 158 CLR 535.

⁷ (1983) 153 CLR 297.

⁸ See, in particular, the reasoning of Gibbs CJ, Wilson and Dawson JJ in the *Tasmanian Dam Case*, discussed below at n 38.

⁹ Sir Daryl's Southey Memorial Lecture, published as Sir Daryl Dawson, 'The Constitution - Major Overhaul or Simple Tune-up?' (1984) 14 *Melbourne University Law Review* 353. Although not a head of power examined in this thesis, Sir Daryl's remarks in his Southey Lecture drew particular attention to the Court's expansive interpretation of s 51(xxi) in this period. Ibid 360-1.

¹⁰ Ibid 355. Sir Harry Gibbs also repeated his criticisms of the majority reasons in the *Tasmanian Dam Case* after his retirement from the Court. See Sir Harry Gibbs, 'The Decline of Federalism?' (1994) 18 *University of Queensland Law Journal* 1 and Harry Gibbs, 'External Affairs Power: A Critical Analysis' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 264.

respect to the implementation of treaties under s 51(xxix). Part 2 considers Deane's answer to the question of whether the Commonwealth has power with respect to the incorporation of trading and financial corporations under s 51(xx). Finally, part 3 examines the scope of the Commonwealth's power with respect to the 'prevention' of interstate industrial disputes under s 51(xxxv).

These areas of Deane's s 51 jurisprudence have been selected for discussion because they illustrate his tendency to give s 51 a broad construction,¹¹ and because each embodies significant points of difference between Deane's reasoning and that of the other members of the Court. In addition, these topics provide striking examples of Deane's attitude towards four interpretive tools in the construction of s 51:

1. precedent, particularly Deane's use of the *Engineers' Case* to support his extension of Commonwealth legislative power;
2. policy, and Deane's assessment of contemporary *national* interests in expanding the reach of Commonwealth power under s 51;
3. proportionality reasoning, as a means for Deane to limit the impact of Commonwealth legislative power on individual rights; and,
4. the Convention Debates, and Deane's reliance on 'the people' to explain his rejection of a place for the framers' subjective intentions in constitutional interpretation.

The assessment of Deane's use of these tools in this chapter lays the foundation for comparisons in later chapters with Deane's reasoning in other areas of his constitutional jurisprudence.

As foreshadowed, this chapter argues that in the context of s 51, from an early stage of his High Court decision-making, Deane turned to 'the people' to support important components of his interpretive approach. There are a number of ways in which 'the people' could have influenced Deane's conception of Australian federalism, and s 51 in particular. For example, federalism can be perceived as establishing a system of checks and balances, separating power vertically and thereby protecting individual liberties by

¹¹ Note, however, the limitations that Deane's proportionality test imposed on the Commonwealth's power to implement treaties under s 51(xxix). Deane's proportionality test is discussed below n 66.

decentralising power.¹² Federalism may also be regarded as reinforcing democratic participation in governance, with 'the people' electing representatives at both the national and State levels.¹³ Speaking extra-curially, Sir Daryl Dawson also highlighted that respect for 'the people' – their choice of a federal system in 1901, and their power to change that system through s 128 – should encourage judicial reticence to 'alter' the federal division of legislative power under the Constitution.¹⁴

The decisions of Deane examined in this chapter, and the next, indicate that his understanding of the relationship between 'the people' and the federal system was not influenced by these considerations. Instead, Deane utilised 'the people', viewed by him as 'the people of Australia',¹⁵ to support an expansion of national power, tempered by an increased role for the Court in balancing the national interest against the protection of individual liberties. However, a question for consideration in these chapters is, if reliance on 'the people' can support different concepts of federalism, how compelling is this aspect of Deane's constitutional philosophy?

A Part 1: The Implementation of Treaties under the External Affairs Power

Section 51(xxix) of the Constitution grants the Commonwealth Parliament power to make laws for the peace, order and good government of the Commonwealth with respect to 'external affairs'. This part explores aspects of Deane's understanding of the Commonwealth's legislative power to implement

¹² See Stokes' analysis of the purpose and function of federalism, and his assessment of the place of the people, and their rights, under the Australian federal system: Michael Stokes, 'Federalism, Responsible Government and the Protection of Private Rights: A New Interpretation of the Limits of the Legislative powers of the Commonwealth' (1986) 16 *Federal Law Review* 135, 153. See also Kirby J's description of federalism and federal balance as an essential guarantee of liberty in contemporary society in *XYZ v Commonwealth* (2006) 227 ALR 495, 535 and *New South Wales v Commonwealth* ('Workchoices Case') (2006) 231 ALR 1, 150-1.

¹³ Brian Galligan and Cliff Walsh, 'Australian Federalism Yes or No' in Gregory Craven (ed) *Australian Federation* (1992) 193, 196.

¹⁴ Sir Daryl Dawson, 'The Constitution - Major Overhaul or Simple Tune-up?' (1984) 14 *Melbourne University Law Review* 353, 365.

¹⁵ *Stevens v Head* (1993) 176 CLR 433, 460 (emphasis added).

international treaties and agreements under this head of power.¹⁶ As Blackshield and Williams observe, this has been '[b]y far the most controversial question concerning s 51(xxix)',¹⁷ and it is for this reason, and the richness of this topic as a source of Deane's understanding of the principles of constitutional interpretation, that this aspect of s 51(xxix) has been selected for analysis.¹⁸ The key case in this field, and arguably the most politically controversial case handed down by the Gibbs Court, was the *Tasmanian Dam Case*. This landmark case was decided in 1983, within a year of Deane's appointment to the Court.¹⁹ In it, Deane set out the essence of his approach to this aspect of s 51(xxix); an approach he solidified in his 1988 decision of *Richardson v Forestry Commission*.²⁰ The importance of Deane's reasoning in the *Tasmanian Dam Case* for this and later chapters makes it necessary to outline briefly the nature of the dispute in this case.

1 *The Tasmanian Dam Case litigation*

The *Tasmanian Dam Case* was the culmination of an intense political conflict between the State of Tasmania and the Commonwealth.²¹ In recognition of this politically charged atmosphere, the Court took the unusual step of prefacing its decision with a 'Statement', in which it emphasised that the Court's exclusive concern lay with the legality, not desirability, of the legislative scheme.²²

¹⁶ This part does not explore all components of the treaty implementation aspect of s 51(xxix). For instance, the question of whether the Commonwealth may implement only treaty obligations, or whether the power is triggered by the existence of non-binding recommendations, is not examined here. For a discussion of this issue see, Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 280-6.

¹⁷ Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (4th ed, 2006) 904. On the Court's approach to other aspects of this head of power see *ibid* Chapter 19.

¹⁸ A list of Deane's decisions on s 51(xxix), including and beyond the treaty implementation aspect, is contained in Appendix B.

¹⁹ Deane was appointed to the Court on 27 July 1982. The decision in the *Tasmanian Dam Case* was handed down on 1 July 1983.

²⁰ (1988) 164 CLR 261 ('*Richardson*'). Deane described his judgment in *Richardson* as 'repeat[ing], in a slight expanded form' what he wrote in the *Tasmanian Dam Case*. *Ibid* 311.

²¹ Much has been written on the *Tasmanian Dam Case*. For commentary on the background to the case, and the Court's decision, see, for example, Tony Blackshield, '*Tasmanian Dam Case*' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 658 and Leslie Zines, '*The Tasmanian Dam Case*' in H. P. Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003) 262.

²² *Tasmanian Dam Case* (1983) 158 CLR 1, 58-9. On the significance of the Court's rhetoric in this Statement see Michael Coper, *Encounters with the Australian Constitution* (1987) 37-8 and Brian Galligan, *Politics of the High Court* (1987) 242-5.

The conflict had been triggered by the State's proposed construction of a hydro-electric dam on the Gordon River below the Franklin River, in Tasmania's south-west region ('the Dam'). As a result of lobbying by environmental groups, the construction of the Dam became a central issue in the 1983 national election campaign. The Hawke-Labor opposition promised to utilise Commonwealth legislative power and s 109 to prevent the construction of the Dam. In contrast, the Liberal Party's policy of 'new Federalism'²³ committed the Commonwealth to respecting State autonomy over local policy issues.

The Labor party was successful at the national polls,²⁴ and quickly enacted a legislative package designed to prevent construction of the Dam. Deane described the legislation as a complex 'entanglement of provisions',²⁵ reliant on a suite of Commonwealth legislative powers. Its purpose was to maximise the chance that at least one provision would survive the inevitable legal challenge. This technique ultimately proved effective as a majority of the Court upheld sufficient elements of the scheme to prevent the Dam's construction.

One of the heads of power relied on by the Commonwealth was s 51(xxix).²⁶ In 1981 sites in Tasmania, including the Dam site, had been nominated by the Commonwealth (ironically, at the request of Tasmania) for listing on the World Heritage List under the Convention for the Protection of the World Cultural and Natural Heritage ('the Convention'). The Convention, among other things, required State Parties, that is, the Commonwealth, to identify, preserve and protect cultural and natural heritage belonging to that State. The

²³ See Patrick Weller, *Malcolm Fraser PM: A Study in Prime Ministerial Power* (1989) 307-11.

²⁴ However, as Zines observed, the acute federal issues were reflected in the electoral polls, as the Labor party failed to win a single Tasmanian seat in the House of Representatives in the 1983 election. Leslie Zines, 'The *Tasmanian Dam Case*' in H. P. Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003) 262, 265.

²⁵ *Tasmanian Dam Case* (1983) 158 CLR 1, 250.

²⁶ Other heads of power included the corporations power (s 51(xx)), race power (51(xxvi)) and the implied nationhood power. Deane's understanding of s 51(xx) is explored further in part 2 of this chapter. Some of Deane's remarks regarding the treatment of Indigenous Australians, in the context of his discussion of s 51(xxvi), are relevant to the later discussion of *Leeth* in chapter 5. For an examination of the Court's treatment of the issues under s 51(xxvi) and the implied nationhood power in the *Tasmanian Dam Case* see, for example, G. J. Lindell, 'The Corporations and Races Powers' (1984) 14 *Federal Law Review* 219 and Cheryl Saunders, 'The National Implied Power and Implied Restrictions on Commonwealth Power' (1984) 14 *Federal Law Review* 267.

Commonwealth sought to rely on its obligations under this Convention to prohibit the construction of the Dam.

Section 6 of the *World Heritage Properties Conservation Act 1983* (Cth) ('the Act') empowered the Governor-General to issue a proclamation over 'identified property' in circumstances where the protection of the property by Australia was a matter of international obligation by reason of the Convention, or otherwise. Section 9(1)(a) to (g) of the Act prohibited a spectrum of activities in relation to proclaimed land, including the Dam site, unless the consent of the responsible federal Minister had been obtained. Prohibited activities ranged from major works such as excavations, drilling, constructing or demolishing structures, to smaller acts such as damaging vegetation. Section 9(1)(h) made it unlawful for a person to perform an act which had been proscribed for the purposes of that paragraph in relation to particular property, without the prior consent of the Minister. Regulations made under that section prohibited acts undertaken for the purposes of constructing a dam on the site.²⁷

Section 69 of the *National Parks and Wildlife Conservation Act 1975* (Cth) also purported to authorise the Governor-General to make regulations giving effect to a range of international conventions. Regulation (1)(a) of the *World Heritage (Western Tasmania Wilderness) Regulations* (Cth) prohibited the construction of a dam on the site. Regulations (1)(b) to (g) prohibited a range of other activities mirroring s 9(1)(a) to (g) of the Act.

In separate judgments, Mason and Murphy JJ upheld s 9 of the Act in its entirety. Brennan and Deane JJ, however, upheld only s 9(1)(h). Deane's reasoning fused both wide and narrow visions of s 51(xxix). Deane held, like Mason and Murphy JJ, that the external affairs power authorised the domestic implementation of any bona fide treaty obligation. Simultaneously, Deane imposed a significant conformity limitation, requiring the Commonwealth's legislation to be a proportionate means of implementing that treaty obligation. The following discussion examines how Deane justified and applied this approach to the treaty implementation aspect of s 51(xxix).

²⁷ See Reg 4(2)(a) to (c) of the *World Heritage Properties Conservation Regulations 1983* (Cth).

2 *When is a law that domestically implements a treaty a law with respect to 'external affairs'?*

According to Deane, s 51(xxix) empowered the Commonwealth to implement bona fide international treaties, without the additional requirement that the treaty itself relate to a subject of 'international concern'. For Deane, two key factors supported this broad understanding of s 51(xxix): first, his understanding of the settled principles of constitutional interpretation and precedent; and second, policy considerations.

(a) *Principles of interpretation and precedent*

Deane opened his judgment in the *Tasmanian Dam Case* by emphasising that the correct interpretation of the Constitution, which he concluded was giving s 51(xxix) a broad construction, must be determined exclusively by the application of '*legal method and legal principle*.'²⁸ Deane's reasoning on s 51(xxix) commenced, uncontroversially, with what he would later describe as the '*compelling reasoning of the Engineers' Case*.'²⁹ Thus Deane argued forcefully in the *Tasmanian Dam Case* that the scope of s 51(xxix):

is not to be limited by reference to notions of legislative powers being reserved to the States. Nor is it to be limited by the notion that to give the words conferring the power their full effect would imperil the *balance* between the Commonwealth and the States which was achieved by the distribution of legislative powers contained in the Constitution.³⁰

Accordingly, like Mason, Murphy and Brennan JJ, Deane held that 'federal balance' considerations were not grounds for restricting the scope of s 51(xxix).³¹

²⁸ *Tasmanian Dam Case* (1983) 158 CLR 1, 250 (emphasis added). Similarly, see Deane's disclaimer at the conclusion of his reasons in *Richardson* that the function of the Court was '*confined to determining the legal questions*', by reference to 'general principles of constitutional law': *Richardson* (1988) 164 CLR 261, 320 (emphasis added).

²⁹ *Richardson* (1988) 164 CLR 261, 307 (emphasis added) citing *Engineers' Case* (1920) 28 CLR 129.

³⁰ *Tasmanian Dam Case* (1983) 158 CLR 1, 254 (emphasis added). See also *Richardson* (1988) 164 CLR 261, 307.

³¹ *Tasmanian Dam Case* (1983) 158 CLR 1, 129 (Mason J); 169-70 (Murphy J); 220-1 (Brennan J); 254-5 (Deane J).

The relevance of concepts of 'federal balance' to constitutional interpretation, particularly in the context of s 51(xxix), had been raised prior to the *Tasmanian Dam Case*, in *Koowarta v Bjelke-Petersen*.³² In *Koowarta* the Court faced the question of whether legislation implementing the obligations of the Commonwealth under the International Convention on the Elimination of All Forms of Racial Discrimination was supported by s 51(xxix). There, Gibbs CJ, Aickin, Wilson and Stephen JJ had held that considerations of 'federal balance', and in particular the scope for s 51(xxix) to extend the legislative power of the Commonwealth, should play a role in the Court's interpretation of the head of power.

Gibbs CJ, for example, argued in *Koowarta* that a broad approach to s 51(xxix) would have the effect that:

The distribution of powers made by the Constitution could in time *be completely obliterated*; there would be no field of power which the Commonwealth could not invade, and the *federal balance* achieved by the Constitution could be entirely destroyed.³³

Wilson J likewise emphasised that a broad approach to s 51(xxix) would 'leave the existence of the States as constitutional units intact but it would deny to them any significant legislative role in the federation.'³⁴ Accordingly, they held, with Aickin J agreeing with Gibbs CJ, that for a law implementing a treaty obligation domestically to be supported by s 51(xxix) the law must itself relate to a subject matter of 'international character'.³⁵

Stephen J shared the concerns of Gibbs CJ, Aickin and Wilson JJ that an expansive interpretation of s 51(xxix) was contrary to the nature of the Federation established under the Constitution.³⁶ For his part, however, Stephen J imposed a lesser restriction on the Commonwealth, holding that laws implementing obligations in treaties of 'especial concern to the relationship between Australia and that other country' or of 'general international concern' would be matters of 'external affairs' supported by s 51(xxix).³⁷ Although

³² (1982) 153 CLR 168 ('*Koowarta*').

³³ *Koowarta* (1982) 153 CLR 168, 198 (emphasis added).

³⁴ *Ibid* 252.

³⁵ *Ibid* 201 (Gibbs CJ); 251 (Wilson J).

³⁶ *Ibid* 216.

³⁷ *Ibid* 216-7.

continuing to voice their 'federal balance' concerns in the *Tasmanian Dam Case*,³⁸ Gibbs CJ and Wilson J, joined by Dawson J, considered themselves constrained by precedent to adopt Stephen J's 'international concern' test in the *Tasmanian Dam Case*.³⁹

In the *Tasmanian Dam Case* Deane emphatically rejected the relevance of 'federal balance' considerations to the interpretation of s 51(xxix). Two aspects of Deane's analysis are of particular interest in articulating his attitude towards precedent and his understanding of the settled principles of constitutional interpretation. The first was Deane's treatment of the Court's contemporary decisions in his reasoning. Somewhat unusually, Deane's analysis of the case law on s 51(xxix) did not include detailed discussion of *Koowarta*. In fact, only Murphy J in the *Tasmanian Dam Case* treated *Koowarta* to less detailed examination than Deane.⁴⁰ Deane's reasoning drew instead on *R v Burgess; Ex parte Henry*,⁴¹ a decision of the Court in 1936. Deane argued that that case established that the Commonwealth could give effect to any agreement 'binding on the Commonwealth in relation to other countries whatever the subject-matter of the agreement may be.'⁴² In Deane's view,

nothing in the judgments [of *Koowarta*]... causes me to modify my acceptance of, and agreement with, the views expressed by a majority of the Court in *Burgess' Case*.⁴³

Through this approach Deane was able to weave a deft course in his analysis: adopting the view of s 51(xxix) that he favoured and by-passing the conundrums of *Koowarta*,⁴⁴ while still demonstrating a deferential attitude

³⁸ *Tasmanian Dam Case* (1983) 158 CLR 1, 100 (Gibbs CJ); 197 (Wilson J).

³⁹ Ibid 101 (Gibbs CJ); 197 (Wilson J); and 306-7 (Dawson J). Freed from the constraints of precedent, Sir Harry Gibbs indicated after his retirement from the Court that both the majority view in the *Tasmanian Dam Case*, and Stephen's 'international concern' test, should be rejected. Instead, he affirmed, as the 'better view', that s 51(xxix) enabled the Commonwealth to give effect to an international agreement domestically only if the law had the 'character' of an external affair. Harry Gibbs, 'External Affairs Power: A Critical Analysis' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 264, 264.

⁴⁰ *Tasmanian Dam Case* (1983) 158 CLR 1, 170.

⁴¹ (1936) 55 CLR 608.

⁴² *Tasmanian Dam Case* (1983) 158 CLR 1, 258.

⁴³ Ibid.

⁴⁴ On 'The Prickly Problem of Precedent' posed by *Koowarta*, see Michael Coper, *Encounters with the Australian Constitution* (1987) 41-3.

towards precedent and the values of certainty and predictability in constitutional interpretation that such deference embodied.⁴⁵

Second, Deane's decisions in the *Tasmanian Dam Case* and *Richardson* confirmed his understanding of the important place of the *Engineers' Case* in constitutional interpretation. In the *Tasmanian Dam Case* and *Richardson* Deane turned to the *Engineers' Case* as the starting point in his analysis. As foreshadowed, given the historic hold of the *Engineers' Case* on Australian constitutional theory, Deane's reference to the *Engineers' Case* in 1983 was not surprising. Indeed, it would have been more striking had Deane not referred to the *Engineers' Case* in his analysis in the *Tasmanian Dam Case*. However, as one of the charges levelled against Deane's later implied rights decisions was that his methodology strayed from the principle in the *Engineers' Case*,⁴⁶ it was significant that in his decisions on the reach of s 51(xxix) Deane located his interpretive approach within the paradigm of the *Engineers' Case*.

In the *Tasmanian Dam Case* and *Richardson* Deane embraced what Galligan has described as the 'technical method and public rhetoric' of the *Engineers' Case*.⁴⁷ Thus Deane emphasised that the Court's task in interpreting s 51 required that the language of the text be given:

its full effect and is not to be limited by reference to *preconceptions* of the extent of the residue of legislative powers retained by the States or by the notion that to give the words comprising that grant their full effect would somehow *imperil the constitutional balance* between the Commonwealth and the States.⁴⁸

Under this approach, 'federal balance' considerations were regarded by Deane as illegitimate, vague conceptions, analogous to reserved powers reasoning.⁴⁹ Such concepts therefore had no place in determining the scope of

⁴⁵ See, for example, Sir Anthony Mason's extra-curial reflections that a judge's decision to adhere to, or depart from, precedent required the balancing of 'the need for continuity, consistency and predictability against the competing need for justice, flexibility and rationality.' Sir Anthony Mason, 'The Use and Abuse of Precedent' (1988) 4 *Australian Bar Review* 93, 111.

⁴⁶ See, for example, the critique of McHugh J in *McGinty* (1996) 186 CLR 140, 231-2.

⁴⁷ Brian Galligan, 'The Australian High Court's Role in Institutional Maintenance and Development' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions* (1996) 184, 201.

⁴⁸ *Richardson* (1988) 164 CLR 261, 307 (emphasis added).

⁴⁹ Although note Zines' observation that the majority judges in the *Tasmanian Dam Case* did not address the distinction drawn by Gibbs CJ and the minority judges between the reserved powers doctrine generally and the special issue of the position of the external affairs power and treaties to overcome the nature of the 'Federal Commonwealth' under the Constitution: Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 283.

Commonwealth legislative power under s 51. This is not to suggest that Deane considered the federal nature of the Constitution wholly irrelevant in constitutional interpretation. In the *Tasmanian Dam Case*, Deane recognised that the federal structure of the Constitution played a part in constitutional interpretation through the principle in the *Melbourne Corporation Case*.⁵⁰ However, Deane's judgment in the *Tasmanian Dam Case* and *Richardson* indicated that the federal nature of the Constitution did not intrude into his understanding of the meaning of the Commonwealth power with respect to 'external affairs' under s 51(xxix).

Deane's reasoning in the *Tasmanian Dam Case* and *Richardson* also employed the 'traditional disclaimers of apolitical legalism'⁵¹ that distinguished the Court's vision of its role in the *Engineers' Case*. For example, Deane emphasised that the Court's task was to resolve the 'question of law', through the application of 'legal method and legal principle',⁵² without consideration whether the Commonwealth's measures were 'desirable'.⁵³ Deane's rejection of the 'international concern' test also manifested his commitment to limit the Court's role to consideration of 'legal' questions. Under Stephen J's 'international concern' test, the Court was required to scrutinise the subject matter of an international treaty, and to consider the level of international engagement with particular subject matters. In contrast, Deane deferred the question of whether the treaty related to matters of 'international concern' to Parliament and the Executive.⁵⁴ Thus, under Deane's test, and that of Mason, Brennan and Murphy JJ, the Court's focus was instead on the 'question of law', that is, whether the treaty by its terms imposed an 'obligation' on the Commonwealth of sufficient specificity to support domestic implementation. However, it is a question for later discussion whether Deane's deference to Parliament and the Executive, and his ostensible embrace of legalism in constitutional

⁵⁰ *Tasmanian Dam Case* (1983) 158 CLR 1, 254 examining *Melbourne Corporation Case* (1947) 74 CLR 31. Deane's approach to this implication is discussed in chapter below n 133.

⁵¹ Brian Galligan, *Politics of the High Court* (1987) 242.

⁵² *Tasmanian Dam Case* (1983) 158 CLR 1, 250.

⁵³ *Richardson* (1988) 164 CLR 261, 320 (emphasis added).

⁵⁴ Mason J also expressed a concern to limit the Court's engagement with these political questions in *Koowarta* (1982) 153 CLR 168, 229 and *Tasmanian Dam Case* (1983) 158 CLR 1, 125. See also Zines' critique of Stephen J's test in Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 285.

interpretation in this aspect of his reasoning, stood in conflict with Deane's willingness to strictly scrutinise Parliament through his proportionality test.⁵⁵

(b) Considerations of policy

The second key component of Deane's reasoning in the *Tasmanian Dam Case* in support of a broad understanding of s 51(xxix) was his assessment of policy considerations.⁵⁶ For example, Deane was swayed by Murphy J's assessment that Australia would become an 'international cripple'⁵⁷ if the Commonwealth was denied broad power under s 51(xxix). Later in his judgment, Deane also acknowledged that a broad approach to s 51(xxix) was necessary as:

the *responsible conduct of external affairs in today's world* will, on occasion, require observance of the spirit as well as the letter of international agreements, compliance with recommendations of international agencies and pursuit of international objectives which cannot be measured in terms of binding obligation.⁵⁸

This passage demonstrated Deane's willingness to allow national interest to influence the Court's construction of s 51 heads of power. However, as Zines has remarked, Deane's reference to national interest was not textually mandated: reliance on either national interest or federalism in constitutional reasoning involved 'implications and assumptions' by the Court.⁵⁹

What is significant for this discussion of Deane's concept of federal relationships and s 51 was not that Deane relied on such considerations, as indeed each member of the Court in the *Tasmanian Dam Case* utilised concepts of nationalism or federalism to support their reasoning. Instead, the significance of this aspect of Deane's reasoning in the *Tasmanian Dam Case* lies in his choice of nationalism over federalism as the relevant implication or assumption

⁵⁵ See further below n 66.

⁵⁶ The role of policy in the Court's reasoning in the *Tasmanian Dam Case* is explored in Michael Coper, 'The High Court and the World of Policy' (1984) 14 *Federal Law Review* 294.

⁵⁷ *Tasmanian Dam Case* (1983) 158 CLR 1, 262 (Deane J). Although Deane placed this phrase in quotation marks he did not attribute it to Murphy J. For Murphy J's use of the phrase see *Koowarta* (1982) 153 CLR 168, 241 citing *New South Wales v Commonwealth* ('*Seas and Submerged Lands Case*') (1975) 135 CLR 337, 503.

⁵⁸ *Tasmanian Dam Case* (1983) 158 CLR 1, 258-9 (emphasis added).

⁵⁹ Leslie Zines, 'The State of Constitutional Interpretation' (1984) 14 *Federal Law Review* 277, 284.

supporting his analysis in that case.⁶⁰ Chapter 2 explores other illustrations of national interest as a theme in Deane's constitutional jurisprudence and argues that Deane's preference is reinforced by his concept of the legal sovereignty of 'the people' of Australia.

The above quotation from Deane's judgment in the *Tasmanian Dam Case* also demonstrated his willingness to interpret the Constitution in a manner consistent with contemporary realities – the needs of 'today's world'.⁶¹ This concern was also illustrated by Deane's response to an argument that s 51(xxix) should be interpreted narrowly based on the framers' intentions regarding the practical operation of the Australian Federation. In light of the debate that would later arise over the role of the framers in constitutional interpretation, Deane's response to this argument is significant. First, Deane argued in the *Tasmanian Dam Case* that he could 'discern little legal force in that submission'.⁶² Second, Deane further stated that, in his view, the assessment of the historical record advanced in favour of a narrow interpretation of s 51(xxix) was 'unduly harsh in its assessment of the foresight of the architects of our nation'.⁶³ In the *Tasmanian Dam Case* Deane therefore advanced his own account of the framers' views, claiming that Sir Henry Parkes had recognised 'as a basic object of the proposed federation' that it should be capable of engaging in the international stage 'with uncrippled power'.⁶⁴ According to Deane, Parkes recognised that a broad grant of power to the Commonwealth was essential to the success of the newly created nation. This aspect of Deane's judgment in the *Tasmanian Dam Case* represented one of his earliest comments on the role of the framers in constitutional interpretation. The effect of these remarks in the *Tasmanian Dam Case* appears to be twofold. First, Deane asserted that the framers' intentions were not determinative of constitutional meaning. Second, Deane indicated that the framers' intentions were not uniform, and so could support a variety of

⁶⁰ See also Deane's statement, one month after the *Tasmanian Dam Case*, that the grants of legislative power to the Commonwealth 'were considered *necessary and proper for the purposes of the nation that would be formed by, and would develop under, the federation*.' *Duncan* (1983) 158 CLR 535, 589-90 (emphasis added). Aspects of Deane's analysis in this case are explored in part 1 of chapter 2.

⁶¹ *Tasmanian Dam Case* (1983) 158 CLR 1, 258 (emphasis added).

⁶² *Ibid* 255. Mason J also rejected the proposition that the Constitution must conform 'to expectations held in 1900': *Tasmanian Dam Case* (1983) 158 CLR 1, 126. On Mason J's argument see further Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 283-4.

⁶³ *Tasmanian Dam Case* (1983) 158 CLR 1, 255.

⁶⁴ *Ibid* citing Sir Henry Parkes in Official Record of the Debates of the National Australasian Convention (1891), 14.

meanings of the Constitution. This two-pronged attack on the use of the Convention Debates, and the framers' intentions, in constitutional interpretation was a distinctive feature of Deane's reasoning throughout his High Court decisions.⁶⁵

3 *Deane's use of proportionality reasoning to limit s 51(xxix)*

According to Deane, the accepted test for determining when a law could be characterised as falling within this aspect of s 51(xxix) was whether the law was '*capable of being reasonably considered to be appropriate and adapted to*' giving effect to treaty obligations.⁶⁶ As Selway demonstrated, this test was well established prior to the *Tasmanian Dam Case*.⁶⁷ Deane's innovation in the *Tasmanian Dam Case* was the introduction of the language of '*reasonable proportionality*', a concept drawn from European law, into the characterisation test.⁶⁸ Thus Deane argued that for a law implementing treaty obligations to be supported by s 51(xxix) it must evince:

*a reasonable proportionality between the designated purpose or object and the means which the law embodies for achieving or procuring it.*⁶⁹

This test clearly required the Court to examine the relationship between the legislative means and ends.⁷⁰ The role of proportionality reasoning as a theme in Deane's constitutional decision-making is an important topic in this thesis, extending beyond his application of the test in the context of s 51(xxix). The

⁶⁵ See, for example, *Incorporation Case* (1990) 169 CLR 482, 511. Deane's attitude towards the framers' intentions is explored below n 156.

⁶⁶ *Tasmanian Dam Case* (1983) 158 CLR 1, 259 (emphasis added). See also *Richardson* (1988) 164 CLR 261, 311.

⁶⁷ Brad Selway, 'The Rise and Rise of the Reasonable Proportionality Test in Public Law' (1996) 7 *Public Law Review* 212. See also Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1, 27-31.

⁶⁸ *Tasmanian Dam Case* (1983) 158 CLR 1, 260 (emphasis added). On the European origins of 'proportionality' analysis, see Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1, 2.

⁶⁹ *Tasmanian Dam Case* (1983) 158 CLR 1, 260 (emphasis added).

⁷⁰ As to the basic inquiry in proportionality analysis between means and ends, see Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1, 2. Note that in 1996 Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ, in a joint judgment, commented that the term 'proportion suggests a comparative relation of one thing to another as respects magnitude, quantity or degree' and so the test of 'reasonable proportionality... appears to restate the basic question': *Victoria v Commonwealth* ('*Industrial Relations Case*') (1996) 187 CLR 416, 488.

following section focuses on Deane's application of the test in the *Tasmanian Dam Case* and *Richardson* and the insights it offers into Deane's understanding of the judicial role in this context.

(a) Deane's proportionality reasoning in the Tasmanian Dam Case

In the *Tasmanian Dam Case*, Deane provided an 'extravagant example'⁷¹ of a law that would fail his reasonable proportionality test. In his example, Australia was a party to a Convention requiring that all steps be taken to safeguard against the spread of an obscure sheep disease. The Commonwealth enacted a law requiring the slaughter of all sheep in Australia, even though no incidence of the disease had yet occurred in Australia. Clearly this was a 'drastic' or 'extreme course'⁷² undertaken by Parliament to fulfil its treaty obligations. Deane concluded that:

The absence of any reasonable proportionality between the law and the purpose of discharging the obligation under the convention would preclude characterization as a law with respect to external affairs notwithstanding that *Tweedledee* might, 'contrariwise', perceive logic in the proposition that the most effective way of preventing the spread of any disease among sheep would be the elimination of all sheep.⁷³

Deane's decision to punctuate his 'extravagant example' with an allusion to *Tweedledee*'s 'contrariwise' logic was itself a distinguishing feature of his judgment.⁷⁴ It seems that Deane's understanding of the 'legal method and legal principle',⁷⁵ applicable in constitutional cases, encompassed allusion to Lewis Carroll's *Through the Looking Glass*.⁷⁶

⁷¹ *Tasmanian Dam Case* (1983) 158 CLR 1, 260.

⁷² *R v Foster* (1949) 79 CLR 43, 96-7 cited in *Tasmanian Dam Case* (1983) 158 CLR 1, 261.

⁷³ *Tasmanian Dam Case* (1983) 158 CLR 1, 260 (emphasis added). Deane's reference to 'Tweedledee' and 'contrariwise' logic was an allusion to Lewis Carroll, *Alice's Adventures in Wonderland & Through the Looking Glass* (1960) 158.

⁷⁴ The *Tasmanian Dam Case* was not Deane's only allusion to literature in his constitutional jurisprudence. See also Deane's reference to George Orwell's *Nineteen Eighty-Four* and Hans Christian Anderson's story of the Emperor's New Clothes in *University of Wollongong v Metwally* (1984) 158 CLR 447, 476-8.

⁷⁵ *Tasmanian Dam Case* (1983) 158 CLR 1, 250. Note also the Court's 'Statement' at the beginning of the case that the issues involved were 'strictly legal questions': *Tasmanian Dam Case* (1983) 158 CLR 1, 58-9.

⁷⁶ See Lewis Carroll, *Alice's Adventures in Wonderland & Through the Looking Glass* (1960) 158. In this story Tweedledum and Tweedledee battled over a 'new rattle', during which all before them – people, trees and the rattle itself – were damaged. Alice perceived the battle was over a

Deane applied his proportionality test in the *Tasmanian Dam Case* to hold invalid much of the Commonwealth's legislative scheme. In Deane's view, while the scheme would accomplish its goal, the legislation cast its net too wide, effectively preventing any 'real development or improvement of land.'⁷⁷ In particular, Deane perceived that the wide prohibitions, applying automatically to the identified property regardless of the nature of the land or its proposed use, meant that there was no necessary relationship between the purpose of the law and the means chosen by Parliament to give effect to it.⁷⁸ Section 6(2) of the Act and Regulations 9(1)(h) and 9(2), however, were of a different class. Because these provisions prevented particular damage or destruction of particular property, they were 'reasonably proportionate' to the implementation of the Commonwealth's treaty obligations and so sustainable under the external affairs power.⁷⁹

Kirk has identified three levels of analysis arising in proportionality reasoning.⁸⁰ The first is an assessment of the suitability of the law, that is, whether the law is a rational means of achieving Parliament's desired end. Second is necessity analysis, in which the Court asks whether an alternative, less drastic or onerous, means was available to Parliament to achieve its ends. Finally, balancing analysis sees the Court compare the weight or value of the Parliament's purpose against the interests affected by the law. Of the three levels, suitability analysis is the least strict assessment of the relationship between the means and ends of the law. However, at each level the Court can apply the tests with a varying degree of intensity or 'margin of appreciation'.⁸¹ By its level of analysis, and the intensity of its application, the Court demonstrates different degrees of deference to Parliament's assessment of the means by which to achieve its purpose.

trivial matter. In this way, the context of Tweedledee's 'contrariwise' logic itself illustrates a disproportionate means to achieve Tweedledum and Tweedledee's goal.

⁷⁷ *Tasmanian Dam Case* (1983) 158 CLR 1, 266.

⁷⁸ *Ibid* 266-7.

⁷⁹ *Ibid* 267. Kirk referred to legislation being 'tailored' to the treaty obligations in Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1, 31.

⁸⁰ Kirk, above n 79, 5-9.

⁸¹ *Ibid* 5, 54. Brennan J adopted the language of a 'margin of appreciation' in his proportionality analysis in *ACTV* (1992) 177 CLR 106, 159.

In the *Tasmanian Dam Case* Deane applied the strictest of Kirk's standards of review. Deane assessed the suitability and necessity of the legislation and then balanced the burden of the legislative freeze on development against the environmental and heritage objectives of the Commonwealth under its obligations under the Convention. Deane's willingness to strictly scrutinise the choices made by Parliament in the implementation of the Convention was exposed more clearly in *Richardson*.

(b) Clarification and conundrums in Richardson

Richardson involved a challenge to further legislation enacted under s 51(xxix) in reliance on the Convention. Section 16 of the *Lemonthyme and Southern Forests (Commission of Inquiry) Act 1987* (Cth)⁸² imposed a 'freeze' on prescribed land, which was designed to allow the Commonwealth time to assess the heritage value of land in Tasmania. In this period, land-owners were prevented from engaging in a range of activities, such as logging, constructing roads or tracks, carrying out excavation works, and doing any other prescribed act capable of adversely affecting the protected area. In addition, s 16(3) of the *Lemonthyme Act* made it unlawful for land-owners to fail to take 'reasonable steps' to prevent prohibited acts occurring on their property.

All members of the Court in *Richardson* held that the relevant test was whether the law was reasonably capable of being seen as appropriate and adapted to the implementation of the Commonwealth's treaty obligations.⁸³ On the facts, Mason CJ, Wilson, Brennan, Dawson and Toohey JJ, with Deane and Gaudron JJ dissenting in separate judgments, held that it was within Parliament's power to conclude that the *Lemonthyme Act* in its entirety was a reasonable means of preserving the land until a determination of its status under the World Heritage Convention was made.⁸⁴ Thus for the majority judges, it was for Parliament to balance the adverse impact on land-owners

⁸² Henceforth the '*Lemonthyme Act*'.

⁸³ *Richardson* (1988) 164 CLR 261, 289 (Mason CJ and Brennan J); 303 (Wilson J); 311 (Deane J); 336 (Toohey J); 342 (Gaudron J). Dawson J, however, emphasised that this was the test of the majority in *Tasmanian Dam Case*, and indicated his general dissatisfaction with the breadth of their approach: *ibid* 324-8.

⁸⁴ *Ibid* 291-2 (Mason CJ and Brennan J); 303-4 (Wilson J); 328 (Dawson J); 336-7 (Toohey J).

against the fulfilment of the Commonwealth's treaty obligations and the ensuing environmental benefits.

By contrast, Deane's reasoning in *Richardson* again evinced a willingness to engage in strict scrutiny of legislative choices. Deane attempted to deflect criticism on this basis by emphasising that his test was 'less stringent'⁸⁵ than the 'appropriate and adapted' test that had been applied in earlier cases. Also, as discussed above, Deane asserted that 'general principles of constitutional law', and questions of law rather than political considerations, decided the case.⁸⁶ Through these statements, Deane sought to establish his deference to Parliament's political determinations and locate his reasoning within the protective framework of 'apolitical legalism'.⁸⁷ However, the strictness of Deane's application of proportionality reasoning tells a different story.

Deane's analysis in *Richardson* applied both necessity and balancing levels of Kirk's proportionality analysis. According to Deane only s 16(1)(a), prohibiting the felling of trees for the purposes of forestry operations, was valid.⁸⁸ This measure, Deane argued, was reasonably to be regarded as necessary for the fulfilment of the Commonwealth's treaty obligations to protect natural heritage. However, the bulk of the prohibitions in the *Lemonthyme Act* were not proportionate to this objective. For example, Deane noted that some activities, such as the construction of a fire break, were prohibited even if conducted for the purpose of protecting the heritage value of the land.⁸⁹ Particularly significant was Deane's emphasis on the onerous obligations on land-owners; an interference with ordinary property rights that he held could not be justified on the basis of the particular environmental objectives of the Parliament alone.⁹⁰ This determination stood in contrast with the analysis of the majority judges, who held that it was for Parliament, not the Court, to balance the interests of individual property owners against its interest in implementing the treaty

⁸⁵ Ibid 312.

⁸⁶ Ibid 320.

⁸⁷ Brian Galligan, *Politics of the High Court* (1987) 242.

⁸⁸ *Richardson* (1988) 164 CLR 261, 319. Gaudron J held that on the basis of the information before the Court the *Lemonthyme Act* afforded 'general environmental protection' rather than protection 'of the qualities and features which may be of outstanding universal value' and so the Act was not proportionate to the Commonwealth's treaty obligations. Ibid 346-9.

⁸⁹ Ibid 316-8.

⁹⁰ Ibid 315-6.

obligations of the Commonwealth.⁹¹ In this way, *Richardson* illustrated the influence of 'the people' on Deane's approach to constitutional interpretation, the first examined to this point in this thesis. This aspect of Deane's reasoning was punctuated by one key passage in his judgment in *Richardson*, a passage meriting further discussion.

(i) *'The people', proportionality and federal relationships*

Deane emphasised the role of 'the people' in his reasoning in *Richardson* by arguing that:

Insignificant though those areas may be in the overall perspective from Canberra, their owners, few though they may be, are citizens whose lives and property are beyond the reach of the Parliament except to the extent authorized by a relevant grant of Commonwealth legislative power. Yet there was no effort by the Commonwealth to justify the application of the protective regime, with all its stringency, to those privately owned areas of freehold land.⁹²

This passage evinced Deane's belief that Parliament had given insufficient weight to the individual rights affected by the law.⁹³ This was confirmed for Deane by the fact that the Commonwealth had been unable to demonstrate to the Court that it had investigated the impact of its regime on individual land-owners.⁹⁴ Deane noted that this information had been available to the Commonwealth, with the inference being that the Commonwealth was uninterested in the impact of the law on individuals.⁹⁵ Thus, the interests of the 'few' Tasmanian land-owners had been sacrificed to the Commonwealth Parliament's pursuit of policy objectives; objectives it had deemed to be in the interests of Australia, and the Australian people as a whole.

It is useful at this time to compare the place of individual rights in Deane's reasoning in the *Tasmanian Dam Case* and *Richardson* against his treatment of the

⁹¹ See in particular, *ibid* 304 (Wilson J); 327-8 (Dawson J).

⁹² *Ibid* 316.

⁹³ Compare Deane's analysis with the reasoning of Mason CJ, Deane and Gaudron JJ in *Davis v Commonwealth*, also decided in 1988, where the concept of reasonable proportionality was utilised in the context of the incidental power of the Commonwealth. There, the impact of the Commonwealth's measures on traditional common law rights was significant for Mason CJ, Deane and Gaudron JJ's assessment of the validity of the measures, found to be 'grossly disproportionate to the need to protect the commemoration' of the bicentenary of European settlement in Australia. See *Davis v Commonwealth* (1988) 166 CLR 79, 100.

⁹⁴ *Richardson* (1988) 164 CLR 261, 316.

⁹⁵ *Ibid*.

'federal balance' arguments. Both proportionality analysis and 'federal balance' principles are mechanisms for limiting the Commonwealth's power under s 51(xxix), but only the former was favourably received by Deane. Deane confirmed his rejection of the 'federal balance' arguments at the outset of his judgment in *Richardson*, emphatically declaring that it was 'now more than half a century' since the Court recognised that s 51 heads of legislative power must not be confined by concerns that giving s 51 its 'full effect would somehow imperil the constitutional balance between the Commonwealth and the States.'⁹⁶

Following his reference to the *Engineers' Case*, Deane argued that s 51 grants of power were not to be considered in a 'vacuum' but within their 'constitutional context'.⁹⁷ That context, according to Deane, was the Constitution's commitment to judicial review:

It is to this Court that *the people have entrusted* the ultimate responsibility of determining whether a law which the Parliament has purported to impose comes within the scope of the legislative powers which *they have conferred* upon the Parliament.⁹⁸

The link Deane made in this passage between 'the people' and his concept of judicial review was an important and recurring element of his constitutional philosophy.⁹⁹ In this discussion of Deane's approach to s 51(xxix), the significance of this passage lies in connection Deane made between the sovereignty of 'the people' and his consideration of the impact of the law on the interests of 'the people' through his proportionality reasoning. It was therefore 'the people' and judicial review, rather than the federal division of power, that Deane regarded as the context for the interpretation of s 51.

Commentators such as Detmold and Kirk have suggested, however, that 'federal balance' reasoning may in fact be evident in Deane's reasoning in *Richardson* through his proportionality test.¹⁰⁰ This argument rests on the following statement by Deane:

⁹⁶ Ibid 307.

⁹⁷ Ibid.

⁹⁸ Ibid (emphasis added).

⁹⁹ See in particular Deane's justification of the use of strict proportionality analysis in the context of the implied freedom of political communication, discussed further below chapter 6 n 150.

¹⁰⁰ M. J. Detmold, 'Australian law: Federal Movement' (1991) 13 *Sydney Law Review* 31, 58. See also Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1, 36.

no real effort [was] made to confine the prohibitions of the overall protective regime, with the overriding of the ordinary rights of citizens and the *ordinary jurisdiction of the State of Tasmania* which it would involve, to activities which it might reasonably be thought represented some real actual or potential threat to what might properly be seen, for the purposes of the Convention, as natural or cultural heritage.¹⁰¹

Kirk and Detmold suggest that this passage evinced a concern by Deane to protect the 'predetermined notions of appropriate state powers', a concept which lies at the heart of 'federal balance' reasoning.¹⁰² However, this assessment of Deane's reasoning in *Richardson* appears to take his single phrase – 'ordinary jurisdiction of the State of Tasmania' – out of context. The point Deane sought to make in this section of his judgment in *Richardson* was that interference with individual liberties was not permitted except as authorised under s 51. Only those laws that were a reasonably proportionate means of achieving Parliament's objective were valid under s 51(xxix). Viewed in this context, Deane's brief reference to the States does not detract from his assessment that it was because of the undue intrusion by Parliament on individual rights that the legislation was invalid. Rather *Richardson* illustrated Deane's preference for judicial process as the means of protecting individual rights – the rights of the 'few' – from the interests of the majority of 'the people' as expressed by Parliament.

Deane had signalled his interest in the judicial protection of 'the people' as early as his swearing-in speech, where he confirmed that the source of law, and all governmental power, resided in 'the people'.¹⁰³ Subsequent chapters argue that the pattern of Deane's decision-making prior to 1988 confirms Deane's sensitivity towards 'the people' and the judicial protection of their interests from interference by Parliament or the Executive. To take one example, in *A v Hayden* in 1984, Deane expressed a deeply sceptical view of the Government, stating that:

These five cases illustrate the abiding wisdom of the biblical injunction against putting one's 'trust in men in power': Psalms 146:3 Jerusalem Bible, p.927.¹⁰⁴

¹⁰¹ *Richardson* (1988) 164 CLR 261, 317 (emphasis added).

¹⁰² Kirk, above n 100, 36.

¹⁰³ Transcript of the Ceremonial Sitting of the Occasion of the Swearing-in of the Honourable Mr Justice Deane as a Justice of the High Court of Australia at Canberra, Tuesday 27 July 1982, 17-18.

¹⁰⁴ *A v Hayden* (1984) 156 CLR 532, 592 (emphasis added).

This statement was a remarkably open criticism by a federal judge of the federal Executive, displaying a deep distrust of those wielding governmental power. It was noted in the introduction to this thesis that during the Mason Court era members of the Court acknowledged that the Australian constitutional system embraced a commitment to more than simple majoritarianism.¹⁰⁵ Under this vision of the Australian democratic system, an increased level of scrutiny of legislative measures may be expected, particularly with respect to the impact of a law on minority interests. However, even accepting the correctness of that vision, and the appropriateness of the Court's interpretation of the Constitution consistent with that vision, Deane's analysis in *Richardson* may be overly strict. Under the conformity test established in *Richardson*, the Court's task was to assess whether the legislation was 'reasonably' appropriate and adapted, displaying a degree of deference to legislative decision-making. Despite Deane's endorsement of that approach, his application of proportionality analysis in *Richardson* may be seen to move beyond the application of 'established constitutional principle', to engage in a 'political' analysis of the appropriateness of the legislation.

4 *Deane's vision of the Court's role in s 51(xxix) – final observations*

In summary, Deane's decisions in the *Tasmanian Dam Case* and *Richardson* demonstrated a wide understanding of the Commonwealth legislative power with respect to 'external affairs', rejecting the need to restrict legislative power by reference to 'federal balance' considerations. At the same time, however, Deane imposed a conformity test which empowered the Court to assess the extent to which the impact of the legislation on individual rights was reasonably proportionate to the legislature's objective. The combination of these elements in Deane's understanding of s 51(xxix) demonstrates two themes in Deane's vision of federal relationships under the Constitution. First, Deane was unconcerned by the centralisation of legislative power, and its effects on the dynamics of the Australian Federation. Second, Deane preferred the Court, and

¹⁰⁵ See discussion in the introduction above, text accompanying n 48.

judicial process, rather than the federal division of legislative power, as a vehicle for the protection of individual liberties from interference.

Deane's decisions in this field also illustrate the application of a number of interpretive tools that are of significance in charting the development of his approach to constitutional interpretation. For example, Deane's decision in the *Tasmanian Dam Case* suggests that he was sceptical of the utility of reference to the Convention Debates as an aid in constitutional interpretation. In addition, proportionality reasoning emerged after the *Tasmanian Dam Case* and *Richardson* was a pervasive tool in Deane's jurisprudence, resting on his wider understanding of the Court's duty to protect 'the people' and to interpret the Constitution in a manner consistent with contemporary context. His application of that principle also suggested that Deane was willing to engage in extensive scrutiny of Parliament. That vision of the Court's role in relation to Parliament sat uncomfortably with his overt reliance on the legalism of the *Engineers' Case* to support his interpretation of s 51.

Deane's blending of reliance on established legal principles, and innovative interpretive techniques, particularly in his reference to the framers in his reasons in the *Tasmanian Dam Case* and *Richardson*, were also apparent in his decision in *Incorporation Case*. This decision was one of Deane's most famous dissenting decisions and is examined in the next part of this chapter.

B *Part 2: Section 51(xx) and the issue of incorporation*

Section 51(xx) provides that the Commonwealth has power with respect to:

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

The emergence of corporations as key players across many areas of Australian life has meant that the ambit of this power has significant consequences for the 'federal balance' between the regulatory power of the Commonwealth and the

States.¹⁰⁶ Prior to the *Incorporation Case* of 1990, Deane's examination of s 51(xx) dealt with two key issues: what is a 'trading or financial corporation'; and, what activities of such corporations can the Commonwealth regulate?¹⁰⁷

Deane had examined one aspect of the first question while still a member of the Federal Court. In *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd*, Deane provided an expansive description of a 'financial corporation' as including non-profit organisations 'dealing in finance'.¹⁰⁸ This description was subsequently affirmed by the High Court in *State Superannuation Board v Trade Practices Commission* in the joint judgment of Mason, Murphy and Deane JJ.¹⁰⁹ In *State Superannuation Board*, and later in the *Tasmanian Dam Case*, these three judges argued that a corporation was a 'trading or financial' corporation under s 51(xx) if its trading or financial activities were a significant and substantial aspect of the corporation's current activities.¹¹⁰ These judges rejected the narrower view favoured by Gibbs CJ, Wilson and Dawson JJ that s 51(xx) required the trading or financial activities of the corporation to be its primary or dominant undertaking.¹¹¹ It was on this basis that in the *Tasmanian Dam Case* Mason, Murphy, Brennan and Deane JJ found that the Hydro Electric Commission, a public body charged with the production and supply of electricity to the State, was a trading corporation.¹¹²

Deane's appointment to the High Court also coincided with the ascendancy of an expansive answer to the question of which activities of a s 51(xx) corporation the Commonwealth could regulate. In the *Tasmanian Dam Case*, Gibbs CJ,

¹⁰⁶ Note particularly the recent debate over the Court's extension of s 51(xx) in *New South Wales v Commonwealth* ('Workchoices Case') (2006) 231 ALR 1.

¹⁰⁷ For a discussion of these issues, and Deane's jurisprudence in this context, see for example, G. J. Lindell, 'The Corporations and Races Powers' (1984) 14 *Federal Law Review* 219; Geoffrey Kennett, 'Constitutional Interpretation in the Corporations Case' (1990) 19 *Federal Law Review* 223 and Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) chapter 5.

¹⁰⁸ (1978) 22 ALR 621, 642. Zines has observed that the concept of 'financial corporation' was 'well described' by Deane in this decision: Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 89.

¹⁰⁹ (1982) 150 CLR 282, 305.

¹¹⁰ Ibid 305-6 (Mason, Murphy and Deane JJ) and *Tasmanian Dam Case* (1983) 158 CLR 1, 155-7 (Mason J); 179 (Murphy J); 272 (Deane J).

¹¹¹ *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282, 305 (Mason, Murphy and Deane JJ). Compare, *Tasmanian Dam Case* (1983) 158 CLR 1, 116-7 (Gibbs CJ). Wilson and Dawson JJ found it unnecessary to decide this issue in the *Tasmanian Dam Case*, although Dawson J indicated that he would have agreed with the view of Gibbs CJ: ibid 207.

¹¹² *Tasmanian Dam Case* (1983) 158 CLR 1, 155-7 (Mason J); 159 (Murphy J); 240 (Brennan J); 292-3 (Deane J).

Mason, Murphy, Brennan and Deane JJ concluded that s 51(xx) authorised the Commonwealth to regulate the trading activities of trading corporations, and activities carried out for the purposes of trade.¹¹³ Mason, Murphy and Deane JJ were willing to extend s 51(xx) still further, to regulate the activities of trading corporations.¹¹⁴

Deane argued in the *Tasmanian Dam Case* that s 51(xx) was an important plenary power bestowed on the Commonwealth, one that, consistent with language and principle, must be construed 'expansively rather than pedantically'.¹¹⁵ For this reason, Deane concluded that s 51(xx) could not be confined to permit the Commonwealth to regulate only the trading activities of trading corporations. Deane acknowledged that policy considerations confirmed a broad interpretation of this head of Commonwealth legislative power, stating that:

No one with knowledge of the political and other non-trading activities of trading corporations in and since the days of the East India Company would suggest that the non-trading activities of trading corporations *are any less appropriate* to be placed under the legislative control of a *national government* than are their trading activities.¹¹⁶

In this vein Deane argued that it was not '*realistic*' for the trading and financial activities of corporations to be 'compartmentalized and isolated' from their non-trading activities.¹¹⁷ Although Deane observed that a law framed 'no corporation shall' will not necessarily be valid, he regarded s 51(xx) as broad enough to permit the Commonwealth to regulate all the activities of a trading corporation.¹¹⁸

Against this steady expansion of s 51(xx), the majority decision in the *Incorporation Case* 'came as a surprise'.¹¹⁹ The case concerned Commonwealth legislation designed to encourage economic activity by creating a uniform national regulatory regime for companies and securities, including provision for the incorporation of 'trading and financial corporations'. The question

¹¹³ Ibid 119 (Gibbs CJ); 148 (Mason J); 179 (Murphy J); 240-1 (Brennan J); 269-71 (Deane J).

¹¹⁴ Ibid 148-9 (Mason J); 179 (Murphy J); 269-70 (Deane J).

¹¹⁵ Ibid 269.

¹¹⁶ Ibid 269-70 (emphasis added).

¹¹⁷ Ibid 270 (emphasis added).

¹¹⁸ Ibid 272.

¹¹⁹ G.J. Lindell, 'Recent Developments in the Judicial Interpretation of the Australian Constitution' in Geoffrey Lindell (ed) *Future Directions in Australian Constitutional Law* (1994) 1, 6.

before the Court was whether the words 'formed within the limits of the Commonwealth' denied the Commonwealth power with respect to the creation of 'trading and financial' corporations.

Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ, in a joint judgment, held that s 51(xx) could not support a Commonwealth law with respect to incorporation. The majority argued that three factors supported their conclusion: text, precedent and history. First, according to the majority, on its 'plain meaning', s 51(xx) granted the Commonwealth power with respect to 'formed' corporations, that is, those corporations already in existence.¹²⁰ Second, the majority claimed that the Court's reasoning in *Huddart, Parker & Co Pty Ltd v Moorehead* was authority for the proposition that s 51(xx) did not grant the Commonwealth power to incorporate trading and financial corporations.¹²¹ Finally, the majority argued that history, including drafts of the Constitution and the Convention Debates, confirmed that s 51(xx) was not a power with respect to the incorporation of trading and financial corporations.¹²²

Deane, in a passionate dissent, rejected each stage of the majority's analysis. For Deane, the text of s 51(xx) was analogous to the lighthouses power in s 51(vii). Thus, he argued, the power with respect to constitutional corporations in s 51(xx) included the power to create trading and financial corporations. The persuasiveness of Deane's analogy has been questioned.¹²³ However, as Kennett has argued, the diametrically opposed grammatical analysis of the majority and Deane reinforced that the words of s 51(xx) are ambiguous.¹²⁴ Thus, a compelling analysis of the meaning s 51(xx) must depend on sources beyond the text, including precedent, policy and history. Deane's analysis of each of these tools in the *Incorporation Case* offered significant insights into Deane's constitutional philosophy.

¹²⁰ *Incorporation Case* (1990) 169 CLR 482, 498.

¹²¹ (1909) 8 CLR 330 ('*Huddart*').

¹²² *Incorporation Case* (1990) 169 CLR 482, 501-3.

¹²³ See Geoffrey Kennett, 'Constitutional Interpretation in the *Corporations Case*' (1990) 19 *Federal Law Review* 223, 231-2 and Dennis Rose, 'Judicial Reasonings and Responsibilities in Constitutional Cases' (1994) 20 *Monash University Law Review* 195, 197.

¹²⁴ Kennett, above n 123, 233.

1 *Principles of interpretation and precedent*

Deane commenced his judgment in the *Incorporation Case* with a statement of the principles of construction governing the interpretation of s 51. Deane emphasised that it was ‘the words – *and those words alone*’¹²⁵ which controlled the meaning of s 51(xx). This statement resonated with Sir Owen Dixon’s invocation of ‘strict and complete legalism’ as the appropriate legal principle governing constitutional interpretation.¹²⁶ Deane’s remarks were made in the context of arguments that s 51(xx) should be read narrowly, with reference to the Convention Debates and the allegedly negative consequences of a broad interpretation of the head of power. In this context, reliance on the ‘settled principle’ of the *Engineers’ Case* was a powerful rhetorical device through which to challenge the reasoning of a joint judgment of six members of the Court. Deane’s decision in the *Incorporation Case* thus provided another illustration, seven years after the *Tasmanian Dam Case*, of Deane’s reliance on the *Engineers’ Case* and the plain meaning of the constitutional text to support his broad construction of s 51. However, the pattern of Deane’s jurisprudence, and his reasoning in the *Incorporation Case*, indicated that Deane frequently looked beyond the ‘words alone’, to his understanding of the Constitution’s ‘fundamental concepts’, contemporary context and policy considerations to inform the interpretation of the Constitution.

Deane’s opening remarks in the *Incorporation Case*, relying on ‘the words’ of the constitutional text, also suggested a significant twist in Deane’s understanding of the ‘settled principle’ of the *Engineers’ Case*. Deane explained that the Court looked to ‘the words’ of the Constitution, because those words ‘constitute the compact made between *the people* of this country when, by referenda, they ... “agreed to unite in one indissoluble Federal Commonwealth.”’¹²⁷

Following the *Engineers’ Case*, it had been settled principle that the authority of the Constitution, and the principles governing its interpretation, had at their foundation a respect for parliamentary supremacy and a belief that the

¹²⁵ *Incorporation Case* (1990) 169 CLR 482, 504 (emphasis added).

¹²⁶ ‘Swearing-in of Sir Owen Dixon as Chief Justice’ (1952) 85 CLR xi, xiv.

¹²⁷ *Incorporation Case* (1990) 169 CLR 482, 504 (emphasis added).

authority of the Constitution rested in its status as an Act of Imperial Parliament.¹²⁸ In the above passage, however, Deane referred to the compact of 'the people'; a reference resonating with his swearing-in speech that the source of law under the Constitution was 'the people'.¹²⁹ In the *Incorporation Case* Deane therefore utilised 'the people' to reinforce an interpretation of the text of the Constitution freed from the 'assumptions' of the framers regarding 'federal balance' considerations. This interpretive principle was reinforced by Deane later in his judgment in his adamant rejection of reliance on the subjective intentions of the framers as a tool in constitutional interpretation.¹³⁰

Deane's emphasis on the 'settled principles' of the *Engineers' Case* in his judgment in the *Incorporation Case* supported his rejection of the majority's analysis of the case law on s 51(xx). In *Huddart* the Court had intimated that the Commonwealth's power under s 51(xx) did not extend to the incorporation of 'trading and financial corporations'.¹³¹ The Court in the *Incorporation Case* acknowledged that the 'reserved powers' doctrine heavily influenced the reasoning of the Court in that case.¹³² In the *Incorporation Case*, however, the majority judges relied on the authority of *Huddart*, on the basis that its conclusion on the reach of s 51(xx) could be seen as deriving from 'purely textual considerations' divorced from these discredited principles of constitutional interpretation.¹³³ For Deane, however, reliance on *Huddart* introduced reserved powers reasoning by the backdoor; reasoning which, in the *Tasmanian Dam Case* and *Richardson* Deane had forcefully rejected as having no relevance to the task of construing s 51 heads of power.¹³⁴ With greater force and more colourful imagery than his decisions on s 51(xxix), Deane claimed

¹²⁸ See, for example, Sir Owen Dixon, 'The Law and the Constitution' (1935) 51 *Law Quarterly Review* 590, 597. See discussion above n 28.

¹²⁹ Prior to the *Incorporation Case* in 1990 Deane had expressed this principle in a number of cases. See, for example, *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351, 442 and *Breavington* (1988) 169 CLR 41, 132.

¹³⁰ See further below n 146.

¹³¹ For further discussion of the Court's reasoning in *Huddart* see Geoffrey Kennett, 'Constitutional Interpretation in the *Corporations Case*' (1990) 19 *Federal Law Review* 223, 235-7.

¹³² *Incorporation Case* (1990) 169 CLR 482, 499 (Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ); 506-11 (Deane J).

¹³³ *Ibid* 499.

¹³⁴ See discussion above text accompanying chapter 1 n 50 and n 96.

that any reference to the *Huddart* decision required the case to be '*disinterred and selectively dissected*'.¹³⁵

2 *Policy considerations in constitutional interpretation*

A further disagreement between Deane and the majority judges in the *Incorporation Case* lay in their assessment of the policy consequences of the legislation, and what Deane described as the question of 'convenience'.¹³⁶ According to Deane, the majority judgment was influenced by the consideration that 'it would be productive of difficulty and inconvenience' to construe s 51(xx) as conferring power to incorporate only corporations of a 'trading and financial' character.¹³⁷ As s 51(xx) was not a power with respect to all corporations, there was some weight to the majority's concern regarding the administrative complications associated with rules for incorporation that apply only to corporations of a specified character.¹³⁸ However, Deane forcefully rejected the majority's analysis on two grounds.

First, Deane argued that the majority's analysis of the practical effect of s 51(xx) 'assumes an unduly restrictive connotation' of 'trading and financial' corporations.¹³⁹ As the overview of Deane's approach to s 51(xx) at the outset of this part indicated, Deane took a broad view of the meaning of 'trading or financial' corporations. Deane therefore considered that the exclusion of the special classes of corporations from the definition of constitutional corporations would 'not seriously impair'¹⁴⁰ the Commonwealth's power to design a national corporations law.

¹³⁵ *Incorporation Case* (1990) 169 CLR 482, 506 (emphasis added). Deane famously repeated this morbid imagery when he rejected a 'dead hands' theory of construction of the Constitution in *Theophanous* (1994) 182 CLR 104, 171.

¹³⁶ *Incorporation Case* (1990) 169 CLR 482, 511. This was the second of two 'subsidiary' arguments addressed by Deane at the conclusion of his judgment. The first was the majority's reliance on the framers' intentions.

¹³⁷ *Ibid* 511.

¹³⁸ Geoffrey Kennett, 'Constitutional Interpretation in the *Corporations Case*' (1990) 19 *Federal Law Review* 223, 227-30 and Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 103-4.

¹³⁹ *Incorporation Case* (1990) 169 CLR 482, 511. Kennett has observed that the majority's reference to convenience was linked to the framers' intentions and therefore 'hardly compelling.' Kennett above n 138, 230.

¹⁴⁰ *Incorporation Case* (1990) 169 CLR 482, 512.

Second, Deane offered a 'more complete answer' to this argument. Deane reasoned that there was 'no legal justification' for denying the scope of the power on the basis of the supposed inconvenience of the resulting legislation.¹⁴¹ This answer appeared to rest on a separation of powers analysis. According to Deane, the question of the potential inconvenience of the legislation was a consideration that might be seen by the Parliament as 'calling for restraint in the exercise of the legislative power.'¹⁴² However, it was for Parliament to consider the desirability or prudence of its legislative regime, while the Court's task was to examine whether the law fell within what Deane described as the 'plenary grant of legislative power' to the Commonwealth.¹⁴³ In this way, in the *Incorporation Case* Deane again drew attention to the distinction between the roles of the Parliament and the Court in the Australian constitutional system.

It may be asked, however, whether Deane's commitment to judicial deference in the *Incorporation Case* was a substantial one. Deane had emphasised the distinction between the legal and political roles with some force in his reasoning in the *Tasmanian Dam Case* and *Richardson*. However, Deane's understanding of the Court's role in 'legal' analysis in those cases did not preclude his reference to the needs of the nation in 'today's world'¹⁴⁴ in support of his broad interpretation of the Commonwealth's legislative power to implement treaties. Similarly, Deane's application of proportionality analysis allowed him to strictly scrutinise the necessity of Parliament's course of action, particularly where the legislation adversely affected individual rights.

In his reasoning in the *Incorporation Case*, Deane revealed his support of the policy objectives of the legislation. Thus Deane stated that it

is plain that ... the advantages of such national companies legislation with respect to such corporations seem to me overwhelmingly to outweigh the alleged inconvenience.¹⁴⁵

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Deane therefore referred to issues of the potential inconvenience of the legislation as considerations that might be seen by the Parliament as 'calling for restraint in the exercise of the legislative power.' *Incorporation Case* (1990) 169 CLR 482, 512.

¹⁴⁴ *Tasmanian Dam Case* (1983) 158 CLR 1, 258.

¹⁴⁵ *Incorporation Case* (1990) 169 CLR 482, 512. For a sceptical analysis of this argument see Ian M Ramsay, 'Company Law and the Economics of Federalism' (1990) 19 *Federal Law Review* 169. On the inconvenience effected by the majority's decision in the *Incorporation Case*, see Kirby J's

With this statement, Deane confirmed his preference for national, uniform, regulatory solutions, over the diversity of State based regimes. As Deane supported the objective of the legislation in the *Incorporation Case*, and regarded any inconvenience as clearly proportionate to the pursuit of that objective, Deane's commitment to judicial deference was not put to the test in this case.

3 *The framers in constitutional interpretation*

The final element of Deane's analysis in the *Incorporation Case* which remains to be discussed was his analysis of the relevance of the framers' intentions to the interpretation of s 51(xx). Deane's examination of the Convention Debates in the *Incorporation Case* represented both a significant point of difference between his approach and that of the majority judges and an illustration of his treatment of what would become an important topic in his constitutional jurisprudence. Before turning to Deane's remarks, however, some background regarding the Court's views on the relevance of the Convention Debates in Australian constitutional interpretation prior to the *Incorporation Case* is required.¹⁴⁶

(a) *Opening the Debates – Cole v Whitfield*

Prior to 1988 and the decision of *Cole v Whitfield*,¹⁴⁷ the Court had imposed a 'self-denying ordinance'¹⁴⁸ on the use of the Convention Debates in constitutional interpretation. This restriction was tied to *Engineers'* literalism, and the Court's assessment of its obligation to derive the meaning of the Constitution 'according to its own terms'.¹⁴⁹ *Cole* officially lifted the embargo on the use of the Debates, at least in part.¹⁵⁰

lament regarding the 'grotesque complications' that flowed from the 'narrow' majority decision: *R v Hughes* (2000) 202 CLR 535, 564.

¹⁴⁶ Much has been written on this topic. See, for example the various scholarly contributions to Gregory Craven, (ed) *The Convention Debates 1891-1898: Commentaries, Indices and Guide* (1986).

¹⁴⁷ (1988) 165 CLR 360 ('*Cole*').

¹⁴⁸ Michael Kirby, 'Constitutional Interpretation and Original Intent: a Form of Ancestor Worship?' (2000) 24 *Melbourne University Law Review* 1, 9.

¹⁴⁹ *Engineers' Case* (1920) 28 CLR 129, 142.

¹⁵⁰ Kirk observed that the rule in *Cole* was not a novel interpretive principle, but had restated the approach of Griffith CJ in *Municipal Council of Sydney v Commonwealth* (1904) 1 CLR 208, 213-4.

The rule of reference in *Cole*, 'hypnotically simple'¹⁵¹ in its terms, stated that reference to the Convention Debates:

may be made, not for the purpose of substituting for the meaning of the words used the scope and effect – if such could be established – which the founding fathers subjectively intended the section to have, but for the purpose of identifying the *contemporary meaning* of the language used, the *subject* to which that language was directed and the *nature and objectives* of the movement towards federation from which the compact of the Constitution finally emerged.¹⁵²

In this passage the Court attempted to restrict the influence of 'original intent' in constitutional interpretation while recognising the value of the Debates as an important resource of Australian constitutional history.¹⁵³

The *Cole* rule has been criticised as endorsing a false dichotomy between an objective reference to the Debates and reliance on the intentions of the framers. For instance, Schoff has gathered an extensive list of examples where members of the Court, while ostensibly applying the *Cole* rule, slipped from reliance upon the objective intentions of the framers into a consideration of the framers' subjective intentions.¹⁵⁴ The majority's reliance on the Convention Debates in the *Incorporation Case* appears itself to illustrate the fine line drawn by the *Cole* rule.¹⁵⁵ In the *Incorporation Case* the joint judgment turned to the Debates for the purpose of ascertaining the 'subject to which the paragraph was directed.'¹⁵⁶ To this end the majority judges cited Sir Samuel Griffith as evincing that 'the draftsmen of the provision did not contemplate' that the Commonwealth's power under s 51(xx) would extend to incorporation.¹⁵⁷ The consequence of this

Even so, the legitimising of the Court's reference to the Convention Debates was a 'significant breakthrough' in *Cole*: Jeremy Kirk, 'Constitutional Interpretation and a Theory of Evolutionary Originalism' (1999) 27 *Federal Law Review* 323, 329.

¹⁵¹ See Paul Schoff, 'The High Court and History: It Still Hasn't Found(ed) What It's Looking For' (1994) 5 *Public Law Review* 253, 254.

¹⁵² *Cole* (1988) 165 CLR 360, 385 (emphasis added).

¹⁵³ As a sample of the works exploring the degree to which original intent should influence constitutional interpretation, contemporaneous to the decision in the *Incorporation Case*, see Greg Craven, 'Original Intent and the Australian Constitution: Coming Soon to a Court Near You?' (1990) 1 *Public Law Review* 166 and Sir Daryl Dawson, 'Intention and the Constitution: Whose Intent?' (1990) 6 *Australian Bar Review* 93.

¹⁵⁴ Paul Schoff, above n 151, especially 261-66. See also Kennett's observation that 'some of the uses for historical material in *Cole v Whitfield* are, with respect, not really distinguishable from the project of effectuating the founders' intentions': Geoffrey Kennett, 'Constitutional Interpretation in the *Corporations Case*' (1990) 19 *Federal Law Review* 223, 239.

¹⁵⁵ See discussion in Paul Schoff above n 151, 264-5 and Geoffrey Kennett above n 154, 240.

¹⁵⁶ *Incorporation Case* (1990) 169 CLR 482, 501.

¹⁵⁷ *Ibid* 502.

analysis was that the majority could restrict the scope of s 51(xx) without threatening the general trend in s 51 jurisprudence favouring the expansion of Commonwealth power.¹⁵⁸ However, as Kennett argues, the majority judges' inquiry was directed towards the power the delegates considered that s 51(xx) should confer.¹⁵⁹ This inquiry appears to cross the line into an assessment of what the 'founding fathers *subjectively* intended'¹⁶⁰ for the section.

How did Deane respond to the relevance of the Convention Debates to constitutional interpretation?

In *Cole*, and *Port McDonnell Professional Fishermen's Association v South Australia*,¹⁶¹ Deane participated in unanimous joint judgments of the Court defining and applying the *Cole* rule.¹⁶² Accordingly, Deane can be regarded as endorsing the basic premise of the *Cole* rule: that historical texts can be used to ascertain historical meaning, but that the subjective intentions of the framers are irrelevant in constitutional interpretation. This thesis argues that despite Deane's hyperbolic statements in *Theophanous* regarding the 'dead hands' of the framers,¹⁶³ Deane was consistent in his adherence to this basic premise of the rule in *Cole*.¹⁶⁴ Deane's reasoning in *Breavington v Godleman*,¹⁶⁵ the *Incorporation Case*¹⁶⁶ and *Theophanous*¹⁶⁷ evinced his distinctive rationale for the exclusion of the framers' subjective intentions from constitutional interpretation based on his understanding of the role of 'the people' as legal sovereigns. It was this rationale that marked the difference in approach in the *Incorporation Case* between Deane and the majority judgment.

¹⁵⁸ In this way, the majority may have been acting as 'result-oriented historians.' See further the use of this critique in the context of United States Supreme Court decisions interpreting the Constitution in Scott Douglas Gerber, *First Principles: the Jurisprudence of Clarence Thomas* (1999) 153.

¹⁵⁹ Geoffrey Kennett, 'Constitutional Interpretation in the *Corporations Case*' (1990) 19 *Federal Law Review* 223, 240.

¹⁶⁰ *Cole* (1988) 165 CLR 360, 385 (emphasis added).

¹⁶¹ (1989) 168 CLR 340.

¹⁶² See also the joint judgment of Brennan, Deane and Toohey JJ, citing the *Cole* rule, in *Capital Duplicators (No 1)* (1992) 177 CLR 248, 274.

¹⁶³ *Theophanous* (1994) 182 CLR 104, 171.

¹⁶⁴ This assessment of Deane's attitude towards the role of historical meaning appears at odds with Heydon J's extra-curial classification of Deane's theory in John Dyson Heydon, 'Theories of Constitutional Interpretation: A Taxonomy' (2007) *Winter Bar News* 12, 20-2.

¹⁶⁵ *Breavington* (1988) 169 CLR 41, 132-3.

¹⁶⁶ *Incorporation Case* (1990) 169 CLR 482, 511.

¹⁶⁷ *Theophanous* (1994) 182 CLR 104, 171.

(b) *'The people' and the framers in the Incorporation Case*

In the *Incorporation Case* Deane rejected the argument that the intentions of the framers supported a narrow construction of s 51(xx), denying the Commonwealth the power to incorporate trading and financial corporations. Deane's answer was in two parts, mirroring his earlier remarks regarding the role of the framers' intentions in the interpretation of s 51(xxix) in the *Tasmanian Dam Case*.¹⁶⁸

(i) *Deane's particular answer – the credibility of the Debates*

First, Deane attacked the credibility of the interpretation of the historical record advanced by the majority judges. Thus Deane in the *Incorporation Case* emphasised that the 'few brief references in the Convention Debates are far from compelling' and 'contrary [to] statements in early authority'.¹⁶⁹ Consequently Deane argued that the Convention Debates provide unconvincing testaments to the purpose of the head of power.¹⁷⁰ These remarks mirrored Deane's earlier rebuttal of an argument based on the Convention Debates in *Breavington*.¹⁷¹ In *Breavington* it had been argued that the delegates at the Constitutional Conventions supported a narrow understanding of the operation of s 118. Deane, however, forcefully rejected that argument in *Breavington* on two 'particular'¹⁷² grounds: first, that the Debates were not a credible source, as only one reference to the topic could be found;¹⁷³ and second, that the meaning attributed to the Debates was inconsistent with contemporary commentary by Inglis Clark and Higgins on the meaning of s 118.¹⁷⁴ These aspects of Deane's analysis in the *Incorporation Case* and *Breavington* forcefully illustrated that, at best, the *Cole* rule prescribed only when reference to the

¹⁶⁸ Compare *Tasmanian Dam Case* (1983) 158 CLR 1, 255. See discussion above n 62.

¹⁶⁹ *Incorporation Case* (1990) 169 CLR 482, 511. Kennett agreed with Deane's assessment of the historical record: Geoffrey Kennett, 'Constitutional Interpretation in the *Corporations Case*' (1990) 19 *Federal Law Review* 223, 238-9. Lindell also agreed that it was 'very doubtful as to what was intended by the framers': G.J. Lindell, 'Recent Developments in the Judicial Interpretation of the Australian Constitution' in Geoffrey Lindell (ed) *Future Directions in Australian Constitutional Law* (1994) 1, 7.

¹⁷⁰ *Incorporation Case* (1990) 169 CLR 482, 511.

¹⁷¹ Deane's decision in *Breavington* is examined below chapter 2 part 3.

¹⁷² *Breavington* (1988) 169 CLR 41, 133.

¹⁷³ See 1897 Adelaide Convention, 20 April, 1897, 1004-5 (Mr Barton).

¹⁷⁴ *Breavington* (1988) 169 CLR 41, 133.

Debates was permitted; it did not prescribe the weight the Court should attach to history in solving a particular interpretive question. In both *Breavington* and the *Incorporation Case* Deane made a compelling argument that the Convention Debates did not themselves provide unequivocal support for restricting the meaning of ss 118 or 51(xx).

(ii) Deane's 'fundamental' answer – 'the people' and the subjective intentions of the framers

Second, in the *Incorporation Case* Deane offered 'a more fundamental'¹⁷⁵ reason for rejecting the majority's use of the Debates. Thus Deane argued in the *Incorporation Case* that:

it is not permissible to constrict the effect of the words which were *adopted by the people* as the compact of a nation by reference to the intentions or understanding of those who participated in or observed the Convention Debates (see *Breavington v Godleman*).¹⁷⁶

Although Deane described the argument relying on the framers' intentions as 'subsidiary'¹⁷⁷ in the scheme of the majority's analysis in the *Incorporation Case*, Deane's concern regarding the role of the framers' intentions in constitutional interpretation was signalled at the outset of his reasons. As mentioned previously, Deane opened his reasons by emphasising that it was the words of the Constitution '*and those words alone*' that constituted the '*compact made between the people of this country*'.¹⁷⁸ Thus Deane argued that if those words granted the Commonwealth power to incorporate 'trading and financial corporations':

it is simply not to the point that some one or more of the changing participants in Convention Committees or Debates or some parliamentarian, civil servant or draftsman on another side of the world intended or understood that the words of the national compact would bear some different or narrower meaning.¹⁷⁹

¹⁷⁵ *Incorporation Case* (1990) 169 CLR 482, 511. In *Breavington* Deane described his application of the *Cole* rule as his 'general' answer for rejecting use of the Debates to narrow the meaning of s 118: *Breavington* (1988) 169 CLR 41, 132.

¹⁷⁶ *Incorporation Case* (1990) 169 CLR 482, 511 (emphasis added) citing *Breavington* (1988) 169 CLR 41, 131-3.

¹⁷⁷ *Incorporation Case* (1990) 169 CLR 482, 511.

¹⁷⁸ *Ibid* 504 (emphasis added).

¹⁷⁹ *Ibid*.

In Deane's view, the role of 'the people' in forming the national compact therefore rendered the subjective intentions of the framers irrelevant to the Court's task in constitutional interpretation.¹⁸⁰

The citation by Deane in the *Incorporation Case* to *Breavington* was also significant. In *Breavington* Deane had endorsed the *Cole* rule as permitting the Court to rely on the Debates to ascertain the history and subject matter of the constitutional text.¹⁸¹ However, Deane continued in *Breavington* that, 'one cannot ... otherwise rely upon the Convention Debates'¹⁸² to identify the actual intentions of the framers. This was because:

It would be an affront to the genius of the framers of the Australian Constitution and *subversive of the procedures by which Federation was achieved by the Australian people* to constrict the meaning and effect of the words of the Constitution by reference to passing comments made by delegates in the course of such discussion.¹⁸³

From this passage, and Deane's reliance upon it in the *Incorporation Case*, it appeared that Deane did not reject either the relevance of historical meaning in constitutional interpretation or the use of the Convention Debates as a tool in locating that meaning. Instead, Deane's concern lay with ensuring that the Court gave effect to the intentions of 'the people' as legal sovereigns.

As Deane explained in the *Incorporation Case*, the Constitution was a compact 'made between the people', that is, through the assent of 'the people' at referenda. This, Deane later explained in *Theophanous*, was one part of the explanation of the current legal force of the Constitution.¹⁸⁴ Deane's restriction on the use of the Convention Debates in constitutional interpretation flowed from his commitment to give effect to the intentions of the sovereign people. The fact that by contemporary standards the Constitution did not gain the

¹⁸⁰ As Kennett emphasised, this reasoning would also render irrelevant the intention of the Imperial Parliament: Geoffrey Kennett, 'Constitutional Interpretation in the *Corporations Case*' (1990) 19 *Federal Law Review* 223, 241. See also Justice Dyson Heydon's extra-curial reflections on this consequence of Deane's 'living force' analysis in John Dyson Heydon, 'Theories of Constitutional Interpretation: A Taxonomy' (2007) *Winter Bar News* 12, 20.

¹⁸¹ *Breavington* (1988) 169 CLR 41, 132-3.

¹⁸² *Ibid.*

¹⁸³ *Ibid* 133 (emphasis added).

¹⁸⁴ *Theophanous* (1994) 182 CLR 104, 171. Deane argued in *Theophanous* that the legal force of the Constitution also depended on the contemporary acquiescence of 'the people' to the Australian constitutional system.

assent of *all* the people,¹⁸⁵ does not affect the persuasiveness of this aspect of Deane's reasoning. Rather, the crucial fact for Deane's analysis was that the intentions of 'the people' could not be subverted by reliance on the subjective intentions of a number of their representatives at the Constitutional Conventions.

Kennett has suggested that the *Incorporation Case* evinced a fundamental division in the Court between the approaches of Deane and the majority towards the role of the Convention Debates in constitutional interpretation.¹⁸⁶ Kennett considered that Deane in the *Incorporation Case* implicitly rejected *Cole*, and the role of historical meaning in constitutional interpretation.¹⁸⁷ Although Deane does not expressly endorse *Cole* in the *Incorporation Case*, there is nothing beyond the more forceful tone of this decision to suggest that Deane's approach to history and constitutional interpretation had changed from his earlier decision in *Breavington*.¹⁸⁸ Indeed, the general answer Deane offered in the *Incorporation Case* was in similar terms to his earlier decision in *Breavington*. In addition, by citing *Breavington* in his reasons in the *Incorporation Case* Deane indirectly incorporated his explicit endorsement of the *Cole* rule in that earlier case.¹⁸⁹ Thus a preferable interpretation of Deane's decision in the *Incorporation Case* is that it confirmed his belief that the role of 'the people' as sovereign provided the rationale for distinguishing between valid references to the historical meaning of words in the Debates, and invalid reliance on the subjective intentions of the framers.

Ironically, the most explicit statement by Deane of the relationship between his concept of 'the people' and the *Cole* rule, and the continuing relevance of history in his interpretive theory, came not in his judgments but in a comment directed to counsel during oral argument. In 1993, during argument in *Capital Duplicators Pty Ltd v Australian Capital Territory (No 2)*, Deane remarked:

¹⁸⁵ See, for example, the discussion of the role of women in the movement towards Federation in Deborah Cass and Kim Rubenstein, 'Representation/s of Women in the Australian Constitutional System' (1995) 17 *Adelaide Law Review* 3, 27-30.

¹⁸⁶ Geoffrey Kennett, 'Constitutional Interpretation in the *Corporations Case*' (1990) 19 *Federal Law Review* 223, 240-2.

¹⁸⁷ *Ibid.*

¹⁸⁸ See also Deane's intervening decision endorsing *Cole* in *Wooldumpers* discussed below in part 3 of this chapter.

¹⁸⁹ *Incorporation Case* (1990) 169 CLR 482, 511.

is not this resort to the Federation Debates getting quite out of control? I mean, *the people of this country did not know what was said in the heat of debate in those Convention Debates. They knew what the history before Federation was.* But the way we are beginning to parse and analyse these *passing comments*, some of which do little credit to the people who made them on any appraisal, really is beginning to reduce this Court, or divert this Court, I would think, from its *proper function of ascertaining what the people of the Country meant when they adopted the Constitution.*¹⁹⁰

In this passage, despite palpable frustration with the arguments of counsel directing the Court to the Convention Debates, Deane did not reject outright the relevance of the Debates to the task of constitutional interpretation. Rather Deane expressed concerns regarding the reliability of the 'passing comments' of the framers – a phrase Deane had employed five years earlier in his decision in *Breavington*.¹⁹¹ During argument in *Capital Duplicators (No 2)* in 1993, Deane emphasised that the Court's ultimate task in constitutional interpretation was to ascertain what '*the people ... meant*' when they adopted the Constitution. This explained why Deane believed that the Debates may be utilised as an interpretative tool: as evidence of what *Cole* described as the 'contemporary meaning' of the text, or the movement towards Federation, that is, as evidence of aspects of the 'history before Federation' that could be known by 'the people'. Such references to the Debates, however, were to be distinguished from the idiosyncratic statements of the framers – their subjective intentions regarding the text and its operation – that were outside the knowledge of the people in 1900. In this way, Deane's approach offered a principled and clear explanation of the legitimate uses of the Convention Debates, supporting the rule in *Cole* by reference to the ultimate touchstone in constitutional interpretation, role of 'the people' as legal sovereigns.

Applying Deane's approach to the argument in the *Incorporation Case*, the reference by the majority to the statements by a number of framers regarding the purpose of s 51(xx) may properly be considered to be reliance on 'passing comments' made 'in the heat of debate'.¹⁹² These remarks by the delegates may

¹⁹⁰ *Capital Duplicators Pty Ltd v Australian Capital Territory (No 2)*, Transcript of Argument, 21 April 1993, 158 (emphasis added). Schoff cited part of these remarks by Deane as evincing 'a measure of judicial disaffection with historical argument': Paul Schoff, 'The High Court and History: It Still Hasn't Found(ed) What It's Looking For' (1994) 5 *Public Law Review* 253, 272.

¹⁹¹ *Breavington* (1988) 169 CLR 41, 133 (emphasis added).

¹⁹² *Capital Duplicators Pty Ltd v Australian Capital Territory (No 2)*, Transcript of Argument, 21 April 1993, 158.

not be regarded as representing the knowledge or intentions of 'the people' concerning the regulation of corporations, and the purpose of granting Commonwealth legislative power over 'trading and financial' corporations. Deane's rejection of the majority's reliance on the framers' intentions in the *Incorporation Case* therefore had considerable force, grounded on his understanding of the intentions of 'the people', not their representatives, as the touchstone of constitutional interpretation.

The next part examines Deane's interpretation of aspects of s 51(xxxv). In a decision in 1989, in *Wooldumpers*,¹⁹³ Deane turned to the Convention Debates to support his argument that the nature of industrial disputation made it appropriate for the 'prevention' limb to be extended as a potential source of Commonwealth power. As in the *Incorporation Case*, Deane's reasoning in *Wooldumpers* evinced his vision of the '*national compact*,'¹⁹⁴ the importance of national solutions to issues facing contemporary Australians, and the significance of the language of the grant of power under s 51 as a starting point for constitutional interpretation.

C *Part 3: The 'prevention' limb of the industrial relations power*

Section 51(xxxv) grants the Commonwealth power with respect to:

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

It is trite to say that this head of power is not a plenary industrial relations power.¹⁹⁵ Rather, the terms 'conciliation and arbitration', 'industrial dispute' and the requirement that the dispute be interstate have been interpreted by the

¹⁹³ (1989) 166 CLR 311.

¹⁹⁴ *Incorporation Case* (1990) 169 CLR 482, 504 (emphasis added).

¹⁹⁵ As Creighton and Stewart remark, this head of power was drafted in a manner that both denied the Commonwealth comprehensive power over industrial law and compelled the form of federal regulation. Breen Creighton and Andrew Stewart, *Labour Law* (4th ed, 2005) 84. For a discussion of the restriction the language of this power has imposed on Commonwealth legislative policy see generally Bill Ford, 'Labour Relations Law' in Tony Blackshield, Michael Coper and George Williams (eds), *Oxford Companion to the High Court of Australia* (2001) 412.

Court to limit the Commonwealth's capacity to establish a comprehensive industrial relations regime.¹⁹⁶

Deane's time on the bench, however, coincided with a period of expansion of this head of power. For example, the term 'industrial dispute' was interpreted prior to 1982 as containing three requirements: first, that the parties to the dispute stood in an industrial relationship; second, that the parties were engaged in an industry; and third, that the dispute related to an industrial matter.¹⁹⁷ However, in *R v Coldham; Ex parte Australian Social Welfare Union*, in 1983, the Court altered this narrow, formalistic, and long-standing, interpretation of the concept of 'industrial dispute'.¹⁹⁸ In this 'landmark'¹⁹⁹ case, the Court unanimously said that 'the words' industrial dispute 'are not a technical or legal expression.'²⁰⁰ Rather, the words must be given their 'popular meaning', that is, the meaning they would convey to the person 'in the street.'²⁰¹

The Court's reasoning in *Coldham* rested heavily on the principle of interpretation endorsed in *Jumbunna Coal Mine N.L v Victorian Coal Miners' Association*.²⁰² There, O'Connor J emphasised that when construing the words in s 51:

[I]t must be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve.²⁰³

Applying this principle in *Coldham*, the Court held that s 51(xxxv) must be interpreted consistent with:

¹⁹⁶ See further: Tina Crisafulli, 'Conciliation and Arbitration' in Tony Blackshield, Michael Coper and George Williams (eds), *Oxford Companion to the High Court of Australia* (2001) 126. The restrictions of s 51(xxxv) have led the Commonwealth to look to other heads of power through which to impose national regulatory systems over employment and employment conditions. See the Court's recent response to the Commonwealth's use of s 51(xx) to legislate on employment issues in *New South Wales v Commonwealth* ('Workchoices Case') (2006) 231 ALR 1.

¹⁹⁷ Peter Hanks, *Constitutional Law in Australia* (2nd ed, 1996) 379.

¹⁹⁸ (1983) 153 CLR 297 ('Coldham'). This case was selected by Justice Michael McHugh in his extra-curial examination of the High Court's judicial method as one of thirteen illustrations of the High Court extending or changing the law in Michael McHugh, 'The Law-Making Function of the Judicial Process. Part 1' (1988) 62 *Australian Law Journal* 15, 24.

¹⁹⁹ Breen Creighton and Andrew Stewart, *Labour Law* (4th ed, 2005) 84.

²⁰⁰ *Coldham* (1983) 153 CLR 297, 312.

²⁰¹ *Ibid.*

²⁰² (1908) 6 CLR 309.

²⁰³ *Ibid* 367-8.

the high object for which it was unquestionably designed – the prevention and settlement by conciliation and arbitration of industrial disputes which could not be remedied by any action taken by a single State or its tribunals.²⁰⁴

Thus a broad approach to s 51(xxxv) saw the Court relax the requirement that a dispute occur in an 'industry' and involve an industrial 'matter', and hold that the Commonwealth had jurisdiction over the settlement of disputes involving social workers.²⁰⁵

In cases such as *Coldham*, however, the Court's examination of s 51(xxxv) arose in the context of the Commonwealth's power with respect to the 'settlement' of such disputes. This part examines Deane's novel attempt to utilise the 'prevention' limb of s 51(xxxv) to expand the Commonwealth's power over industrial relations, and to reduce the formalistic mechanisms that had been devised to overcome the requirement that a dispute be 'interstate' in character. The detail of Deane's thoughts on this topic came in his 1989 decision in *Wooldumpers*.

1 *The dispute in Wooldumpers*

Wooldumpers concerned the powers of the Industrial Relations Commission, established under the *Conciliation and Arbitration Act 1904* (Cth), to reinstate a dismissed employee. The issue was whether the dispute satisfied this Act's threshold jurisdictional requirement that an industrial dispute extend beyond the limits of any one State.²⁰⁶ The Union claimed that the dismissal satisfied this requirement because it fell within the ambit of an existing 'paper dispute'. A paper dispute is a 'legal fiction' in which an employee representative body serves a 'log of claims' on an employer representative body in another state (or

²⁰⁴ *Coldham* (1983) 153 CLR 297, 314.

²⁰⁵ See further commentary in Peter Hanks, *Constitutional Law in Australia* (2nd ed, 1996) 380. On the Court's expansion of the concept of an 'industrial matter' see Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (4th ed, 2006) 1021-6.

²⁰⁶ See s 4(1) of the *Conciliation and Arbitration Act 1904* (Cth) which in turn reflected the terms of s 51(xxxv). Deane regarded the Commission's jurisdiction as more limited than s 51(xxxv) allowed: *Wooldumpers* (1989) 166 CLR 311, 327-8. This view was also expressed in *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232, 288 (Deane, Gaudron and McHugh JJ).

vice versa).²⁰⁷ This mechanism generates an interstate aspect to any matter falling within the ambit of the log of claims.²⁰⁸

The High Court in *Wooldumpers* unanimously rejected the Union's argument that the dismissal fell within the ambit of the log of claims and consequently held that the Commission lacked jurisdiction to determine the dispute.²⁰⁹ The nature of the challenge in *Wooldumpers* made it possible for the Court to limit its decision to a determination of the ambit of the existing log of claims. This was the approach taken by five Justices: Wilson, Dawson and Toohey JJ in a joint judgment, and Brennan and Gaudron JJ each in single decisions. Mason CJ and Deane, however, made the novel suggestion that if the Commonwealth utilised its power under s 51(xxxv) to enact laws with respect to the *prevention* of interstate industrial disputes it might be unnecessary to rely on paper disputes to manufacture or escalate industrial unrest from an intrastate to the interstate level.²¹⁰ However, Mason CJ ultimately considered that the facts in *Wooldumpers* made it an unsuitable vehicle in which to examine this aspect of s 51(xxxv).²¹¹ Accordingly Mason CJ's remarks lack the detail, and intensity, of those of Deane.²¹²

2 *Deane's reasoning in Wooldumpers*

In 2006 Blackshield and Williams described Deane's decision in *Wooldumpers* as the 'boldest pronouncement'²¹³ on the potential reach of s 51(xxxv). Consistent

²⁰⁷ See the recent discussion of 'paper disputes' in *New South Wales v Commonwealth (AKA Workplace Relations Challenge)* [2006] HCATrans 215, 4 May 2006 (Callinan J). See also Bill Ford, 'Labour Relations Law' in Tony Blackshield, Michael Coper and George Williams (eds), *Oxford Companion to the High Court of Australia* (2001) 412.

²⁰⁸ See further Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (4th ed, 2006) 1037-44.

²⁰⁹ For a detailed examination of the facts and analysis of the judgments on this topic see Rosemary J Owens, 'Re Federated Storemen and Packers Union of Australia; Ex Parte Wooldumpers (Victoria) Ltd' (1989) 17 *Melbourne University Law Review* 318.

²¹⁰ *Wooldumpers* (1989) 166 CLR 311, 320-21 (Mason CJ); 327 (Deane J). Note also Deane's fleeting remarks on the 'prevention' limb in *Duncan* (1983) 158 CLR 535, 592.

²¹¹ *Wooldumpers* (1989) 166 CLR 311, 320-21.

²¹² This is not to suggest that Mason CJ's judgment in *Wooldumpers* lacked lyrical quality. For example, Mason CJ described the artificiality of the paper dispute mechanism as a contrived 'jurisdictional talisman' designed to sustain the life of the dispute. *Ibid* 319.

²¹³ George Williams, *Labour Law and the Constitution* (1998) 48. See, to like effect, Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (4th ed, 2006) 1030.

with his emphasis on the language of the text in the *Tasmanian Dam Case* and the *Incorporation Case*, in *Wooldumpers* Deane asked rhetorically why, if 'the Constitution means what it says',²¹⁴ the Commonwealth's power should be regarded as exclusively with respect to the 'settlement' of interstate disputes. Rather, Deane observed of s 51(xxxv):

Its emphasis is as much upon conciliation and arbitration for the 'prevention' of inter-State 'industrial disputes' *in the abstract* as it is upon conciliation and arbitration for the 'settlement' of particular identified inter-State 'industrial disputes' which have actually broken out.²¹⁵

Thus Deane concluded that the section empowered the Commonwealth to make laws to resolve existing interstate disputes and to take action 'before the actual threshold of dispute' was reached or before a dispute assumed an interstate character.²¹⁶

Deane's approach to s 51(xxxv) was striking for its potential to expand Commonwealth regulatory control over industrial relations.²¹⁷ Since 1910, and the decision of *Australian Boot Trade Employees' Federation v Whybrow & Co*,²¹⁸ the Court had held that before arbitration could occur, the parties and subject matter of a specific interstate industrial dispute must be ascertained.²¹⁹ This interpretation of the requirements of s 51(xxxv) had two adverse consequences for the conduct of industrial relations and the powers of the federal Commission; consequences which could be removed under Deane's new vision for s 51(xxxv).

First, the Court's decision in *Whybrow* had stimulated the practice of 'paper disputes', whereby a distinct industrial dispute between identified parties spanning the boundaries of a State was manufactured by the service of logs of claims.²²⁰ This was a practice that attracted the ire of Deane in *Wooldumpers*. He

²¹⁴ *Wooldumpers* (1989) 166 CLR 311, 328 (emphasis added).

²¹⁵ *Ibid* 327 (emphasis added).

²¹⁶ *Ibid*.

²¹⁷ However, in light of the Court's recent extension of s 51(xx) in the *Workchoices Case*, Deane's broad view of s 51(xxxv) may not be utilised by the Commonwealth as a source of power over industrial matters.

²¹⁸ (1910) 11 CLR 11 ('*Whybrow*').

²¹⁹ See further Breen Creighton and Andrew Stewart, *Labour Law* (4th ed, 2005) 89.

²²⁰ The Court has accepted that paper disputes satisfied the requirements of s 51(xxxv) because a 'dispute' for the purposes of this head of power was defined as extending to a 'disagreement, difference or dissidence': *Metal Trades Employers Association v Amalgamated Engineering Union* (1935) 54 CLR 387, 429.

considered it counter-intuitive that under a system designed for the settlement of disputes, a precondition for entry into the Commonwealth system was the escalation of a dispute.²²¹ Under Deane's new vision for s 51(xxxv), however, this limitation on Commonwealth power could be removed.

Second, the *Whybrow* doctrine, and its focus on identifiable parties to a dispute, had denied the Commission jurisdiction to make common rule awards, that is, awards binding on all persons engaged in a particular industry. However, the joint judgment of Deane, Gaudron and McHugh JJ in *O'Toole v Charles David Pty Ltd*²²² in 1991 intimated the possible removal of this limitation by emphasising what Deane had described in *Wooldumpers* as the Commonwealth's power to 'prevent' disputes, 'in the abstract'.²²³ At issue in *O'Toole* was the validity of s 60 of the *Conciliation and Arbitration Act*, a privative clause which purported to render awards made by the Commission 'final and conclusive' and immune from challenge on the basis that they lacked constitutional foundation.²²⁴ The Court in *O'Toole* held that the section did not immunise an award from challenge on the basis that it exceeded Commonwealth legislative power under s 51(xxxv). However, Deane, Gaudron and McHugh JJ conceded that the Commonwealth could restrict legal challenge to awards made by the Commission. This was because s 51(xxxv) was a power for the 'conciliation and arbitration for the *prevention* of interstate industrial disputes in the *abstract*'.²²⁵ Thus, they argued, the Commission could take reasonable measures to ensure that awards were not themselves 'an open-ended possible source of aggravated interstate industrial dispute'.²²⁶ On this basis, provided 'adequate' procedures were available to challenge the validity of the awards, Deane, Gaudron and McHugh JJ held that a provision such as s 60 could be considered 'necessary

²²¹ *Wooldumpers* (1989) 166 CLR 311, 328.

²²² (1991) 171 CLR 232 ('*O'Toole*').

²²³ *Wooldumpers* (1989) 166 CLR 311, 327.

²²⁴ For an overview of the Court's attitude towards privative clauses, see Ian Holloway, 'Privative Clauses' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 559.

²²⁵ *O'Toole* (1991) 171 CLR 232, 288 (emphasis added).

²²⁶ *Ibid* 290. See, in a similar vein, the remarks of Deane and Toohey JJ in *Nationwide News* that s 51(xxxv) extended to powers and immunities that were reasonably capable of being seen as appropriate and adapted to enabling or enhancing the functions of the Industrial Relations Commission. This, they suggested, could include the protection of the reputation of the Commission. *Nationwide News* (1992) 177 CLR 1, 68-9.

and incidental to the effective exercise and discharge' of the Commission's powers.²²⁷

As in the *Tasmanian Dam Case* and the *Incorporation Case*, Deane's extension of the Commonwealth's power in *Wooldumpers* was notable for its lack of concern that his interpretation of s 51(xxxv) might detrimentally impact the 'federal balance.' Nor did Deane explore the possibility that employees or employers might benefit from access to a diversity of industrial relations systems, or systems not tied to the vehicle of conciliation and arbitration as required by s 51(xxxv).²²⁸ Instead, Deane's reasoning in *Wooldumpers* focused on his perception of the benefits to the Australian community of an early resolution, nationally based, industrial relations regime.²²⁹ Thus, Deane argued that it was necessary for the Commonwealth to have power to be proactive in the resolution of industrial disputation and to be able to settle and prevent disputes 'in the abstract.' This was particularly important, Deane reasoned, in light of the nature of modern industrial relations, that is, the ease of modern communication, the 'close interaction and interdependence' between employees and employers at the national level, and the emergence of national representative bodies.²³⁰ These characteristics of contemporary Australian industrial relations supported Deane's conclusion that s 51(xxxv) must be interpreted as extending the Commonwealth's power to legislate with respect to the settlement *and* prevention of industrial disputes.

3 *The Convention Debates in Wooldumpers*

Deane turned to the Convention Debates to support his broad construction of s 51(xxxv) in *Wooldumpers*. Although seldom regarded as iconic in Deane's constitutional jurisprudence, *Wooldumpers* should therefore be regarded as an

²²⁷ O'Toole (1991) 171 CLR 232, 290-2.

²²⁸ Compare Kirby J's analysis in the *Workchoices Case* that the requirement of interstateness under s 51(xxxv) was an important constitutional guarantee, contributing to diversity and experimentation in industrial regulation: *New South Wales v Commonwealth* ('*Workchoices Case*') (2006) 231 ALR 1, 118.

²²⁹ In relation to Deane's commitment to the benefits of tribunals empowered to resolve industrial disputes in a comprehensive manner, see also the discussion below in chapter 2, part 1, of Deane's decision in *Duncan* (1983) 158 CLR 535.

²³⁰ *Wooldumpers* (1989) 166 CLR 311, 328.

important signal of the place of the framers and historical meaning in his interpretive philosophy.

Deane introduced his reference to the Convention Debates in *Wooldumpers* by citing *Cole* as authority for the proposition that the Court may utilise the Debates to isolate the contemporary meaning of the language used and the subject to which it was addressed.²³¹ Deane then quoted extensively from various delegates of the 1891 and 1897 Conventions.²³² These quotations, including two separate statements by Higgins at the Adelaide and Melbourne Conventions, addressed the nature of industrial disputation prior to Federation.²³³ The delegates remarked on the character of recent industrial disputes, indicating that such disputes invariably could not be contained, and spread quickly to become inter-colonial affairs. In these quotations, the delegates drew attention (as did Deane in his analysis of the nature of modern industrial relations) to the role that representative employee and employer bodies played in facilitating the spread of disputes across colonial borders.²³⁴

Deane's use of the Debates in *Wooldumpers* clearly involved ascribing a level of intention to those framers he cited in his judgment. Amongst the statements by the delegates describing the character of industrial disputes at Federation were reflections on the desirability of establishing a national system to ensure that industrial disputation was resolved quickly, before it escalated beyond the local arena.²³⁵ Such statements clearly reflected the delegates' views on the necessity of a level of central control and their views on the intended reach of s 51(xxxv). By utilising these statements, Deane inescapably drew on the subjective intentions of some of the framers in support of his argument.²³⁶

It may be argued, however, that Deane's use of Convention Debates in *Wooldumpers* was consistent with his understanding of the rule in *Cole*. The statements Deane cited from the Convention Debates in *Wooldumpers* referred

²³¹ Ibid 329 citing *Cole* (1988) 165 CLR 360, 385-6.

²³² *Wooldumpers* (1989) 166 CLR 311, 329-30.

²³³ Ibid.

²³⁴ Ibid.

²³⁵ Ibid.

²³⁶ Compare Kennett's commentary on the blurred line in the use of the Debates in the *Incorporation Case*, Geoffrey Kennett, 'Constitutional Interpretation in the *Corporations Case*' (1990) 19 *Federal Law Review* 223, 240.

to the nature of industrial disputation prior to Federation, and might as readily have been published in contemporary newspapers.²³⁷ It was for this contemporary commentary on the nature of industrial disputes prior to Federation, rather than for the views of the framers on the appropriate reach of s 51(xxxv), that Deane turned to the Debates in *Wooldumpers*. Although, somewhat unusually, Deane did not refer to 'the people' in his judgment in *Wooldumpers*, his approach was arguably consistent with his later statement during argument in *Capital Duplicators (No 2)* that the Court's role in constitutional interpretation was to ascertain 'what the people of the Country meant when they adopted the Constitution' in 1901.²³⁸ Deane's use of history in this way in *Wooldumpers* confirmed that, despite the vivid metaphors of judgments such as *Theophanous*,²³⁹ it cannot be said that Deane was uniformly sceptical of the relevance of the Debates in constitutional interpretation, or fearful that any reference to the voice of the framers must automatically subvert the intentions of 'the people'.

Despite these insights from *Wooldumpers*, significant questions regarding the role of history in Deane's constitutional jurisprudence remained unanswered. For example, it appeared from Deane's reasoning in the *Incorporation Case* and *Wooldumpers* that he turned to historical meaning when it extended or expanded the reach of s 51. In neither case did Deane permit history to be used 'to constrict the meaning and effect of the words of the Constitution.'²⁴⁰ Was this an additional requirement of Deane's rule of reference, or a product of the factual issues in dispute in the cases examined to this point in this thesis? Or does this suggest that Deane turned to history only when it supported his preferred analysis of constitutional questions? Another question unanswered in *Wooldumpers* was how Deane would respond to tension between historical and contemporary meaning. Such analysis was unnecessary in *Wooldumpers* as, on Deane's interpretation, both history and the nature of contemporary industrial disputes supported the extension of s 51(xxxv). Deane's understanding of the

²³⁷ It may be for this reason that Deane did not question the accuracy and reliability of the Convention Debates as a resource in *Wooldumpers*. Contrast Deane's description of the Debates as containing only a few, and 'passing comments', by the framers on s 118 in *Breavington* (1988) 169 CLR 41, 133.

²³⁸ *Capital Duplicators Pty Ltd v Australian Capital Territory (No 2)*, Transcript of Argument, 21 April 1993, 158 (emphasis added).

²³⁹ *Theophanous* (1994) 182 CLR 104, 171.

²⁴⁰ *Breavington* (1988) 169 CLR 41, 133.

role of historical meaning, and its place within his 'living force' theory, is an important topic for further discussion in this thesis.

Conclusion

This chapter has explored examples of Deane's s 51 jurisprudence and his extension of the reach of Commonwealth legislative power. In the decisions under review, Deane turned to the authority of the *Engineers' Case* and his understanding of national interest, convenience, and contemporary social context as relevant to the interpretive exercise. For Deane, his recognition in *Nationwide News* that 'federalism' was a fundamental doctrine of the Constitution,²⁴¹ did not lead him to adopt interpretations of s 51 sensitive to 'federal balance' considerations.

There were three distinctive features of Deane's decisions examined in this chapter, each related to his vision of the role of 'the people' in constitutional interpretation. First, in the *Tasmanian Dam Case*, the *Incorporation Case* and *Wooldumpers* Deane extended Commonwealth legislative power further than a majority of the Court.²⁴² In each case, Deane was heavily influenced by his assessment of the benefits to the Australian community of a broad Commonwealth power with respect to external affairs, and national regulatory control of industrial relations and over trading and financial corporations, and their incorporation. Second, Deane advanced an innovative, and principled, foundation for the rule of reference to the Convention Debates established by the Court in *Cole*. That rule was premised on Deane's recognition that 'the people', not the framers, were legal sovereigns. Finally, Deane limited the reach of s 51(xxix) through the imposition of a strict conformity test. His introduction, and application, of 'proportionality' analysis in this context reflected Deane's understanding of the Court's duty to protect 'all manner of people' under the Constitution.

²⁴¹ *Nationwide News* (1992) 177 CLR 1, 69-70.

²⁴² As will be seen in chapters 4 and 5, Deane's willingness to extend s 51 was mirrored by a corresponding willingness to increase the express and implied protection offered by the Constitution to individual rights.

Chapter 2 continues this discussion of Deane's federal vision, with a focus on his understanding of how 'the people' reinforced his preference for national solutions over 'federal balance' considerations and underpinned his approach to constitutional implication.

Chapter 2 FEDERALISM (II): LEGAL AND ECONOMIC RELATIONSHIPS WITHIN THE FEDERATION BEYOND S 51

Introduction

This chapter continues the work of chapter 1 by delving further into Deane's vision of Australian federalism. Of interest in this chapter is Deane's approach to a mix of constitutional provisions and implications, which he saw as influencing the legal and economic relationship between the Commonwealth and the States, and the legal relationship between the States.¹

This chapter is in three parts. Part 1 considers Deane's decisions in *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd*² and *University of Wollongong v Metwally*;³ decisions highlighting key elements of Deane's federal vision and aspects of his understanding of the Court's role in drawing constitutional implications. Part 2 examines Deane's approach to s 90 and the Commonwealth's exclusive power to impose excise duties. Part 3 examines two implications that Deane held could be derived from the nature of the Constitution and the Federation it established. The first implication examined in this final part is Deane's approach to the principle in the *Melbourne Corporation Case* and the scope of the constitutional implication limiting the Commonwealth's power to enact laws that burden or discriminate against a States. The second is Deane's solution to national choice of law dilemmas, derived from the nature of the Constitution and manifested by a range of provisions, including s 118. Deane first articulated this implication in

¹ This focus means that Deane's attitude towards the constitutional place of the Territories, and the people of the Territories, is left largely unexplored in this chapter. For a glimpse of Deane's approach to this question see the joint judgment of Brennan, Deane and Dawson JJ in *Capital Duplicators (No 1)* (1992) 177 CLR 248 and the commentary on that case and *Breavington* (1988) 169 CLR 41 in Graham Nicholson, 'The Concept of "One Australia" in Constitutional Law and the Place of Territories' (1997) 25 *Federal Law Review* 281.

² (1983) 158 CLR 535.

³ (1984) 158 CLR 447. ('Metwally').

Breavington in 1988, a case which, as chapter 1 has demonstrated, was rich with insights into Deane's distinctive vision of the Constitution and its interpretation.

This chapter brings together an unusual group of cases, and subject matters of greater diversity than chapter 1. However, Deane's decision-making in these cases displayed an internal consistency and revealed recurring themes and threads; themes also featuring prominently in Deane's s 51 jurisprudence. This consistency was not surprising, for the coherence and distinctiveness of Deane's analysis stemmed from his understanding of the role of 'the people' as the source of the Constitution's legitimacy. However, it was in the cases examined in this chapter, rather than in his s 51 jurisprudence, that Deane more fully articulated the connection between his concept of 'the people' and his vision of Australian federalism.

A *Part 1: Deane's iconic judgments in Duncan and Metwally*

1 Duncan

At issue in *Duncan* was the validity of an attempt by the Commonwealth and New South Wales to establish a single arbitral tribunal for the settlement of industrial disputes in the coal industry of that State. The Coal Industry Tribunal was vested with power jointly by the Commonwealth (pursuant to s 51(xxxv)) and New South Wales to exercise jurisdiction over disputes in the coal industry lying exclusively within the State, and those extending beyond its borders. This arbitral power was thought to be beyond that which either legislature, acting independently, could confer.

The Court held unanimously that the Constitution presented no obstacle to both legislatures consenting to the joint vesting of power in a single tribunal. Of interest in this chapter is how Deane reached the conclusion that the Constitution permitted the Commonwealth and New South Wales legislatures

to vest powers in a single Tribunal in the furtherance of their common regulatory goal.⁴

(a) *Deane's reasoning in Duncan*

According to Deane, 'two general propositions' supported the joint vesting of powers by the Commonwealth and New South Wales in the Tribunal. First, Deane observed that co-operation was a '*positive objective*' of the Constitution.⁵ Second, the Constitution should not be construed as giving rise to a lacuna in legislative power.⁶ These propositions were derived by Deane from 'the *terms* of the Australian Constitution and from the *nature of the federation* which it embodies.'⁷

This part focuses on Deane's understanding of the first proposition, that is, the distinctiveness of Deane's claim that co-operation was a fundamental objective of the Constitution. However, Deane's introductory remarks to his second proposition are also worthy of note as they reinforce early connections between key concepts in his constitutional thought. In this context, Deane remarked:

The Constitution of Australia was established not pursuant to any compact between the Australian Colonies but, as the preamble of the Constitution emphatically declares, *pursuant to the agreement of 'the people' of those Colonies*.⁸

Deane followed this statement by remarking that the heads of power conferred on the Commonwealth Parliament were those which were thought '*necessary*' for the nation that was formed by, and would develop under, the Constitution.⁹ In this way, Deane's judgment juxtaposed the recognition of the formative role of 'the people' with a broad interpretation of the Commonwealth's heads of legislative power under s 51.

⁴ Deane's reasoning in *Duncan* also raised the possibility that the Commonwealth's power under s 51(xxxv) to 'prevent' industrial disputes might include the power to take measures to resolve intrastate disputes, including in the coal industry. Deane's views on the 'prevention' limb of s 51(xxxv), more fully articulated in *Wooldumpers*, have been discussed above chapter 1 part 3.

⁵ *Duncan* (1983) 158 CLR 535, 589 (emphasis added).

⁶ *Ibid.*

⁷ *Ibid* (emphasis added).

⁸ *Ibid* (emphasis added).

⁹ *Ibid* (emphasis added). See above chapter 1 n 60.

Given that Deane's understanding of 'the people' was an important thread in his jurisprudence, it is unfortunate that he did not pursue this line of reasoning in *Duncan* further. However, three points emerge from this passage. First, Deane's remarks in *Duncan* were virtually identical to his reflections in his swearing-in speech. Thus, in July 1982, at his swearing-in and in September 1983, in *Duncan*, Deane emphasised that the compact of the Constitution was made between 'the people', not the artificial entities of government (whether 'States' or 'Colonies'). Second, Deane's reference to 'the people' in *Duncan* demonstrated that he regarded 'the people', and their role in the formation of the Constitution, as relevant to the Court's task in interpreting the Constitution. Chapter 1 has argued that Deane utilised his concept of the sovereignty of 'the people' as the foundation of his rule of reference to the Convention Debates. In *Duncan*, through this passage, Deane linked his vision of the sovereignty of 'the people' to the resolution of questions regarding the distribution, and sharing, of legislative power in the Australian Federation.¹⁰ Third, Deane was distinctive in *Duncan* in emphasising the role of 'the people' in his judgment. Deane's consistent and distinctive use of 'the people' in his analysis of the nature of Australian federalism are characteristic features of Deane's decisions examined in this chapter.

The most famous aspect of Deane's decision in *Duncan* was his claim that co-operation was a '*positive objective*' of the Constitution. As mentioned above, each member of the Court held that the tribunal established under the joint legislative scheme was valid. However, Deane offered an unusual degree of encouragement to the Commonwealth and State legislatures to engage in co-operative schemes. For instance, Gibbs CJ remarked in *Duncan* that:

The Constitution effects a division of powers between the Commonwealth and the States but nowhere forbids the Commonwealth and the States to exercise their respective powers in such a way that each is complementary to the other. There is no express provision in the Constitution, and no principle of constitutional law, that would prevent the Commonwealth and the States from acting in co-operation.¹¹

¹⁰ However, Deane's reference to the preamble in *Duncan* was not examined in McKenna, Simpson and Williams's exploration of the use of the preamble in constitutional interpretation: Mark McKenna, Amelia Simpson and George Williams, 'First Words: The Preamble To The Australian Constitution' (2001) *University of New South Wales Law Journal* 28.

¹¹ *Duncan* (1983) 158 CLR 535, 552. See also Gibbs CJ's earlier remarks, again expressed in the negative, that 'the Constitution was certainly *not intended to inhibit co-operation* between the Commonwealth and the States in their respective agencies': *R v Humby; Ex Parte Rooney* (1973) 129 CLR 231, 240 (emphasis added). Gibbs CJ's remarks are discussed in G.J. Lindell, 'Recent

Brennan J similarly described the Court's inquiry as directed at whether the legislative scheme faced a 'constitutional impediment'.¹² Deane also observed that co-operation was 'in no way *antithetic* to the provisions of the Constitution.'¹³ Deane agreed that there was no 'general constitutional barrier' precluding concurrent legislation of the Commonwealth and the States establishing a joint administrative tribunal.¹⁴

However, in contrast to the rest of the Court, Deane took the further step of asserting that co-operation was a 'positive objective' of the Constitution. In light of Deane's later reliance on the 'general doctrines of government', symbolised by his statements in *Nationwide News*,¹⁵ it was significant that in one of his earliest decisions, in 1983, Deane was willing to frame his reasoning in terms of the broad underlying themes and principles of the Constitution. There are many possible explanations of this point of difference between Deane and the rest of the Court. For example, other members of the Court may have been concerned to limit the breadth of their remarks in *Duncan*, or reticent to engage with the role of deeper theoretical issues in the interpretation of the Australian Constitution. Alternatively, the other members of the Court may not have embraced co-operation as an objective or value underpinning the Australian federal system, nor shared Deane's wider vision of the nature of constitutions. For whatever reason, Deane was the only judge to adopt co-operation as the paradigm of the Australian Constitution in such enthusiastic terms.

Deane's reasoning was also unique in its attempt to justify co-operation as the model of federalism envisaged in the Constitution. Deane's analysis on this question was contained entirely in the following passage:

The existence of a constitutional objective of Commonwealth/State co-operation may, on occasion, be obscured by the fact that cases in this court in relation to the constitutional scope of legislative powers are commonly concerned with the resolution of competing legislative claims of the Commonwealth and one or more of the States. It is, however, *unnecessary to do*

Developments in the Judicial Interpretation of the Australian Constitution' in Geoffrey Lindell (ed) *Future Directions in Australian Constitutional Law* (1994) 1, 40.

¹² *Duncan* (1983) 158 CLR 535, 583. Note also Mason J's observation the co-operative legislative action must not 'contravene the Constitution.' Ibid 563.

¹³ Ibid 589 (emphasis added).

¹⁴ Ibid.

¹⁵ *Nationwide News* (1992) 177 CLR 1, 69.

more than refer to the provisions of s 51(xxxiii), (xxxiv), (xxxvii) and (xxxviii) and of Ch V of the Constitution to *demonstrate the existence* of such a constitutional objective.¹⁶

This passage demonstrated two important aspects of Deane's reasoning in *Duncan*, each intersecting with decisions and themes explored in other chapters of this thesis. The first was the significance of Deane's choice of co-operative federalism over other theories of federalism, and the consistency of this choice within his constitutional jurisprudence. The second was *Duncan's* insights into Deane's interpretive technique, specifically his understanding that co-operative federalism was a 'fundamental concept' of the Constitution which was manifested by, rather than confined by, the provisions of the text.

(b) *Deane's federal vision in Duncan*

Deane did not define with precision his understanding of co-operative federalism in *Duncan*, nor in any later decision. However, Deane's conclusion in *Duncan* that the Commonwealth and States could exercise their powers concurrently was a significant indicator of his understanding of the nature of Australian federalism.¹⁷ Deane's decision in *Duncan* clearly rejected a vision of the Australian federal system as requiring an immutable division of power between the Commonwealth and the States along vertical lines. In his reasons, Deane did not ignore the fact that historically much disputation had come before the Court regarding the boundaries of Commonwealth and State power.¹⁸ However, in contrast to Gibbs CJ, Deane's analysis did not dwell on the fact that the Constitution effected 'a division of powers between the Commonwealth and the States.'¹⁹ Rather, Deane's conclusion in *Duncan* rejected a vision of the Australian Constitution that insisted on a strict division of responsibility amongst and between the Commonwealth and the States. Instead, Deane's conclusion on the validity of the legislative scheme implicitly

¹⁶ *Duncan* (1983) 158 CLR 535, 589 (emphasis added). This passage was cited with approval by Brennan CJ and Toohey J in *Gould v Brown* (1998) 193 CLR 346, 374.

¹⁷ Compare McConvill and Smith's discussion of the concurrent exercise of power by the Commonwealth and States as the distinguishing feature of co-operative federalism: James McConvill and Darryl Smith, 'Interpretation and Cooperative Federalism: *Bond v R* from a Constitutional Perspective' (2001) 29 *Federal Law Review* 75, 75.

¹⁸ *Duncan* (1983) 158 CLR 535, 589.

¹⁹ *Ibid* 552 (Gibbs CJ).

aligned the essence of the compact of 'the people', its 'positive objective' of co-operation, with proactive and comprehensive solutions to pressing social issues by agreement and joint action between the Commonwealth and the States.²⁰

Deane's reasoning in *Duncan* was consistent with his adamant rejection of 'federal balance' arguments in relation to s 51(xxix) or 51(xx), and the preference he expressed in a number of cases for national solutions to social problems. For example, chapter 1 has canvassed Deane's assessment of the benefits of a national corporations regime in the *Incorporation Case* and his expansion of Commonwealth legislative power over industrial relations through the 'prevention' limb of s 51(xxxv) in *Wooldumpers*. Not in these contexts, nor in *Duncan*, did Deane voice a concern that a joint legislative scheme, or the expansion of Commonwealth legislative power, threatened the foundations of the Constitution or the Australian Federation. Nor did Deane suggest that precluding co-operation between the levels of government was an important element in the protection of individual rights, by reinforcing institutional breaks on the concentration of governmental power.²¹ Instead, in *Duncan*, Deane advanced an interpretation of the Constitution that facilitated the cohesive solutions to the issues facing contemporary Australians, via co-operation between the Commonwealth and the States.²²

(c) *Deane's 'fundamental concepts' reasoning in Duncan*

Deane's reasoning in *Duncan* revolved around his understanding of the 'positive objective' of co-operation, that is, the 'fundamental concept' of federalism under the Australian Constitution. Despite his engagement with broad constitutional values in *Duncan*, Deane was the only member of the Court to place significant emphasis on the constitutional text. Thus, in the passage quoted above, Deane listed the grants of Commonwealth legislative

²⁰ Ibid 589-92.

²¹ Compare, for example, Kirby J's vision of federalism in *XYZ v Commonwealth* (2006) 227 ALR 495, 535 and *New South Wales v Commonwealth* ('Workchoices Case') (2006) 231 ALR 1, 150-1.

²² Interestingly, through his observations on the 'prevention' limb of s 51(xxxv), *Duncan* also suggested Deane's openness to the pursuit of a uniform Commonwealth solution to disputes in the coal industry: *Duncan* (1983) 158 CLR 535, 592.

power under ss 51(xxxii) and (xxxiv) as illustrative of co-operation as the 'positive objective' of the Constitution.²³

Deane's method of analysis in *Duncan* epitomised what is described in this thesis as his 'fundamental concepts' reasoning. Under this approach Deane saw elements of the text as manifesting the underlying doctrines of the Constitution, in this case, the constitutional doctrine of 'co-operative' federalism.²⁴ Thus Deane regarded his list of provisions as sufficient to 'demonstrate the existence' of that doctrine.²⁵ However, Deane did not turn to his list of provisions in *Duncan* to derive his answer to the validity of the co-operative legislative scheme. Instead, Deane looked beyond the language of the text to the Constitution's underlying values and principles, its 'positive objective', as the framework for his analysis.

Although the sections cited by Deane in *Duncan* facilitate co-operation between the institutions of government, they do not unequivocally support Deane's proposition that co-operation was the underlying objective of the Constitution.²⁶ If the interpretive maxim *expressio unius* were applied to Deane's list, a different construction can be reached: these provisions could equally be regarded as the *exclusive* mechanisms by which Parliaments can combine their legislative power. Applying *expressio unius* would therefore lead to a different concept of Australian federalism.²⁷ Deane's reasoning implicitly rejected the *expressio unius* maxim, as it regarded the text as manifesting, not limiting, the Constitution's underlying values and principles.²⁸ However, he did not avert to the possibility that the text of the Constitution could support a contrary vision of federalism. Thus Deane's reasoning in *Duncan* proceeded 'from' an embrace of the

²³ Ibid 589.

²⁴ See further discussion in Graeme Hill, 'Revisiting *Wakim* and *Hughes*: the Distinct Demands of Federalism' (2002) 13 *Public Law Review* 205, 219, fn 122.

²⁵ *Duncan* (1983) 158 CLR 535, 589.

²⁶ Hill, above n 24, 219.

²⁷ See further ibid 219, fn 122. This alternative vision of federalism was labelled 'co-ordinate federalism' by Hill in his commentary.

²⁸ In *Leeth*, Deane and Toohey JJ were forceful in their rejection of the *expressio unius* principle in the context of 'fundamental concepts' reasoning: *Leeth* (1992) 174 CLR 455, 485. The rejection of *expressio unius* is essential if a 'fundamental concepts' interpretive approach such as that advanced by Deane in *Leeth* and *Duncan* is to be sustained.

principle of 'co-operation' as the Constitution's 'fundamental concept', but provided only limited argument 'for' that interpretation of the Constitution.²⁹

As will be seen, Deane applied his 'fundamental concepts' reasoning throughout his jurisprudence, from this early illustration in *Duncan* to some of his final, and most controversial, decisions on the implied freedom of political communication in 1994.³⁰ As applied in his free speech cases, Deane's 'fundamental concept's reasoning was subject to forceful rebuke. Thus in *McGinty* McHugh J said:

I cannot accept, as Deane and Toohey JJ held in *Nationwide News Pty Ltd v Wills*, that a constitutional implication can arise from a particular doctrine that 'underlies the Constitution'. ... Top-down reasoning is not a legitimate method of interpreting the Constitution ... after the decision of this Court in the *Engineers' Case*, the Court had consistently held, prior to *Nationwide News* and *Australian Capital Television Pty Ltd v Commonwealth*, that it is not legitimate to construe the Constitution by reference to political principles or theories that are not anchored in the text of the Constitution or are not necessary implications from its structure.³¹

McHugh J may have been thinking of Deane's decision in *Duncan* when he warned against the use of 'co-operative federalism' as a tool in constitutional interpretation in *Re Wakim; Ex parte McNally*.³² In *Wakim* a majority of the Court, including McHugh J, held invalid the key provisions of the co-operative legislative scheme permitting the cross-vesting of State and Territory jurisdiction in Commonwealth Courts, on the basis that under Ch III of the Constitution federal courts had not been given power to exercise State jurisdiction.³³ McHugh J observed in *Wakim* that the parties drew support from 'co-operative federalism.' He responded, however, that:

²⁹ Compare Hill's analysis of the Court's reasoning in *Wakim* (1999) 198 CLR 511 in Graeme Hill, 'Revisiting *Wakim* and *Hughes*: the Distinct Demands of Federalism' (2002) 13 *Public Law Review* 205, 226.

³⁰ The similarity between Deane's reasoning in *Duncan* and his joint judgment with Toohey JJ in *Leeth* is examined by Hill: *ibid* 219, fn 122. In contrast, in his extensive examination of constitutional implications, Kirk does not refer to *Duncan* as an illustration of the 'inductive' reasoning approach epitomised by Deane and Toohey JJ in *Leeth*: Jeremy Kirk, 'Constitutional Implications (I): Nature, Legitimacy, Classification, Examples' (2000) 24 *Melbourne University Law Review* 645, 662-3.

³¹ *McGinty* (1996) 186 CLR 140, 231-2 (citations omitted).

³² (1999) 198 CLR 511 ('*Wakim*').

³³ *Wakim* has been the subject of considerable academic critique. See, for example, Graeme Hill, above n 29 and George Williams, 'Cooperative federalism and the Revival of the Corporations Law: *Wakim* and Beyond' (2002) 20 *Company and Securities Law Journal* 160.

co-operative federalism is not a constitutional term. It is a *political slogan*, not a criterion of constitutional validity or power. ... Behind its invocation in the present cases lies a good deal of loose thinking.³⁴

McHugh J did not explicitly criticise Deane's decision in *Duncan* as an illustration of such 'loose thinking' or as displaying 'top-down reasoning.' This is somewhat surprising. *Duncan* and *Nationwide News* clearly demonstrated Deane reasoning 'top-down': reasoning 'from'³⁵ his understanding of a broad theory of governance that was manifested in, but not limited by, the text of the Constitution. Given the force of McHugh J's direct criticism of Deane and Toohey JJ's analysis in other cases, why did McHugh J not display the same disquiet regarding Deane's reasoning in *Duncan*?

One reason why Deane's analysis in *Duncan* escaped direct criticism from McHugh J may be the fact that Deane in *Duncan* adopted a deferential attitude towards the Australian Parliaments. Chapter 6 argues that at the heart of McHugh J's criticism of top-down reasoning lies a concern regarding the degree of choice exercised by the Court under that interpretive approach, and its impact on the relationship between the Court and Parliament. Deane's decision in *Duncan* undoubtedly *chooses* between co-operative and co-ordinate models of federalism. As the Court was required to declare the legitimacy of the co-operative legislative scheme, such a choice was inevitable. However, in *Duncan*, Deane's adoption of co-operative federalism reinforced the expression of the will of 'the people' of both the nation, through the federal Parliament, and of New South Wales.

The coincidence between Deane's 'fundamental concepts' reasoning in *Duncan* and an attitude of judicial deference to the legislature has two significant consequences for his reasoning in *Duncan*. First, by exhibiting deference to the legislatures, Deane's innovation in *Duncan* may be immunised from allegations of illegitimate judicial activism. Although the text of the Constitution is not unambiguous, Deane's conclusion facilitated a functional solution to contemporary social issues, which also accorded with the will of 'the people' expressed through two legislative bodies. Second, and ironically, Deane's

³⁴ *Wakim* (1999) 198 CLR 511, 556 (emphasis added).

³⁵ Graeme Hill, 'Revisiting *Wakim* and *Hughes*: the Distinct Demands of Federalism' (2002) 13 *Public Law Review* 205, 226.

display of deference in *Duncan* isolated his reasoning from the rest of his jurisprudence. Thus, with the exception of *Duncan*, Deane utilised 'fundamental concepts' reasoning to impose limits on parliamentary supremacy and to strengthen the judicial protection of the rights of 'the people'. This rights-sensitive approach to constitutional interpretation was particularly apparent in his reasoning in *Metwally*, a case decided a year after *Duncan*.

2 Metwally

On 22 November 1984, the Court delivered its fascinating and controversial decision in *Metwally*. This case arose from a racial discrimination action launched by Metwally against the University of Wollongong under the *Anti-Discrimination Act 1977* (NSW). A year earlier, the Court in *Viskauskas v Niland*³⁶ had found Pt II of this Act, dealing with racial discrimination, inoperative by virtue of s 109 of the Constitution on the basis that it was inconsistent with the Commonwealth's *Racial Discrimination Act 1975* (Cth).³⁷ Section 109 is a mechanism for resolving the dilemma of inconsistency between laws of the Commonwealth and the States, providing that:

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

After *Viskauskas* the Commonwealth enacted the *Racial Discrimination Amendment Act 1983* (Cth). Section 3 of this Act provided that the Commonwealth's intention was not, nor had it been, to exclude the operation of State legislation in this field. The issue for the Court in *Metwally* was whether the Commonwealth's law could revive the State law by retrospectively removing the basis of the inconsistency between the two laws.

Gibbs CJ, Murphy, Brennan and Deane JJ held that s 109 of the Constitution restricted the Commonwealth's ability to achieve this object. In separate reasons, the majority judges emphasised that s 109 rendered a State law

³⁶ (1983) 153 CLR 280 ('*Viskauskas*').

³⁷ This finding flowed from the Court's application of the 'cover the field' test for inconsistency. See discussion in H. P. Lee, 'Retrospective Amendment of Federal Laws and the Inconsistency Doctrine in Australia' (1985) 15 *Federal Law Review* 335, 338-9.

immediately inoperative upon the enactment of an inconsistent Commonwealth law.³⁸ This operation could not be ousted by a drafting mechanism of the Commonwealth Parliament.³⁹ As a consequence, the Court reasoned that s 109, a section on its face affirming the status of the Commonwealth as the supreme legislative body in the Federation, effected a qualification on Commonwealth legislative power.⁴⁰

For Deane, this understanding of s 109 flowed from his vision of the section, and the Constitution generally, as protective of the rights of the Australian people. This thesis argues that although Deane's vision was central to his constitutional philosophy, doctrinal and logical difficulties attend some of Deane's applications of that vision across his High Court decisions. *Metwally* was an illustration of Deane's ambitious, and ultimately unpersuasive, application of this vision. The following discussion explores the impact of Deane's people-based approach on his understanding of federal relationships, and examines some of the particular difficulties associated with recasting s 109 as a constitutional guarantee against the effect of some retrospective laws.⁴¹

(a) *Deane's reasoning in Metwally*

It was one of the striking features of Deane's jurisprudence that within two years of his appointment to the Court, in cases as different as *Duncan* and *Metwally*, Deane demonstrated his willingness both to engage with the underlying doctrines and concepts of the Constitution and to mark out a distinctive interpretive principle that placed these concepts explicitly at the centre of his reasoning. The key passage of Deane's reasoning in *Metwally*, evoking the sentiments of his swearing-in speech, was Deane's statement that:

the Australian federation was and is a union of people and ... whatever may be their immediate operation, the provisions of the Constitution should properly be viewed as ultimately concerned with the governance and protection of the

³⁸ *Metwally* (1984) 158 CLR 447, 457 (Gibbs CJ); 469 (Murphy J); 473-4 (Brennan J); 478 (Deane J).

³⁹ *Ibid* 457 (Gibbs CJ); 469 (Murphy J); 474 (Brennan J); 479 (Deane J). But note the proviso in Deane's judgment regarding a combined course of action by the Commonwealth and the State legislatures, discussed below at n 51.

⁴⁰ Zines reflects on this 'somewhat ironical' interpretation of the majority judges in *Metwally* in Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 411.

⁴¹ The larger question, whether the constitutional concept of 'the people' is itself sufficient to support the implication of broad constitutional rights is discussed below in chapter 5 part 2.

people from whom the artificial entities called the Commonwealth and States derive their authority.⁴²

For Deane, this vision of 'the people', and their connection to the Constitution, supported the implication of constitutional guarantees limiting Parliament's power to affect the rights and freedoms of 'the people'.

Applying this vision to the interpretation of s 109, Deane reasoned that properly understood, s 109 was:

not concerned merely to resolve disputes between the Commonwealth and a State as to the validity of their competing claims to govern the conduct of individuals in a particular area of legislative power. It serves the equally important function of protecting the individual from the injustice of being subjected to the requirements of valid and inconsistent laws of Commonwealth and State Parliaments on the same subject.⁴³

Thus, although the text of s 109 did not itself identify how the section was to operate in relation to retrospective laws, Deane reasoned that the provision must be given an interpretation consistent with its purpose as a guarantee of individual liberties. As a provision designed to protect 'the people' from the demands of multiple and inconsistent laws,⁴⁴ Deane held that the s 109 operated with temporal effect, and could not be undone by Commonwealth legislation that declared its intention had never been to 'cover the field' on the topic of racial discrimination.

How convincing is Deane's vision of s 109 as an important guarantee of individual liberty?

(b) Section 109 as a rule of law guarantee

On any interpretation, s 109 operates for the benefit of 'the people', by establishing a mechanism to ensure that they were not subject to the demands inconsistent laws of the Commonwealth and the States. Thus Mason J, who strenuously disagreed with Deane's interpretation of s 109 as a provision protecting the individual from retrospective laws, acknowledged that by virtue

⁴² *Metwally* (1984) 158 CLR 447, 476-7.

⁴³ *Ibid* 477.

⁴⁴ Compare Deane's description of ss 109 and 118 in *Street* (1989) 168 CLR 461, 521-2.

of its ordinary operation s 109 'necessarily' affected rights by rendering invalid an inconsistent State law.⁴⁵ To this extent, therefore, Deane's later descriptions of s 109 as effecting an important rule of law guarantee are compelling.⁴⁶

Deane's recognition that s 109 must be interpreted consistently with the role of the section as a guarantee of individual liberty also reinforced the Court's approach to determining the existence of an inconsistency. Prior to 1984, the Court had affirmed that s 109 did not only operate when it was impossible to obey the commands of both the Commonwealth and State law.⁴⁷ Rather, the provision was activated when there was a conflict between the intentions of the two legislatures.⁴⁸ Deane's vision of the s 109 reinforced that the section should be applied by reference to substance, not form, and the guarantee should not be defeated merely by creative legislative drafting.

However, Deane's vision of s 109 significantly extended the guarantee beyond this interpretation of the section's rights-purpose. The essence of his reasoning in *Metwally* was the recognition that, if s 109 was an important constitutional guarantee, the provision must operate to ensure that 'the people' were able to ascertain which law they were required to obey, *at the time* they set about complying with those commands. Accordingly, to allow the Commonwealth to revive with retrospective effect a State law was inconsistent with the substantive protection afforded by the section. However, this analysis appears to be an argument in favour of a general injunction against retrospective legislation.⁴⁹ Certainly the tenor of Deane's subsequent decisions, particularly in *Polyukhovich*, suggests that Deane was inclined against such laws, and derived constitutional limitations restricting the Parliament's power to enact such laws whenever possible. However there are significant difficulties with Deane's understanding of s 109 as encompassing a limitation on Commonwealth retrospective laws.

⁴⁵ *Metwally* (1984) 158 CLR 447, 463.

⁴⁶ See *Street* (1989) 168 CLR 461, 521-2.

⁴⁷ For an overview of the Court's approach to s 109, see Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (2nd ed, 2006) 221-31.

⁴⁸ See discussion in H. P. Lee, 'Retrospective Amendment of Federal Laws and the Inconsistency Doctrine in Australia' (1985) 15 *Federal Law Review* 335, 338-9.

⁴⁹ As Zines reflects, the majority decisions are 'difficult to understand from the viewpoint of pure logic' once it is accepted that the Commonwealth can enact retrospective law. Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 411.

(c) *Section 109 and retrospective laws: conundrums*

Deane explained that s 109 prevented a State law from being revived with retrospective effect. However, he recognised in *Metwally* that the Constitution did not impose a limit on the Parliament's power to enact retrospective legislation.⁵⁰ Consistent with this view, Deane acknowledged in *Metwally* that 'in combination' the Commonwealth and the State could remove the hurdle imposed by s 109.⁵¹ This could be done by the combined effect of two retrospective laws: an enactment of a retrospective Commonwealth law proclaiming its intention not to cover the field and a retrospective State law re-enacting its legislation.⁵² If, as Deane acknowledged in *Metwally*, the Commonwealth and the State, 'in combination', can avoid the operation of s 109, surely the extended operation of the section effects a guarantee of *form* rather than *substance*? In *Duncan* Deane had heartily endorsed the principle of co-operation between the legislatures in the Federation, but recognised that this co-operation was subject to the operation of constitutional guarantees.⁵³ If s 109 was a guarantee in *substance*, co-operation should not enable the legislatures to avoid its effects. In these circumstances, Deane's extension of the operation of s 109 to secure a 'guarantee' against certain retrospective federal legislation was not compelling. It offered only limited practical benefits to the individual, while simultaneously imposing unnecessary and impractical burdens on the legislature.

A comparison between Deane's reasoning in *Duncan* and *Metwally* underscores a further limitation of his analysis in the latter case. As foreshadowed, in *Duncan* Deane's 'fundamental concepts' reasoning reinforced the principle of parliamentary supremacy. The facts of *Metwally* itself acutely highlighted that Deane's interpretation of s 109 was not the only way in which the provision could be regarded as operating for the benefit of 'the people'. In *Metwally*, the State and Commonwealth Parliaments had enacted anti-discrimination

⁵⁰ *Metwally* (1984) 158 CLR 447, 479-80.

⁵¹ *Ibid* 480.

⁵² *Ibid*.

⁵³ *Duncan* (1983) 158 CLR 535, 589.

legislation, legislation clearly designed to protect the rights of 'the people'. Through its amending legislation, the Commonwealth had attempted to ensure that people like *Metwally* gained the benefit of the State legislation. Thus an interpretation of s 109 as supporting the principle of parliamentary supremacy, on the facts of *Metwally*, resulted in a significant guarantee of the rights of 'the people'.

Deane's reasoning in *Metwally* rejected the possibility that the interests of 'the people' could be served by the people's representatives in this way. Instead, in *Metwally* Deane affirmed that in his view, 'the people' were best served through the implication of judicially-enforceable constitutional guarantees, in that case, through limiting Parliament's ability to revive the State law with retrospective effect. In 1984, Deane's vision of 'the people', and the manner in which their interests were protected under the Constitution, challenged the paradigm of the Australian constitutional system. Mason J's judgment contained the strong statement against Deane's vision of s 109. Mason J argued that

the object of s 109, no more and no less, is to establish the supremacy of Commonwealth law where there is a conflict between a Commonwealth law and a State law.⁵⁴

Mason continued, rejecting Deane's interpretive principle, stating that the section was 'not a source of individual rights and immunities':

Nor is the section a source of protection to the individual against the unfairness and injustice of a retrospective law. That is a matter which lies quite outside the focus of the provision. In these circumstances to distil from s 109 an unexpressed fetter upon Commonwealth legislative power is to twist the section from its true meaning and stand it upon its head.⁵⁵

As foreshadowed in the introduction to this thesis, by the time of his retirement, Mason had indicated his belief that majoritarian democracy was itself insufficient to protect individual rights in Australia.⁵⁶ Further, in *ACTV* in 1992, Mason CJ recognised that 'the people' were legal sovereigns.⁵⁷ In this context, Mason J's criticism of Deane's people-based interpretation in *Metwally* was particularly telling. In 1984, and, again in *Polyukhovich* in 1991, Mason J reacted strongly against Deane's analysis that recognition of the role of 'the people' as

⁵⁴ *Metwally* (1984) 158 CLR 447, 463.

⁵⁵ *Ibid.*

⁵⁶ Sir Anthony Mason, 'Future Directions in Australian Law' (1987) 13 *Monash University Law Review* 149, 163. See discussion above chapter 1 n 48.

⁵⁷ *ACTV* (1992) 177 CLR 106, 137-8 (Mason CJ).

legal sovereigns required the implication of guarantees limiting the power to enact retrospective laws.⁵⁸ Mason J's response in *Metwally* reinforced that a recognition of the role of 'the people' in the Constitution did not compel an interpretive principle of the form embraced by Deane. The limitations of the ability of Deane's concept of 'the people' to support, as the sole or significant factor, the implication of broad constitutional guarantees is discussed further in chapter 5.

For present purposes, it is sufficient to observe that the practical hurdles attending Deane's interpretation of s 109 render his conclusion in *Metwally* unconvincing. This view of *Metwally* does not, however, prevent Deane's interpretive principle, based on 'the people', from guiding the Court in the interpretation of the Constitution. Part 2 of this chapter explores another early example of Deane interpreting the Constitution, specifically s 90, through the prism of 'the people'. Deane's vision of s 90 as serving a rights-purpose provides valuable insights into the interpretation of this section, the meaning of which has deeply divided the Court.

B Part 2: Section 90 and the economic relationship between the Commonwealth and the States

It is trite to say that the States are largely dependent on the Commonwealth for the necessary funds to perform their responsibilities. This phenomenon, often described as 'vertical fiscal imbalance', was facilitated by a series of High Court decisions.⁵⁹ For instance, in 1908 the High Court held that, consistent with s 94 of the Constitution, the Commonwealth could utilise trusts to retain 'surplus' revenue for its future needs rather than distributing that surplus to the States.⁶⁰ The 'uniform tax cases' in 1942 and 1957 also allowed the Commonwealth to

⁵⁸ *Polyukhovich* (1991) 172 CLR 501, 540.

⁵⁹ Coper describes the High Court as delivering 'Four Body Blows' against the States, resulting in the precarious financial position of the States: Michael Coper, *Encounters with the Australian Constitution* (1987) 206.

⁶⁰ *New South Wales v Commonwealth* ('Surplus Revenue Case') (1908) 7 CLR 179. See further, Coper, n 59, 207.

gain control of income taxation through the operation of contingent grants to the States under s 96.

In this context, indirect taxation is one of the few remaining sources of revenue for the States. However, s 90 of the Constitution provides that the Commonwealth shall have exclusive power to impose 'duties of customs and of excise.' The breadth of this prohibition accordingly has a great impact on the States' financial independence. Much therefore depends on the definition of a 'duty of excise' adopted by the Court. On this issue, however, the Court has traditionally been fiercely divided on the key questions surrounding s 90, that is: is an 'excise duty' a tax on goods at the moment of production or manufacture, or does it extend to sales and consumption taxes? Must there be a direct relationship between the tax and the quantity of goods? Does the Court assess the relationship on the terms of the law or by reference to its substantive effect?⁶¹

Deane's only single judgment on s 90 was in *Hematite Petroleum Pty Ltd v Victoria*, a decision handed down in 1983, one month before *Duncan*.⁶²

Commentators have remarked that *Hematite* evinced a 'rare explicitness'⁶³ by the Court regarding the importance of both purpose and policy in the interpretation of s 90. However, prior to *Hematite* the Court had been divided between 'centralist' and 'federal balance' understandings of the nature of Australian federal relations, and on the purpose of s 90. These competing visions of s 90 were evinced in the majority and minority approaches in *Hematite*.

Deane's vision of s 90 in *Hematite*, however, cut across the centralist and federal balance perspectives on this section. Deane perceived s 90 as designed to forge national cohesion and identity, by means of a substantive guarantee of equality and unity of 'the people of the Commonwealth.' The following discussion

⁶¹ For an overview of the Court's approach to these questions see Coper, n 59, 224-42 and Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (2nd ed, 2006) 292-302.

⁶² (1983) 151 CLR 599 ('*Hematite*'). On the timing of these, and other key Deane decisions, see Appendix A. Deane's s 90 decisions are listed in Appendix B.

⁶³ George Winterton, HP Lee, Arthur Glass and James A Thomson, *Australian Federal Constitutional Law: Commentary and Materials* (2nd ed, 2007) 565.

examines Deane's reasoning in *Hematite* for its insights into his understanding of s 90. It also considers what Deane's understanding of the fundamental nature of the Constitution, as a compact of 'the people', reveals regarding his approach to the economic dynamics of Australian federalism, and the principles that should guide the Court in constitutional interpretation.

1 Hematite

(a) *The dispute in Hematite*

Hematite concerned Victorian legislation imposing a tax in excess of \$10 million on three pipelines carrying hydrocarbons from Bass Strait to processing plants located on the mainland.⁶⁴ The fee was levied annually on the use of the pipeline, rather than assessed by reference to the volume of petroleum products that it conveyed. Although the interpretation of s 90 prior to 1983 was by no means settled, the Court, commencing with *Dennis Hotels Pty Ltd v Victoria*,⁶⁵ had adopted an exception to s 90 for certain State licence fees.⁶⁶ However, a majority of the Court in *Hematite* (Mason, Murphy, Brennan and Deane JJ; Gibbs CJ and Wilson J dissenting) held that the Act purported to impose a tax that was in substance a duty of excise. Accordingly, the tax was invalid under s 90.⁶⁷

As discussed in chapter 1, the *Tasmanian Dam Case* demonstrated that the Gibbs Court was divided on the relevance of 'federal balance' considerations to the interpretation of s 51.⁶⁸ In *Hematite*, the Court, most clearly in the opposing judgments of Gibbs CJ and Mason J, also split over the degree to which s 90 should reflect a 'federal balance' in the economic relationship between the Commonwealth and the States.

⁶⁴ The challenge was to s 2 of the *Pipelines (Fees) Act 1981* (Vic) which amended the *Pipelines Act 1967* (Vic). This legislation increased the size of the annual licence fee by over 1000%.

⁶⁵ (1960) 104 CLR 529 ('*Dennis Hotels*').

⁶⁶ See further discussion in Michael Coper, *Encounters with the Australian Constitution* (1987) 229.

⁶⁷ Dawson J did not sit in *Hematite*. As Coper indicates, Dawson J appears to have excused himself on the basis that he had advised on the legality of the tax while Solicitor-General for Victoria. *Ibid* 238.

⁶⁸ See above chapter 1 n 33.

In the *Tasmanian Dam Case*, Gibbs CJ had feared that a broad interpretation of s 51 could deprive the States of a meaningful sphere of influence. Similar views influenced Gibbs CJ in *Hematite* to reject a 'wide and loose' construction of s 90.⁶⁹ He considered that s 90 was designed to grant the Commonwealth control over tariff policy.⁷⁰ In *Hematite*, Gibbs CJ defined a 'duty of excise' narrowly, as a tax 'directly related to goods' imposed at a point in their production or distribution 'before they reach the hands of the consumer.'⁷¹ In addition, Gibbs CJ argued that the validity of State legislation must be determined according to whether its legal effect was the imposition of an excise duty.⁷²

Wilson J shared Gibbs CJ's analysis of the test to be applied, and the result of its application in *Hematite* to find that the Victorian legislation imposed a valid licence fee.⁷³ As in the *Tasmanian Dam Case*,⁷⁴ Wilson J invoked the rhetoric of legalism in support of his analysis, stating that s 90 alone 'defines the limits of exclusive legislative power.'⁷⁵ Thus, s 90:

provides no authority to the Court to assume the responsibility of determining larger questions of fiscal responsibility within the federation; nor, of course, is the Court equipped to undertake such a task. Those larger questions must be determined, consistently with the Constitution, in the political arena.⁷⁶

Gibbs CJ was more open regarding the federal consequences of applying s 90 by reference to the substantive effect of the law. Thus he warned that such an approach could expand the reach of the section to an extent that 'gravely hampers the States in the conduct of their financial affairs.'⁷⁷

Mason J's analysis in *Hematite* reflected a different understanding of how questions of federalism should influence constitutional interpretation. In contrast to Gibbs CJ, Mason J's judgment did not display ostensible concern

⁶⁹ *Hematite* (1983) 151 CLR 599, 618.

⁷⁰ *Ibid* 616.

⁷¹ *Ibid* 615.

⁷² *Ibid*.

⁷³ *Ibid* 623-4. Wilson J also argued that 'it is the nature of a tax and not its economic consequences which determines whether it is a duty of excise': *ibid* 648.

⁷⁴ Compare *Tasmanian Dam Case* (1983) 158 CLR 1, 204.

⁷⁵ *Hematite* (1983) 151 CLR 599, 649.

⁷⁶ *Ibid*.

⁷⁷ *Ibid* 618.

regarding the impact of a broad interpretation of s 90 on State economic affairs. According to Mason J, the purpose of s 90 was to give the Commonwealth a 'real control over the taxation of commodities' and 'to protect and stimulate home production and influence domestic price levels' without State interference.⁷⁸ Mason J therefore defined a 'duty of excise' as a tax 'upon commodities to the point of receipt by the consumer.'⁷⁹ Mason J also rejected the need for an 'arithmetical relationship' between the tax and the quantity or value of the goods. Rather, it was enough that the tax entered into the 'cost of the goods' and was 'reflected in the prices at which the goods are subsequently sold.'⁸⁰ Further, again in contrast to Gibbs CJ, Mason J was adamant that the relationship between the tax and the goods must be established on the basis of the substantive effect of the law, not its form.⁸¹ Accordingly, Mason J concluded that the tax in *Hematite* was not a licence fee, but a tax on a step in the production of petroleum products.⁸²

Both Murphy and Brennan JJ also held the pipeline licence fee in *Hematite* invalid under s 90.⁸³ It was in the context of this divided Court that Deane offered his unique perspective on s 90. His reasoning adopted a broad vision of the definition of excise, and accepted the importance of an analysis of 'substance' over 'form' in assessing whether a tax is an excise duty. These aspects of his reasoning resonated with the analysis of Mason and Brennan JJ, with whom he later joined in judgments.⁸⁴ However, Deane's approach was fused with, and informed by, his distinctive people-focused understanding of the purpose of the section. It was through this prism that Deane viewed the pipeline fee in *Hematite*, and concluded that it imposed a tax that was in substance a duty of excise.

⁷⁸ Ibid 631.

⁷⁹ Ibid 628.

⁸⁰ Ibid 632.

⁸¹ Ibid 630.

⁸² Ibid 634-6.

⁸³ Ibid 640 (Murphy J); 659 (Brennan J). Murphy J's approach to s 90 has been the subject of detailed review in Deborah Z Cass, 'Lionel Murphy and Section 90 of the Australian Economic Constitution' in Michael Coper and George Williams (eds), *Justice Lionel Murphy: Influential or Merely Prescient?* (1992) 19.

⁸⁴ Note, for example, Deane's joint judgment with Mason J in *Philip Morris* (1989) 167 CLR 399 and Brennan, Deane and Toohey JJ's joint judgment in *Capital Duplicators (No 1)* (1992) 177 CLR 248.

(b) *Deane's people-focused analysis in Hematite*

In what would become a common rhetorical device in his judgments, Deane signalled his unique perspective on s 90 with the opening words of his decision in *Hematite*.⁸⁵ Thus, emphasising the role of 'the people', Deane stated:

The compact between the people of the Australian colonies which is embodied in the Constitution was for unity in 'one indissoluble Federal Commonwealth'.⁸⁶

In *Hematite*, two years prior to his decision in *Metwally*, Deane recast the purpose of s 90 as a provision for the benefit of 'the people', arguing, s 90:

cannot properly be seen as part of a merely arbitrary division of legislative powers between the Commonwealth and the States. To the contrary, that provision – or some other means of ensuring *uniformity of excise duties throughout Australia* – was a necessary ingredient of any acceptable scheme for achieving the abolition of internal customs barriers which was *an essential objective of the Federation* and for ensuring that the *people of the Commonwealth were guaranteed equality* as regards the customs and excise duties which they were required to bear and the bounties which they were entitled to receive.⁸⁷

This statement of the purpose and function of s 90 separated Deane's vision from the orthodox theories of s 90. Here, Deane's interest clearly lay beyond questions of the legal and financial relationships between the Commonwealth and the States.⁸⁸ Thus Deane's reasoning in *Hematite* was not focused exclusively on questions of the Commonwealth's control over the economy, or its interest in tariff policy. Instead, Deane examined the burden of excise and customs duties on 'the people' and the ability of s 90 to protect 'the people' from State taxes of that description.

⁸⁵ Compare, for example, Deane's reference to the compact of 'the people' in his opening paragraph in the *Incorporation Case*, as the basis for rejecting reliance on the subjective intentions of the framers. *Incorporation Case* (1990) 169 CLR 482, 503-4. More famously, see Deane's opening passages in *Street* (1989) 168 CLR 461, 521-2.

⁸⁶ *Hematite* (1983) 151 CLR 599, 660 (emphasis added). Compare this statement with the opening remarks of Brennan, Deane and Toohey JJ on the effect of s 90 in *Capital Duplicators (No 1)* (1992) 177 CLR 248, 274. There Brennan, Deane and Toohey JJ stated:

The Constitution was enacted to give effect to the *agreement reached by the people* of New South Wales, Victoria, South Australia, Queensland, Tasmania and Western Australia to unite 'in one indissoluble Federal Commonwealth.'

Ibid (emphasis added). Further similarities between Deane's reasoning in *Hematite* and that of Brennan, Deane and Toohey JJ in *Capital Duplicators (No 1)* are examined below n 92.

⁸⁷ *Hematite* (1983) 151 CLR 599, 661-2 (emphasis added).

⁸⁸ See further Deane's statement in *Street* that s 90 was one of a number of provisions that both 'serve the function of advancing or protecting the liberty, the dignity or the equality of the citizen under the Constitution' and 'are also integral parts of the *very structure of the federation*.' *Street* (1989) 168 CLR 461, 522 (emphasis added).

It was also highly significant that in 1983, a year after his appointment to the Court, in a case dealing with the economics of Australian federalism, Deane located the purpose of s 90 in what he would later describe as the ‘two constant themes’⁸⁹ of his jurisprudence: the inherent *equality* of the *sovereign people*. In *Hematite*, two years prior to *Metwally*, Deane’s vision of ‘the people’ and their role in the Constitution emerged in this passage. *Hematite* was also one of the earliest decisions evincing what Lindell later described as his ‘strong and abiding concern regarding equality as a constitutional doctrine.’⁹⁰ The importance of equality as a theme in Deane’s constitutional jurisprudence is a topic pursued in later chapters of this thesis.⁹¹

Deane’s vision of the rights-purpose of s 90 found some favour with a number of other members of the Court. Thus in 1992, three months after *Leeth*, Deane’s vision of s 90 as ‘guaranteeing equality’ between the people as regards customs and excise duties was endorsed by Brennan, Deane and Toohey JJ in their joint judgment *Capital Duplicators Pty Ltd v Australian Capital Territory (No 1)*.⁹² It is significant that it was also these three judges who in *Leeth* had expressed their commitment to the constitutional protection of the equality of ‘the people’. In contrast to Deane’s later ambitious guarantee in *Leeth*, however, his vision of s 90 as designed to benefit ‘the people’ has some historical support. Coper has argued that, although the historical materials are inconclusive regarding the purpose of s 90, there is some foundation for regarding s 90 as designed to remove disparity in the tax burden between the people of the States, and to remove the distortion to the flow of goods that a differential tax burden would create.⁹³ In this way, matching history with a recognition of the significance of the role of the sovereign people, Deane’s vision of s 90 provided a principled

⁸⁹ Deane, quoted in Tony Stephens, *Sir William Deane: The Things that Matter* (2002) 94 (emphasis added).

⁹⁰ G.J. Lindell, ‘Recent Developments in the Judicial Interpretation of the Australian Constitution’ in Geoffrey Lindell (ed) *Future Directions in Australian Constitutional Law* (1994) 1, 42.

⁹¹ See, in particular, the discussion of *Street* in chapter 4, and *Leeth* in chapter 5. Note also the role of equality in Deane’s reasoning of *QEC* and *Breavington*, decisions examined later in this chapter.

⁹² (1992) 177 CLR 248, 274 (Brennan, Deane and Toohey JJ) (*Capital Duplicators (No 1)*) citing with approval *Hematite* (1983) 151 CLR 599, 661-2. Lindell referred to Brennan, Deane and Toohey JJ’s endorsement of Deane’s views in *Hematite* on the purpose of s 90 as an illustration of the influence of Deane’s views on equality: G.J. Lindell, above n 90, 42.

⁹³ Michael Coper, *Encounters with the Australian Constitution* (1987) 229. Deane and Toohey JJ’s reliance on history in *Leeth*, in the form of the Convention Debates, and status of the common law right of equality, is discussed further in chapter 5.

basis for the embrace of a 'substance over form' approach to the operation of the section. This benefit of Deane's approach in *Hematite* is the next topic for discussion.

(c) *'The people', formalism and the breadth of Deane's vision of s 90*

The Court's decision in *Hematite* illustrated that acceptance of neither the broad nor narrow theory of the purpose of s 90 compelled the choice of a 'substance' or 'form' application of s 90. For example, Gibbs CJ rejected Mason J's adoption of a substantive application of the meaning of 'excise', on the basis that no interpretation of s 90 could secure the Commonwealth real control of the economy.⁹⁴ On the other hand, Murphy J argued forcefully that s 90 must be applied by reference to a law's practical effect, even though, on his view, s 90 performed the narrow function of precluding State taxes discriminating between goods produced in and outside of the State.⁹⁵

Deane's vision of s 90 in *Hematite* disentangled a substantive application of s 90 from the controversial, and unresolved, question of the economic requirements of 'federal balance'. This was because Deane saw s 90 as a guarantee of the important principles of equality and unity in the new nation. In this context, Deane perceived that s 90 could not be seen as concerned with '*matters of form rather than substance*.'⁹⁶ A formalist approach must be rejected, argued Deane, lest the section:

confer no more than an *illusory protection* which a State can destroy by imposing what is in substance an excise duty under some other guise.⁹⁷

Only a substantive application of s 90 could ensure that this important function of s 90 was fulfilled. Once it is accepted that the legal force of the Constitution flows, at least in part, from 'the people', not the 'artificial entities' of the Commonwealth or the States, the argument that provisions of the Constitution should not be avoided by the form of words used by the legislature is

⁹⁴ *Hematite* (1983) 151 CLR 599, 615.

⁹⁵ *Ibid* 638.

⁹⁶ *Ibid* 662 (emphasis added).

⁹⁷ *Ibid* (emphasis added).

particularly strong. Thus, under Deane's approach, the Court must assess whether a tax was an excise duty by examining its operation, that is, by assessing its impact on those 'required to bear' the tax.⁹⁸ On the facts of *Hematite*, Deane's application of this approach led him to conclude that the \$10 million licence fee was in fact an excise duty.

The application of Deane's substance over form approach to the facts of *Hematite* also provided an insight into the definition of an 'excise' endorsed by Deane.⁹⁹ According to Deane, and the majority judges, the size of the Victorian 'pipeline licence fee' was a significant factor in its classification as an excise. Thus, on their view, it was inevitable that the 'fee' would be incorporated into the price of the petroleum products. It was on this basis that the majority judges found a 'relationship' between the tax and the goods.¹⁰⁰ Thus, even though Deane in *Hematite* declared it unnecessary to rule on a precise definition of 'excise',¹⁰¹ his approach clearly tended towards a broad and flexible connection between the tax and the goods, not limited to the identification of a 'direct' relationship between the goods and the size of the tax.

Deane's acceptance of a broad definition of excise was confirmed by his later joint judgments on this topic. For example, in their decision in *Capital Duplicators Pty Ltd v Australian Capital Territory (No 2)* Mason CJ, Brennan, Deane and McHugh JJ adopted the broad definition of an excise as a tax on goods at any point before it reaches the consumer, and applied this test by reference to the substance, or practical effect of the law.¹⁰² By endorsing this approach to s 90, Deane favoured central control of the economy over 'federal balance' considerations. This preference mirrored Deane's understanding of the principles governing the interpretation of ss 51(xxix), 51(xx) and 51(xxxv).

⁹⁸ *Ibid.*

⁹⁹ Interestingly, as Hanks observed, Deane did not engage directly with the debate regarding the definition of excise duty in *Hematite*. Peter Hanks, 'Section 90 of the Commonwealth Constitution: Fiscal Federalism or Economic Unity?' (1986) 10 *Adelaide Law Review* 365, 367.

¹⁰⁰ This conclusion led Dawson J in a later case to question whether any indirect tax might ultimately be classified as an excise. *Gosford Meats Pty Ltd v New South Wales* (1985) 155 CLR 368, 413 ('*Gosford*'). See further the commentary in Michael Coper, *Encounters with the Australian Constitution* (1987) 238.

¹⁰¹ *Hematite* (1983) 151 CLR 599, 665.

¹⁰² (1993) 178 CLR 561, 591. Mason CJ, Brennan, Deane and McHugh JJ in this case argued that in *Hematite*, *Gosford* and *Philip Morris* Deane had accepted the broad definition of excise. See *ibid* 588-589.

Against this pattern of reasoning, however, stood Mason CJ and Deane's decision in *Philip Morris Ltd v Commissioner of Business Franchises (Vic)*.¹⁰³ This case contained a number of insights into Deane's attitude towards precedent in constitutional cases and his vision of federal dynamics. These aspects of Mason CJ and Deane's decision in *Philip Morris* merit consideration, tempered by a recognition of the fact that in this case Deane elected not to produce his own judgment, but to deliver a joint judgment with Mason CJ.

(d) Philip Morris: precedent, policy and fiscal federalism

Aspects of Deane's approach to precedent in constitutional interpretation were examined in chapter 1. In the common law world, the perception of objectivity in judicial reasoning is tied to an adherence to, or reasoned departure from, precedent. Thus, as Gibbs J famously observed, judges should not interpret the Constitution 'as though the pages of the law reports were blank.'¹⁰⁴ On the other hand, the High Court has recognised that it is not bound by its own decisions, particularly when interpreting the Constitution.¹⁰⁵ Deane's jurisprudence contains illustrations of varied responses to the role of precedent in constitutional interpretation. These ranged from Deane's fierce statements of the Court's duty to adhere to 'fundamental constitutional truth' over the demands of precedent,¹⁰⁶ to his concession of his own views on the preferable interpretation of the Constitution in the face of 'clear and settled trend of judicial authority.'¹⁰⁷ In *Philip Morris*, however, Mason and Deane JJ adhered to what they regarded as unsatisfactory precedent for policy reasons.

Philip Morris concerned the validity of a State prior period licence fee applied in relation to tobacco products. Mason CJ and Deane, with some reluctance,

¹⁰³ (1989) 167 CLR 399 ('*Philip Morris*').

¹⁰⁴ *Queensland v Commonwealth* ('*Second Territories Senators Case*') (1997) 139 CLR 585, 599. For an extensive examination of the place of precedent in constitutional interpretation see Andrew Lynch, *The Impact of Dissenting Opinions upon the Development of Australian Constitutional Law* (PhD thesis, University of New South Wales, 2005)

¹⁰⁵ *The Engineers' Case*, for example, establishes a pedigree of dissent that is difficult to ignore in the Australian context. See further discussion in Lynch, above n 104, 259.

¹⁰⁶ See, for example, *Stevens v Head* (1993) 176 CLR 433, 461. See also, *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 480 and *Re Tyler; Ex parte Foley* (1994) 181 CLR 18, 34.

¹⁰⁷ *Flaherty v Girgis* (1986) 162 CLR 574, 610.

recognised the continued validity of such licence fees as an exception to s 90.¹⁰⁸ At the same time, however, they were careful to confine the reach of that exception strictly to alcohol and tobacco products.¹⁰⁹ Before Mason CJ and Deane determined the validity of the licence fee, however, an important preliminary question had to be decided. Did counsel require the Court's leave to reargue the correctness of precedent before the High Court? This question came before the Court in *Evda Nominees Pty Ltd v Victoria*,¹¹⁰ another s 90 case.

(i) *Evda and the question of leave*

Evda raised the issue of whether a State tax, taking the form of a prior period licence fee imposed on tobacco retailers and wholesalers, was an excise duty. Counsel sought to reopen the decision of *Dennis Hotels* claiming that it had been challenged, indirectly, by the reasoning of members of the Court in *Hematite*. Gibbs CJ, Mason, Murphy, Wilson, Brennan and Dawson JJ held that the leave of the Court was required before counsel may challenge the correctness of a past decision of the Court. Deane, however, refused to impose a procedural barrier of this nature.¹¹¹

Gibbs CJ, during argument, expressed the concern that:

This Court, of course, has to apply the law. Prima facie, the law is what the Court has laid down. It would reduce the operation of the Court, or the workings of the Court to an absurdity if it were permissible for counsel to keep on challenging settled decisions. ... Therefore, there must reside in the Court, a power to say whether or not counsel may address full argument to the question whether a previous decision is right or wrong.¹¹²

These remarks represented the only indication of the policy concerns that may have influenced the majority judges' conclusion in *Evda* that counsel required leave from the Court to challenge precedent.¹¹³

¹⁰⁸ *Philip Morris* (1989) 167 CLR 399, 438.

¹⁰⁹ *Ibid.*

¹¹⁰ (1984) 154 CLR 311 ('*Evda*').

¹¹¹ *Ibid* 316.

¹¹² *Evda Nominees Pty Ltd v Victoria* Transcript of Proceedings, 4 April 1984, 11.

¹¹³ Note however, that in *Richardson Dawson J* reflected that:

Considerations of practicality make it necessary that the law should, as far as possible, take a consistent course. The constant re-examination of concluded questions is incompatible with that aim. That is why this Court has adopted the practice of requiring leave to be granted before it will allow a previous decision to be re-argued.

Richardson (1988) 164 CLR 261, 322 (emphasis added).

Deane's statements during oral argument indicated that he shared Gibbs CJ's concerns that there should be limitations on the degree to which long-established authority may be challenged in all cases.¹¹⁴ He also shared the views of the rest of the Court that the *Evda* did not provide an appropriate vehicle for reconsidering *Dennis Hotels*.¹¹⁵ However, Deane did not agree that counsel required the consent of the Court to present argument of this nature.¹¹⁶ Deane's approach revealed a different perspective to that of the majority judges on the role of precedent in constitutional adjudication, and the ability of the Court to control challenges to its decisions by counsel.¹¹⁷

It has been Kirby J, not Deane, who has offered a detailed analysis of these issues.¹¹⁸ Sharing Deane's conclusion that a requirement of leave should not be imposed, in *Brownlee v The Queen* Kirby J emphasised the 'party's right' to advance arguments challenging authority before the Court.¹¹⁹ According to Kirby J, it remains important for the Court to:

keep the mind open to the possibility that a new context, presenting different needs and circumstances and fresh insights, may convince the Court ... that its predecessors had adopted an erroneous view of the Constitution.¹²⁰

This emphasis by Kirby J on 'new content' and 'fresh insights' as a foundation for refusing to impose the leave requirement on counsel resonated with Kirby J's endorsement in *Brownlee v The Queen* of a 'living force' theory of constitutional interpretation.¹²¹ For Deane also, the refusal to endorse the leave requirement may have been connected to his acceptance of a 'living force' theory of interpretation, famously given voice by Deane a decade after *Evda* in

¹¹⁴ *Evda Nominees Pty Ltd v Victoria* Transcript of Proceedings, 4 April 1984, 31.

¹¹⁵ *Ibid.* See also, *Evda* (1984) 154 CLR 311, 316 (Gibbs CJ, Mason, Murphy, Wilson, Brennan and Dawson JJ).

¹¹⁶ *Evda Nominees Pty Ltd v Victoria* Transcript of Proceedings, 4 April 1984, 31.

¹¹⁷ See, to like effect, *Philip Morris* (1989) 167 CLR 399, 409.

¹¹⁸ See, for example, *Brownlee v The Queen* (2001) 207 CLR 278, 312-15 and *XYZ v Commonwealth* (2006) 227 ALR 495, 518.

¹¹⁹ *Brownlee v The Queen* (2001) 207 CLR 278, 314 (emphasis added).

¹²⁰ *Ibid* 314.

¹²¹ *Ibid* 332-43. See also *XYZ v Commonwealth* where Kirby J affirmed that his reasons for concluding that 'constitutional reargument requires no leave' were identical to those of Deane in *Evda*, and that the settled principles of constitutional interpretation were 'that the Constitution is not to be confined to meanings that were held, or to applications that were expected, at the time of its adoption in 1900.' *XYZ v Commonwealth* (2006) 227 ALR 495, 518-20.

Theophanous.¹²² Unlike Kirby J, however, Deane never expressed a connection between these aspects of his jurisprudence.

Whatever lay behind Deane's approach, in *Philip Morris* Deane again expressed the opinion, contrary to that of six members of the Court, that counsel did not require leave from the Court to challenge the correctness of *Dennis Hotels*.¹²³ On the substantive issues in the case, Mason CJ and Deane accepted that policy reasons demanded the continued acceptance of the Court's decisions in *Dennis Hotels* and *Dickenson's Arcade Pty Ltd v Tasmania*.¹²⁴

(ii) Philip Morris and the weight of policy considerations

In their analysis of the substantive issues in *Philip Morris*, Mason CJ and Deane observed that by the 1980s, responses to the Court's jurisprudence on s 90 had reached a similar level of controversy as had s 92 prior to *Cole v Whitfield*.¹²⁵ Mason CJ and Deane argued that the *Dennis Hotels* exception led to 'highly artificial results', whereby State licence fees based on a prior period, but not a current period, were excluded from the operation of s 90.¹²⁶ However, Mason CJ and Deane held that the 'artificial results' of these cases could be 'rationalized' in the 'special fields'¹²⁷ in which they operated, that is, according to the history of alcohol and tobacco licensing schemes. On this basis, they continued to recognise the validity of a limited State 'franchise fee' exception to s 90 with respect to these products.¹²⁸ The strained exception of tobacco and alcohol products recognised by Mason CJ and Deane in *Philip Morris* reflected an unhappy compromise by these judges between competing policy considerations.

¹²² *Theophanous* (1994) 182 CLR 104, 171.

¹²³ *Philip Morris* (1989) 167 CLR 399, 409.

¹²⁴ (1974) 130 CLR 177.

¹²⁵ *Philip Morris* (1989) 167 CLR 399, 433. Their remarks related particularly to the question whether s 90 was to be interpreted according to its substantive or legal operation.

¹²⁶ *Ibid.*

¹²⁷ *Ibid* 440.

¹²⁸ See, in particular, *ibid* 438.

First, Mason CJ and Deane acknowledged that the precarious financial position of the States was a relevant consideration in the interpretation of s 90. They explained:

Financial arrangements *which are of great importance to the governments of the States* and perhaps the *economy of the nation* have been made for a long time past on the faith of these decisions. The power of this Court to overrule its previous decisions would not be properly exercised to disturb those arrangements unless, in the light of *later insights* into the *true meaning* of the Constitution, obedience to its terms or the interests of *certainty* in those arrangements clearly demanded that those decisions be reconsidered.¹²⁹

Given Deane's later express endorsement of a 'living force' theory, it is particularly interesting that in this passage Mason CJ and Deane recognised that '*later insights*' – that is, contemporary understanding and context – could influence a decision to overrule precedent.¹³⁰ Also, this passage suggested that Deane permitted 'federal balance' considerations to intrude into his evaluation of the question whether to overrule the *Dennis Hotels* exception to s 90. This reference to 'federal balance' considerations in *Philip Morris* is particularly striking given that both Mason CJ and Deane had argued forcefully in their decisions on s 51 that such considerations were irrelevant to constitutional interpretation.

One consequence of Mason CJ and Deane's recognition of a limited exception for State licence fees in relation to tobacco and alcohol in *Philip Morris* was to ensure that the stream of cases expanding the definition of excise duty, and the operation of s 90, were not reopened. In this way, Mason CJ and Deane maintained the Court's broad interpretation of s 90, and its preference for national control over federal balance. A further consideration acknowledged by Mason CJ and Deane was that the exclusion of these products could be justified by virtue of the need to 'protect the public interest in light of the characteristics' of those commodities.¹³¹ The exception recognised for tobacco and alcohol may therefore intersect with Deane's concern to protect the disadvantaged and vulnerable in the community, by recognising the social and medical consequences attaching to use of those products. It is not clear, however, why a

¹²⁹ Ibid 438 (emphasis added)

¹³⁰ Compare Kirby J's discussion in *Brownlee* of the significance of 'new insights' as a factor in his decision not to impose a requirement that counsel obtain leave to challenge precedent. See above n 120.

¹³¹ *Philip Morris* (1989) 167 CLR 399, 439.

recognition of the benefits to 'the people' flowing from licensing regimes in respect of alcohol and tobacco must extend to exclude the State prior period licence fees from the definition of an excise duty in s 90.

The exclusion recognised by Mason CJ and Deane has been justly criticised.¹³² The path woven by Mason CJ and Deane between their disapproval of the principle in *Dennis Hotels* and a concession to the financial requirements of the State, on the basis of the special status of these products, does not stand as a leading example of principled and cohesive reasoning by either judge. This is particularly the case for Deane, for his recognition of the exclusion in *Philip Morris*, without an acknowledgment of the impact of that exclusion on 'the people', may call into question the strength of Deane's commitment to his vision of s 90 as a substantial equality guarantee.

The next part of this chapter considers how Deane's adherence to 'fundamental concepts' reasoning, and his vision of the essential nature of the Federation, was reflected in two implications he drew from the nature of the Constitution, and the Federation it created. These decisions also provide further examples of Deane's understanding of the role of precedent, history and policy, and the language of the text, in constitutional interpretation.

C Part 3: Deane's implications from the nature of the Federation in QEC and Breavington

1 Queensland Electricity Commission

*Queensland Electricity Commission v Commonwealth*¹³³ concerned a challenge to provisions inserted into the *Conciliation and Arbitration Act 1904* (Cth) by the *Conciliation and Arbitration (Electricity Industry) Act 1985* (Cth). The new provisions were designed to expedite the settlement of a dispute involving a

¹³² See, for example, *Ha v New South Wales* (1997) 189 CLR 465, 501 (Brennan CJ, McHugh, Gummow and Kirby JJ).

¹³³ (1985) 159 CLR 192.

Queensland government authority, the Queensland Electricity Commission ('QEC'). Under the new provisions, the powers of the Conciliation and Arbitration Commission to reject a dispute and to sit as a single member panel were removed in relation to the dispute involving the QEC. In addition, any future dispute involving the Queensland electricity industry would be governed by new streamlined provisions. The QEC argued that the amendments to the Act were invalid, as contrary to the principle in the *Melbourne Corporation Case*.

Until 2003, and the Court's decision in *Austin v Commonwealth*,¹³⁴ Mason J's exposition of two limbs or elements of the *Melbourne Corporation Case* was generally regarded as authoritative.¹³⁵ According to Mason J, the implication had two distinct limbs or elements:

- (1) The prohibition against laws discriminating against the States, or a State; and
- (2) The prohibition against laws that operate to destroy or curtail the continued existence of the States or their capacity to function as governments.¹³⁶

As the amendments in QEC excluded a State governmental body from the ordinary application of the Commonwealth's conciliation and arbitration regime, the case concerned the validity of a law that discriminated against the States.¹³⁷ On the facts, Gibbs CJ, Mason, Wilson and Dawson JJ held that the legislation was invalid in its entirety. Brennan and Deane JJ, in separate judgments, agreed that the Commonwealth's attempt to apply the streamlined procedures to all future disputes involving the State authority infringed the discrimination limb of the *Melbourne Corporation* principle. However, Brennan J and Deane each held that those aspects of the legislation applying special procedures to the dispute involving the QEC were valid. This was because s 51(xxxv) authorised discriminatory laws, that is, laws with the purpose of settling a particular industrial dispute.¹³⁸

¹³⁴ (2003) 215 CLR 185.

¹³⁵ See, for example, *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, 231 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

¹³⁶ QEC (1985) 159 CLR 192, 217. Cited with approval in *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, 231 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

¹³⁷ QEC (1985) 159 CLR 192, 217-8 (Mason J); 226 (Wilson J); 232 (Brennan J). Dawson J discussed the discrimination principle as a species of law that curtailed the capacity of the States to function: *ibid* 261.

¹³⁸ *Ibid* 238-40 (Brennan J); 251-2 (Deane J).

Deane's expression of the content of the implication in *QEC* was essentially the same as that of Mason J. However, two distinctive elements of Deane's reasoning in *QEC* emerge against this common background and reinforce recurring themes in Deane's constitutional jurisprudence. First, Deane implied a limitation on the Commonwealth's legislative power to discriminate against the States by utilising his 'fundamental concepts' reasoning. Second, Deane referred to 'the people' as part of his analysis of implications governing federal relationships under the Constitution.

(a) *Deane's 'fundamental concepts' reasoning*

Just as Deane signalled the key features of his reasoning at the outset of his judgment in *Hematite*, the opening paragraphs of Deane's reasons in his 1985 decision in *QEC* expressed the essence of his understanding of the source of the implied limitation in that case. In *QEC* Deane commenced his analysis with a summary of the history of Australian constitutional interpretation. This involved a consideration of the reserved powers and implied immunities doctrines, described by Deane as emerging during the 'infancy of the Commonwealth, while *national identity and spirit* were still at a formative stage.'¹³⁹ Deane then explored the defeat of those approaches in the *Engineers' Case* as the Commonwealth assumed an 'independent ... personality.'¹⁴⁰ However, Deane's reasoned in *QEC* that the *Engineers' Case* left intact two foundational interpretive principles.¹⁴¹ First, that:

the written terms of the Constitution were predicated upon and embodied (cf, particularly, Constitution ss 106, 107) an *assumption* of the continued existence of the States as viable political entities.¹⁴²

Second, Deane argued the Court could derive an implication limiting Commonwealth legislative power 'flowing from' the 'assumption', or 'fundamental concept', of the continued existence of the States.¹⁴³

¹³⁹ Ibid 244 (emphasis added).

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Ibid 245 (emphasis added).

¹⁴³ Ibid.

What was the 'assumption' of the federal system Deane recognised in *QEC*?

Deane explained that:

The Commonwealth, unlike the States, is the creature of the Constitution. Its legislative and executive powers are limited to what the Constitution confers. Alone, those powers are inadequate to provide more than a truncated part of the functions of government. If, without constitutional amendment to fill the void, the States were to cease to exist as independent entities, an essential element of the substratum of the Federation would be gone.¹⁴⁴

To preserve this 'assumption', Deane argued that the Constitution must include an implied restriction on Commonwealth power to ensure that the essential building blocks of the Federation continue to exist. This functional assessment of the role of the States was also apparent in Deane's analysis of the relevance of the *Melbourne Corporation* principle in the *Tasmanian Dam Case*.¹⁴⁵ In the *Tasmanian Dam Case*, decided two years before *QEC*, Deane rejected an argument that the substantial interference with State property holdings threatened the independent functioning of the State. For Deane, (and likewise Mason, Brennan and Murphy JJ), limitations imposed on the use of land by the State did not compromise the ability of the State to provide those functions and services necessary for governance but not fulfilled at the national level.¹⁴⁶

It was a significant feature of Deane's decision in *QEC* that he again located his analysis, and the derivation of the constitutional implication, within the framework of the *Engineers' Case*. As chapter 1 has examined, Deane had turned to a consideration of the *Engineers' Case* in the *Tasmanian Dam Case* and the *Incorporation Case* to support his extension of Commonwealth legislative power. Deane's reference to the *Engineers' Case* to legitimise his method of implication, that of 'fundamental concepts' reasoning, however, set *QEC* apart from Deane's other implication cases.

In *QEC*, Deane was not alone in turning to the broad concept of federalism to derive his implied limitation on Commonwealth power. For instance, Gibbs CJ emphasised that it was clear 'in principle, and established by authority' that this limitation could be derived from the federal nature of the Constitution.¹⁴⁷

¹⁴⁴ Ibid 246.

¹⁴⁵ *Tasmanian Dam Case* (1983) 158 CLR 1, 280-1.

¹⁴⁶ Ibid 141 (Mason J); 169 (Murphy J); 214-6 (Brennan J); 281 (Deane J).

¹⁴⁷ *QEC* (1985) 159 CLR 192, 205.

Mason, Wilson and Dawson JJ each derived the limitation from their understanding of the federal system, and the nature and structure of the Constitution.¹⁴⁸ In contrast, Brennan J derived his implication by closer attention to the constitutional text, holding that the limitation was '*necessarily implied by s 106 of the Constitution if not from the nature of the federation.*'¹⁴⁹ While Deane did refer to ss 106 and 107 in his judgment,¹⁵⁰ the context of his reference makes plain that these sections were not critical to his reasoning. Rather, for Deane it was 'the nature of the federal system',¹⁵¹ not the demands of s 106, that formed the basis of his recognition of an implied restriction on Commonwealth legislative power. Deane's approach to constitutional implication in *QEC* was therefore consistent with his reasoning in *Duncan*, where Deane had reasoned that the Constitution's 'positive objective' of co-operation was manifested by provisions such as ss 51(xxxiii), (xxxiv), (xxxvii) and (xxxviii).

(b) Discrimination, equality and 'the people'

In a study of Deane's constitutional jurisprudence, *QEC* is perhaps best known for Deane's fleeting remark that a Commonwealth law discriminating against a particular State:

would also be within the preclusive scope of a *related, or perhaps comprehensive*, restraint upon Commonwealth powers which is arguably implicit in the written words of the Constitution. That other arguable restraint would arise as an *implication of the underlying equality of the people of the Commonwealth under the law of the Constitution.*¹⁵²

David Jackson QC, on behalf of the QEC, had argued that the Constitution incorporated a 'broader implication' than the *Melbourne Corporation* principle. He argued that the Constitution contained the implication that the Commonwealth was not competent to legislate in a manner that discriminated against the 'people of a State.'¹⁵³ It was this broader implication that Deane appeared to adopt in the above passage.¹⁵⁴ Chapter 5 explores the connection

¹⁴⁸ Ibid 206 (Gibbs CJ); 212 (Mason J); 222 (Wilson J); 260 (Dawson J).

¹⁴⁹ Ibid 231 (emphasis added).

¹⁵⁰ Ibid 245.

¹⁵¹ Ibid.

¹⁵² Ibid 247-8 (emphasis added).

¹⁵³ Ibid 195.

¹⁵⁴ Jackson QC also appeared in *Leeth*. On the significance of counsel's arguments in shaping the development of constitutional jurisprudence, see the opening remarks of McHugh and Keith

between Deane's federal implication and the individual guarantee of legal equality recognised by Deane and Toohey JJ in *Leeth*, and the persuasiveness of that guarantee. However, two points emerge from the above passage in *QEC* that intersect with the topic of this chapter.

First, in this passage Deane confirmed his interest in the concepts of 'the people' and 'equality' in his constitutional jurisprudence. Although Deane did not explore the existence of a broader equality guarantee in *QEC*, his judgment evinced his openness, as early as 1985, towards expanding the constitutional protection of equality. It also indicated that questions of the legal relationship between the Commonwealth and the States were not, for Deane, divorced from his concept of the Constitution as a compact of 'the people'. Combined, Deane's references to equality in *Hematite* and *QEC* established the ground-work for what Lindell later described as Deane's '*strong and abiding concern* regarding equality as a constitutional doctrine.'¹⁵⁵

Second, this passage sheds light on Deane's attitude towards the Court's approach to the derivation of constitutional implications. By leaving open the question of Jackson's 'broader implication' in this way, Deane acknowledged the possibility of an implication drawn from his understanding of the role of 'the people' as legal sovereigns. It is true that any contemporary assessment of Deane's reasoning in *QEC* is undoubtedly influenced by an understanding of his later recognition of broad implied rights, particularly in the 1990s. However, the tenor of Deane's reasons in *QEC*, and his rights-rich reasoning in *Metwally*, would seem to have offered encouragement to counsel in the 1980s to pursue creative arguments based on wide-ranging implications. Deane's openness to broad doctrines, and novel arguments regarding the existence of constitutional guarantees, confirmed the coherence of Deane's interpretive approach across decisions spanning such apparently disparate topics as *Hematite*, *Duncan*, *Metwally*, and *QEC*.

Mason in their Sir Maurice Byers Memorial Lectures, published as Michael McHugh, 'Does Chapter III of the Constitution Protect Substantive as well as Procedural Rights?' (2001) 21 *Australian Bar Review* 235 and Keith Mason, 'What is Wrong with Top-Down Legal Reasoning?' (2004) 78 *Australian Law Journal* 574.

¹⁵⁵ G.J. Lindell, 'Recent Developments in the Judicial Interpretation of the Australian Constitution' in Geoffrey Lindell (ed) *Future Directions in Australian Constitutional Law* (1994) 1, 42 (emphasis added).

The balance of this chapter explores a further illustration of the way in which Deane's understanding of 'the people', and his 'fundamental concepts' reasoning, shaped his reasoning. In *Breavington*, in 1988, Deane considered a further aspect of the legal relationships between the entities of government in the Federation, and demonstrated his commitment to the implication of fundamental constitutional guarantees protective of the rights of the people 'of Australia'.

2 Breavington

Up to this point, this thesis has examined Deane's understanding of the relationship, both fiscal and legal, between the Commonwealth and the States. This section considers Deane's understanding of aspects of the legal interaction between the States, or the States and Territories, and specifically the question of choice of law in intranational disputes. In *Stevens v Head*, Deane remarked that this question of choice of law raised a '*fundamental constitutional truth*' which '*lies at the heart of [his] understanding of the structure and working of the Constitution.*'¹⁵⁶ This truth was that the Constitution was 'the compact by which *the people of Australia united as a single nation*' and established a unitary legal system.¹⁵⁷ The story of Deane and his 'fundamental constitutional truth' began in August 1987, during oral argument in *Breavington*.

(a) Breavington: an overview

Breavington involved an action brought in Victoria in respect of personal injuries occasioned in the Northern Territory.¹⁵⁸ A statutory scheme in the Territory limited the recovery of common law damages in that jurisdiction. However, in Victoria plaintiffs had access to full common law damages. The

¹⁵⁶ *Stevens v Head* (1993) 176 CLR 433, 461 (emphasis added).

¹⁵⁷ *Ibid* 460 (emphasis added).

¹⁵⁸ The facts of *Breavington* and the structure of Deane's analysis in this case are discussed in: Jeremy Kirk, 'Conflicts and Choice of Law within the Australian Constitutional Context' (2003) 31 *Federal Law Review* 247, 262-5 and in Graeme Hill and Adrienne Stone, 'The Constitutionalisation of the Common Law' (2004) 25 *Adelaide Law Review* 67, 93-4.

case reached the High Court on the assumption that the private international law rules, those rules governing conflict of laws between nation states, also governed disputes within the Federation.¹⁵⁹ The key rule in private international law in 1987 was *Phillips v Eyre*,¹⁶⁰ which, in general terms, gave preference to the law of the forum court over the law of the place where the tort was committed.¹⁶¹ This rule encouraged forum shopping by plaintiffs.

Prior to *Breavington*, the Constitution was not thought to have a direct bearing on the choice of law rules applicable to legal disputes within the Australian Federation.¹⁶² However, during oral argument, Deane interrupted Hayne QC to suggest that:

a background question is that *the national question* has to be approached in the context of s 118 of the Constitution.¹⁶³

Deane continued, probing whether the 'correct answer' to the dispute in *Breavington* could necessarily be derived from private international law.¹⁶⁴ The case was relisted to hear argument on the constitutional issues.¹⁶⁵

When judgment was delivered, members of the Court differed on the role played by the Constitution in intranational choice of law issues.¹⁶⁶ Deane argued in *Breavington* that the Constitution spoke to the dispute in two ways; analysis which was fiercely contested by other members of the Court. Before turning to the detail of Deane's reasoning in *Breavington*, it is useful to set out these key points of difference.

¹⁵⁹ On whether this topic is properly seen as 'choice' or 'conflict' of laws, see Stephen Gageler, 'Private Intra-national law: Choice or Conflict, Common law or Constitution?' (2003) 23 *Australian Bar Review* 1.

¹⁶⁰ (1870) LR 6 QB 1, adopted in *Koop v Bebb* (1951) 84 CLR 629.

¹⁶¹ The rule in *Phillips v Eyre* is complicated by the so-called 'flexible exception' recognised by Lord Wilberforce in *Chaplin v Boys* [1971] AC 356, 391.

¹⁶² On the interpretation of s 118 prior to *Breavington* see Jeremy Kirk, 'Conflicts and Choice of Law within the Australian Constitutional Context' (2003) 31 *Federal Law Review* 247, 261-2.

¹⁶³ *Breavington* (1988) 169 CLR 41, 46-7 (Deane J during argument) (emphasis added).

¹⁶⁴ *Breavington v Godleman*, Transcript of Proceedings, 6 August 1987, 29.

¹⁶⁵ Other questions on which the Court wished to hear further argument included whether the choice of law rule to be applied was influenced by s 18 of the *State and Territorial Laws and Records Recognition Act 1901* (Cth) or by the presence as a party of Telecom, a Commonwealth entity.

¹⁶⁶ *Breavington* raised the issue of the conflict between a Territory and a State law. According to Deane, this did not require different analysis: *Breavington* (1988) 169 CLR 41, 137-8.

For Deane, the first issue was the nature of the Federation created by the Constitution. While the Colonies were independent entities, with independent legal systems, Deane concluded that one of the fundamental assumptions of the Constitution was that it was a '*compact between the people*' to forge a new nation under the Constitution.¹⁶⁷ For Deane, this meant that the States could not be regarded as independent 'nations', and accordingly the central premise of the rule in *Phillips v Eyre* was incompatible with the Constitution.¹⁶⁸ Instead, Deane held that the Constitution established a *unitary legal system*, that is:

a comprehensive legal system in which the substantive law applicable to govern particular facts or circumstances is objectively ascertainable or predictable and internally consistent or reconcilable.¹⁶⁹

In a unitary legal system, therefore, only one set of substantive laws could apply to a dispute, regardless of the location in the Federation in which an action was commenced.¹⁷⁰

In separate judgments, Mason CJ, and Wilson and Gaudron JJ (in a joint judgment) also held that the Constitution created a unitary legal system.¹⁷¹ Like Deane, they concluded that the rule in *Phillips v Eyre* was inconsistent with this underlying premise of the Australian Constitution. However, three members of the Court (Brennan, Dawson and Toohey JJ) strenuously objected to the vision of the Federation as a unitary legal system.¹⁷² This was because, for the purposes of determining choice of law, the States remained 'mutually independent'¹⁷³ legal systems.

The second way in which Deane believed that the Constitution spoke to the choice of law dispute in *Breavington* was by mandating the content of the choice rule. According to Deane the Constitution required that the substantive law of

¹⁶⁷ Ibid 120 (emphasis added).

¹⁶⁸ Ibid 125, 135.

¹⁶⁹ Ibid 121.

¹⁷⁰ See further, Jeremy Kirk, 'Conflicts and Choice of Law within the Australian Constitutional Context' (2003) 31 *Federal Law Review* 247, 263. The distinction between substantive and procedural laws was a contentious issue in the subsequent cases of *McKain* (1991) 174 CLR 1 and *Stevens v Head* (1993) 176 CLR 433.

¹⁷¹ *Breavington* (1988) 169 CLR 41, 78 (Mason CJ), 98 (Wilson and Gaudron JJ).

¹⁷² Ibid 111 (Brennan J); 142 (Dawson J); 166 (Toohey J). See further, *McKain* (1991) 174 CLR 1, 36 (Brennan, Dawson, Toohey and McHugh JJ).

¹⁷³ *Breavington* (1988) 169 CLR 41, 111 (Brennan J).

the State with the 'predominant territorial nexus' to the action be applied.¹⁷⁴ Deane derived this rule by implication from the nature of the Constitution, specifically, by applying 'fundamental concepts' reasoning. Wilson and Gaudron JJ derived a similarly territorially-based rule from the Constitution, but sourced their rule in the 'full faith and credit' guarantee of s 118 of the Constitution.¹⁷⁵ These judges also differed on the degree of flexibility inherent in the constitutional rule.¹⁷⁶

Mason CJ, Brennan, Dawson and Toohey JJ rejected this aspect of Deane's analysis. They considered that the solution to intranational choice of law was not compelled by the Constitution, but instead was to be found in the common law, or through the legislative process. The difference between Mason CJ on the one hand, and Brennan, Dawson and Toohey JJ on the other was in the identity of the legislature responsible for choice of law rules. Consistent with their understanding of the independence of the legal systems of the States, Brennan, Dawson and Toohey JJ, most clearly in their later joint judgment (joined also by McHugh JJ) in *McKain v R W Miller & Company (South Australia) Pty Ltd*, emphasised that it was the States' right to dictate to their Courts the choice of law rules that apply.¹⁷⁷ In contrast, Mason CJ, held that that power lay with the Commonwealth Parliament, under s 51(xxv).¹⁷⁸ Despite these differences, however, the Court in *Breavington* unanimously held that on the facts of that case the Territory law applied to limit the damages available to the plaintiff.

The question of choice of law between the States in the Australian Federation came before Deane on three further occasions, in *McKain*; *Stevens v Head* and

¹⁷⁴ Ibid 129.

¹⁷⁵ Ibid 93-100. On the different place of s 118 in the judgments of Deane, and Wilson and Gaudron JJ, see below n 200.

¹⁷⁶ Wilson and Gaudron JJ considered that only an 'inflexible rule' would prevent forum shopping: ibid 98 and 91 (Wilson and Gaudron JJ). Deane, however, suggested that the Court would engage in the 'discretionary weighing' of factors including fairness and justice: *McKain* (1991) 174 CLR 1, 53. For commentary on these differences, and an assessment of the preferable rule to apply to intranational choice of law, see the distinct approaches of Jeremy Kirk, 'Conflicts and Choice of Law within the Australian Constitutional Context' (2003) 31 *Federal Law Review* 247 and James Stellios, 'Choice of Law and the Australian Constitution: Locating the Debate' (2005) 33 *Federal Law Review* 7.

¹⁷⁷ (1991) 174 CLR 1, 36 (Brennan, Dawson, Toohey and McHugh JJ) ('*McKain*'). On the fact that neither s 118, nor the general nature of the Constitution, speaks to the content of the choice of law rule, see earlier *Breavington* (1988) 169 CLR 41, 107-8 (Brennan J); 150 (Dawson J); 164 (Toohey J).

¹⁷⁸ *Breavington* (1988) 169 CLR 41, 83.

Goryl v Greyhound Australia Pty Ltd.¹⁷⁹ In these cases Deane remained committed to his understanding of the constitutional components of choice of law. In *McKain*, however, a change to the composition of the Court had a significant effect on the Court's position on this issue. Whereas in *Breavington* a majority had accepted the unitary legal system vision, the departure of Wilson J, and his replacement by McHugh J, saw this view relegated to the minority. Thus in *McKain*, Brennan, Dawson, Toohey and McHugh JJ, in a joint judgment, held that the States were mutually independent legal territories, and accordingly the private international law rules applied to resolve a choice of law dispute.¹⁸⁰

Only in *John Pfeiffer Pty Ltd v Rogerson*,¹⁸¹ in 2000, would Deane's vision prevail, at least in part. In *Pfeiffer* the Court affirmed that the States could not be viewed as independent nations, or foreign nations, within the Federation.¹⁸² However, the Court rejected the view that the Constitution itself mandated the application of a choice of law rule. Instead, the common law must be made consistent with the understanding of the States as units within the federal compact under the Constitution.¹⁸³ There remains lingering controversy regarding the merits of the *Pfeiffer* solution.¹⁸⁴ Nevertheless, it was a lasting testimony to Deane's vision that, although his understanding of the nature of the Federation and its influence on the solution to national choice of law disputes has been contested, since his interjection during argument in *Breavington* the relevance of the constitutional context to these disputes has not been denied.

(b) Deane's constitutional vision in Breavington

Breavington, and three cases that followed while Deane was a member of the Court, are particularly rich sources of insight into Deane's vision of the Constitution and its interpretation. For instance, chapter 1 has demonstrated that *Breavington* was an early vehicle for Deane's examination of the role of the

¹⁷⁹ (1994) 179 CLR 463 ('*Goryl*').

¹⁸⁰ *McKain* (1991) 174 CLR 1, 36 (Brennan, Dawson, Toohey and McHugh JJ).

¹⁸¹ *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 ('*Pfeiffer*').

¹⁸² *Pfeiffer* (2000) 203 CLR 503, 534 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); 550 (Kirby J).

¹⁸³ *Ibid* 528 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); 546 (Kirby J).

¹⁸⁴ See, for example, the critiques of Graeme Hill and Adrienne Stone, 'The Constitutionalisation of the Common Law' (2004) 25 *Adelaide Law Review* 67 and James Stellios, 'Choice of Law and the Australian Constitution: Locating the Debate' (2005) 33 *Federal Law Review* 7.

Convention Debates as a tool in constitutional interpretation. This topic was also the vehicle one of Deane's 'persistent dissents'.¹⁸⁵ Thus, in *Stevens v Head*, Deane, when faced with the decision of the newly formed majority in *McKain*, remarked:

I am fully conscious of the weight of the considerations which support the view that a decision of the Court which still enjoys majority support should be treated by an individual member of the Court as being as binding upon him or her as it is on the members of every other Australian court. There are, however, weighty statements of authority which support the proposition that, in matters of fundamental constitutional importance, the members of this Court are obliged to adhere to what they see as the requirements of the Constitution of which the Court is both a creature and the custodian.¹⁸⁶

Here, in contrast to *Philip Morris*, Deane placed adherence to the 'correct' interpretation of the Constitution over the call of precedent.

In the context of the present discussion of Deane's federal vision, the significance of *Breavington* lies in three related aspects of his reasoning. First, Deane's reliance on 'fundamental concepts' reasoning to derive the constitutional solution to intranational choice of law is notable. Second, *Breavington* shed further light on the place of 'the people' in Deane's understanding of the nature of the Australian Federation. Third, was the importance of Deane's decision that the Constitution, rather than the common law or the Parliament, determined the content of the choice of law rule.

(i) *Reasoning from 'fundamental concepts' in Breavington*

In what is now a familiar rhetorical technique in Deane's decisions, Deane commenced his decision in *Breavington* with a statement of the fundamental principle guiding the Court's decision in this case.¹⁸⁷ Thus he remarked:

The provisions of the Constitution must be construed *in the general context* that, while the Federation was *intended* to preserve the existence of the former Colonies as States, *the compact between the people of those Colonies was to unite in*

¹⁸⁵ The term 'persistent dissent' is utilised by Lynch. See Andrew Lynch, *The Impact of Dissenting Opinions upon the Development of Australian Constitutional Law* (PhD thesis, University of New South Wales, 2005) 259.

¹⁸⁶ *Stevens v Head* (1993) 176 CLR 433, 461-2. See discussion in Lynch, above n 185, 270-80.

¹⁸⁷ Compare Deane's opening remarks in *Hematite*, discussed above n 86, and the *Incorporation Case*, discussed above n 125. The structure of Deane's reasoning in *Breavington* and the *Incorporation Case*, particularly his treatment of 'extraneous arguments' (including the relevance of the framers' intentions), was strikingly similar in these two decisions.

one indissoluble Commonwealth under a new system of law to which all within its territory ... were thenceforth to be subject.¹⁸⁸

As he did in *Duncan*, Deane then marshalled aspects of the text that confirmed, or manifested, this underlying 'fundamental concept' of the Constitution. In *Breavington*, these were:¹⁸⁹

1. The conferring of original jurisdiction on the High Court and the vesting of federal jurisdiction on courts named in Ch III;¹⁹⁰
2. The doctrine of the separation of federal judicial power embodies the 'jurisprudential basis of the Constitution', that is, the assumption that laws exist independently of the exercise of judicial power. Thus the content of law cannot be contingent on the court which hears the action;¹⁹¹
3. The existence, and 'pervading influence' of the uniform common law throughout the nation;¹⁹²
4. The principle, 'at the heart of the legal system embodied in the Constitution' and recognised in *Metwally* that an individual should not be exposed to 'the injustice' of being subjected to simultaneously valid but inconsistent laws;¹⁹³ and
5. The unity deriving from the jurisdiction of the High Court as the final and general appellate tribunal for the nation.¹⁹⁴

As in *Duncan*, Deane repeatedly described these five elements of the text and structure of the Constitution as manifesting the 'inference' of the Constitution, that is, that the Australian Federation established a unitary system of law.¹⁹⁵ The language of underlying doctrines 'manifested' by the text and structure of the Constitution was later employed in Deane and Toohey JJ in their reasoning in *Leeth*.¹⁹⁶

Deane's reliance on 'fundamental concepts' reasoning to develop his implication *from* his vision of the Constitution as establishing a unitary legal

¹⁸⁸ *Breavington* (1988) 169 CLR 41, 120 (emphasis added).

¹⁸⁹ The stages of Deane's analysis in *Breavington*, including these five manifestations of his 'fundamental concepts', are set out in detail in Graeme Hill and Adrienne Stone, 'The Constitutionalisation of the Common Law' (2004) 25 *Adelaide Law Review* 67, 93-4.

¹⁹⁰ *Breavington* (1988) 169 CLR 41, 122. Compare *ibid* 87 (Wilson and Gaudron JJ).

¹⁹¹ *Ibid* 122-3.

¹⁹² *Ibid* 123.

¹⁹³ *Ibid*.

¹⁹⁴ *Ibid* 124.

¹⁹⁵ *Ibid* 121-2.

¹⁹⁶ *Leeth* (1992) 174 CLR 455, 484 (Deane and Toohey JJ).

system, rather than reasoning *for* that proposition is reinforced by Deane's use of s 118 in his analysis.¹⁹⁷ Section 118 provides that:

Full faith and credit shall be given, throughout the Commonwealth, to the laws, the public Acts and records, and the judicial proceedings of every State.

As foreshadowed, it had been Deane who first raised with counsel during oral argument the significance of s 118 to the issues in the case in *Breavington*.¹⁹⁸ Drawing an analogy between giving full faith and credit to 'a person's word' and a judicial judgment, Deane reasoned that a substantive interpretation of s 118 required that the contents of the law be enforceable in another State jurisdiction.¹⁹⁹ This understanding of s 118 would itself have produced the outcome Deane endorsed in *Breavington*, that is, that the Constitution compelled a territorially-based choice of law rule within a unitary legal system. That Deane did not take this path in his analysis confirmed his willingness to engage with general doctrines of the Constitution. However, and particularly in his implied rights cases, this interpretive approach exposed his decisions to the criticism that his reasoning departed too far from the text, turning instead to vague and individualised assumptions as the foundation for his analysis.

In form and substance, Deane's analysis commenced with the general doctrines of the Constitution rather than the terms of s 118. Deane's reference to s 118 in his decision in *Breavington* occurred at the close of his analysis, reinforcing the relative importance of 'fundamental concepts' and specific textual provisions in his analysis. Deane argued that the rule he derived from the general nature of the Constitution:

would have been the position under the provisions of the Constitution (in particular, ss 106, 107 and 108) even if those provisions had not included s 118. The presence of s 118 serves to make that position plain.²⁰⁰

As foreshadowed in *Duncan*, Deane's reasoning did not apply the *expressio unius maxim*. Thus the text of the Constitution, such as s 118, did not displace or restrict the broad implication of a unitary legal system, and the constitutional

¹⁹⁷ On the difference between reasoning 'from' and 'for' different visions of the Australian Federation see Graeme Hill, 'Revisiting *Wakim* and *Hughes*: the Distinct Demands of Federalism' (2002) 13 *Public Law Review* 205, 226.

¹⁹⁸ *Breavington* (1988) 169 CLR 41, 46-7 (during argument).

¹⁹⁹ *Ibid* 129.

²⁰⁰ *Ibid*.

choice of law rule. Rather, the text merely made 'plain' the result derived from Deane's vision of the Australian Federation.

Deane's distinctive reliance on his 'fundamental concepts' reasoning, rather than the content of s 118, was underscored by the different role of s 118 in the reasoning of Wilson and Gaudron JJ. Although reaching very similar conclusions, Wilson and Gaudron JJ, in contrast to Deane, focused exclusively on s 118 as providing the relevant constitutional dimension of the case. Further, while Deane commenced dramatically with his reference to the fundamental nature of the Constitution, and the place of 'the people', Wilson and Gaudron JJ turned to the constitutional context of the case only after a lengthy discussion of the case law on private international law rules.²⁰¹

(ii) *'The people' and the unitary system of law*

In Deane's judgment in *Breavington*, and in the subsequent cases on s 118, 'the people' feature in his analysis in a number of ways.²⁰² Deane linked the existence of a unitary system of law to the intentions of 'the people' in forming the Federation. The connection drawn by Deane between 'the people' and the unitary system was evinced from the opening passage of his judgment in *Breavington*, when Deane affirmed that the Constitution was the 'compact of the people ... to create a new system of law'.²⁰³ Significantly, Deane continued in *Breavington* to affirm his understanding of the legal sovereignty of 'the people', stating that:

the *Australian people*, rather than the past authority of the United Kingdom Parliament [offers] a more acceptable contemporary explanation of the authority of the basic law of the Constitution.²⁰⁴

As foreshadowed, Deane had endorsed the principle that legal sovereignty resided in 'the people' before *Breavington* in 1988. For example, in *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* Deane had queried whether the *Statute of*

²⁰¹ Wilson and Gaudron JJ's constitutional analysis starts ten pages into their judgment: *ibid* 93.

²⁰² Chapter 1 has indicated the role of 'the people' in Deane's reasoning in *Breavington* as an explanation of his understanding of the role of the framers' intentions in constitutional interpretation.

²⁰³ *Breavington* (1988) 169 CLR 41, 120 (emphasis added).

²⁰⁴ *Ibid* 123 (emphasis added).

Westminster 1931 (Imp) had effected a significant change in Australian legal independence.²⁰⁵ The significance of this passage from *Breavington*, however, lies in Deane's connection between the proposition that sovereignty resides in the 'Australian people' and his conclusion that the Constitution effected a 'single nation with a unitary system of law.'²⁰⁶ Although Deane had prioritised the national over the federal in decisions prior to *Breavington*, in this case Deane made explicit the connection between his federal vision, and his understanding of 'the people' as the 'Australian people.' This vision of 'the people', and their role in the Constitution goes some way towards explaining the centralising tendencies Deane exhibited in the cases examined in this chapter and chapter 1.

Although Deane did not examine s 128 in his reasoning in *Breavington*, Deane and Toohey JJ's discussion of that section in *Nationwide News* suggested that Deane saw that provision as reinforcing his vision of 'the people' as 'the people' of Australia. In *Nationwide News* Deane and Toohey JJ remarked that through s 128:

the Constitution reserves to the people of the Commonwealth the ultimate power of governmental control. ... While one can point to qualifications and exceptions, such as those concerned with the protection of the position of the less populous States, the general effect of the Constitution is, ... that ... *all citizens of the Commonwealth who are not under some special disability are entitled to share equally in the exercise of those ultimate powers of governmental control.*²⁰⁷

In this way, Deane and Toohey JJ in *Nationwide News* argued that through the subsequent act of sovereign power, through amending the Constitution, the people acted as the 'people of the Commonwealth.'

However, Deane and Toohey JJ's emphasis on the national components of s 128 in *Nationwide News* has not been uniformly endorsed. For example, Gummow J in *McGinty v Western Australia*,²⁰⁸ drew particular attention to s 128 as supporting a federalised understanding of popular sovereignty. In *McGinty* the Court held that neither the Commonwealth Constitution nor the Western

²⁰⁵ (1985) 159 CLR 351, 442.

²⁰⁶ *Stevens v Head* (1993) 176 CLR 433, 461 (emphasis added).

²⁰⁷ *Nationwide News* (1992) 177 CLR 1, 71-2 (emphasis added).

²⁰⁸ (1996) 186 CLR 140.

Australian Constitution contained an implied guarantee of electoral equality.²⁰⁹ Gummow J assessed that question from the perspective of the *federal* basis of representative government. For example Gummow J cited the role of the Senate and the manner of election of federal representatives as establishing an important federal component to the principle of representative government as it was embodied in the Constitution.²¹⁰ Most significantly for present purposes, however, Gummow J also emphasised that:

Broad statements as to the reposition of 'sovereignty' in 'the people' of Australia, if they are to be given legal rather than popular or political meaning, must be understood in light of the federal considerations contained in s 128.²¹¹

Section 128 indeed imposes many limitations on the ability of 'the people' to alter the *federal* dimensions of the Constitution. For example, Gummow J pointed in *McGinty* to the requirements under s 128 for diminishing proportionate representation of a State, or altering the limits of a State.²¹² In addition, Gummow J emphasised the 'negative power' under s 128, permitting a majority of electors in three States to block a proposal which is accepted by a majority of the nation's electors.²¹³ These requirements impose significant limitations on the sovereignty of 'the people of Australia' to influence the federal nature of the Constitution.

These federal limits on the power of 'the people of Australia' under s 128 would seem to require attention if support is sought for a unitary legal system from an understanding of the constitutional concept of 'the people'. The extra-curial writings of Gummow J (writing in support of the unitary legal system concept) may indicate that recognition of the federal dimension of the concept of 'the people' does not inevitably point against a unitary legal system model.²¹⁴ However, as the constitutional text itself does not provide unequivocal support for the proposition that 'the people' means 'the people of Australia' in all circumstances, Deane's decisions must be regarded as manifesting his decision

²⁰⁹ For further comment on the significance of this case see Greg Carne, 'Representing Democracy or Reinforcing Inequality: Electoral Distribution and *McGinty v Western Australia*' (1997) 25 *Federal Law Review* 351.

²¹⁰ *McGinty* (1996) 186 CLR 140, 275.

²¹¹ *Ibid.*

²¹² *Ibid.*

²¹³ *Ibid.*

²¹⁴ See, for example, W M C Gummow, 'Full Faith and Credit in Three Federations' (1995) 46 *South Carolina Law Review* 979.

to preference 'the people of Australia' over the potential federal limits of the concept of 'the people'.

(iii) 'The people' and the content of Deane's choice of law rule

The second way in which Deane turned to 'the people' in *Breavington* was through his comparison between s 118 and s 109. According to Deane, both sections were fundamental guarantees, protecting the citizen from the injustice of facing the demands of two valid yet inconsistent legal commands.²¹⁵ In *Breavington* Deane explicitly incorporated his own previous statements in *Metwally*, in particular, his views that the Federation must be regarded as a federation of 'the people', and so the Constitution's terms must be interpreted for their benefit.²¹⁶

As he had in *Metwally*, Deane's decision in *Breavington* emphasised that the Constitution served the interests of the citizens by strengthening the judicial protection of their rights. Accordingly, Deane regarded the choice of law issue as pivotal to the ability of the people to predict the rules and responsibilities that would govern a particular set of circumstances. For Deane the 'guarantee' of the rule of law under the Constitution, made plain by the terms of s 118, required that the Constitution itself hold the answer to the question of what law would apply to any given dispute within the Federation.²¹⁷

As Mason CJ's reasoning bears out, however, it was possible to endorse a vision of the Australian federal system as incorporating a unitary system of law without endorsing Deane's view that the Constitution mandated a territorially-based the choice of law rule. Under Mason CJ's solution to the choice of law dilemma, it was Parliament, rather than the Court (as interpreter of the Constitution) that determined the content of the rule. Thus, as in *Metwally*, Mason CJ deferred to the principle of parliamentary supremacy in constitutional adjudication, stating that it was:

²¹⁵ *Street* (1989) 168 CLR 461, 522.

²¹⁶ *Breavington* (1988) 169 CLR 41, 123.

²¹⁷ *Ibid.*

preferable that Parliament should provide a solution by an exercise of legislative power ... than that the Court should spell out a rigid and inflexible approach from the language of s 118.²¹⁸

Deane's reasoning in both *Metwally* and *Breavington* did not display this degree of deference. For Deane, the Constitution required that the individual's rule of law interest could not be altered by their elected representatives. In *Breavington* Deane reasoned that only a territorially-based rule, fixed by the 'fundamental concepts' enshrined in the Constitution, could secure the predictability and certainty necessary to protect the people's rights and interests. In this way the Court assumed the role of protector of the rights of 'the people'. This is a feature of Deane's jurisprudence that extended beyond his rule of law decisions in *Metwally* and *Breavington*. The legitimacy of Deane's assumption of that role, based on Deane's unique concept of the sovereignty of 'the people', is a question for consideration in later chapters of this thesis.

Conclusion

An examination of Deane's federal jurisprudence reveals a judge committed to national more than federal considerations. Where Deane's reasoning departed in outcome or tenor from that of other members of the Court in the cases considered in this chapter, the source of that difference was invariably Deane's understanding of the constitutional significance of 'the people'.

This chapter has examined two further elements of Deane's understanding of federalism and the Constitution. First, the cases in this chapter highlight the connection between Deane's preference for national solutions and his vision of the 'people of Australia'. Second, Deane's reasoning evinced the role of 'fundamental concepts' in his interpretive philosophy. Under this approach, underlying doctrines were illustrated, demonstrated or manifested by the text, and may provide the foundation for constitutional implications. Both elements of Deane's decisions in this chapter introduce a significant degree of judicial choice into constitutional interpretation, whether by framing the concept of 'the

²¹⁸ Ibid 83.

people' to contain a national element, or articulating of the content of the Constitution's 'fundamental concepts'.

Deane's reasoning in *Metwally*, *Hematite* and *Breavington* also highlighted the strength of Deane's commitment to the judicial protection of the rights of 'the people'. The next chapter continues this discussion, exploring Deane's decisions on the separation of powers principle.

Chapter 3 THE SEPARATION OF FEDERAL JUDICIAL POWER

Introduction

The separation of federal legislative and executive power from judicial power has long been acknowledged as a fundamental doctrine upon which the Constitution is based.¹ This doctrine is reflected in both the structural division of federal power in the first three Chapters of the Constitution and in the language of s 71, through its vesting of federal judicial power in 'courts'.

In *R v Kirby; Ex parte Boilermakers' Society of Australia*² the Court confirmed that the separation of federal judicial power under the Constitution had two important consequences, or 'limbs'.³ The 'first limb' of the separation doctrine was that *only* 'courts' designated in Ch III may exercise federal judicial power. This principle has never been challenged.⁴ In contrast, the second limb of the separation of powers doctrine has been received 'equivocally'.⁵ The 'second limb' precluded a federal court from exercising non-judicial functions.⁶ Its

¹ *New South Wales v Commonwealth* ('Wheat Case') (1915) 20 CLR 54, 88 (Isaacs J). *Nationwide News* (1992) 177 CLR 1, 70 (Deane and Toohey JJ). For an overview of the development of the doctrine in Australian jurisprudence, see Fiona Wheeler, 'Separation of Powers' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 618.

² (1956) 94 CLR 254 ('Boilermakers' Case'). Affirmed by the Privy Council in *Attorney-General of the Commonwealth of Australia v The Queen* [1957] AC 288.

³ On the significance of the *Boilermakers' Case*, and the two limbs of the separation doctrine, see Fiona Wheeler, 'The Boilermakers Case' in H. P. Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003) 160.

⁴ The strictness of the application of the first limb of the separation doctrine has been tempered slightly by the recognition of a range of exceptions, including for military justice tribunals. The Court has also accepted that, within strictly confined limits, federal judicial power can be delegated to non-judicial bodies: *Harris v Caladine* (1991) 172 CLR 84. Although this was a decision in which Deane participated, it is not explored in this thesis.

⁵ Peter Gerangelos, 'Interpretational Methodology in Separation of Powers Jurisprudence: the Formalist/Functionalist Debate' (2005) 8 *Constitutional Law and Policy Review* 1, 5. See further *R v Joske; Ex parte Shop Distributive and Allied Employees' Association* (1976) 130 CLR 87, 90 (Barwick CJ), 102 (Mason J). Note also Sir Anthony Mason, 'A New Perspective on Separation of Powers' (1996) 82 *Canberra Bulletin of Public Administration* 1, 5-6.

⁶ For commentary this limb, see Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 166-70, 212-8.

purpose was to immunise the federal judiciary from the influence of governmental policy.⁷ Combined, the two limbs of the separation doctrine ensure the independent exercise of judicial power at the federal level; guaranteeing a key protection of individual liberty and an important element of the rule of law.⁸

Part 1 of this chapter examines Deane's implication of rights from the first limb of the separation of powers principle. This part isolates three important topics from this aspect of Deane's jurisprudence: the guarantee of 'judicial process', culminating in *Dietrich*; the question of Bills of Attainder and retrospective criminal laws in *Polyukhovich v Commonwealth*;⁹ and Deane's restriction of the jurisdiction of military tribunals, consistent with his vision of the right of military personnel to be tried for federal offences in Ch III courts, in *Re Tracey*; *Ex parte Ryan*.¹⁰ These cases illustrate Deane's consistent use of his 'fundamental concepts' reasoning to strengthen the constitutional protection of individual liberties. Despite these similarities, however, these cases also reflect the considerable diversity of Deane's jurisprudence: ranging from the modest and compelling implication of procedural judicial process guarantees to his overreaching and unsustainable guarantee against federal retrospective criminal laws in *Polyukhovich*.

Part 2 turns to Deane's thoughts on the second limb of the separation doctrine, through his identification of the limits of the designated persona exception to that limb. In *Grollo v Palmer*¹¹ the last of three joint judgments given by Deane on this topic, Deane participated in a joint majority judgment which upheld the

⁷ See discussion in George Winterton, 'The Separation of Judicial Power as an Implied Bill of Rights' in G Lindell (ed) *Future Directions in Australian Constitutional Law* (1994) 185, 188. Ayres provides a fascinating 'behind the scenes' perspective on the *Boilermakers' Case*, and the purpose of the second limb of the separation principle. Note in particular the extract from a letter written by Sir Owen Dixon to Lord Simonds discussing the imminent decision by the Privy Council on the appeal in the case and expressing Sir Owen's concern that the melding of judicial and non-judicial power could lead to 'fatal consequences' and undermine the reputation of the judiciary. Philip Ayres, *Owen Dixon* (2003) 255 (emphasis added).

⁸ See, for example, Andrew Inglis Clark, 'The Supremacy of the Judiciary under the Constitution of the United States, and under the Constitution of the Commonwealth of Australia' (1903) XVII *Harvard Law Review* 1, 19.

⁹ (1991) 172 CLR 501 ('*Polyukhovich*').

¹⁰ (1989) 166 CLR 501 ('*Re Tracey*'). This case was the first of a trilogy of cases on the military justice exception to the separation of federal judicial power delivered while Deane was a member of the Court. The two further cases were *Re Nolan*; *Ex parte Young* (1991) 172 CLR 460 ('*Re Nolan*') and *Re Tyler*; *Ex parte Foley* (1994) 181 CLR 18 ('*Re Tyler*').

¹¹ (1995) 184 CLR 348 ('*Grollo*').

use of judges, in their personal capacity, to authorise wire-taps. The *Grollo* decision endorsed a broad exception to the second limb of the separation of powers principle, informed by precedent and an assessment of policy considerations. At first glance, Deane's designated person exception appeared inconsistent with his strict enforcement of the separation of powers principle in his military tribunal decisions. As Deane's only decisions on the *persona designata* exception were joint judgments, the question might be asked why Deane's understanding of the second limb of the separation of powers doctrine warrants more than a passing comment in this thesis, particularly when other significant decisions on Ch III, such as *Chu Kheng Lim v Minister for Immigration*¹² and *Brandy v Human Rights and Equal Opportunity Commission*¹³ are not a focus of this chapter.¹⁴

An explanation of this treatment of the designated person exception in this chapter lies in four factors. First, although less certain in its doctrinal foundation, the second limb of the separation doctrine remains an established element of the Australian separation of powers doctrine. Any discussion of Deane and the separation of powers doctrine would be one-sided without a consideration of his view of this principle. Deane's decisions on the designated person exceptions must therefore be considered. Second, these cases are of historical significance as it has been this exception, and the incompatibility doctrine developed by Deane and other judges in this area, that has been a fertile area in Ch III jurisprudence since Deane's departure from the Court.¹⁵ Third, as a series of three joint judgments, these cases are a reminder of the challenges facing the identification of the role of joint judgments as accurate signals of an individual judge's constitutional philosophy. Fourth, the *Grollo* joint judgment contained significant reflections on the importance of judicial method, and the personal qualities of judges, as guarantees of individual rights. This was a view of judges and the judicial process that stood at the heart of

¹² (1992) 176 CLR 1 ('*Chu Kheng Lim*'). For further examination of this case, and its significance in the Mason Court's development of Ch III rights, see George Winterton, 'The Separation of Judicial Power as an Implied Bill of Rights' in G Lindell (ed) *Future Directions in Australian Constitutional Law* (1994) 185.

¹³ (1995) 183 CLR 245.

¹⁴ Deane's decision in *Leeth* (with Toohey J) was also an important indicator of his attitude towards rights flowing from Ch III. However, the Ch III aspects of *Leeth* are discussed below in chapter 5 as part of the analysis of their reasoning in that case.

¹⁵ See, in particular, *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

Deane's constitutional philosophy. For these reasons, Deane's decisions on the second limb of the separation principle are a significant resource regarding Deane's constitutional vision.

A Part 1: Rights implied from the separation of powers principle

Chapter 2 affirmed the significance of Deane's swearing-in speech as a signal of his vision of federal relationships, that is, that the Federation was a 'Federation of *the people* not the States'.¹⁶ To a greater extent, Deane's swearing-in speech also encapsulated the heart of his vision for Ch III as a source of implied rights. Thus, in his speech Deane explained that:

the grant of judicial power by the people was subject to what I see as *fundamental constitutional guarantees*, namely, that the power granted must primarily be exercised by an *independent judiciary* and that those exercising the power must *act judicially*.¹⁷

Deane's High Court jurisprudence bears out this statement, manifesting guarantees falling precisely into the two categories outlined in his speech: first, a guarantee that federal judicial power will be exercised by '*courts*'; second, a guarantee as to the *manner* of exercise of that power.

Deane's guarantee that a Ch III court exercise judicial power '*judicially*' was the most novel of his two guarantees in 1982.¹⁸ Recognised by the Court as a constitutional guarantee of natural justice in 1992, it was Deane, along with Gaudron J, who consistently propounded this guarantee.¹⁹ Deane's early

¹⁶ Transcript of the Ceremonial Sitting of the Occasion of the Swearing-in of the Honourable Mr Justice Deane as a Justice of the High Court of Australia at Canberra, Tuesday 27 July 1982, 18 (emphasis added).

¹⁷ Ibid (emphasis added).

¹⁸ Although note that in 1910, Harrison Moore had suggested that Parliament might be prohibited from interfering with judicial administration, including requiring a court 'to act in a non-judicial way.' WH Moore, *The Constitution of the Commonwealth of Australia* (2nd ed, 1910) 323. The early commentaries on Ch III, including that of Moore, are examined in Fiona Wheeler, 'Original Intent and the Doctrine of Separation of Powers in Australia' (1996) 7 *Public Law Review* 96.

¹⁹ On the development of this guarantee, see, for example: Christine Parker, 'Protection of Judicial Process as an Implied Constitutional Principle' (1994) 16 *Adelaide Law Review* 341; Michael McHugh, 'Does Chapter III of the Constitution Protect Substantive as well as Procedural Rights?' (2001) 21 *Australian Bar Review* 235 and Fiona Wheeler, 'The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia' (1997) 23 *Monash University Law Review* 248. For a contemporary perspective on the influence of Deane

decisions in *Australian Builders Construction Employees and Builders Labourers' Federation v Commonwealth*,²⁰ and *Hammond v Commonwealth*²¹ and his emotive, and unusual, statement issued in *Commonwealth v Brian Toohey*,²² demonstrate both Deane's coherence on the topic of implied rights from Ch III and provide the context for evaluating Deane's later Ch III jurisprudence. However, it was not until his decision in *Polyukhovich*, in 1991, that he articulated the principles through which his judicial process guarantee was derived. Deane's judgment in *Polyukhovich* therefore provides the starting point for this analysis.

1 Deane's Judicial Process Guarantee

(a) 'Fundamental concepts' reasoning and Deane's judicial process guarantee

As in *Breavington*, Deane's analysis in *Polyukhovich* commenced with a discussion of the 'fundamental concept' at issue in the case.²³ Thus Deane did not begin by examining precedent or the language of s 71, but rather the purpose and function of the separation of powers principle. In *Polyukhovich* Deane quoted extensively from Blackstone's Commentaries to underline the traditional understanding of the separation of powers principle as the 'one main preservative of the public liberty'.²⁴ According to Deane, it was upon this principle, with its rights-protective purpose, that the Constitution was 'structured'.²⁵ It is unlikely that other members of the Mason Court would have disagreed with this statement of the purpose of the separation of powers in *Polyukhovich*, or Deane's recognition that the separation of federal judicial power was implicit in the structure of the Constitution. However, the priority

and Gaudron JJ in this area see Fiona Wheeler, 'Due Process, Judicial Power and Chapter III in the New High Court' (2004) 32 *Federal Law Review* 205.

²⁰ (1981) 37 ALR 469 ('BLF').

²¹ (1982) 152 CLR 188 ('Hammond').

²² *Commonwealth v Brian Toohey* (Unreported, High Court of Australia, Deane J, 8 November 1988).

²³ Compare Deane's opening remarks in *Breavington* (1988) 169 CLR 41, 120-1. Discussed above chapter 2 n 188.

²⁴ *Polyukhovich* (1991) 172 CLR 501, 606. Deane's discussion of the separation principle in *Polyukhovich*, including his citation from Blackstone, built on his analysis in *Re Tracey* (1988) 166 CLR 518, 580. Deane's reasoning in *Re Tracey* is discussed later in this part.

²⁵ *Polyukhovich* (1991) 172 CLR 501, 606. With this language, Deane in *Re Tracey* and in *Polyukhovich* anticipated his later statement that the Constitution was structured upon three fundamental doctrines, including the separation of powers principle. See *Nationwide News* (1992) 177 CLR 1, 69-70 (Deane and Toohey JJ).

placed by Deane on the purpose of the separation of powers in *Polyukhovich* had a dramatic and distinctive impact on the scope and operation of rights that Deane implied from that principle in *Polyukhovich*, and throughout his Ch III jurisprudence.²⁶

In *Polyukhovich*, Deane derived his judicial process guarantee from the first limb of the Constitution's separation of powers doctrine.²⁷ After affirming the purpose of the separation of powers doctrine as an important guarantee of liberty, Deane argued that:

to construe Ch III of the Constitution as being concerned only with labels and as requiring no more than that the repository of judicial power be called a court would be to convert it into a mockery, rather than a reflection, of the doctrine of separation of powers.²⁸

According to Deane, if the Court was to give effect to the purpose of the first limb of the separation doctrine, federal judicial power must be vested in an institution which is a 'court' *in substance*. Thus, the Constitution's separation of powers doctrine required that federal judicial power be exercised by a Court according to 'the essential attributes of the curial process.'²⁹ In *Polyukhovich*, Deane referred to the Constitution's protection of the 'traditional judicial procedures, remedies and methodology'³⁰ but did not specifically identify the content of these 'essential attributes'.

A significant feature of Deane's analysis in *Polyukhovich* was that, unlike his 'fundamental concepts' reasoning in *Duncan* or *Breavington*, Deane did not turn directly to 'the people' in support of his implication.³¹ Indeed, with the exception of his swearing-in speech, Deane's implication of rights from the first limb of the separation principle was notable for its lack of references to 'the people'. This distinctive feature of Deane's Ch III jurisprudence may be a

²⁶ Wheeler has examined the significance of a purposive approach to the separation of powers doctrine, and its importance for Deane's implication of judicial process rights from Ch III, in Fiona Wheeler, 'The Rise and Rise of Judicial Power under Chapter III of the Constitution: a Decade in Overview' (2001) 20 *Australian Bar Review* 283 and Fiona Wheeler, 'Due Process, Judicial Power and Chapter III in the New High Court' (2004) 32 *Federal Law Review* 205.

²⁷ See further discussion in Wheeler (2001) above n 26, 250-1 and (2004) above n 26, 209.

²⁸ *Polyukhovich* (1991) 172 CLR 501, 607 (citation omitted). Deane's use of the language 'mockery' in *Polyukhovich* was evocative his earlier statement that s 80 should not be interpreted as a 'potentially mischievous mockery' in *Kingswell* (1985) 159 CLR 264, 307.

²⁹ *Polyukhovich* (1991) 172 CLR 501, 607 (emphasis added).

³⁰ *Ibid* 607.

³¹ Compare *Duncan* (1983) 158 CLR 535, 589 and *Breavington* (1988) 169 CLR 41, 120-1.

response to the pedigree of rights-sensitive interpretations of the 'fundamental concepts' involved in these cases. Unlike the orthodox vision of federalism, the separation of federal judicial power had a long tradition as an important rights guarantee before Deane's appointment to the Court. Thus, in his Ch III jurisprudence Deane may have considered it unnecessary to turn to the comparatively untested concept of 'the people' to support his implication of constitutional rights from Ch III.

Deane's use of 'fundamental concepts' reasoning to derive a judicial process guarantee was compelling. Deane's judicial process guarantee derived from a substantive interpretation of s 71, consistent with the purpose of the first limb of the separation principle.³² As Justice Michael McHugh has observed extra-curially:

It is, after all, a 'short step' from the constitutional requirement that judicial power can only be vested in the courts identified in s 71 to the conclusion that Ch III guarantees the procedural rights *necessary* for the exercise of that power.³³

The logical path to determine the substantive meaning of s 71, and the nature of a 'court' was, as Deane reasoned, to turn to the 'general doctrine', or 'fundamental concept' of the separation principle.³⁴ Further, as Wheeler has observed, Deane's approach provided a clear principle for identifying the limits of the judicial process guarantee, that is, according to those 'attributes' of a Court required to effect the purpose of the separation principle.³⁵

The strength of Deane's derivation of the judicial process guarantee from the first limb of the separation principle is highlighted by comparing the approaches of Deane and Gaudron JJ on this topic. Like Deane, Gaudron J was a consistent proponent of a constitutional guarantee of judicial process.³⁶ As

³² See further Fiona Wheeler, 'The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia' (1997) 23 *Monash University Law Review* 248, 254.

³³ Michael McHugh, 'Does Chapter III of the Constitution Protect Substantive as well as Procedural Rights?' (2001) 21 *Australian Bar Review* 235, 238. McHugh's reference to a 'short step' was a quotation from Leslie Zines, 'A Judicially Created Bill of Rights?' (1994) 16 *Sydney Law Review* 166, 168.

³⁴ See discussion in Keith Mason, 'What is Wrong with Top-Down Legal Reasoning?' (2004) 78 *Australian Law Journal* 574, 582.

³⁵ Fiona Wheeler, 'Due Process, Judicial Power and Chapter III in the New High Court' (2004) 32 *Federal Law Review* 205, 210-11.

³⁶ For Gaudron J's exploration of the judicial process guarantee during Deane's period on the Court, see *Harris v Caladine* (1991) 172 CLR 84, 150-2; *Re Nolan* (1991) 172 CLR 460, 496; *Polyukhovich* (1991) 172 CLR 501, 703-4 and *Leeth* (1992) 174 CLR 455, 502. Developments in Gaudron J's approach after this period are examined in Wheeler, above n 35.

Wheeler has indicated, according to Gaudron J the judicial process guarantee flowed from the second limb of the separation of powers principle.³⁷ Thus Gaudron J argued that the second limb of the separation principle required that the Commonwealth could only confer 'judicial power' on a Ch III court. As an essential feature of judicial power, the absence of judicial process from the exercise of a function meant that such a power was not judicial power, and therefore could not be exercised by a Ch III court.³⁸ Under Gaudron J's approach, therefore, the Court was required to engage with the difficult question of the meaning of 'judicial power' in order to frame the content of her judicial process guarantee.³⁹ In contrast, Deane's method of implication avoided this task, linking his judicial process guarantee instead to the limb of the separation principle that has never been challenged.⁴⁰

Given that many of Deane's decisions employing 'fundamental concepts' reasoning have been criticised as impermissibly extending the discretion of the Court in the interpretation of the Constitution, it is significant that Deane's procedural due process guarantee was an aspect of his implied rights jurisprudence which has been accepted by the Court.⁴¹ Indeed, in the passage from Justice Michael McHugh's extra-curial address quoted above, it is apparent that a fierce critic of Deane's 'fundamental concepts' reasoning in the free speech cases, endorsed Deane's interpretive approach in this context.⁴² It is ironic therefore that this illustration of Deane's compelling application of 'fundamental concepts' reasoning is found in *Polyukhovich*, a case that also exhibited some of Deane's least persuasive analysis in his attempt to extend Ch III protection to prohibit retrospective criminal laws. Before pursuing this aspect of *Polyukhovich*, however, further remarks must be made on the content of Deane's judicial process guarantee. The next stage of this discussion returns

³⁷ Wheeler, above n 35, 210-11.

³⁸ *Polyukhovich* (1991) 172 CLR 501, 703-4.

³⁹ See further Wheeler above n 35, 210-11.

⁴⁰ Compare Sir Anthony Mason's reflections flowing his retirement from the Court regarding the continuing value of the second limb in Sir Anthony Mason, 'A New Perspective on Separation of Powers' (1996) 82 *Canberra Bulletin of Public Administration* 1, 2.

⁴¹ See Mason CJ, Dawson and McHugh JJ's suggestion that a procedural due process guarantee, a guarantee of 'natural justice', may be derived from Ch III, in *Leeth* (1992) 174 CLR 455, 470. See also Brennan, Deane and Dawson JJ's statement that the Constitution guaranteed that judicial power may not be exercised 'inconsistent with the essential character of a court or with the nature of judicial power.' *Chu Kheng Lim* (1992) 176 CLR 1, 27.

⁴² Michael McHugh, 'Does Chapter III of the Constitution Protect Substantive as well as Procedural Rights?' (2001) 21 *Australian Bar Review* 235, 238. See above n 33.

to Deane's earliest decisions on the judicial process guarantee, in *BLF* and *Hammond*.

(b) 'Essential features': the content of Deane's judicial process guarantee

Deane's decisions in *BLF* and *Hammond* in the 1980s confirm Deane's long standing interest in rights implied from Ch III. Indeed, *BLF* was a decision delivered by Deane while a member of the Federal Court. Through their facts, these two early cases provide useful illustrations of Deane's vision of the scope and operation of his judicial process guarantee.

(i) BLF and Hammond: the impact of Royal Commissions on trials in Courts exercising federal judicial power

BLF and *Hammond* arose from urgent applications for injunctions to prevent continued investigation by, and public proceedings of, State and Federal Royal Commissions. In *BLF*, deregistration proceedings had been commenced against the Builders Labourers' Federation ('BLF') in the Federal Court.

Simultaneously, a dual Victorian and Commonwealth Royal Commission was investigating whether members of the BLF had engaged in unlawful conduct. This conduct inevitably had a bearing on the pending deregistration proceedings. The BLF argued in the Federal Court, before Bowen CJ, Deane and Evatt JJ, that the proceedings of the Royal Commission constituted an interference with the exercise of federal judicial power in the deregistration proceedings.

Hammond was heard by the High Court, comprising Gibbs CJ, Mason, Murphy, Brennan and Deane JJ, two weeks after Deane's swearing-in as a Justice of that Court. Hammond was charged with offences under the *Crimes Act 1914* (Cth) relating to the mishandling of meat for export. A Joint Royal Commission had also been established to investigate allegations of the mishandling of meat for export and human consumption in Victoria. The Commissioner called Hammond to give evidence about events and activities which were the subject of the federal criminal proceedings. In both instances Deane held that the

Commissioners could not proceed in a manner that adversely interfered with the exercise of federal judicial power by the Court. Two features of Deane's reasoning in these cases are of particular interest.

First, Deane was the only member of the Court in each case to refer, albeit fleetingly, to the role that Ch III, and the separation of powers principle, played in limiting the power of the Royal Commissions. In *BLF* the Commonwealth argued that the *Royal Commissions Act 1902* (Cth) specifically authorised the Federal Royal Commission to act in a manner that would ordinarily constitute contempt of court. Deane, with whom Bowen CJ and Evatt J concurred, rejected this interpretation of the Commonwealth Act, but added:

If, contrary to my view, the Royal Commissions Act 1902 did purportedly authorize a Royal Commissioner to interfere with the course of justice in a Ch III court in a manner which would otherwise constitute contempt of court, *a question would arise as to the legislative competence of the Commonwealth Parliament to enact a law having that effect.*⁴³

Thus, in Deane's view, Ch III guaranteed that a Court exercising federal judicial power must act 'judicially.' Accordingly, certain aspects of the manner of exercise of federal judicial power might be protected from interference by the Federal Executive. Although Deane's reasoning in *BLF* contained no further reference to the constitutional protection of judicial process, his comments in this passage, made in 1981, mirrored his later remarks at his swearing-in speech as a Justice of the High Court.

Deane confirmed his understanding of the guarantees flowing from the Constitution's separation of powers in his dissenting judgment in *Hammond*. Emphasising that the Victorian County Court hearing the federal charges against Hammond was exercising federal judicial power pursuant to s 71, Deane remarked:

It is, in my view, clear that neither the Parliament nor the Executive Government of the Commonwealth or of a State is competent to prevent or prejudice the judicial exercise by a court of part of the judicial power of the Commonwealth by the type of interference with the due administration of justice in a particular case which would ordinarily constitute contempt.⁴⁴

⁴³ *BLF* (1981) 37 ALR 470, 477 (emphasis added).

⁴⁴ *Hammond* (1982) 152 CLR 188, 205-6.

As Zines has noted, Deane's emphasis in *BLF* and *Hammond* on whether the Royal Commissions constituted an interference with the 'due administration of justice', provided a 'test for determining the limits on legislative power arising from Chapter III.'⁴⁵ In this way, these early decisions articulated features of the guarantee which would later be accepted by other members of the Court in cases such as *Leeth*⁴⁶ and *Chu Kheng Lim*.⁴⁷

In *Hammond* Deane was alone in raising s 71 as the source of this limitation on legislative and executive power. It is true that Murphy and Brennan JJ in *Hammond* referred to the constitutional dimension to the case. Justice Murphy, for instance, developed his thinking on s 80, noting that it would be inconsistent with Hammond's right to trial by jury that 'he now be subjected to interrogation by the executive government or that his trial be prejudiced in any other manner.'⁴⁸ Brennan J's reference to Ch III was less determinate. Thus Brennan J left open the question whether the Constitution would permit Parliament to deprive Hammond of his common law privilege against self-incrimination.⁴⁹ As in *BLF*, Deane's emphasis on the separation of powers principle and s 71 confirmed the distinctiveness of his vision of Ch III as incorporating a judicial process guarantee.

The second significant feature of Deane's analysis in *BLF* and *Hammond* was his understanding of the requirements of the fair exercise of federal judicial power. The Court in *Hammond* unanimously held that it was inconsistent with the conduct of Hammond's criminal trial for him to be required to give evidence before the Royal Commission. However, Gibbs CJ, Mason, Murphy and Brennan JJ, held that the continued conduct of the Commission, including the publication of its report, did not interfere with the fairness of Hammond's trial. Gibbs CJ, for instance, considered the risk to Hammond posed by the publication of the Commissioner's report, balanced against the public interest

⁴⁵ Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 204.

⁴⁶ *Leeth* (1992) 174 CLR 455, 470.

⁴⁷ *Chu Kheng Lim* (1992) 176 CLR 1, 27.

⁴⁸ *Hammond* (1982) 152 CLR 188, 201.

⁴⁹ *Ibid* 203. Kennett drew attention to Brennan J's judgment in *Hammond* as a suggested source of rights from Ch III, but interestingly does not mention Deane's analysis: Geoffrey Kennett, 'Individual Rights, the High Court and the Constitution' (1994) 19 *Melbourne University Law Review* 581, 591. However, Deane's analysis is discussed in Leslie Zines, above n 45, 204.

served by the investigation, was not sufficiently great to require a delay in the release of the Commissioner's report.⁵⁰

The difference between Deane's dissenting judgment in *Hammond* and that of the majority judges lay in the importance Deane placed on the separation principle.⁵¹ Deane's starting point was his belief that a 'fundamental' element of the administration of criminal justice was the principle that a criminal defendant will not be subjected to a parallel inquisitorial inquiry related to the subject of their trial.⁵² Accordingly, Deane argued that 'ordinary considerations of justice and fairness'⁵³ required that the Commissioner be restrained from further questioning Hammond, and from reporting his findings, until after the conclusion of his criminal trial.

Similarly, in *BLF* Deane engaged in 'weighing'⁵⁴ the conflicting public interests. In a passage evoking Deane's later views on the importance of Commonwealth and State co-operation, in *BLF* Deane stated that the '*very fact that the Royal Commissions were established by co-operative action*' between the Commonwealth and Victorian governments underlined the significance of the public interest protected by the investigations.⁵⁵ Although Deane acknowledged the 'more than ordinarily difficult task'⁵⁶ required in weighing the conflicting interests in *BLF*, he found that the interests of justice were paramount. As Deane regarded the ongoing investigations as an interference with the fairness of the deregistration proceedings, Deane ordered that the Commission cease its investigation until the finalisation of those proceedings.⁵⁷

Deane's willingness to protect the integrity of the exercise of federal judicial power from Executive interference was later dramatically evinced by Deane's

⁵⁰ *Hammond* (1982) 152 CLR 188, 199.

⁵¹ *Ibid* 205.

⁵² *Ibid* 206.

⁵³ *Ibid* 208.

⁵⁴ *BLF* (1981) 37 ALR 470, 476 (emphasis added).

⁵⁵ *Ibid* (emphasis added).

⁵⁶ *Ibid*.

⁵⁷ *Ibid*.

response to the unusual incident arising in 1988 from litigation in *Commonwealth v Brian Toohey*.⁵⁸

(ii) Commonwealth v Brian Toohey: Ch III guarantees of open court and judicial independence

In *Commonwealth v Brian Toohey* the Commonwealth sought an urgent injunction to prevent the publication by the media of a security agent's identity and location.⁵⁹ After the completion of proceedings, Deane was informed that a member of the Commonwealth Attorney-General's Department had recorded the names of individuals seated in the public gallery. Deane considered that this incident was a 'cause for serious concern'⁶⁰ and called a special sitting of the Court. Satisfied by the Commonwealth's explanation of its conduct provided at that hearing, Deane decided that no further action against the Commonwealth was required. However, he issued a strongly worded statement defending the independence of the federal judiciary.⁶¹ As may be expected in light of the media interest in the original case, combined with the tenor of Deane's remarks, Deane's ASIS Secrets Case Statement attracted considerable attention, and support, from the media.⁶²

Deane's ASIS Secrets Case Statement spoke to his constitutional vision on many levels. It commenced:

The Constitution establishes this Court as the ultimate repository of national judicial power. As a general rule the Court's exercise of that judicial power is in public sittings to which members of the public are admitted as of course and, subject to the directions of the Court, as of right. One reason for that approach to the exercise of judicial power is that open and public administration of justice by the

⁵⁸ *Commonwealth v Brian Toohey* (Unreported, High Court of Australia, Deane J, 8 November 1988).

⁵⁹ For a more detailed discussion of the events leading to the issue of Deane's statement, and partial quotations from that statement see Rebecca Craske, 'Open Court' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 511. The orders in this case, and Deane's subsequent statement are reproduced in full in 'Orders in ASIS Secrets case' (1988) 19 *Legal Reporter* 6.

⁶⁰ 'Orders in ASIS Secrets case' (1988) 19 *Legal Reporter* 6, 6.

⁶¹ Henceforth 'ASIS Secrets Case Statement'.

⁶² See, for example, Bronwyn Young, 'Judge calls special sitting over spy case', *Australian Financial Review* 22 November 1988, 1 and Bronwyn Young, 'Govt forced to apologise over name-taking incident', *Australian Financial Review* 23 November 1988, 5. Note also the comment in the *Australian Law Journal*, published as 'The Right of Freedom of Public Access to Court Hearings' (1989) 63 *Australian Law Journal* 155.

country's final Court is a safeguard of judicial independence and conducive to public trust.⁶³

The concept of 'public trust' in the institutions of government would later become a prominent theme in Deane's jurisprudence, particularly in his decisions on the implied freedom of political communication.⁶⁴

Deane continued his statement by remarking that the interrogation of the public regarding their attendance in Court was a '*qualification of that right and could be seen as a discouragement of its exercise.*'⁶⁵ The involvement of the Executive in this incident reinforced for Deane:

the importance of ensuring that *the right* of members of the public to attend the public sittings of the Court be not compromised and that *the independence of the court from the control of the Executive Government in the exercise of judicial power be vigilantly safeguarded and publicly proclaimed.*⁶⁶

These extracts capture the tone of Deane's statement. Of particular interest for present purposes was Deane's reference to the 'right' of public access to the Court. In 1988, rights-discourse was seldom used in the context of the Australian Constitution.⁶⁷ However, in that year, in *Davis v Commonwealth* and *Richardson* Deane had held federal legislation invalid on the basis that it was a 'disproportionate' interference with traditional common law rights.⁶⁸ With similar tone to his defence of the interests of the 'few' Tasmanian land-owners in *Richardson*, Deane in his ASIS Secrets Case Statement cast the Executive branch as both overzealous and intimidating and affirmed the 'right' of 'the people' to attend judicial proceedings.

Deane's ASIS Secrets Case Statement also confirmed, in the strongest terms, Deane's commitment to the *constitutional* protection of the manner of exercise of federal judicial power. Although s 15 of the *Judiciary Act 1903* (Cth) provides

⁶³ 'Orders in ASIS Secrets case' (1988) 19 *Legal Reporter* 6, 7 (emphasis added).

⁶⁴ See further discussion chapter 6 n 57. Note also Finn's reflections on the concept of 'public trust' and its relation to the Court's recognition of popular sovereignty in Paul Finn, 'A Sovereign People, A Public Trust' in Paul Finn (ed) *Essays on Law and Government* (1995) 1.

⁶⁵ 'Orders in ASIS Secrets case' (1988) 19 *Legal Reporter* 6, 7 (emphasis added).

⁶⁶ *Ibid* (emphasis added).

⁶⁷ On the importance of rights discourse, and the developments in the Court's jurisprudence in the 1990s, see further Peter Bailey, "'Righting" the Constitution Without a Bill of Rights' (1995) 23 *Federal Law Review* 1.

⁶⁸ *Davis v Commonwealth* (1988) 166 CLR 79, 100 (discussed above chapter 1 n 93) and *Richardson* (1988) 164 CLR 261, 316.

that High Court proceedings are ordinarily to be conducted in open court, Deane chose to frame his remarks not by reference to this statute but to the Constitution. Thus Deane commenced his Statement by acknowledging that the High Court is the 'ultimate repository of national judicial power.' A number of years after Deane's ASIS Secrets Case Statement, Gaudron and McHugh JJ each recognised guarantees of 'open justice' as aspects of their judicial process guarantees.⁶⁹ Given that Deane did not confirm the existence of a guarantee of 'open justice' in his decisions on Ch III, his ASIS Secrets Case Statement is an important signal that Deane regarded his judicial process guarantee as encompassing a 'right' of this nature.⁷⁰

In addition, Deane's ASIS Secrets Case Statement confirmed some of the mechanisms available to the Court to protect its processes from interference by the Executive. Deane's solution to what he regarded as a threat to judicial independence had been to call the Executive to answer his concerns in a special sitting, and to issue a rebuke. In *BLF* and *Hammond* the response of the Court to the actual and threatened interference by the Executive with the judicial proceedings had been to grant an injunction preventing that conduct. These three occurrences illustrated the use of the inherent powers of a court to prevent contempt or abuse of process. Given Deane's emphasis in *Polyukhovich* that s 71 be interpreted to ensure that the court was a 'reflection' not a 'mockery' of the purpose of the separation of powers principle, it seems likely that Deane would have regarded these inherent powers as themselves constitutionally protected on the basis that they were an 'essential feature' or 'traditional judicial procedure' of a Ch III 'court'.⁷¹

⁶⁹ Gaudron J recognised a guarantee of 'open and public' proceedings in *Re Nolan* (1991) 172 CLR 460, 496. In *Grollo* McHugh J stated that '[o]pen justice is the hallmark of the common law system of justice and is an essential characteristic of the exercise of federal judicial power.' *Grollo* (1995) 184 CLR 348, 379.

⁷⁰ On the Constitution's protection of 'open justice' see further Fiona Wheeler, 'The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia' (1997) 23 *Monash University Law Review* 248, 261-2.

⁷¹ See further Charles Chesterman, 'Contempt: In the Common Law, but not the Civil Law' (1997) 46 *International And Comparative Law Quarterly* 521, 549. Gleeson CJ and Gummow J have stated that the Court's contempt powers have their 'source in Ch III of the Constitution': *Re Colina; Ex parte Torney* (1999) 200 CLR 386, 395. See also Kirby J's statement that the Court's abuse of process powers 'may ultimately have a constitutional foundation' derived from the 'implied powers of the integrated Judicature of the Commonwealth to protect its own processes from legislative or executive abuse or misuse': *Island Maritime Ltd v Filipowski* (2006) 226 CLR 328, 354.

Deane's decisions in *BLF* and *Hammond*, and his defence of the principle of open justice in his ASIS Secrets Case Statement in 1988 were moderate guarantees, protecting elements of the exercise of judicial power clearly established as characteristics, or powers, of a 'court' in the common law tradition. Given Deane's fierce commitment to the protection of 'the people', however, it is not surprising that his decisions revealed an increasing tendency to extend guarantees flowing from Ch III beyond these core matters. Commentators have speculated on the range of court processes and procedures that Deane may have found included within the constitutional guarantee.⁷² While the outer limits of Deane's guarantee remain unclear, in 1992, Deane and Gaudron JJ confirmed in *Dietrich*, in separate judgments, that they were willing to extend their Ch III guarantees to secure the 'fair' administration of criminal justice in the federal system. Although only Deane and Gaudron JJ recognised a constitutional right in *Dietrich*, as foreshadowed in the introduction to this thesis the Court's decision was strongly criticised as an illustration of its assumption of a 'political' role.⁷³

(iii) A 'fair trial': *Dietrich* and the role of the Court

In *Dietrich*, the Court considered an argument that the trial of a serious criminal offence constituted a miscarriage of justice because the indigent defendant had been unable to obtain legal representation. Dietrich contended that he had a right to be provided with counsel at public expense, or, alternatively, that his trial was unfair because of the absence of representation. All members of the Court rejected the principle that an accused had a right to counsel at public expense.⁷⁴ However, a majority of the Court, with Brennan and Dawson JJ dissenting, accepted that a trial of a serious offence without counsel would ordinarily be unfair, and that, in those circumstances, a Court could then stay proceedings.⁷⁵

⁷² See, for example, Christine Parker, 'Protection of Judicial Process as an Implied Constitutional Principle' (1994) 16 *Adelaide Law Review* 341 and Fiona Wheeler, 'The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia' (1997) 23 *Monash University Law Review* 248.

⁷³ See above introduction n 37.

⁷⁴ *Dietrich* (1992) 177 CLR 292, 311 (Mason CJ and McHugh J); 317 (Brennan J); 330 (Deane J); 342 (Dawson J); 356 (Toohey J); 362-3 (Gaudron J).

⁷⁵ *Ibid* 311 (Mason CJ and McHugh J); 330-1 (Deane J); 357 (Toohey J); 371 (Gaudron J).

In *Dietrich* Deane punctuated his decision with a forceful opening statement, reflecting his vision of Ch III. Deane said:

The fundamental prescript of the criminal law of this country is that no person shall be convicted of a crime except after a fair trial according to law. In so far as the exercise of the judicial power of the Commonwealth is concerned, *that principle is entrenched by the Constitution's requirement of the observance of judicial process and fairness* that is implicit in the vesting of the judicial power of the Commonwealth exclusively in the courts which Ch III of the Constitution designates.⁷⁶

In a similar tone, Gaudron J in *Dietrich* also affirmed that the Constitution's guarantee of judicial process entrenched the 'fundamental requirement that a trial be fair.'⁷⁷

Deane's judgment in *Dietrich* bore many similarities to his decision a decade earlier in *Hammond*. In each, Deane could have decided the case without reference to Ch III. In *Dietrich*, for example, Mason CJ, Toohey and McHugh JJ framed their reasons in terms of the Court's inherent powers and the common law right to a fair trial.⁷⁸ However, for Deane and Gaudron JJ the guarantees contained within the Constitution were intimately connected with the resolution of the issues in these cases.⁷⁹ In addition, in both *Hammond* and *Dietrich*, Deane affirmed that the Constitution protected the *fairness* of a criminal trial, and his reasoning demonstrated the weight he attached to fairness to the accused over wider public interests. That Deane's guarantee strengthened the constitutional protections afforded to criminal defendants confirmed the pattern of Deane's jurisprudence to protect what he described in his swearing-in speech as the 'poor', 'weak' and 'bad' amongst the sovereign people.

Arguably, the controversy of *Dietrich* did not centre on Deane and Gaudron JJ's extension of the Constitution's judicial process guarantee to incorporate the

⁷⁶ Ibid 326 (emphasis added).

⁷⁷ Ibid 362.

⁷⁸ Ibid 311 (Mason CJ and McHugh J); 357 (Toohey J).

⁷⁹ Although, as Wheeler observed, it was surprising that Deane and Gaudron JJ did not elaborate on the constitutional aspect of the case, given that *Dietrich* had been charged with a serious federal offence: Fiona Wheeler, 'The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia' (1997) 23 *Monash University Law Review* 248, 265.

principle of a fair trial. Five months before *Dietrich*, Mason CJ, Dawson and McHugh JJ in *Leeth* had acknowledged that the Constitution contained a guarantee of natural justice.⁸⁰ In this context, as Zines has observed, extending the guarantee to protect elements of a 'fair trial' was not a significant extension of their recognition that the Constitution contained a guarantee that federal judicial power must be exercised according to judicial process.⁸¹ Thus, Deane's reasoning in *Dietrich* was not criticised because of his extension of implied constitutional rights to protect elements of a fair criminal trial.⁸² Rather, the controversy of *Dietrich* flowed from the fact that, although lacking the power to compel the redistribution of public money into legal aid, a majority of the Court isolated the provision of legal representation to indigent persons facing trial of serious criminal offences as an ordinary element of a 'fair trial'.

For Brennan and Dawson JJ, in dissent, this conclusion significantly overstepped the constitutional duty of the Court. Brennan J, for example, emphasised that it was for those who controlled 'the public purse strings' to determine the allocation of funding from that limited resource.⁸³ Brennan J did not deny that a trial will be 'most fairly conducted' when both sides are represented.⁸⁴ Nor did he deny that the cost of legal representation should be born by Australian society as a cost of a 'civilized system of justice'.⁸⁵ However, Brennan J reasoned that the decision to fund legal aid, and the allocation of resources between criminal and civil cases, was not a matter for the Courts.⁸⁶ Accordingly, Brennan J concluded that the majority's decision effected an 'unwarranted intrusion into legislative and executive functions'.⁸⁷ Further, for the Court to stay indefinitely criminal proceedings in circumstances where legal aid had not been obtained was to fail to exercise the Court's constitutional

⁸⁰ *Leeth* (1992) 174 CLR 455, 470 (Mason CJ, Dawson and McHugh JJ); 486-7 (Deane and Toohey JJ). See also Brennan J's acceptance of this guarantee in *Chu Kheng Lim* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ).

⁸¹ Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 203. See also Fiona Wheeler, 'The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia' (1997) 23 *Monash University Law Review* 248, 267.

⁸² As Zines observes, 'it is difficult to argue that parliament could, consistently with the separation of judicial power, require courts to conduct unfair trials.' Leslie Zines, above n 81, 203.

⁸³ *Dietrich* (1992) 177 CLR 292, 323. See also *ibid* 349 (Dawson J).

⁸⁴ *Ibid* 316.

⁸⁵ *Ibid* 317.

⁸⁶ *Ibid* 323. See also *ibid* 349-50 (Dawson J).

⁸⁷ *Ibid*.

duty.⁸⁸ In this way, Brennan J invoked the separation of powers principle to limit, rather than extend, the judicial protection of individual rights.

Brennan and Deane JJ's different views on the proper limits of the Court's role consistent with the separation of powers principle emerged through a number of decisions explored in this thesis. For example, in *Richardson*, Brennan J was cautious in his application of proportionality reasoning, in later cases explaining that that test should only be applied when matched with an appropriate 'margin of appreciation' to Parliament's decision-making.⁸⁹ In decisions such as *Polyukhovich*, *Re Tracey* and *Leeth*, decisions handed down before *Dietrich* and considered in later sections of this thesis, Brennan J consistently adopted an attitude of greater deference to Parliament than the path chosen by Deane. Given that Brennan J in *Leeth* evinced a strong commitment to the protection of the equality of the sovereign people – an issue encapsulating the 'two constant themes' of Deane's jurisprudence – the tension between Deane and Brennan JJ's vision of the Court's role is a valuable prism through which to explore Deane's jurisprudence.

Although Brennan and Dawson JJ's passionate dissents exemplify the finely balanced issues involved in *Dietrich*, Deane's reasoning in this case arguably satisfied Allan's requirement that innovation in constitutional interpretation, particularly in the protection of fundamental individual rights, must be matched with both 'rigorous analysis' and 'appropriate deference' to the Parliament and Executive arms of government.⁹⁰ In *Dietrich*, Deane conceded that the Court may be required to refer to 'the underlying notion of fairness' in framing the content of a constitutional guarantee of a 'fair trial', and that 'subjective values and perceptions may intrude into the judicial process.'⁹¹ However, those considerations would be tempered by the fact that in most cases the content of the guarantee:

⁸⁸ Ibid 324.

⁸⁹ See, for example, *ACTV* (1992) 177 CLR 106, 159.

⁹⁰ TRS Allan, 'The Common Law as Constitution: Fundamental Rights and First Principles' in Cheryl Saunders (ed) *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 146, 166. Although not explicitly applying his criteria to an assessment of *Dietrich*, Allan endorsed the majority decision in that case as 'a fine illustration' of the Court upholding reasoning consistently with its duty to uphold the rule of law. Ibid 162-5.

⁹¹ *Dietrich* (1992) 177 CLR 292, 329.

will primarily fall to be determined by the staple processes of legal reasoning, namely, induction and deduction from earlier decisions and settled rules and practices.⁹²

Deane's analysis in *Dietrich*, and his application of the fair trial guarantee, thus drew on the 'fundamental concept' of the first limb of the separation of powers principle, explored by Deane in cases such as *Re Tracey* and *Polyukhovich*, informed by the common law method of judicial reasoning. Significantly, Deane's reasoning in *Dietrich* was also responsive to the significant policy consequences of impact of unfair criminal trial for serious offence.⁹³ Although faced with a choice between competing policy considerations, Deane's reasoning was supported by his analysis of history, precedent and principle.

Further, although lacking the deference displayed by Brennan and Dawson JJ to Parliament and the Executive, Wheeler's analysis of the consequences of *Dietrich* suggests that Deane's approach nevertheless maintained an appropriate level of deference.⁹⁴ This was because Deane's approach did not endorse a constitutional guarantee that legal representation would be provided at public expense at the trials of serious criminal offences. Rather, Deane held that the Constitution guaranteed that a trial for a serious criminal offence would not proceed unfairly. As Wheeler observed, under this guarantee, Parliament and the Executive retained significant power, and responsibility, to 'address (and prevent) many sources of unfairness so as to allow fair trials to proceed.'⁹⁵ How Parliament and the Executive pursued those measures were matters within the exclusive determination of those arms of government. The fact that under Deane's guarantee the Parliament and the Executive were required to take action of this nature, or run the risk of stays in criminal proceedings, was, as Deane argued, an inevitable consequence of the criminal justice system.⁹⁶

⁹² Ibid.

⁹³ See further discussion in Fiona Wheeler, 'The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia' (1997) 23 *Monash University Law Review* 248, 269.

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ *Dietrich* (1992) 177 CLR 292, 330. See further Wheeler, above n 93, 270.

This chapter continues by examining Deane's extension of Ch III rights to include a constitutional protection from Bills of Attainder and retrospective criminal laws in *Polyukhovich*. As foreshadowed, Deane's reasoning in *Polyukhovich* illustrated both the strength and weaknesses of his 'fundamental concepts' approach and confirmed Deane's commitment to increasing the Constitution's protection of individual rights, at times at the expense of rigorous and principled legal analysis.

2 *Polyukhovich: Ch III, Bills of Attainder and retrospective criminal laws*

Polyukhovich challenged the validity of amendments to the Commonwealth's *War Crimes Act 1945* (Cth).⁹⁷ These amendments permitted the prosecution of Australian residents for 'war crimes' committed in Europe during World War II. Initially, the case was argued solely on the basis that the legislation was not supported by a head of Commonwealth legislative power. However, during oral argument Deane queried whether the *War Crimes Act* might infringe a constitutional implication contained in Ch III by virtue of its retrospective operation.⁹⁸ The matter was then reargued to permit a challenge to the legislation on this additional basis. Deane and Gaudron JJ, in dissent, upheld the challenge on this ground. Mason CJ, Dawson and McHugh JJ, however, fiercely rejected the argument that Ch III imposed, by implication, a limitation on the Commonwealth's power to enact retrospective criminal laws. Brennan and Toohey JJ did not decide this issue. Brennan J, in dissent, held that the *War Crimes Act* was invalid on the basis that it was not supported by a head of power. Toohey J upheld the legislation, observing that even if the Constitution imposed a restriction on retrospective criminal laws, the *War Crimes Act* was not relevantly retrospective. Thus, the amendment to the *War Crimes Act* was upheld by a narrow majority of the Court.

⁹⁷ *War Crimes Act 1945* (Cth) as amended by the *War Crimes Amendment Act 1988* (Cth). Henceforth the '*War Crimes Act*'. For a discussion of the pre-1988 legislation, and the motivations behind the amendments see J Thomson, 'Is it a Mess? The High Court and the War Crimes Case: External affairs, defence, judicial power and the Australian Constitution' (1992) 22 *University of Western Australia Law Review* 197, 199-200.

⁹⁸ *Polyukhovich v Commonwealth* Transcript of Argument, 3 September 1990, 48. Deane later asked whether the legislation would be consistent with '*US notions of due process*' and whether Parliament could dispense with the requirements of a '*fair trial*': *ibid* 59-60 (emphasis added).

Deane's dissenting decision in *Polyukhovich* was one of his most complex, and, in many respects his least compelling. His analysis was in three phases. First, Deane commenced with an examination of the purpose of the first limb of the separation of powers principle. As foreshadowed, it was on this basis that Deane derived his judicial process guarantee. Deane applied the same process of reasoning to derive an implied prohibition on federal Bills of Attainder. This chapter argues that Deane's application of 'fundamental concepts' reasoning in *Polyukhovich* to derive a constitutional limitation on Bills of Attainder offered a principled basis for the implication of this important constitutional guarantee.

The second stage of Deane's analysis considered the status of retrospective criminal laws under Ch III. For the reasons examined below, Deane's analysis in this section of his judgment in *Polyukhovich* was similar to his line of reasoning in *Metwally*. Like *Metwally*, this section of Deane's analysis in *Polyukhovich* exhibited significant doctrinal, historical and logical limitations, rendering his extension of constitutional protection to preclude retrospective criminal laws unconvincing. In the final phase of his judgment, Deane examined a number of arguments advanced against his interpretation of Ch III, based on both Australian and American precedent, and the framers' intentions. This structure reinforced the similarity between Deane's reasoning in *Breavington* and *Polyukhovich* and the important place of 'fundamental concepts' reasoning in his interpretive philosophy. However, Deane's reference to the framers in these cases differed. A question for discussion in this context is whether *Polyukhovich* revealed a divergence or inconsistency in what had appeared, from the cases examined in chapter 1, to be Deane's principled approach to the role of the framers in constitutional interpretation.

(a) Bills of Attainder

Bills of Attainder are legislative judgments of guilt.⁹⁹ While the United States Constitution, in Article 1, contains express prohibitions against the enactment of Bills of Attainder, and retrospective criminal laws, the Australian

⁹⁹ Allan described the Act of Attainder as 'the cruellest and most blatant violation of the separation of powers.' TRS Allan, 'The Common Law as Constitution: Fundamental Rights and First Principles' in Cheryl Saunders (ed) *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 146, 159.

Constitution lacks equivalent express guarantees. However, six members of the Court in *Polyukhovich* indicated that Ch III prevented the Commonwealth enacting a Bill of Attainder.¹⁰⁰ This was because legislation of this kind invaded the judicial function exclusively vested in Ch III courts under s 71, that of determining guilt or innocence. On the facts in *Polyukhovich*, however, Mason CJ, Dawson, Toohey and McHugh JJ held that the *War Crimes Act* was not a Bill of Attainder because the Court retained the role of determining whether Polyukhovich had engaged in the prohibited conduct.

Deane's 'fundamental concepts' reasoning offered a persuasive explanation of the implication of a guarantee precluding Bills of Attainder. As the above discussion of Deane's derivation of a judicial process guarantee has explained, in *Polyukhovich* Deane had reasoned that s 71 was concerned with more than mere 'labels'.¹⁰¹ Rather, s 71 incorporated a guarantee that federal judicial power be exercised by a Court, acting judicially. '[A]ccordingly', Deane argued, Ch III precluded Parliament from usurping the judicial power of the Commonwealth by legislation.¹⁰² Applying this analysis, a law declaring a person guilty of an offence would be invalid as a usurpation of judicial power. Further, as Deane's reasoning rested on a purposive approach to the separation of powers principle, his guarantee assessed the substance of the law.¹⁰³ In this way, Deane's approach implicitly rejected the narrow definition of Mason CJ, who had argued that a Bill of Attainder required the law to specify the offence for which the person was deemed guilty and punished.¹⁰⁴ Rather, Deane's approach would extend to those laws that, in effect, constituted a legislative determination of guilt. Deane's reasoning thus significantly extended the protection of individual rights through Ch III, in a manner consistent with the language of s 71, informed by the purpose of the separation of powers doctrine. Ironically, Deane's compelling derivation of his judicial process guarantee, and an implied constitutional prohibition on Bills of Attainder, accentuated the

¹⁰⁰ *Polyukhovich* (1991) 172 CLR 501, 535-6 (Mason CJ); 612 (Deane J); 646-649 (Dawson J); 685-5 (Toohey J); 706 (Gaudron J); 721 (McHugh J).

¹⁰¹ *Ibid* 607.

¹⁰² *Ibid*.

¹⁰³ Fiona Wheeler, 'The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia' (1997) 23 *Monash University Law Review* 248, 254. Compare Deane's approach with Dawson J's broad and substantive definition of a Bill of Attainder, as a law that effected 'a substitution of the judgment of the legislature for that of the courts.' *Polyukhovich* (1991) 172 CLR 501, 647.

¹⁰⁴ *Polyukhovich* (1991) 172 CLR 501, 535.

logical and doctrine hurdles facing Deane's conclusion that Ch III prevents the Commonwealth enacting retrospective criminal laws.

(b) *Retrospective criminal laws*

Deane's extension of his guarantee in *Polyukhovich* to include a prohibition of federal retrospective criminal laws hinged on his unusual understanding of the nature of the judicial function. For Deane, the judicial function in a criminal trial was not limited to what Dawson J described in *Polyukhovich* as an 'inquiry as to whether an accused has been guilty of prohibited conduct.'¹⁰⁵ Instead, Deane argued:

What lies at the *heart* of the exclusively judicial function in criminal matters [is] the determination of whether the accused person has in fact done an act which constituted a criminal contravention of *the then applicable law*.¹⁰⁶

It was this temporal element of the judicial function in criminal trials that, according to Deane, was usurped by a retrospective criminal law.¹⁰⁷ The evocative language of Deane's decision, twice describing the determination of criminal guilt according to standards applicable at the time of the act as lying at the *heart* of the judicial function, highlighted the depth of his conviction that retrospective criminal laws infringed Ch III's separation principle.¹⁰⁸

The limitations of Deane's unusual understanding of the judicial function were underlined by his differentiation between the consistency of retrospective civil and criminal laws with Ch III.¹⁰⁹ According to Deane, in civil cases the central aspect of judicial power was 'the determination of rights and liabilities under the law *as it exists at the time of the proceedings*.'¹¹⁰ However, Deane had indicated at the beginning of his judgment that the 'ordinary object' of the judicial function was the ascertainment of rights and obligations, including guilt or innocence, under the law. How does a retrospective law affect that judicial function? As Zines argues, Deane appeared to assert that the essential features

¹⁰⁵ Ibid 647.

¹⁰⁶ Ibid 614 (emphasis added).

¹⁰⁷ Ibid 613. See to like effect the analysis of Gaudron J: ibid 706.

¹⁰⁸ Ibid 613-4.

¹⁰⁹ This point is forcefully made in Leslie Zines, 'A Judicially Created Bill of Rights?' (1994) 16 *Sydney Law Review* 166, 171. See also Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 211.

¹¹⁰ *Polyukhovich* (1991) 172 CLR 501, 608 (emphasis added).

of a judicial trial were those under a *prospective* law, but that begged the question that was before the Court.¹¹¹ Without further support, in principle or precedent, for Deane's characterisation of the 'heart' of the judicial function, and the difference in that function in civil and criminal cases, Deane's extension of Ch III guarantees to prohibit retrospective criminal laws was considerably weakened.

A further limitation of Deane's reasoning in *Polyukhovich* flowed from his analysis of the federal implications of retrospective criminal laws. Deane remarked in *Polyukhovich* that:

the structure of the federation and the paramountcy of the Commonwealth's legislative powers with respect to designated subject matters *could* give rise to *extraordinary injustice, difficulty and uncertainty* if it was within the Commonwealth's legislative competence to enact an *ex post facto* criminal law.¹¹²

This passage presented two hurdles to Deane's analysis in *Polyukhovich*. First, Deane appeared to suggest that the 'difficulty' created by retrospective criminal laws was a factor telling against their validity. However, chapter 1 has explored Deane's forceful argument in the *Incorporation Case* that there was 'no legal justification' for the inconvenience of a Commonwealth law influencing the Court's conclusion as to its validity.¹¹³ In *Polyukhovich* either Deane departed from his vision of judicial review expressed a year earlier in the *Incorporation Case*, or Deane's focus in *Polyukhovich* was in fact on the 'extraordinary injustice' and 'uncertainty' generated by retrospective criminal laws. Those arguments, however, give rise to the second hurdle facing Deane's analysis in the above passage.

The second issue arising from this passage was that Deane failed to explain adequately the 'extraordinary injustice' and 'uncertainty' that retrospective criminal laws created in a federal system. As Rose has argued, the illustrations of 'extraordinary injustice' or 'uncertainty' that Deane provided in his reasons in *Polyukhovich* did not attach peculiarly to retrospective laws in a federation.¹¹⁴

¹¹¹ Leslie Zines, 'A Judicially Created Bill of Rights?' (1994) 16 *Sydney Law Review* 166, 171.

¹¹² *Polyukhovich* (1991) 172 CLR 501, 615 (emphasis added).

¹¹³ *Incorporation Case* (1990) 169 CLR 482, 512.

¹¹⁴ See Dennis Rose, 'Judicial Reasonings and Responsibilities in Constitutional Cases' (1994) 20 *Monash University Law Review* 195, 203.

For instance, Deane pointed to the possibility that the Commonwealth could retrospectively criminalise conduct that was mandatory under a then applicable State law. Also, Deane noted that an individual could be exposed to double punishment or double jeopardy where State and Commonwealth law criminalised specified conduct, but the retrospective Commonwealth law did not cover the field.¹¹⁵ As Rose argued, however, in both instances the injustice complained of could equally occur under prospective Commonwealth laws.¹¹⁶ In that context, however, it would be a matter for the Commonwealth Parliament to balance the interests and determine the correct and proper path.¹¹⁷ Accordingly, Deane's illustrations of 'extraordinary injustice' suggest that the deciding question for Deane was whether retrospective criminal laws *could* be unjust, and whether in those circumstances Parliament's power *should* be so limited to protect the interests of the individual.¹¹⁸

That Deane was particularly concerned by the potential injustice of retrospective laws, and would seek to imply limits on Parliament's power to enact such laws should not have been a surprise in 1991. Deane's decision in *Metwally*, in 1984, had evocatively expressed his views on the injustice of retrospective laws. In *Metwally* Deane had emphasised that Parliament did not have the power to alter the 'temporal effect' of s 109, any more than the 'Emperor' could declare that he was dressed when, in fact, he had not clothes.¹¹⁹ Deane's colourful language in *Metwally* underscored his concern that s 109 not be interpreted in a manner that deprived 'the people' the protection offered by s 109 from the injustice of being subject to inconsistent legal commands. In *Breavington*, in 1988, Deane had further confirmed that this principle 'lies at the heart' of the legal system, and utilised that principle as a platform for his conclusion that the Constitution effected a unitary legal system, and mandated a territorially-based choice of law rule.¹²⁰ In this way, Deane's decisions in *Metwally* and *Polyukhovich* confirmed his commitment to extending the

¹¹⁵ *Polyukhovich* (1991) 172 CLR 501, 615-6.

¹¹⁶ Dennis Rose, 'Judicial Reasonings and Responsibilities in Constitutional Cases' (1994) 20 *Monash University Law Review* 195, 203.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ Deane also referred in *Metwally* to 'Orwellian notions of doublethink': *Metwally* (1984) 158 CLR 447, 476-8.

¹²⁰ *Breavington* (1988) 169 CLR 41, 123.

Constitution's protection of 'the people' from what Deane perceived to be the injustice of retrospective laws.

(c) Court, Parliament and 'the people' in *Polyukhovich*

Deane's analysis in *Polyukhovich* has been justly criticised.¹²¹ Turning on an unsatisfactory definition of the judicial function in criminal cases, Deane extended the separation of powers doctrine beyond its reasonable limits in pursuit of constitutional protection to guard against the perceived injustice of retrospective criminal laws. However, the reasoning of Brennan and Toohey JJ reflected different paths that were open to Deane to grant protection to 'the people' from some forms of these laws. A brief comparison between Deane's analysis and that of Brennan and Toohey JJ confirms a number of significant assumptions underlying Deane's reasoning in *Polyukhovich* about the proper role of the Court; assumptions which underpin much of Deane's constitutional jurisprudence.

(i) Brennan and Deane JJ compared: judicial deference and the limits of constitutional guarantees

Like Deane and Gaudron JJ, Brennan J found the *War Crimes Act* invalid. As he had in *Dietrich*, Brennan J's approach in *Polyukhovich* adopted a line of reasoning showing greater deference to Parliament than that pursued by Deane. Rather than challenge the general proposition, established in *R v Kidman*,¹²² that the Commonwealth had the power to enact laws with retrospective effect, Brennan concluded that the *War Crimes Act* could not be supported by the defence power.¹²³ This was because the retrospective operation of the *War Crimes Act* could not be justified as 'reasonably appropriate and adapted' to the Commonwealth's peace-time defence.¹²⁴

¹²¹ See, for example, Dennis Rose, 'Judicial Reasonings and Responsibilities in Constitutional Cases' (1994) 20 *Monash University Law Review* 195, 203 and Leslie Zines, 'A Judicially Created Bill of Rights?' (1994) 16 *Sydney Law Review* 166, 171.

¹²² (1915) 20 CLR 425.

¹²³ Brennan J also concluded that the *War Crimes Act* was not supported by the external affairs power. *Polyukhovich* (1991) 172 CLR 501, 592.

¹²⁴ *Ibid* 593.

Brennan J's reasoning therefore balanced the common law's abhorrence of retrospective criminal laws while acknowledging that Parliament had the power to enact such laws.¹²⁵ This open assessment of conflicting policy interests in Brennan J's reasoning stood in sharp contrast to the approach of Deane, which required an artificial definition of the nature of the judicial function in order to bring retrospective criminal laws within the protection of Ch III.

Given Deane's use proportionality reasoning across various subjects in his constitutional jurisprudence, Deane's pursuit of a Ch III guarantee over proportionality analysis to find the *War Crimes Act* invalid was significant. In this way, *Polyukhovich* reinforced Deane's preference for strict constitutional guarantees, over the flexibility of proportionality reasoning, as the means to protect individual rights. This aspect of Deane's approach in *Polyukhovich* is also apparent in his framing of the military justice exception to Ch III, a topic considered in the next section of this chapter.

(ii) Deane and Toohey JJ compared: injustice and fundamental rights

Like Brennan and Deane JJ, Toohey J also emphasised the potential injustice of retrospective criminal laws. Toohey J's judgment devoted considerable attention to the international condemnation of these laws.¹²⁶ However, Toohey J did not decide whether a retrospective criminal law could never offend Ch III.¹²⁷ This was because of Toohey J's understanding of the nature and effect of the *War Crimes Act*. Two points of interest emerge from this aspect of Toohey J's analysis.

First, Toohey J's reasoning focused on the substance of the *War Crimes Act*, not its form. For Toohey J it was significant that *Polyukhovich* would not have been exposed to punishment for conduct that was not proscribed at the time of the

¹²⁵ Kirk observed that Brennan applied the third level of proportionality analysis, balancing analysis, in this context: Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1, 32.

¹²⁶ *Polyukhovich* (1991) 172 CLR 501, 689-90. Toohey J's reasoning is discussed further in Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 211.

¹²⁷ *Polyukhovich* (1991) 172 CLR 501, 690.

alleged acts.¹²⁸ Thus, Polyukhovich would suffer no injustice by virtue of the retrospective operation of the *War Crimes Act*. Further, Toohey J recognised that a relevant consideration was the degree of alleged 'moral transgression'.¹²⁹ This was because the law's 'principle of non-retroactivity' balanced the interests of the individual against the public interest. Both required 'fundamental protection'.¹³⁰ However, sensitivity to the particular unfairness, or lack of unfairness, to Polyukhovich, and the balancing of competing social interests were lacking from Deane's analysis. Indeed, Deane's analysis concluded with an emphatic statement that the 'enormity of the acts of barbarism' committed during World War II must not cloud the inquiry in *Polyukhovich*, which was, the nature of the judicial function under the *War Crimes Act*.¹³¹

Second, Toohey J's reasons contained his famous statement that:

Whether a court may declare a statute to be invalid because it is unjust is a question that goes to the very heart of the relationship between the courts and Parliament.¹³²

Because of his conclusion that the *War Crimes Act* effected no injustice on Polyukhovich, Toohey J observed that this question did not arise on the facts of the case.¹³³ In contrast to Toohey J, Deane did not squarely raise, or answer, the question whether fundamental rights were protected from legislative interference under the Constitution. Even in *Leeth*, a decision containing Deane's greatest engagement with the question of rights flowing from 'the people', Deane and Toohey JJ purported to tie their implication to the text and underlying doctrines of the Constitution. That Deane reasoned in *Polyukhovich* by reference to Ch III, rather than addressing the wider question acknowledged by Toohey J, suggests that Deane preferred to reason from the framework of the well-established principle of the separation of powers rather than concepts of 'fundamental rights'. This was so despite the fact that Deane's reliance on the separation principle required him to adopt an unusual, and unpersuasive, definition of the judicial function.

¹²⁸ Ibid 676.

¹²⁹ Ibid 689-90.

¹³⁰ Ibid 689.

¹³¹ Ibid 631.

¹³² Ibid 687.

¹³³ Ibid.

(d) *The issue of 'the framers' in Polyukhovich*

A final aspect of Deane's analysis in *Polyukhovich* warranting attention was his reference to the framers.¹³⁴ It had been argued in *Polyukhovich* that the absence in the Australian Constitution of an express guarantee against retrospective criminal laws 'was deliberate' and should therefore preclude an implication limiting Commonwealth power to enact such laws.¹³⁵ In *Breavington* and the *Incorporation Case* Deane had responded to arguments that the framers' intentions should restrict the meaning of ss 118 and 51(xx) by stating that the source of the Constitution's legitimacy was 'the people'.¹³⁶ On this basis, the framers' subjective intentions were irrelevant to constitutional interpretation. If that analysis had been applied by Deane in *Polyukhovich*, Deane's answer should have been that the framers' reasons for *not* incorporating an express guarantee prohibiting retrospective criminal laws would also be irrelevant to constitutional interpretation. This was because the framers could no more speak to the intended operation of Ch III than they could to the intended meaning of ss 51(xx) or 118.

However, Deane did not take this path in *Polyukhovich*. First, and in striking contrast to *Breavington* and the *Incorporation Case*, Deane made no reference to 'the people' in this aspect of his analysis. Instead, somewhat cryptically, Deane argued that 'in circumstances where the framers took an altogether different approach to the incorporation of rights' the absence of one or other express rights should not in itself be treated as a reason to reject their implication.¹³⁷ Thus Deane appeared to be suggesting that the framers' intentions remain relevant in constitutional interpretation, but had been misinterpreted by those who sought to restrict the implication of constitutional rights in this case.

Deane continued his analysis, citing an extensive passage from Inglis Clark's *Studies in Australian Constitutional Law*.¹³⁸ Deane argued that Inglis Clark 'clearly enough' considered that retrospective criminal laws were contrary to the

¹³⁴ Ibid 616-9.

¹³⁵ Ibid 720.

¹³⁶ See above chapter 1 n 176.

¹³⁷ *Polyukhovich* (1991) 172 CLR 501, 617.

¹³⁸ Andrew Inglis Clark, *Studies in Australian Constitutional Law* (1901) 39-41.

separation principle.¹³⁹ However, McHugh J and Rose have drawn attention to the significant ellipsis in Deane's quotation from Inglis Clark, who had stated that the Constitution 'does not prohibit the Parliament of the Commonwealth from making retroactive laws.'¹⁴⁰ In this context, Deane's citation from Inglis Clark appears to misrepresent Inglis Clark's analysis. Rose argues on this basis that Deane's reasoning demonstrated a lack of proper legal reasoning,¹⁴¹ compounding the significant limitations of Deane's analysis discussed above.

In a study of Deane's constitutional philosophy, however, a further question arises regarding his quotation from Inglis Clark. In *Breavington* and the *Incorporation Case*, Deane had introduced his particular arguments by affirming that the Convention Debates, or contemporary sources, were inherently capable of supporting a range of meanings. In contrast, Deane's citation of Inglis Clark in *Polyukhovich* was extensive, and suggests that Deane's purpose may have been to rely on Inglis Clark not simply to rebut the framers' intention argument, but rather as support for his interpretation of the effect of Ch III. If this was Deane's intention in citing Inglis Clark, Deane's reasoning in *Polyukhovich* appears to have departed from the key principles of his interpretive approach established in cases such as *Breavington* and the *Incorporation Case*: that it was the intentions of 'the people', not the framers, to which the Court gave effect in constitutional interpretation.

Setting aside the richness of *Polyukhovich* in a study of the strengths and weaknesses of Deane's constitutional philosophy, the next section considers Deane's vision of the reach of the military justice exception to the separation of powers principle. On this topic, Deane returned to his careful and considered analysis of principle and precedent to affirm the right of military personnel to, ordinarily, be tried for a federal offence by a Ch III Court.

¹³⁹ *Polyukhovich* (1991) 172 CLR 501, 619.

¹⁴⁰ Inglis Clark, above n 138, 39 cited in *Polyukhovich* (1991) 172 CLR 501, 720-1 (McHugh J). Rose says that this was a significant ellipsis from Deane's argument: Dennis Rose, 'Judicial Reasonings and Responsibilities in Constitutional Cases' (1994) 20 *Monash University Law Review* 195, 202-3. See to similar effect Dennis Rose, 'On Criticising "Judicial Adventurism"' (2004) June *Quadrant* 32, 35.

¹⁴¹ Dennis Rose (1994), above n 140, 202-3.

3 *The Tracey Trilogy and the military justice exception*

This section examines a final illustration of Deane's application of 'fundamental concepts' reasoning to strengthen the protection of individual rights through Ch III. As some of his most passionate decisions, Deane's trilogy of cases on this topic evinced his commitment to Ch III as the Constitution's 'most important'¹⁴² guarantee.

(i) *Background: the Defence Force Discipline Act and the vexed question of military tribunals*

The *Defence Force Discipline Act* 1982 (Cth) was enacted to establish a unified system of military discipline for the Australian Defence Forces.¹⁴³ Its hierarchy of military tribunals, consisting of superior officers, Defence Force Magistrates, and Courts Martial, were not established consistently with s 72 of the Constitution, as its members were not guaranteed security of tenure until the age of 70. Consequently, although exercising federal judicial power, the tribunals were not Ch III courts.

The *Discipline Act* created offences falling into three categories, each with varying degrees of connection to defence service.¹⁴⁴ The first category consisted of purely military offences, such as absence without leave. The second category was quasi-military offences, that is, offences similar to civilian offences but relating to military circumstances, such as falsifying a service document. Finally, s 61 of the *Discipline Act* imported the full range of offences from an Australian civil jurisdiction into the military system.¹⁴⁵ This section exposed

¹⁴² *Street* (1989) 168 CLR 461, 521 (emphasis added).

¹⁴³ Henceforth the '*Discipline Act*'.

¹⁴⁴ The offences under the *Discipline Act* were summarised in Andrew D Mitchel and Tania Voon, 'Defence of the Indefensible? Reassessing the Constitutional Validity of Military Service Tribunals in Australia' (2000) 27 *Federal Law Review* 499, 501.

¹⁴⁵ In *Re Tracey* and *Re Nolan*, s 61 of the *Discipline Act* imported the full range of criminal offences as they applied in the Australian Capital Territory. As s 61 applied in *Re Tyler* the section had been amended to import offences from the Jervis Bay Territory.

defence personnel to potential liability for prosecution under both the civilian and military justice systems.¹⁴⁶

Re Tracey was the first of three challenges to the validity of the *Discipline Act* that came before Deane.¹⁴⁷ Staff Sergeant Ryan of the Australian Army was charged with offences of the first two categories: absence without leave and falsifying a service document. The Court unanimously held that military tribunals established under the *Discipline Act* could operate as an exception to the separation principle established under Ch III, but sharp differences emerged between the Justices as to the breadth of the exception.

Five members of the Court, in two joint judgments, upheld the Defence Force Magistrate's power to hear all charges against Ryan. Mason CJ, Wilson and Dawson JJ considered that s 51(vi) granted the Parliament power to establish tribunals to try service personnel for offences which were 'sufficiently connected' to military discipline; military discipline itself being essential to the maintenance of Australian defence.¹⁴⁸ They held that it was for Parliament to decide what offences were 'necessary and appropriate' to enforce that discipline. This could include incorporating wholesale civilian offences under s 61.¹⁴⁹

Brennan and Toohey JJ's approach also permitted a broad exception to the Constitution's separation of powers principle. Their test asked whether an

¹⁴⁶ In an attempt to prevent dual punishment, the *Discipline Act* as originally enacted included a provision preventing a civil court from trying an offence that had already been tried by a service tribunal. The Court held that this aspect of the *Discipline Act* was invalid: *Re Tracey* (1988) 166 CLR 518, 547 (Mason CJ, Wilson and Dawson JJ); 575-6 (Brennan and Toohey JJ); 602-3 (Gaudron J). As Deane found that the Parliament's legislative power only extended to establish military tribunals with jurisdiction over exclusively disciplinary offences it was unnecessary for him to decide this issue.

¹⁴⁷ See, after Deane's retirement from the Court, *Re Colonel Aird; Ex parte Alpert* (2004) 220 CLR 308 and *White v Director of Military Prosecutions* [2007] HCA 29 ('White').

¹⁴⁸ *Re Tracey* (1988) 166 CLR 518, 540. It is an interesting fact that the two members of the Court who had served in the armed forces – Sir Anthony Mason and Sir Ronald Wilson – adopted the broadest exception to the separation principle. For discussion of their military service, see Kristen Walker, 'Mason, Anthony Frank' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 459, 459 and Peter Durack, 'Wilson, Ronald Darling' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 714, 715.

¹⁴⁹ *Re Tracey* (1988) 166 CLR 518, 545. Mason CJ, Wilson and Dawson JJ considered it difficult to draw a clear line between an offence which was of a military character and one which was not: *ibid* 544-5. The challenge of drawing this line was also a topic of concern in *White* [2007] HCA 29 at [19]-[21] (Gleeson CJ) and at [73]-[75] (Gummow, Hayne and Crennan JJ).

offence could be 'reasonably regarded as substantially serving the purpose of ... service discipline.'¹⁵⁰ However, Brennan and Toohey JJ were not willing to defer to Parliament to the same degree as Mason CJ, Wilson and Dawson JJ. Instead, Brennan and Toohey JJ applied their test objectively, assessed by reference to factors such as convenience, accessibility, and the appropriateness of civilian courts hearing the charges.¹⁵¹

In contrast, Deane and Gaudron JJ, in a separate judgments, strictly confined the military justice exception to only those offences that were disciplinary in nature.¹⁵² On the facts both judges held that only the charge of absence without leave fell within that category, and so the Defence Force Magistrate lacked the jurisdiction to hear the charge of falsifying a service document.¹⁵³ Consistent with his approach to the first limb of the separation principle throughout his jurisprudence, Deane reached this conclusion by exploring the history and purpose of this 'fundamental concept' of the Constitution.

The Court's reasoning in *Re Tracey* left military tribunals in the unenviable position of having to assess their jurisdiction against a number of different tests. The subsequent challenges to the *Discipline Act* in *Re Nolan* and *Re Tyler* did not resolve this issue, as only McHugh J, new to the Court by the time of *Re Nolan*, was willing to adopt a compromise position.¹⁵⁴

¹⁵⁰ *Re Tracey* (1988) 166 CLR 518, 570.

¹⁵¹ *Ibid.*

¹⁵² Gaudron J considered that offences which were 'substantially the same as civil court offences' could not reasonably be considered 'appropriate and adapted' to controlling the defence forces: *ibid* 602. As discussed below, Deane's approach was framed around the purpose of the separation principle, and confined the exception to the minimum jurisdiction necessary to effect service discipline.

¹⁵³ *Ibid* 591 (Deane J); 604 (Gaudron J).

¹⁵⁴ In *Re Nolan*, McHugh J had authored a brief judgment concurring with Deane: *Re Nolan* (1991) 172 CLR 460, 499. It seems from his judgment in *Re Tyler* and statements during oral argument in *Re Aird; Ex parte Alpert* that McHugh J remained convinced of the correctness of Deane's approach: *Re Tyler* (1994) 181 CLR 18, 39 and *Re Aird; Ex parte Alpert* Transcript of Proceedings, 3 March 2004. Speaking of the Mason CJ, Wilson and Dawson JJ position during argument in *Re Aird*, McHugh J said: 'I could never until the day I die accept the reasoning that leads them to the conclusion.'

(ii) *Deane's strict interpretation of Ch III*

Deane signalled his distinctive approach to the military tribunal exception from the outset of his judgment in *Re Tracey*.¹⁵⁵ Like his later decision in *Polyukhovich*, Deane's focus lay in the purpose of the first limb of the separation of powers doctrine. In a key passage, conveying the tone of his judgment, Deane said:

To ignore the significance of the doctrine or to discount the importance of safeguarding the true independence of the judicature upon which the doctrine is predicated is to run the risk of undermining, or even subverting, the Constitution's *only general guarantee of due process*.¹⁵⁶

It was from this understanding of the purpose of the separation of powers doctrine that Deane found the limits of the military justice exception to Ch III.

Thus he argued:

The guarantee involved in the vesting of judicial power exclusively in Ch III courts is at its most important in relation to criminal matters. *It obviously requires that this Court carefully scrutinize any claim by a Commonwealth officer or instrumentality, other than a court designated by Ch III, to exercise the judicial power of trial and punishment of a person charged with an offence.*¹⁵⁷

Deane held, consistent with the rights-protective purpose of the separation principle, that any deviation from that guarantee required significant justification. According to Deane, a '*pragmatic construction*'¹⁵⁸ of Ch III, and the separation of powers principle, permitted an exception for military tribunals only under two critical limitations. First, their jurisdiction extended only to the *disciplinary* aspects of military service. Second, the jurisdiction of military tribunals was *supplementary* to the civil system.¹⁵⁹ Deane's examination of common law history led him to conclude that, at least in respect of conduct committed in Australia in peacetime, the *Discipline Act* could validly extend to only exclusively disciplinary offences, or offences related to exclusively disciplinary offences.¹⁶⁰ As Kirby J recently observed, Deane's approach 'limited military exceptionalism to the essential needs of discipline in the military context.'¹⁶¹ Accordingly, on the facts in *Re Tracey*, Deane held that only a Ch III

¹⁵⁵ *Re Tracey* (1988) 166 CLR 518, 579.

¹⁵⁶ *Ibid* 580 (emphasis added). Compare Deane's reasoning in *Polyukhovich*, discussed above n 24.

¹⁵⁷ *Ibid* 581 (emphasis added).

¹⁵⁸ *Ibid* 583 (emphasis added).

¹⁵⁹ *Ibid*.

¹⁶⁰ *Ibid* 591.

¹⁶¹ *White* [2007] HCA 29 at [165].

court could hear the charge against Ryan of falsifying the service document, as that charge related to non-disciplinary and general community aspects of criminal conduct.

Chapter 1 has explored how Deane employed proportionality analysis as a tool in characterisation in the context of s 51(xxix). In *Richardson*, for example, Deane balanced the rights of a small number of land-owners against the wider environmental purposes of Commonwealth legislation, and concluded that many of the measures were an unnecessary restriction on individual rights. In *Re Tracey* Deane similarly employed balancing and necessity reasoning to confine the exception to Ch III. However, in this context Deane pre-weighted his test in favour of the separation of powers over military discipline.¹⁶² Thus Deane confined the jurisdiction of military tribunals to the minimum extent necessary, thereby ensuring that service personnel gained the benefit of the Constitution's 'most important'¹⁶³ guarantee, that is, that federal judicial power would be exercised by a court, acting judicially.

Deane's strict protection of the right of military personnel to be tried for federal offences by Ch III courts stood in contrast to the approach of the majority judges. Brennan and Toohey JJ, for example, although recognising the important purpose of the separation of federal judicial power, assessed whether the tribunals were 'reasonably appropriate and adapted' to military discipline. This approach permitted a larger jurisdiction for military justice tribunals, and in both form and substance prioritised military justice over the separation principle. Mason CJ, Wilson and Dawson JJ, took this further, by holding that it was a question for Parliament, not the Court, whether military justice was 'appropriate and adapted' to the purpose of military discipline. Even Gaudron J, whose dissenting decisions were similar in outcome to Deane, embraced a test displaying greater deference to Parliament than Deane. Thus, Gaudron J's test was framed by reference to the purpose of the defence power. At least rhetorically, Gaudron J's approach could therefore 'ebb and flow'

¹⁶² Compare, in the context of Deane's proportionality test in the free speech cases, the discussion of pre-weighted tests in Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668, 694.

¹⁶³ *Street* (1989) 168 CLR 461, 521.

according to the needs of military discipline.¹⁶⁴ In contrast, Deane's approach was respectful of the language of the Constitution's text (as s 51(vi) was made 'subject to' the Constitution) and gave 'due weight' to the separation principle, and its role as a 'safeguard of individual rights.'¹⁶⁵

Gleeson CJ, and Gummow, Hayne and Crennan JJ, in *White v Director of Military Prosecutions*, recently observed that Deane's approach required difficult distinctions to be drawn regarding the nature of an 'exclusively disciplinary' offence.¹⁶⁶ They concluded on this basis that Deane's test imposed an 'unsatisfactory' criterion of validity.¹⁶⁷ In contrast, Kirby J, in dissent in *White*, forcefully argued that '[o]ne of the functions of courts ... is to draw lines.'¹⁶⁸ Although not finding favour with a current majority of the Court, Deane's approach may be seen as providing a principled approach to finding the limits of the military justice exception, tailored to the purpose of the separation principle and its purpose as an important guarantee of individual rights.

Significantly for the purpose of this thesis, Deane's approach to this exception also confirmed the recurring themes and trends of his constitutional philosophy. In particular, these cases confirmed Deane's reliance on 'fundamental concepts' reasoning to imply a constitutional guarantee that military personnel would be tried by a Ch III court, except for 'exclusively disciplinary' offences. The next part of this chapter examines Deane's approach to a second exception to the separation of powers doctrine, that is, the designated person exception to the second limb of the separation doctrine. Ironically, although Deane would not utilise the language of guarantees in this context, it was here, in *Grollo*, that Deane's jurisprudence revealed some of his most forceful comments on the importance of *judges* in the protection of individual rights.

¹⁶⁴ See *Re Tracey* (1988) 166 CLR 518, 600. Deane and Gaudron JJ's approaches are compared in Andrew D Mitchel and Tania Voon, 'Defence of the Indefensible? Reassessing the Constitutional Validity of Military Service Tribunals in Australia' (2000) 27 *Federal Law Review* 499, 518-9.

¹⁶⁵ Mitchel and Voon, above n 164, 519. See also *White* [2007] HCA 29 at [165] (Kirby J).

¹⁶⁶ [2007] HCA 29 at [75] (Gummow, Hayne and Crennan JJ).

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid* at [198].

B *Part 2: Deane and exceptions to the second limb of the separation doctrine*

This part examines Deane's attitude towards the second limb of the separation doctrine which prevents the vesting of non-judicial functions on a federal court. Deane's views on this principle are found in a trilogy of joint judgments on the designated person exception to that principle, *Drake v Minister for Immigration and Ethnic Affairs*,¹⁶⁹ *Hilton v Wells*¹⁷⁰ and *Grollo*.¹⁷¹ This part argues that, although these decisions lack the fierce commitment to a strict separation of judicial power characterising his decisions on the military justice exception to the first limb of the separation principle, Deane's designated person decisions, particularly *Grollo*, confirmed his commitment to judges, and judicial reasoning, as an important protection of individual liberty.

1 *Deane's Federal Court judgment in Drake*

Deane's first exploration of the scope of the designated person exception was as a member of the Federal Court in *Drake*. Drake challenged a decision of the Deputy President of the Administrative Appeals Tribunal, Davies J of the Federal Court, on the basis that his appointment infringed the separation of federal judicial power required by Ch III.¹⁷² Section 7(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) provided that a presidential member of the Tribunal (including a Deputy President) could not be appointed unless he was a Federal Court judge or had certain other specified qualifications. Drake argued that Davies J's appointment was invalid as the Act conferred non-

¹⁶⁹ (1979) 24 ALR 577 ('*Drake*').

¹⁷⁰ (1985) 157 CLR 57 ('*Hilton*').

¹⁷¹ Note that in *Re Tracey* Deane observed that one consequence of the vesting of judicial power in courts consistent with the separation principle was that the judicature and the executive could not be merged 'by the conferral of non-judicial functions' on the judiciary: *Re Tracey* (1988) 166 CLR 518, 580. However, this statement is not itself a resounding endorsement of the second limb of the separation doctrine. It may reflect an endorsement of the requirement of an 'independent judiciary'; an interpretation that is more consonant with the subject matter of the case in which it was issued.

¹⁷² Justice Davies had confirmed a decision of the Minister to cancel Drake's permanent residency visa under s 12 of the *Migration Act 1958* (Cth). Section 12 permitted the Minister to cancel such a visa if the alien had been convicted of offences carrying a specified minimum jail term.

judicial functions on a federal court contrary to the second limb of the separation of powers principle.¹⁷³

The Federal Court, consisting of Bowen CJ, Smithers and Deane JJ, rejected this argument.¹⁷⁴ Bowen CJ and Deane's approach to the designated person exception was contained entirely in the following passage from their joint judgment:

There is nothing in the Constitution which precludes a justice of the High Court or a judge of this or any other court created by the Parliament under Ch III of the Constitution from, in his personal capacity, being appointed to an office involving the performance of administrative or executive functions including functions which are quasi judicial in their nature. Such an appointment does not involve any impermissible attempt to confer upon a Ch III court functions which are antithetical to the exercise of judicial power. Indeed, it does not involve the conferring of any functions at all on such a court.¹⁷⁵

Missing from this passage was any direct reference to the *Boilermakers' Case* or to any general reference to the aims of the separation of powers doctrine under the Constitution.¹⁷⁶ However, what little was said, referring to an 'impermissible attempt' to confer an 'antithetical' function on a Ch III court, was an appropriate endorsement of the underlying principle from Federal Court judges not at liberty to question the High Court's decision in the *Boilermakers' Case*.

Also missing from Bowen CJ and Deane's decision was any justification for their very broad and formalistic exception to the second limb of the separation doctrine.¹⁷⁷ Under Bowen CJ and Deane's approach, the question of the Act's validity was determined by ascertaining, as a matter of statutory interpretation, whether Parliament sought to confer functions on the judge as an individual or on the Court. In this case they concluded that Davies J had been appointed to the Tribunal in his personal capacity, although they did not elaborate on that conclusion. However, as Zines and Lindell have argued, the very rationale of

¹⁷³ Drake also argued that the Act infringed Ch III because it conferred judicial power on the Tribunal. The court also rejected this argument: *Drake* (1979) 24 ALR 577, 584-5 (Bowen CJ and Deane JJ), 592 (Smithers J concurring).

¹⁷⁴ Smithers J concurred with Bowen CJ and Deane on this ground of appeal: *ibid* 592.

¹⁷⁵ *Ibid* 584.

¹⁷⁶ Admittedly Deane's discussion of the first limb of the separation principle in *BLF* and *Hammond* was also extremely limited. Compare above n 43.

¹⁷⁷ Fiona Wheeler, 'Federal Judges as Holders of Non-Judicial Office' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 442, 457.

the second limb of the separation of powers – the protection of the reputation of the federal judiciary – was equally placed at risk by the approach of Bowen CJ and Deane, by permitting a wide scope for the performance of non-judicial activities by judges in a quasi-judicial capacity.¹⁷⁸

The absence of such reasoning, and the recognition of a broad exception to the second limb of the separation doctrine, appears inconsistent with Deane's later High Court decisions on the separation of powers principle. As discussed in this chapter, Deane's High Court judgments were replete with references to the purpose of the first limb of the separation of powers principle. In *Re Tracey*, for example, it was in recognition of this purpose that Deane strictly confined the jurisdiction of military tribunals as an exception to Ch III. It is possible that these differences were the result of the fact that *Drake* was a joint judgment. A further explanation for Deane's apparently formalistic approach to the content and application of the designated person exception in *Drake* may flow from Deane's respect for the strength of High Court precedent on this question. After his retirement from the High Court, Deane reflected that it was the task of a Federal Court judge to 'try to ascertain what the law is' and consequently to try 'to guess what the High Court would hold the law to be.'¹⁷⁹ In 1979, it may have seemed likely that the High Court would uphold the Act, given the range of non-judicial activities performed by High Court judges such as Sir Owen Dixon¹⁸⁰ and Sir John Latham¹⁸¹ in their personal capacities.¹⁸²

¹⁷⁸ Leslie Zines and Geoffrey Lindell, *Sawer's Constitutional Cases* (4th ed, 1982) 613. See further discussion: Wheeler n 177, 454-5.

¹⁷⁹ Deane, quoted in Tony Stephens, *Sir William Deane: The Things that Matter* (2002) 46. See further above introduction n 92.

¹⁸⁰ Sir Owen's extensive non-judicial duties are outlined in Kenneth Hayne, 'Dixon, Owen' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 218, 219. Chapters 7, 8 and 10 of the Ayres' biography shed further light on Dixon's activities in the positions. Philip Ayres, *Owen Dixon* (2003).

¹⁸¹ Sir John Latham had accepted a posting as Australian ambassador to Japan in 1940. Zelman Cowen, 'Latham, John Greig' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 419.

¹⁸² Brown discusses further illustrations of the non-judicial duties performed by High Court judges in A. J. Brown, 'The Wig or the Sword? Separation of Powers and the Plight of the Australian Judge' (1992) 21 *Federal Law Review* 48. Deane may also have been influenced by his personal experience. Throughout his time on the Federal Court, Deane also served as President of the Trade Practices Tribunal. See Rosalind Atherton, Tony Blackshield, Bruce Kercher and Cameron Stewart, 'Deane, William Patrick' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 195, 195.

2 *A view from the High Court: Hilton v Wells*

In 1985, Deane sat on the five-member bench in *Hilton*. This case concerned the validity of a telephone tap under the *Telecommunications (Interception) Act 1979* (Cth) and the use of information obtained via the tap as evidence in criminal proceedings.¹⁸³ Under the *Interception Act*, judges of the Federal Court were assigned the controversial task of issuing telephone tap warrants.¹⁸⁴ Gibbs CJ, Wilson and Dawson JJ, in a joint judgment, held that the *Interception Act* was valid, as it conferred this power on the judges in their personal capacity. Mason and Deane JJ, also in a joint judgment, strongly dissented, holding that the legislation purported to confer non-judicial powers on the Federal Court and so was contrary to Ch III.

(a) *The majority approach*

The majority joint judgment began by affirming the principle in the *Boilermakers' Case*. Thus they reasoned that if a non-judicial power was to be conferred on a judge consistently with the second limb of the separation doctrine, that power must be exercised in the judge's personal capacity.¹⁸⁵ The key question was therefore one of statutory construction: did the reference to 'judge' rather than to the 'court' mean that Parliament intended to describe a person by reference to the qualifications essential for the exercise of the power rather than the institution?¹⁸⁶

Gibbs CJ, Wilson and Dawson JJ held that Parliament had made its intention sufficiently clear that the power under the *Interception Act* was conferred on the judges as individuals.¹⁸⁷ The fact that the power was purely administrative and not incidental to the exercise of judicial power was, in their view, a significant

¹⁸³ Henceforth the '*Interception Act*'.

¹⁸⁴ Sir Anthony Mason has described the authorisation of tap warrants by judges in their personal capacity as the most controversial of non-judicial functions performed by Federal Court judges. Sir Anthony Mason, 'A New Perspective on Separation of Powers' (1996) 82 *Canberra Bulletin of Public Administration* 1, 1.

¹⁸⁵ *Hilton* (1985) 157 CLR 57, 72.

¹⁸⁶ *Ibid.*

¹⁸⁷ Gibbs CJ, Wilson and Dawson JJ noted that even if there was a *prima facie* presumption that the power was conferred on the institution, such a presumption was rebutted in this case. *Ibid* 72-3.

indicator of Parliament's intention.¹⁸⁸ This analysis suggested that Gibbs CJ, Wilson and Dawson JJ were willing to defer considerably to Parliament in this area. Under their approach, the Court's role was to facilitate, rather than to strictly scrutinise, Parliament's objectives. However, the majority recognised that the designated person exception did not allow Parliament to confer unlimited power on a federal judge, holding that non-judicial functions could not be conferred if they 'were such as to prejudice their independence or to conflict with the proper performance of their judicial functions'.¹⁸⁹ Gibbs CJ, Wilson and Dawson JJ held that the *Interception Act* was not such a law.¹⁹⁰

(b) The dissent of Mason and Deane JJ: policing the boundaries

In 'a vigorous dissent',¹⁹¹ Mason and Deane JJ held that Parliament had not evinced an intention that the power to issue tap warrants was conferred on the judges in their personal capacity. Accordingly, the *Interception Act* was invalid. The High Court in *Jones v Commonwealth* characterised the difference between the majority and minority judgments as purely one of statutory construction.¹⁹² Certainly both the minority and majority judgments in *Hilton* framed the issue in the case as one of statutory interpretation.¹⁹³ However, as Zines has argued, Mason and Deane JJ's examination of the basis and purpose of the exception, and consequent interpretation of the legislation, suggests that they proceeded from a different understanding of the permissible scope of the designated person exception.¹⁹⁴ It is this difference that sheds further light on Deane's vision of the Constitution's separation of powers principle.

¹⁸⁸ Ibid 72. This was an interesting conclusion, suggesting that the majority assumed that Parliament was aware of the separation of powers issue, and that the conferral of an administrative power on the judge showed that Parliament intended the *Interception Act* to fall within the exception.

¹⁸⁹ *Hilton* (1985) 157 CLR 57, 73-4.

¹⁹⁰ Ibid 74.

¹⁹¹ Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (2nd ed, 2006) 181.

¹⁹² *Jones v Commonwealth* (1987) 71 ALR 497, 498-9 (Mason CJ, Wilson, Deane and Dawson JJ). Gaudron J was of a different view, believing that *Hilton* left open significant questions of the operation of the separation of powers principle: ibid 499.

¹⁹³ *Hilton* (1985) 157 CLR 57, 72 (Gibbs CJ, Wilson and Dawson JJ) 78 (Mason and Deane JJ).

¹⁹⁴ Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 216.

In the following passage, Mason and Deane JJ explained their approach to the designated person principle:

the independence of the federal judiciary which is protected by the *Boilermakers' Case* will be preserved in a substantial way if, ... we continue to acknowledge that Parliament may confer non-judicial functions on a federal judge *only* where there is a clear expression of legislative intention that the functions are to be exercised by him in his personal capacity, detached from the court of which he is a member.¹⁹⁵

Mason and Deane JJ recognised that Parliament's ability to confer non-judicial power on judges as designated persons was bounded by reference to the purpose of the second limb of the separation principle and, as they indicated in a later passage, the broader purpose of the separation principle as a 'safeguard of individual liberty'.¹⁹⁶ In this way, Deane's reasoning in *Hilton* mirrored his derivation of the judicial process guarantee in *Polyukhovich* as both decisions defined the limits of the implication flowing from Ch III from the purpose of that doctrine.

In *Hilton* Mason and Deane JJ recognised that the designated person principle was an exception to the second limb of the separation doctrine, and so commented:

One may ask: what is the point of our insisting, in conformity with the dictates of the *Boilermakers' Case*, that non-judicial functions shall not be given to a Ch III court, if it is legitimate for Parliament to adopt the expedient of entrusting these functions to judges personally in lieu of pursuing the proscribed alternative of giving the functions to the court to which the judges belong?¹⁹⁷

Accordingly, Mason and Deane JJ narrowed the designated person exception by requiring that Parliament clearly express its intention to confer non-judicial power on judges as individuals. On this approach, in contrast to the majority judges, Mason and Deane JJ considered it the Court's role to strictly enforce the boundaries of legitimate parliamentary action under the Constitution's separation of powers.

Mason and Deane JJ insisted in *Hilton* that the scope of the designated person exception was restricted in two further ways. First, a federal judge could not be

¹⁹⁵ *Hilton* (1985) 157 CLR 57, 82 (emphasis added).

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

compelled to undertake the non-judicial function; rather, their consent must be given.¹⁹⁸ Second, they recognised:

the general qualification that what is entrusted to a judge in his individual capacity is not inconsistent with the essence of the judicial function and the proper performance by the judiciary of its responsibilities for the exercise of judicial power.¹⁹⁹

This second qualification was similar to that of the majority.²⁰⁰ The requirement of consent, however, was unique to Mason and Deane JJ. The lack of consent by Federal Court judges on the facts of this case (particularly compared with provisions requiring consent by State judges) was critical to Mason and Deane JJ's conclusion that the *Interception Act* conferred the powers on the court, not the judges as designated persons.²⁰¹ Without the consent of the judges, the power to issue tap warrants was conferred as part of the responsibilities of judicial office, and was therefore inseparable from that office.²⁰² Indeed, Mason and Deane JJ suggested that the imposition of non-judicial functions on a judge without their consent might be invalid as an infringement of the 'underlying concept of the separation of powers.'²⁰³

(c) *The lessons of Hilton v Wells*

In contrast to the broad and formalistic approach of Bowen CJ and Deane in *Drake*, Mason and Deane JJ in *Hilton* imposed significant limitations on the exception by reference to the purpose of the second limb of the separation of powers principle.²⁰⁴ This change in Deane's approach may reflect an altered perception of the role of the exception or a recognition by Deane that as a member of Australia's highest court he was at liberty to confine the scope of the exception as saw fit. With these two cases, apparently indicating different approaches to the scope of the exception, what can be said of Deane's attitude

¹⁹⁸ Ibid 83.

¹⁹⁹ Ibid.

²⁰⁰ Compare ibid 73-4.

²⁰¹ Ibid 85-6.

²⁰² Ibid 85.

²⁰³ Ibid 82 (emphasis added).

²⁰⁴ The difference between Deane's approaches in *Drake* and *Hilton* was underscored by the treatment of *Drake* by members of the Court in *Hilton*. In *Hilton* it was Gibbs CJ, Wilson and Dawson JJ - not Mason and Deane JJ - that cited the key passage from *Drake* with apparent approval. In contrast, Mason and Deane JJ in *Hilton* referred to the case merely as an example of legislation validly conferring non-judicial functions on a judge in their personal capacity, and their judicial role as a necessary qualification for appointment to that function. Ibid 69 (Gibbs CJ, Wilson and Dawson JJ); 83 (Mason and Deane JJ).

towards the second limb of the separation doctrine? Two interpretations appear possible.

(i) *What is the significance of Mason J's role in Hilton?*

The consequence of Mason and Deane JJ's definition of the scope of the designated person exception was that they upheld the conferral of some non-judicial functions on judges as designated persons. To be validly conferred, these powers must not be contrary to the incompatibility principle, that is, not inconsistent with the proper exercise of judicial power by the Court. Although Mason and Deane JJ set out the incompatibility test as a limitation to the designated person exception, it is not a great step to suggest that they must have formed the opinion that *not all* non-judicial functions conferred on judges were of their nature likely to violate the separation of powers principle. Accordingly, Mason and Deane JJ's judgment in *Hilton* might reflect an attempt to introduce a principle designed to replace the second limb of the separation doctrine, and its designated person exception. That Sir Anthony Mason desired to clear away the designated person exception and replace it with the incompatibility principle was made clear by his paper 'A New Perspective on the Separation of Powers', delivered in 1996 after his retirement as Chief Justice.²⁰⁵ On this interpretation, when in *Hilton* Mason and Deane JJ framed their judgment around the central question – '*what is the point*' of attempting to enforce strict separation and a broad exception to it – they may not have been simply attempting to claw back the scope of the designated person exception. Instead, Mason and Deane JJ might have been suggesting a possible line of argument to counsel should the Court decide to reconsider the *Boilermakers' Case*.²⁰⁶

²⁰⁵ Sir Anthony Mason commented that the designated person exception 'has little to comment it. Rationality would be advanced if the concept were jettisoned and replaced by the incompatibility test.' Sir Anthony Mason, 'A New Perspective on Separation of Powers' (1996) 82 *Canberra Bulletin of Public Administration* 1, 5 (emphasis added).

²⁰⁶ Mason and Deane JJ observed that the Commonwealth Solicitor-General had submitted that the Court should reconsider the *Boilermakers' Case*. However, they noted that argument had not been made on this question, and so they refrained from 'giving an answer': *Hilton* (1985) 157 CLR 57, 86.

This interpretation of *Hilton*, however, hinges on an assumption that Deane shared Mason J's doubts regarding the second limb of the separation principle. Prior to *Hilton*, Deane had not previously expressed such concerns. Previous chapters have indicated that Deane was a judge willing both to adhere to his understanding of 'fundamental constitutional truth' in the face of precedent,²⁰⁷ and to strongly criticise the existing state of authority.²⁰⁸ In this context, it would seem likely that, if Deane felt that the *Boilermakers' Case* was wrongly decided, or that it unnecessarily complicated the separation of powers principle, he would have indicated that he entertained those doubts.

(ii) *What is the significance of Deane's pattern of a strict and purposive interpretation of the separation principle?*

A second interpretation of the minority judgment in *Hilton* is that, for his part, Deane did not share Mason J's concerns over the correctness of the designated person exception. This interpretation is strengthened by the fact that it was open to Deane to join the majority judgment if he believed that the *Boilermakers' Case* required too strict a quarantine of judicial and non-judicial power. The majority judgment, although upholding the second limb of the separation doctrine, allowed Parliament a wider scope to confer non-judicial powers on judges. Certainly the majority's approach lacked the additional hurdles (of legislative clarity and consent) imposed by Mason and Deane JJ. Deane did not, however, choose this course. Instead he joined with Mason J and adopted a narrow construction of Parliament's power to confer non-judicial powers on Ch III judges.

Deane's confining of the designated person exception in *Hilton*, compared to his approach in *Drake*, may therefore demonstrate Deane's consistency across his

²⁰⁷ Compare, for example, Deane's commitment to 'fundamental constitutional truth' over precedent in the context of s 118 discussed above chapter 2 n 186.

²⁰⁸ Note, for example, Deane's forceful criticism of the Court's s 92 jurisprudence (before *Cole*) as demonstrating that:

the ordinary processes of legal reasoning have had but a small part to play and ... judicial exegesis has tended to confuse rather than elucidate. Indeed, it is as if many voices of authority have been speaking differently at the same time with the result that, putting to one side some basic propositions, it is all but impossible to comprehend precisely what it is that authority has said.

Miller v TCN Channel Nine Pty Ltd (1986) 161 CLR 556, 616.

separation of powers jurisprudence. In *Hilton*, as he had in *Re Tracey*, Deane imposed restrictions on Parliament's powers in order to keep the exception within its proper limits. Further, as Wheeler has argued, the adoption of consent and incompatibility limitations may reflect the Court's trend towards a purposive interpretation of the Constitution over formalistic interpretations.²⁰⁹

Deane's final (joint) judgment on the designated person exception, in *Grollo*, suggests that his framing of the exception was influenced by a purposive analysis of the separation of powers doctrine.²¹⁰ In particular, *Grollo* reflected assumptions regarding the importance of judicial process that were pervasive across Deane's jurisprudence, and reinforced the consistency of his reasons in *Hilton* and *Grollo* with the wider body of his constitutional decision-making.

3 *Grollo v Palmer*

Of the judges who sat in *Grollo* only Deane and Dawson JJ were also members of the Court in *Hilton*.²¹¹ Like *Hilton*, *Grollo* raised the issue of the validity of a tap warrant issued under the *Interception Act*. In the intervening period, the Act had been amended to require the consent of the judges to the assumption of the non-judicial role in their personal capacity.²¹² On the facts, the Court, with McHugh J dissenting, concluded that the conferral of these powers on judges of the Federal Court in their personal capacity was not incompatible with the separation of federal judicial power enshrined in Ch III.

The principal judgment was that of Brennan CJ, Deane, Dawson and Toohey JJ.²¹³ They reformulated the two limiting conditions imposed by Mason and Deane JJ in *Hilton*. Accordingly, they required: first, that a judge consent to the conferral of the non-judicial power; and second, that the non-judicial

²⁰⁹ Wheeler's comments were made in relation to the Court's embrace of these limitations in *Grollo*, but arguably Mason and Deane JJ's reasoning in *Hilton* could stand as an earlier illustration of this tendency. Fiona Wheeler, 'Federal Judges as Holders of Non-Judicial Office' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 442, 465.

²¹⁰ *Ibid.*

²¹¹ Brennan J, although a member of the Court in 1985, did not sit in *Hilton*.

²¹² Thus Brennan CJ, Deane, Dawson and Toohey JJ comment that the Act provided 'even clearer indicia showing that the power to issue interception warrants is conferred on judges as designated persons and not on the courts of which eligible judges are members.' *Grollo* (1995) 184 CLR 348, 362.

²¹³ Gummow J wrote a separate majority judgment and McHugh J dissented. Gaudron J did not sit in this case.

function must not be 'incompatible' with the performance of the judge's 'judicial functions' or with the proper discharge by the Court of its responsibilities.²¹⁴

Grollo was the second occasion when Deane, as a High Court judge, did not express disapproval of the second limb of the separation of powers principle or follow Sir Anthony Mason's extra-curial urgings to abandon the designated person principle in favour of an overarching incompatibility test. In other areas of public and private law, Deane had been at the forefront of simplifying complex doctrine under umbrella principles.²¹⁵ However, there was no suggestion in the joint judgment in *Grollo*, nor indeed in Deane's comments during argument in either *Hilton* or *Grollo*, that he wished to undertake such a simplification. Thus it may be concluded that Deane approved the validity of the second limb of the separation doctrine.

In the course of reformulating the *Hilton* limiting conditions on the designated person exception, the joint judgment in *Grollo* recognised that the Court must assess whether the appointment undermined the integrity of the judiciary.²¹⁶ This touchstone revealed two important elements of the *Grollo* approach. First, it effected a tightening of the exception. Second, it secured this effect by means of a purposive interpretation of the separation of powers principle.²¹⁷ At the doctrinal level, therefore, Deane's participation in the joint judgment in *Grollo* confirmed his previous restrictions on the exception in *Hilton* and was consistent with his restriction of the scope of the military justice exception by reference to a purposive interpretation of the separation of powers principle in *Re Tracey*.

There were, however, two significant points of difference between Deane's joint judgment in *Grollo* and Deane's analysis in other Ch III cases. First, as in *Hilton*,

²¹⁴ *Grollo* (1995) 184 CLR 348, 364-5.

²¹⁵ See, for example, Deane's approach to the doctrine of proximity in tort summarised in Rosalind Atherton, Tony Blackshield, Bruce Kercher and Cameron Stewart, 'Deane, William Patrick' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 195.

²¹⁶ *Grollo* (1995) 184 CLR 348, 365.

²¹⁷ See, on the role of purposive analysis in *Grollo*: Fiona Wheeler, 'Federal Judges as Holders of Non-Judicial Office' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 442, 465.

the joint judgment in *Grollo* did not explain the continued recognition by the Court of the designated person exception to the separation of powers principle. There is no apparent reason for this omission in *Grollo*, except perhaps the compromise flowing from a joint judgment of four members of the Court; judges who had at various times expressed quite divergent views on Ch III issues.²¹⁸ The second difference related to the decision on the facts of *Grollo*. That decision highlighted that, despite the restrictions on the exception, Parliament could still confer controversial powers on federal judges in their personal capacity. The joint judges recognised that the issuing of tap warrants was 'no business for a judge to be involved in.'²¹⁹ Nevertheless, the joint judgment upheld the legislation in *Grollo*. In reaching that conclusion on the facts, the members of the joint judgment, including Deane, balanced the threat to the separation of powers against other interests served by the legislation, including the perceived advantages of the participation of judicial officers in the executive process.²²⁰ The following section examines how the joint judgment's approach to that balancing process confirmed Deane's understanding of the role of judicial reasoning as a significant guarantee of individual rights.

(a) The independence of judges: the protection of rights through the judge's personal qualities

Like *Hilton*, the issue in *Grollo* surrounded legislation authorising the issue of 'intrusive and clandestine' tap warrants.²²¹ According to the joint judgment, the primary factor weighing in favour of compatibility was the vital function performed by the judges in scrutinising applications for the warrants. Thus, the joint judgment argued that in the face of legislation designed to combat 'serious crime':

some impartial authority, accustomed to the *dispassionate* assessment of evidence and sensitive to the *common law's protection of privacy and property* (both real and personal), be authorised to control the official interception of communications.²²²

²¹⁸ Compare, for example, the different approaches of members of the Court in *Re Tracey*. Wheeler observes that 'certain passages in the joint judgment suggest that the finding of compatibility was a borderline one', perhaps suggesting the melding of varied approaches by the members of the joint judgment to Ch III issues: *ibid* 462.

²¹⁹ *Grollo* (1995) 184 CLR 348, 367.

²²⁰ *Ibid*.

²²¹ *Ibid*.

²²² *Ibid* (emphasis added).

Thus the use of judges, according to the joint judgment, provided:

*a desirable guarantee that the appropriate balance will be kept between the law enforcement agencies on the one hand and criminal suspects or suspected sources of information about crime on the other.*²²³

At the heart of the joint judgment in *Grollo* was therefore a concern that the power to issue tap-warrants under the *Interception Act* was a grave threat to individual rights protected under the common law. In their view, the necessity of a level of impartial control over the powers of the Executive justified the use of judges as designated persons in this role, despite the risks they had identified to judicial integrity and public confidence in the judiciary.²²⁴ Rather, the guarantee, and the fact that the judges decided 'independently of the applicant agency', was sufficient to preserve public confidence in the judiciary despite their participation in the tap warrant system.²²⁵

As the dissenting judgment of McHugh J forcefully highlighted, however, the joint judgment rested on a number of critical assumptions. For example, it was assumed that the judges could exercise the power independently of the executive even though, by definition, they were deprived of the institutional independence provided by their court. In addition, the joint judgment admitted that the 'judicial method' utilised in the grant of the interception warrant was not identical to the ordinary adversarial process, as the proceedings were clandestine, and *ex parte*.²²⁶ The independence to which the joint judges referred must therefore be the ability of the judges to decide the issue independently, that is, to decide with *independence of mind*. Accordingly, the key protection offered to individuals by having serving federal judges issue tap warrants was that the Ch III judges would bring to this task, in their personal capacity, their '*professional experience and cast of mind*'.²²⁷ Implicit in this statement, and the reasoning of the joint judgment generally, was the assumption that the Ch III judges would utilise elements of the judicial process, particularly judicial reasoning, in deciding whether to grant a tap warrant. The judicial methodology was therefore regarded as itself providing an important protection for individual liberty.

²²³ Ibid (emphasis added).

²²⁴ Ibid.

²²⁵ Ibid.

²²⁶ Ibid.

²²⁷ Ibid (emphasis added).

This emphasis on judicial method by the joint judgment was evocative of the extra-curial writings of one of its member, Sir Gerard Brennan. In his paper 'Courts For The People: Not People's Courts', delivered two months prior to the decision in *Grollo*, Sir Gerard remarked on the significance of judicial integrity, and judicial impartiality, in maintaining public confidence in the judiciary.²²⁸ Sir Gerard added that judicial impartiality was not a quality that was assumed, along with the judicial robes, on appointment to the bench. Rather:

It is a *cast of mind* that is a feature of personal character honed ... by exposure to those judicial officers and professional colleagues... This indefinable quality governs the conduct of the proceedings, the evaluation of evidence, the conclusion of facts and the analysis and application of legal rules.²²⁹

It was in this 'cast of mind', a phrase utilised in *Grollo*,²³⁰ that the joint judgment placed its trust. Thus it was because of these qualities that the joint judgment appeared satisfied that the vital protection of rights provided by judges in this context outweighed the risks to judicial integrity and independence.

In *Grollo* McHugh J was not convinced by this line of argument. He questioned whether the role of the judges in protecting individual liberties under the *Interception Act* would be regarded as an adequate counterbalance to the threat posed by their involvement in the issue of tap warrants to the public perception of the independence of the judiciary. There is much that is persuasive in McHugh J's analysis. In particular, the joint judgment provided no answer to McHugh J's suggestion that retired judges rather than serving federal judges, in their personal capacity, could instead be called upon to issue tap warrants.²³¹ Such an appointment would surely provide the benefits of a judicial cast of mind, while retaining a strict separation between the federal judiciary and the Executive. In addition, the joint judgment proceeded on the assumption that judges were best qualified to resolve disputes, and protect rights. This

²²⁸ Sir Gerard Brennan, 'Courts For The People: Not People's Courts' (1995) 2 *Deakin Law Review* 1. This paper was presented as the Inaugural Deakin Law School Oration, 26 July 1995. See also Sir Gerard's swearing-in speech as Chief Justice, at (1995) 183 CLR ix, x, and Sir Gerard Brennan, 'Why be a Judge?' (1996) 14 *Australian Bar Review* 89.

²²⁹ Brennan, above n 228, 6 (emphasis added).

²³⁰ *Grollo* (1995) 184 CLR 348, 367.

²³¹ *Ibid* 384. See further, Joseph and Castan, who observed that although the majority decision was 'well-founded', particularly in light of comparable overseas precedent, the majority judgment failed to 'adequately address McHugh J's criticisms.' Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (2nd ed, 2006) 184-5.

paternalistic assumption was not, and arguably cannot reasonably be, substantiated.

The principle that a Court performed a vital role in the protection of human rights was a constant thread in Deane's jurisprudence. In *Grollo* the joint judgment clarified and extended this concept significantly by recognising the role of a judge's personal capacities and attributes as a counterbalance to the intrusive powers of the Executive under the *Interception Act*. Although a joint judgment, *Grollo* therefore advances an understanding of Deane's constitutional philosophy in two ways. First, his belief in the qualities and function of a judge explained Deane's continued acceptance of the designated person exception: as ultimately serving the purpose of the separation of powers, that is, the protection of individual liberty. Second, *Grollo* clarified Deane's preference for the *judicial* protection of individual rights, over action by the Executive or Parliament. Thus for Deane it was the integrity, independence, impartiality, rationality and the commitment to the protection of common law rights intrinsic in the judicial process,²³² and the judicial 'cast of mind'²³³ that effected the greatest guarantee to 'the people' and their rights.

Conclusion

It is one of the interesting features of Deane's High Court jurisprudence that it began and came to a close with decisions exploring the separation of powers doctrine. Less than two weeks after his swearing-in as a Justice of the Court, in his first High Court decision, Deane indicated in *Hammond* that the separation of powers ensured that federal judicial proceedings were immunised from legislative and executive interference amounting to contempt of court. In subsequent cases, Deane affirmed his belief that Ch III protected aspects of the judicial process from interference, and implied a range of procedural and substantive rights from the first limb of the separation principle, using his 'fundamental concepts' reasoning. Although Deane derived his most innovative, distinctive and controversial Ch III rights in iconic cases delivered

²³² *Grollo* (1995) 184 CLR 348, 367.

²³³ *Ibid.*

in the 1990s, *Hammond* confirmed that Deane's Mason Court cases built on his well-established understanding of the role of the separation principle as a source of constitutional rights.

Thirteen years later, in his final months on the High Court, Deane (in a joint judgment) in *Grollo* defined the limits of the designated person exception to the second limb of the separation doctrine. *Grollo* too built on a pattern of earlier decisions. Perhaps because these decisions were each joint judgments, Deane's cases on the second limb of the separation principle seemed to lack the trademark elements of his 'fundamental concepts' reasoning, and the passionate declarations of the Court's role to protect the rights of 'the people'. Nevertheless, the core of Deane's designated person jurisprudence confirmed his understanding of judicial reasoning as an important guarantee of individual liberties.

The next chapter examines Deane's interpretation of the Constitution's express rights. In this context also, Deane sought to extend the reach of the judicial protection of individual rights, by interpreting the text consistently with his vision of the purpose of the Constitution, as 'ultimately concerned with the governance and protection of the people'.²³⁴

²³⁴ *Metwally* (1984) 158 CLR 447, 477.

Chapter 4 EXPRESS RIGHTS AND THEIR ROLE IN THE CONSTITUTION

Introduction

In *Street* Deane commenced his reasons with his famous rights 'manifesto'.¹ This passage is so significant in Deane's constitutional jurisprudence that it bears repeating in full:

It is often said that the Australian Constitution contains no bill of rights. Statements to that effect, while literally true, are superficial and potentially misleading. The Constitution contains *a significant number of express or implied guarantees of rights and immunities*. The most important of them is the guarantee that the citizen can be subjected to the exercise of Commonwealth judicial power only by the 'courts' designated by Ch III (s 71). Others include: the guarantee that the trial on indictment of any offence against any law of the Commonwealth shall be by jury (s 80); the guarantees against discrimination between persons in different parts of the country in relation to custom and excise duties, and other Commonwealth taxes and bounties (ss 51(ii), 51(iii), 86, 88 and 90); the guarantee of freedom of interstate trade, commerce and intercourse (s 92); the guarantee of direct suffrage and of equality of voting rights among those qualified to vote (ss 24 and 25); the guarantees of the free exercise of religion (s 116); and the guarantee against being subject to inconsistent demands of contemporaneously valid laws (ss 109 and 118).

All of those guarantees of rights or immunities are of fundamental importance in that they serve the function of advancing or protecting the liberty, the dignity of the equality of the citizen under the Constitution.²

Deane's decision in *Street* was delivered a year after a failed referendum to increase the guarantees of individual liberty in the Constitution. In dramatic fashion, in this passage Deane affirmed his vision of the Constitution, in its unamended form, as a significant source of constitutional rights. These rights included implications (such as the separation of powers) and rights-sensitive interpretations of a variety of provisions in the constitutional text. This passage, and Deane's observations on the absence of a formal 'bill of rights', had particular relevance for his approach to the judicial implication of constitutional

¹ Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (3rd ed, 2002) 1100.

² *Street* (1989) 168 CLR 461, 521-2 (emphasis added).

rights. Part 2 of this chapter explores the significance of Deane's 'manifesto' in that context.

Part 1 examines Deane's understanding of ss 80, 51(xxxi), and 117; a more conventional list of the Constitution's express rights than that offered by Deane in *Street*.³ Across these provisions, Deane was a fierce proponent of the principle that, consistent with their importance for the liberty, dignity and equality of 'the people', these provisions must be given a robust interpretation, and applied by reference to 'substance'. Thus the guarantees must not operate at the whim of Parliament, turning on the 'form' of legislation. However, Deane also acknowledged that ss 51(xxxi) and 117 were not absolute constitutional guarantees. Thus his decisions recognised that if the protection offered by these sections was taken too far it could undermine the ability of the Commonwealth, or the States, to exercise the functions of government.

Section 80 stood apart from ss 51(xxxi) and 117 in Deane's jurisprudence. In his three decisions on s 80, Deane exhibited an uncompromising commitment to broadening the rights-protection offered by the section; a commitment leading him in *Kingswell v The Queen* to dissent passionately on the meaning of 'trial on indictment'.⁴ This approach to s 80 turned on Deane's vision of jury trials as a significant guarantee of individual liberty and an important component of fair judicial process. This chapter commences with a discussion of Deane's vision of s 80.

A *Part 1: Deane and three express rights*

1 *Section 80*

Section 80 provides that the 'trial on indictment of any offence against a law of the Commonwealth shall be by jury'. While on the Court, Deane addressed

³ Deane did not decide any cases on s 116. For Deane's understanding of the concept of 'religion', in the context of Victorian taxation legislation, see his joint judgment (with Wilson J) in *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1982) 154 CLR 120.

⁴ (1985) 159 CLR 264 ('*Kingswell*').

three questions relevant to the scope of s 80: the meaning of 'on indictment' (*Kingswell*); whether an accused could waive the guarantee of a jury trial (*Brown v The Queen*);⁵ and the composition of a jury (*Cheatle v The Queen*).⁶

One of the enduring questions raised by Deane's jurisprudence was whether his vision of s 80 as a substantive individual right in *Kingswell*, and his conclusion in *Brown* that an accused cannot waive that right, were compatible. This chapter demonstrates that Deane's consistent message was that s 80 was more than a 'mere procedural provision';⁷ it was a fundamental guarantee of the fair administration of justice in serious federal offences. For Deane this guarantee was of importance to the rights of dignity, liberty and equality of the individual accused and to the community. It was also of equal importance to 'the people' as a whole, by securing the integrity and independence of the judicial process in the federal justice system.

This part examines Deane's decisions on s 80 in reverse chronological order. This approach has two key benefits. First, in *Cheatle* and *Brown* Deane presented a clear picture of the multiple rights dimensions of s 80 and its role in protecting the interests of the individual and 'the people' as a whole. Unfortunately, that message was less clearly developed in Deane's first case on s 80, *Kingswell*. Second, examining Deane's decisions in this order brings into focus those aspects of his vision of s 80 that he shared with other judges, before turning to his forceful dissenting reasons in *Kingswell*.

(a) *Cheatle v The Queen*

In *Cheatle*, in 1993, the Court explored the 'essential features' of a jury trial for the purposes of s 80. Section 57A of the *Juries Act 1927* (SA) provided that a majority verdict could be substituted if a unanimous verdict had not been reached after a specified minimum period. The Court, in a fittingly unanimous joint judgment, held that 'history, principle and authority'⁸ compelled the

⁵ (1986) 160 CLR 171 ('*Brown*').

⁶ (1993) 177 CLR 541 ('*Cheatle*').

⁷ Compare *Spratt v Hermes* (1965) 114 CLR 226, 244 (Barwick CJ).

⁸ *Cheatle* (1993) 177 CLR 541, 562.

conclusion that s 80 precluded a guilty verdict in a trial upon indictment of a federal offence otherwise than by unanimous verdict. For present purposes, two features of the decision in *Cheatle* are of significance: its description of the purpose of s 80, and the interpretive principles applied by the Court to extract the mandatory minimum content of the guarantee.

(i) *The purpose of s 80*

The joint reasons in *Cheatle* identified the core function and ‘essential features’ of s 80 before turning to three ‘arguments against unanimity’⁹ at the final stages of the decision. This structure mirrored the structure of Deane’s reasons in *Polyukhovich* and *Breavington* and may indicate that Deane had a significant hand in writing the *Cheatle* joint judgment.

One of the three ‘arguments against unanimity’ addressed in *Cheatle* was that of convenience, that is, the argument that ‘powerful practical considerations’ favoured the use of majority verdicts in contemporary jury trials.¹⁰ As discussed in chapter 1, Deane had responded to an argument of ‘convenience’ in the *Incorporation Case*, specifically that ‘it would be productive of difficulty and inconvenience’ to construe s 51(xx) as including the power of incorporation but limited to ‘trading and financial’ corporations.¹¹ Deane forcefully rejected this argument in the *Incorporation Case* on both general and particular grounds. In that case Deane had argued that the convenience or practicality of the Commonwealth’s law were issues exclusively for the consideration of Parliament.¹² The Court’s task in constitutional interpretation was rather to give effect to the ‘words’ of the Constitution, as the compact of ‘the people’.¹³ In addition, in the *Incorporation Case* Deane had challenged the accuracy of the conclusion that a national corporations law was ‘productive of inconvenience’, arguing that the ‘benefits’ of a national uniform corporations law would ‘outweigh’ any inconvenience.¹⁴

⁹ Ibid 560.

¹⁰ Ibid 561.

¹¹ *Incorporation Case* (1990) 169 CLR 482, 511.

¹² Ibid 512.

¹³ Ibid 504.

¹⁴ Ibid 512.

The Court in *Cheatle* offered similar general and particular responses to the argument that 'practical' considerations favoured a construction of s 80 permitting a majority verdict in a trial of an indictable federal offence.¹⁵ Thus, in *Cheatle*, the joint judgment argued that:

the abandonment, for reasons of contemporary convenience or practical utility, of an essential feature of the criminal trial by jury which is *guaranteed by s 80 of the Constitution is not a matter for this Court*. It is a matter for *the people of Australia* [fn 'See Constitution 128'] *for whose protection the guarantee, including the requirement of unanimity, was adopted*.¹⁶

Like Deane in the *Incorporation Case*, the Court in *Cheatle* affirmed in this passage that issues of convenience or practicality were not themselves a basis for abandoning the clear meaning of the text. This was because the Court's task was to interpret the Constitution, and s 80 in particular, as an instrument for the benefit of 'the people'.¹⁷ Continuing their analysis of the 'convenience' argument, the Court then addressed its substance, arguing that,

it is not, in any event, apparent that considerations of contemporary convenience or practical utility favour an abandonment of the requirement of unanimity in the case of a criminal jury. To the contrary, one can point to strong support for the view that the requirement of unanimity of a criminal jury is, on balance, *in the public interest in this country*.¹⁸

The effect of these two passages in *Cheatle* was to endorse a significant rights-purpose for s 80. That a joint judgment, reflecting the views of judges with disparate views on constitutional rights and s 80, would affirm such a purpose for the section is particularly striking. Thus, *Cheatle* displayed unanimity amongst the Court as to the position that when enlivened s 80 functioned as a fundamental constitutional guarantee, serving the interests of the 'people of Australia'.

The reference to 'the people' by the Court in *Cheatle* was also of significance. This thesis has demonstrated that reliance on 'the people' was a constant thread in Deane's constitutional jurisprudence. In the above passage, the Court, including Deane, declared that the restriction of constitutional guarantees must

¹⁵ *Cheatle* (1993) 177 CLR 541, 561-2.

¹⁶ *Ibid* 561-2 (emphasis added).

¹⁷ The significance of the Court's reference to the 'essential features' of a jury trial for the Court's interpretive approach is examined further below.

¹⁸ *Cheatle* (1993) 177 CLR 541, 562 (emphasis added) (citation omitted).

be effected by 'the people' through s 128. This sentiment was consistent with Deane's commitment, displayed throughout his jurisprudence, to strengthen of Constitution's protection of 'the people'. Thus Deane regarded it as the Court's duty to interpret the Constitution consistently with its status as an instrument designed for the 'governance and protection of the people'.¹⁹ This entailed, for Deane, the extension of the judicial protection of rights, whether through implication, the reinterpretation of express provisions or the use of proportionality analysis.

However, the above passage from *Cheatle* demonstrated the different layers of meaning available to the concept of 'the people' in constitutional interpretation. In *Cheatle*, the Court turned to 'the people', and their power under s 128, to support judicial reticence and restraint in constitutional interpretation.²⁰ It was therefore for 'the people', not the Court to alter the meaning of s 80, particularly where alteration would affect the extent of the constitutional right guaranteed by that provision. Until 'the people' spoke, through s 128, the Court in *Cheatle* considered that its duty was to faithfully apply the text, according to the 'essential features' of a jury trial.

On the facts in *Cheatle* these different roles of 'the people' each supported the strict enforcement of the terms of the guarantee of s 80. However, across much of Deane's jurisprudence (including the interpretation of ss 51(xxxi) and 117 explored later in this chapter) different visions of the role of 'the people' supported conflicting meanings of the Constitution. Thus, through these passages, *Cheatle* reinforced the flexibility of the concept as a tool in constitutional interpretation, and raised the question of whether this concept can be regarded as a useful or legitimate tool in constitutional interpretation.

¹⁹ *Metwally* (1984) 158 CLR 447, 477.

²⁰ Compare Sir Daryl Dawson's argument that the choice of 'the people' in 1900 to adopt a federal system, and their power under s 128 to amend the Constitution, should encourage judicial reticence to 'alter' the federal division of legislative power under the Constitution: Sir Daryl Dawson, 'The Constitution - Major Overhaul or Simple Tune-up?' (1984) 14 *Melbourne University Law Review* 353, 365.

(ii) *Evolutionary interpretation and s 80*

The Court in *Cheatle* applied a form of evolutionary constitutional interpretation, whereby both history and contemporary circumstances played an important part in ascertaining the content of the guarantee.²¹ Recognising that the phrase 'trial by jury' had an identifiable meaning in the common law when the Constitution was drafted, the starting point for the Court was the elements of that institution in 1900.²² Unanimity was one such feature, as was representativeness. However, in 1900 representativeness was wedded with 'some undesirable characteristics', specifically, the exclusion of women and unpropertied jurors.²³ Would these features also carry forward to 1993?

The Court's unanimous conclusion was that these discriminatory elements were not essential features of the institution of 'trial by jury'. They argued instead that the discriminatory elements of trial by jury in the common law in fact reflected a deeper value or purpose, or underlying 'essential feature' – that of ensuring representativeness in the jury.²⁴ It was by adopting this level of abstraction to the features of the 1900 jury trial that the Court in *Cheatle* was able to allow the institution to 'conform with contemporary standards'.²⁵

Cheatle's interpretive approach has evident strengths and weaknesses. On the one hand, the Court has long recognised, through the use of the connotation and denotation distinction, that the meaning of the Constitution may adapt, within limits, to contemporary circumstances.²⁶ By identifying the 'essential features' of a common law institution of 'trial by jury', the Court in *Cheatle* likewise identified the unchanging elements of the institution – unanimity and representativeness – but allowed those concepts to mould to their contemporary meaning. On the other hand, the choice of essential features from

²¹ For a discussion of evolutionary forms of constitutional interpretation, see Sir Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 13, 16-23. For a different 'taxonomy', see John Dyson Heydon, 'Theories of Constitutional Interpretation: A Taxonomy' (2007) *Winter Bar News* 12.

²² *Cheatle* (1993) 177 CLR 541, 550-2.

²³ *Ibid* 560.

²⁴ *Ibid*.

²⁵ *Ibid* (emphasis added).

²⁶ Goldsworthy argued that *Cheatle* was a compelling application of connotation/denotation reasoning: Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1, 31-3.

a rich historical source permitted the Court considerable flexibility to identify those essential features. This flexibility enabled the Court to excise the undesirable elements of the historical record and ensure that those elements of the institution that did not accord to contemporary (moral) values, did not bind the Constitution's meaning in 1993.

This interpretive methodology was exhibited in a range of Deane decisions. The most obvious illustration of Deane's focus on contemporary meaning can be found in his invocation of the 'living force' theory of interpretation in *Theophanous*.²⁷ As chapter 6 later demonstrates, Deane's 'living force' theory allowed him to fuse traditional and contemporary meaning. However, another decision on the meaning of Ch III also illustrates Deane's use of an evolutionary interpretive approach. In *Mickelberg v The Queen*, decided five years earlier than *Theophanous*, in 1989, Deane examined the nature of the Court's appellate jurisdiction under s 73. Deane alone in that case held that the Court had the power to receive new evidence. In adamant tones, Deane refused to allow that the *traditional* practice and procedure of the Court could prevent the Court from reconsidering the issue. In language strikingly similar to his later endorsement of a 'living force' theory of interpretation in *Theophanous*, Deane remarked in *Mickelberg*:

there is ... no justification for the approach that *ancient procedures* should be allowed to *reach from the past to fetter* with their inadequacies the ability of this Court to do justice in the exercise of its general appellate jurisdiction under the Constitution.²⁸

In *Cheatle*, the Court was not as bold as Deane in *Mickelberg*. The Court in *Cheatle* did not suggest that the institution of jury trials should be recast, that is, it did not urge the rejection of the discriminatory features of the 'past' in order to apply new procedures and traditions. Instead, but to the same effect, the Court in *Cheatle* endorsed the 'essential feature' of jury trials, that were said to underlie the discriminatory practices of the past. In this way, the Court led s 80 beyond the past meaning of the institution of 'trial by jury' into a meaning consistent with contemporary concepts of equality.

²⁷ *Theophanous* (1994) 182 CLR 104, 171.

²⁸ *Mickelberg v The Queen* (1989) 167 CLR 259, 280 (emphasis added).

In contrast to *Cheatle*, in his earlier decisions in *Brown* and *Kingswell* Deane was not faced with the need to 'renovate' the institution of trial by jury. Instead, the recurring issue in these cases was the purpose of s 80.

(b) *Brown v The Queen*

In *Brown* a majority of the Court (Brennan, Deane and Dawson JJ, Gibbs CJ and Wilson J dissenting) held that s 80 prevented an accused from electing to be tried by judge alone for an indictable Commonwealth offence. Deane's reasoning in *Brown* articulated a dual purpose for s 80. First, in language similar to the joint judgment in *Cheatle*, Deane stated that:

the general prescription of trial by jury as the method of trial on indictment of any offence against any law of the Commonwealth constitutes an element of the structure of government and distribution of judicial power.²⁹

Thus Deane regarded s 80 as an important feature of the structure of government '*adopted by, and for the benefit of, the people of the Federation as a whole*'.³⁰ Significantly, Deane also indicated that by prescribing the trial by jury for specified offences, s 80 served the community as a whole as it 'fosters the ideal of *equality in a democratic community*'.³¹ This was because the institution of trial by jury ensured that 'neither the *powerful nor the weak* should expect or fear special or discriminatory treatment'.³² In this way, *Brown* confirmed Deane's continuing interest in equality as a constitutional value, and substantially mirrored the language of his swearing-in speech.³³

Deane's vision of the purpose of s 80, as serving the interests of 'the people' as a whole, coupled with the language of the section (trial '*shall be*' by jury), led him to conclude that the requirements of s 80 could not be waived by an accused.³⁴ This vision for s 80 was consistent with Deane's wider understanding of the nature and purpose of the Constitution. As Deane explained in his swearing-in

²⁹ *Brown* (1986) 160 CLR 171, 202.

³⁰ *Ibid* (emphasis added).

³¹ *Ibid* (emphasis added). Note Stellios' critique that the Court insufficiently distinguished between the role of s 80 and the institution of jury trials: James Stellios, 'The Constitutional Jury - "A Bulwark of Liberty?"' (2005) 27 *Sydney Law Review* 113, 131.

³² *Brown* (1986) 160 CLR 171, 202 (emphasis added).

³³ The role of the jury in fostering equality was not a feature of the Constitution mentioned by Deane and Toohey JJ in *Leeth* in their implication of a general guarantee of legal equality.

³⁴ *Brown* (1986) 160 CLR 171, 201.

speech, the source of the Constitution's legitimacy lay with 'the people' – the 'strong and the weak, the rich and the poor: 'all manner of people.'³⁵ In *Brown* this meant that the significance of the institution of the jury trial for the community, particularly ensuring the equality of people before the law, matched with the mandatory language of the section, required that the guarantee could not be waived.

This view did not mean, however, that Deane did not regard s 80 as an important individual right. Instead, Deane's focus on 'the people' meant that a provision such as s 80 was not activated, or denied, at the whim of Parliament, but operated as a substantive guarantee of individual liberty. In *Kingswell* Deane secured this rights-purpose for s 80 by deriving a substantive meaning of the phrase 'trial on indictment'.

(c) **Kingswell v The Queen**

(i) *A substantive guarantee*

In *Kingswell* the Court examined the validity of a Commonwealth indictable offence that differentiated between the elements of the principal offence, which were matters for the jury, and aggravating features, which were determined by the judge sitting alone. *Kingswell* argued that by removing the aggravating features from the jury his trial was conducted contrary to s 80. Gibbs CJ, Mason, Wilson and Dawson JJ held that whether an offence was 'indictable', and the distinction between elements of the offence and aggravating features, were matters entirely for Parliament.³⁶ Brennan and Deane JJ rejected this conclusion.³⁷ For Brennan and Deane JJ, the term 'offence' had an objective meaning, which could not be subverted by creative legislative drafting. In this case, the aggravating features were in fact important components of the

³⁵ Transcript of the Ceremonial Sitting of the Occasion of the Swearing-in of the Honourable Mr Justice Deane as a Justice of the High Court of Australia at Canberra, Tuesday 27 July 1982, 17.

³⁶ *Kingswell* (1985) 159 CLR 264, 276-7 (Gibbs CJ, Wilson and Dawson JJ); 285 (Mason J).

³⁷ Brennan J's reasoning, and the particular issues associated with the identification of elements of an 'offence' was examined further in James Stellios, 'The Constitutional Jury - "A Bulwark of Liberty?"' (2005) 27 *Sydney Law Review* 113, 117-8.

conduct that was criminalised, and so were required to be put to the jury under s 80.³⁸

In *Kingswell* Deane explained his vision of s 80 in the following passage:

The guarantee of s 80 of the Constitution was not the mere expression of some casual preference for one form of trial. It reflected a deep-seated conviction of free men and women about the way in which justice should be administered in criminal cases. That conviction finds a solid basis in an understanding of the history and functioning of the common law as a bulwark against the tyranny of arbitrary punishment.³⁹

In later passages Deane expanded on s 80's role in protecting individual rights, describing 'the rationale and essential function' of s 80 as '*the protection of the citizen*' from the arbitrary exercise of power by legislators, administrators or judges.⁴⁰ In addition, a jury trial ensured that the criminal justice system was consistent with the principle of a '*fair go*' and 'ordinary notions of *fair play*'.⁴¹ It was because of this understanding of the purpose of s 80 and jury trials that Deane concluded that the section provided a substantive guarantee.⁴²

Accordingly, Deane reasoned that 'the settled principles of legal interpretation' required it to be '*broadly interpreted and applied*'⁴³ and its operation not confined by 'narrow technicality' or 'devious drafting'.⁴⁴ Thus, as s 80 was a provision of importance in the Constitution, the phrase 'trial on indictment' must be given a substantive interpretation.

As in *Re Tracey* and *Cheatle*, Deane sought the meaning of 'indictable offences' in common law history.⁴⁵ In his view, a survey of the history of jury trials supported the conclusion that 'trial on indictment', at the time of drafting the Constitution, bore the meaning of a trial of a 'serious offence', that is, an offence not capable of being dealt with summarily.⁴⁶ Although unnecessary to determine conclusively on the facts in *Kingswell*, Deane expressed the 'tentative

³⁸ *Kingswell* (1985) 159 CLR 264, 294-5 (Brennan J); 321 (Deane J).

³⁹ *Ibid* 298. Deane continued to describe s 80 as a significant constitutional guarantee whilst Governor-General. See, for example, his interview with the ABC, 16 August 1999, quoted in Sir William Deane, *Directions: A Vision for Australia* (2002) 18.

⁴⁰ *Kingswell* (1985) 159 CLR 264, 300 (emphasis added).

⁴¹ *Ibid* 301 (emphasis added).

⁴² *Ibid* 307.

⁴³ *Ibid* 299 (emphasis added).

⁴⁴ *Ibid* citing *Commonwealth and Commonwealth Oil Refineries Ltd v South Australia* (1926) 38 CLR 408, 423 and *Gosford* (1985) 155 CLR 368, 383-4.

⁴⁵ Compare *Re Tracey* (1988) 166 CLR 518, 582-6 and *Cheatle* (1993) 177 CLR 541, 550-2.

⁴⁶ *Kingswell* (1985) 159 CLR 264, 319.

view' that the line between 'serious' and 'summary' offences was whether the offence was punishable by a maximum term of imprisonment for more than one year.⁴⁷

Deane's interpretation of the meaning of 'trial on indictment' has been strongly criticised on various grounds. For example, McHugh J in *Cheng v The Queen* argued that Deane's interpretation could only be reached by 'disregarding the plain meaning of s 80, its drafting history and its purpose.'⁴⁸ Further, McHugh J questioned the persuasiveness of an interpretation of 'trial on indictment' as meaning a 'serious' offence, given that Dixon and Evatt JJ in *R v Federal Court of Bankruptcy; Ex parte Lowenstein*⁴⁹ and Deane in *Kingswell* had reached different conclusions on the meaning of that expression. However, Simpson and Wood have argued that many aspects of constitutional interpretation require boundaries to be drawn by the Court and accordingly an interpretation of s 80 which allows the phrase 'trial on indictment' a meaning other than the procedure chosen by Parliament, is preferable.⁵⁰ Simpson and Wood's analysis appears to accord with the Court's commitment to the interpretation of the Constitution to give effect to 'substance' over 'form'.⁵¹

(ii) *Precedent and the framers' intentions*

In *Kingswell*, Deane only considered it 'necessary' to examine precedent after he had determined that s 80 was a significant constitutional guarantee, and hence requiring an interpretation that ensured that its protection could not be avoided by a drafting device of Parliament.⁵² This approach, whereby the persuasive onus rested on precedent to displace his conclusion on the meaning of s 80, was

⁴⁷ Ibid.

⁴⁸ (2000) 203 CLR 248, 295. Meagher also argued that Deane's interpretation of 'trial on indictment' in *Kingswell* 'smuggles the word "serious" into the text of s 80 and permits the court to define what offences fit this category' under the guise of an ambiguity in the language which does not in fact exist. Dan Meagher, 'New Day Rising? Non-Originalism, Justice Kirby and Section 80 of the Constitution' (2002) 24 *Sydney Law Review* 141, 167.

⁴⁹ (1938) 59 CLR 556, 583-4 ('*Lowenstein*').

⁵⁰ Amelia Simpson and Mary Wood, '"A Puny Thing Indeed" - *Cheng v The Queen* and the Constitutional Right to Trial by Jury' (2001) 29 *Federal Law Review* 95, 111.

⁵¹ Although note Stellios' interpretation of s 80 as serving a significant federal purpose, as an alternative to a rights-based vision of the section: James Stellios, 'The Constitutional Jury - "A Bulwark of Liberty?"' (2005) 27 *Sydney Law Review* 113.

⁵² *Kingswell* (1985) 159 CLR 264, 311.

a style of argument Deane later employed in his decisions in *Breavington* and *Polyukhovich*.⁵³ While Deane intimated in *Kingswell* that direct authority on the meaning of s 80 could displace his interpretation of the section,⁵⁴ his deference to precedent was not tested in *Kingswell* because of his conclusion that no compelling authority controlled the section's meaning.

Deane's critique of the s 80 cases in *Kingswell* was one of his most extensive, and persuasive, reviews of precedent in the constitutional context. The key decision of the Court on this topic was *R v Archdall and Roskrug; Ex parte Corrigan and Brown*.⁵⁵ In *Kingswell* Deane emphasised that the Court in *Archdall* had inadequately justified the rejection of a substantive interpretation of s 80.⁵⁶ On this foundation, Deane reasoned, the longevity of *Archdall* could not be decisive on the meaning of s 80. Instead, Deane concluded that the status of s 80 as a constitutional guarantee demanded that precedent should only be applied to render the protection of s 80 'illusory' if the Court's decision was supported by 'cogent reasoning'.⁵⁷ Deane believed that this burden was not satisfied by *Archdall*, nor were the subsequent cases directly on the point at hand.

As part of his analysis of precedent, and specifically Latham CJ's decision in *Lowenstein*, Deane reflected in *Kingswell* on the relevance of the framers' intentions to the interpretation of s 80. Deane noted that Latham CJ in *Lowenstein* had relied on the 'unlikely views' expressed by Isaacs at the 1898 Convention: that Parliament could decide that murder was not an indictable offence.⁵⁸ Deane then remarked:

⁵³ Compare *Breavington* (1988) 169 CLR 41, 130 and *Polyukhovich* (1991) 172 CLR 501, 614.

⁵⁴ Deane remarked that 'one would need to identify convincing legal reasoning or direct authority' to construe s 80 as meaning only that the trial must not proceed by way of 'summary proceedings.' *Kingswell* (1985) 159 CLR 264, 308. Deane also remarked that '[t]he weight which one would otherwise give to [the] predominant tendency' of authority was greatly reduced by the lack of a coherent line of reasoning in these cases. *Ibid* 318 (emphasis added).

⁵⁵ (1928) 41 CLR 128 (*Archdall*).

⁵⁶ *Kingswell* (1985) 159 CLR 264, 311-2. Gibbs CJ, Wilson and Dawson JJ did not respond to Deane's critique: *ibid* 276-277.

⁵⁷ *Ibid* 312.

⁵⁸ *Ibid* 313 citing *Record of Convention Debates*, Third Session (1898) 352. On the insights of the Debates for the meaning of s 80 see: Amelia Simpson and Mary Wood, "'A Puny Thing Indeed" - *Cheng v The Queen* and the Constitutional Right to Trial by Jury' (2001) 29 *Federal Law Review* 95, 107-11.

Even if regard could properly be had to such views expressed by a *delegate* in the course of debate however, it could scarcely be assumed that they were shared by the *majority* of the Convention which adopted the section.⁵⁹

Although clearly less defined than his later references to the framers' intentions in *Breavington* or the *Incorporation Case*,⁶⁰ this passage signalled Deane's view that opinions of the framers expressed in the Debates could not control the interpretation of s 80.

In the course of his analysis in *Kingswell*, Deane made another significant reference to the framers.⁶¹ Deane said:

It would also seem plain enough that the framers of the Constitution used the words 'on indictment' in s 80 to ensure that the guarantee of trial by jury was not applicable to the type or class of less serious offences which were generally seen, in the last decade of the nineteenth century, as appropriate to be dealt with by justices or magistrates.⁶²

Taken by itself, this passage may suggest, as Meagher has argued, that Deane relied on what the framers 'subjectively intended for its efficacy' in support of his reasoning on s 80.⁶³ However, this statement by Deane occurred in the midst of his examination of the institution of trial by jury at 1900. By highlighting that 'trial on indictment' had a meaning independent of Parliament's decision to proceed summarily, Deane used this history to demonstrate the weaknesses of the orthodox interpretation of s 80. Construed in context, Deane's reference to the framers in *Kingswell* was arguably intended to highlight the errors in the prevailing interpretation of s 80. It was not evidence that Deane had adopted an intentionalist approach to constitutional interpretation.⁶⁴

⁵⁹ *Kingswell* (1985) 159 CLR 264, 313 (emphasis added). In both *Kingswell* and *Breavington*, Deane referred to the framers as 'delegates', language reinforcing Deane's vision of the framers as the representatives of 'the people'. See *Breavington* (1988) 169 CLR 41, 133. On the significance of the choice of designation, between, for example, delegate, framer, founder, see Paul Schoff, 'The High Court and History: It Still Hasn't Found(ed) What It's Looking For' (1994) 5 *Public Law Review* 253, 256-9.

⁶⁰ Compare *Breavington* (1988) 169 CLR 41, 132-3 and *Incorporation Case* (1990) 169 CLR 482, 511.

⁶¹ Deane in *Kingswell* made four references to the framers: at *Kingswell* (1985) 159 CLR 264, 303, 306, 309 and 313.

⁶² *Ibid* 309.

⁶³ Dan Meagher, 'New Day Rising? Non-Originalism, Justice Kirby and Section 80 of the Constitution' (2002) 24 *Sydney Law Review* 141, 167.

⁶⁴ This conclusion does not affect the correctness of Meagher's conclusion that Kirby J was not consistent in his radical non-originalism in interpreting s 80. Kirby J's theory required that the meaning of the section be fixed by the understanding of the current generation. As Deane had relied heavily on an analysis of the common law history of the institution of trial by jury, the paradox of Kirby J's reliance on Deane remains, even if, properly viewed, Deane's reasoning in

These aspects of Deane's reasoning in respect of s 80 build a consistent picture of his vision of the section, and the principles guiding its interpretation. Thus Deane displayed a commitment to strengthening one of the Constitution's express guarantees of individual rights, by rejecting formalism in favour of a purposive analysis of the section. Deane's decisions on s 51(xxxi), examined in the next section of this chapter, display a similar conviction that the Constitution's express rights must be interpreted in a manner consistent with the Constitution's ultimate purpose as an instrument designed for the 'governance and protection of the people'.⁶⁵

2 Section 51 (xxxi)

Section 51(xxxi) provides that the Parliament shall have power with respect to 'the acquisition of property on just terms.' The section functions as both an express grant of legislative power to the Commonwealth and as an important constitutional guarantee of 'just terms'.⁶⁶ Throughout the Court's history, s 51(xxxi) stood apart as an illustration of a constitutional guarantee which has been interpreted in broad fashion.⁶⁷

Deane's most controversial reference to s 51(xxxi) occurred in 1992, in *Mabo (No 2)*. There Deane and Gaudron JJ indicated that a federal law purporting to extinguish or diminish common law native title would constitute an 'acquisition of property' for the purposes of s 51(xxxi), and so activate the 'just terms' guarantee.⁶⁸ By this reference, Deane and Gaudron JJ affirmed that

Kingswell did not rely on the subjective intentions of the framers as Meagher claimed. See *ibid* 166-7.

⁶⁵ *Metwally* (1984) 158 CLR 447, 477.

⁶⁶ See, for example, Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ's statement that s 51(xxxi) 'has assumed the *status of a constitutional guarantee of just terms* ... and is to be given the liberal construction appropriate to such a constitutional provision.' *Clunies-Ross v Commonwealth* (1984) 155 CLR 193, 201-2 (emphasis added).

⁶⁷ For a detailed examination of the Court's theory of s 51(xxxi) and its interpretation, including the work of the Gleeson Court on this topic, see Simon Evans, 'Constitutional Property Rights in Australia: Reconciling Individual Rights and the Common Good' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without A Bill of Rights: Institutional Performance and Reform in Australia* (2006) 197.

⁶⁸ *Mabo (No 2)* (1992) 175 CLR 1, 111.

native title was a valuable property right and ascribed a prominent place to s 51(xxxi) in the protection of the rights of Indigenous Australians.

Leaving *Mabo (No 2)* to one side, however, Deane participated in seven significant cases that examined the scope of s 51(xxxi).⁶⁹ Two features pervade Deane's reasoning in these cases. First, Deane consistently adopted an expansive definition of 'acquisition of property', reflecting his understanding of the contemporary realities of property ownership in Australia and the importance of interpreting the constitutional guarantee by reference to 'substance' over 'form'. Second, Deane used proportionality analysis to define the boundaries between regulation and acquisition, and to weave a path between the governance and rights purposes of s 51(xxxi). Both features of Deane's approach were consistent with the broad characteristics of Deane's constitutional jurisprudence seen in this and preceding chapters. Deane's decision in the *Tasmanian Dam Case*, his first and only single judgment on this topic, most clearly evinced these two features of his approach to s 51(xxxi).

(a) *The Tasmanian Dam Case and s 51(xxxi)*

In the *Tasmanian Dam Case* Mason, Murphy, Brennan and Deane JJ, in separate judgments, addressed the argument that parts of the Commonwealth legislative scheme infringed s 51(xxxi).⁷⁰ Deane alone held that some of the scheme effected an acquisition of property by the Commonwealth,⁷¹ and that it did not provide 'just terms' to the property owner.⁷² This finding by Deane was important for the result of the case, as it meant that a majority of the Court (Gibbs CJ, Wilson, Deane and Dawson JJ) found s 11 of the *World Heritage*

⁶⁹ These cases are listed in Appendix B.

⁷⁰ The relevant provisions were the *World Heritage (Western Tasmania Wilderness) Regulations* 1983 (Cth), enacted under s 69 of the *National Parks and Wildlife Conservation Act* 1975 (Cth), and ss 9, 10 and 11 of the *World Heritage Properties Conservation Act* 1983 (Cth).

⁷¹ Deane concluded that s 11 of the *World Heritage Properties Conservation Act* 1983 (Cth) and *World Heritage (Western Tasmania Wilderness) Regulations* 1983 (Cth) contravened s 51(xxxi).

⁷² Deane's conclusion that some of the legislation, in substance, constituted an 'acquisition of property' by the Commonwealth compelled him to assess whether the scheme provided 'just terms' to the land-owner. He concluded that it did not, because the procedure was 'intrinsically unfair', by virtue of the time delay between acquisition and compensation and the absence of an interest component. See *Tasmanian Dam Case* (1983) 158 CLR 1, 291.

*Properties Conservation Act 1983 (Cth) and the World Heritage (Western Tasmania Wilderness) Regulations 1983 (Cth) to be invalid.*⁷³

(i) The 'acquisition' of property

Mason, Murphy, Brennan and Deane JJ in the *Tasmanian Dam Case* endorsed a broad definition of 'property' in s 51(xxxi).⁷⁴ However, the key point of difference between Deane and the other judges lay in the definition of an 'acquisition'. As Evans observed, for Mason, Murphy and Brennan JJ s 51(xxxi) reflected an important distinction between laws that 'merely deprive an owner of property' and those that result in a 'corresponding acquisition by the Commonwealth'.⁷⁵ For these judges, all that had occurred in the *Tasmanian Dam Case* was a deprivation of property. In their view, the land-owner lost the right to development and control of the land, but the Commonwealth gained no corresponding benefit.⁷⁶ Rather, the Commonwealth gained only a power to control, and veto, any development on the land.⁷⁷

One reason advanced for a narrow definition of the concept of an 'acquisition' is the dual purpose of s 51(xxxi) as a guarantee *and* a grant of power. If the 'just terms' guarantee attached whenever an individual's property rights were subject to adverse interference by the Commonwealth, how can governance proceed? In 1983 Deane recognised the tension inherent in s 51(xxxi). However, he turned to the purpose of s 51(xxxi) as a constitutional guarantee to expand

⁷³ The fact that Murphy and Deane JJ reached different conclusions on the operation of s 51(xxxi) in this case is itself worthy of note. Some commentators have regarded Deane as continuing, and extending, Murphy J's legacy of constitutional rights' expansion. In the *Tasmanian Dam Case*, however, one of the few rights cases in which Murphy and Deane JJ sat together, Murphy and Deane JJ did not share a common vision of the reach of s 51(xxxi). On Murphy's legacy on rights-protection see: John Williams, 'Revitalising the Republic: Lionel Murphy and the Protection of Individual Rights' (1997) 8 *Public Law Review* 27.

⁷⁴ *Tasmanian Dam Case* (1983) 158 CLR 1, 145 (Mason J); 247 (Brennan J); 282-3 (Deane J) citing *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 349. In contrast, Murphy J stated simply that '[p]roperty is a concept of very wide scope' and cited instead his own judgment in *Dorman v Rogers* (1982) 148 CLR 365: *Tasmanian Dam Case* (1983) 158 CLR 1, 181.

⁷⁵ Simon Evans, 'Constitutional Property Rights in Australia: Reconciling Individual Rights and the Common Good' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without A Bill of Rights: Institutional Performance and Reform in Australia* (2006) 197, 199.

⁷⁶ *Tasmanian Dam Case* (1983) 158 CLR 1, 145-6 (Mason J); 181 (Murphy J); 247-8 (Brennan J).

⁷⁷ Mason J described the Commonwealth as obtaining 'merely a power of veto' with respect to the land: *ibid* 146.

the meaning of the concept of 'acquisition', and chose to balance the regulatory and rights purposes of the guarantee through proportionality analysis.

On the meaning of an 'acquisition' of property, Deane explained in the *Tasmanian Dam Case* that if legislation conferred on the Commonwealth:

an identifiable and measurable advantage or is akin to applying the property, either totally or partially, for a purpose of the Commonwealth, it is possible that an acquisition for the purposes of s 51(xxxi) is involved. *The benefit of land* can, in certain circumstances, be enjoyed without any active right in relation to the land being acquired or exercised.⁷⁸

In this way, Deane held that an acquisition extended beyond the transfer of possessory and positive rights in land to the Commonwealth. Deane illustrated his concept of an 'acquisition' in the *Tasmanian Dam Case* by reference to a law creating a one kilometre buffer zone around a Commonwealth military installation.⁷⁹ Deane argued that the buffer zone constituted 'an effective confiscation or acquisition of the benefit of the use of the land in its unoccupied state.'⁸⁰ In his example, the land-owner was deprived of a valuable aspect of their right in the property. Further, the buffer zone also served the 'purposes of the Commonwealth', that is the Defence Forces, by increasing the utility of the Commonwealth defence facility, as effectively as a transfer of an interest in the land. Thus the effect of the buffer zone was to put private property to a public use, without compensation.

In the *Tasmanian Dam Case*, Deane held that the more extensive elements of the legislative scheme satisfied his definition of an 'acquisition' of property.⁸¹ These provisions prevented development of the property, and ensured, as effectively as a transfer of title, that the land was used according to Commonwealth design as an area of World Heritage. Thus, Deane looked beyond the form of the legislation, to its effect on both the land-owner and the Commonwealth. As the law put private property to a public use, it effected an 'acquisition of property'.

⁷⁸ Ibid 283 (emphasis added).

⁷⁹ Ibid 283-4. Note the similarities between Deane's example and the hypothetical posed by Hamilton regarding a restriction on the build up of property located near an airport: R.L. Hamilton, 'Some Aspects of the Acquisition Power of the Commonwealth' (1973) 5 *Federal Law Review* 265, 290. Deane cited Hamilton's article for its discussion of the history of s 51(xxxi) at *Tasmanian Dam Case* (1983) 158 CLR 1, 282.

⁸⁰ *Tasmanian Dam Case* (1983) 158 CLR 1, 284.

⁸¹ Ibid 287-8.

Deane's liberal interpretation of the 'acquisition' of property, particularly through his buffer zone illustration, has much to recommend it.⁸² Prior to the *Tasmanian Dam Case* the rights-purpose of s 51(xxxi) had been implemented by the Court through its broad interpretation of 'property' under the section. Deane took the further step of applying a rights-purpose to the concept of 'acquisition'. As Evans has observed 'a law that merely prohibits use of property by the owner ... may produce the same effect on the individual and their property as a law that acquires title for the Commonwealth.'⁸³ By extending the definition of an acquisition to the gaining of a benefit or advantage by the Commonwealth, Deane continued the expansive tradition in relation to s 51(xxxi), and approached the guarantee in a manner consistent with the 'substance over form' approach that he adopted in *Hematite*.⁸⁴

(ii) *Limiting the guarantee: the boundary between acquisition and regulation*

Deane continued to expand the reach of the guarantee through his 'benefit' or 'advantage' test in cases after the *Tasmanian Dam Case*.⁸⁵ However, Deane also recognised that the guarantee was not absolute. The challenge, Deane (and Gaudron J) argued, was to balance rights against the reality that:

If every such law which incidentally altered, modified or extinguished proprietary rights or interests in a way which constituted such an 'acquisition of property' were invalid unless it provided a quid pro quo of just terms, the legislative powers of the Commonwealth *would be reduced to an extent which could not have been intended by those who framed and adopted the Australian Constitution*.⁸⁶

Deane limited the scope of the guarantee through a series of overlapping limitations to s 51(xxxi). First, s 51(xxxi) did not apply where the acquisition was of property 'of a kind that does not permit of just terms', such as fines or

⁸² In 1973 Hamilton had written of the need to adopt a liberal interpretation of this concept consistent with the section's role in protecting individual interests: Hamilton, above n 79, 270.

⁸³ Simon Evans, 'Constitutional Property Rights in Australia: Reconciling Individual Rights and the Common Good' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without A Bill of Rights: Institutional Performance and Reform in Australia* (2006) 197, 199.

⁸⁴ *Hematite* (1983) 151 CLR 599, 662.

⁸⁵ See, for example, *Mutual Pools and Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 185 ('*Mutual Pools*').

⁸⁶ *Ibid* 189 (emphasis added).

forfeiture of property.⁸⁷ Second, acquisitions 'necessarily'⁸⁸ or 'clearly'⁸⁹ falling within some other head of legislative power,⁹⁰ such as the taxation, bankruptcy or intellectual property powers, fell outside s 51(xxxi).⁹¹

Third, and most significant for present purposes, Deane held that laws fell outside s 51(xxxi) unless they could be 'fairly characterized' as with respect to the acquisition of property. Deane applied this approach in decisions such as *Mutual Pools and Staff Pty Ltd v Commonwealth*⁹² and *Georgiadis v Australian and Overseas Telecommunications Corporation*.⁹³ However it was Deane's reasoning in the *Tasmanian Dam Case* that most clearly revealed the role for proportionality reasoning in this aspect of Deane's approach to s 51(xxxi).

In the *Tasmanian Dam Case*, having determined that a 'benefit' or 'advantage' flowing to the Commonwealth could constitute an acquisition of property, Deane remarked that:

Where the benefit involved represents *no more than* the adjustment of competing claims between citizens in a field which *needs to be regulated in the common interest*, such as zoning under a local government statute, it will be apparent that no question of acquisition of property for a purpose of the Commonwealth is involved.⁹⁴

In the next paragraph of his analysis, Deane endorsed an extract from the United States *Corpus Juris Secundum*, regarding the concept of eminent domain under the Fifth Amendment. This extract had been quoted as being of 'some guidance in the Australian context' by Stephen J in *Trade Practices Commission v Tooth & Co Ltd*.⁹⁵ The passage stated:

There is no set formula to determine where regulation ends and taking begins; so the question depends on the particular facts and necessities of each case and

⁸⁷ For example, laws imposing penalties and fines, forfeiture of property, and seizure of enemy property fall outside the scope of the just terms guarantee on this basis. See *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297, 306 (Mason CJ, Deane and Gaudron JJ) and *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270, 275-6 (Mason CJ); 285-6 (Deane and Gaudron JJ).

⁸⁸ *Tasmanian Dam Case* (1983) 158 CLR 1, 282.

⁸⁹ *Georgiadis* (1994) 179 CLR 297, 306 (Mason CJ, Deane and Gaudron JJ) citing *Mutual Pools* (1994) 179 CLR 155, 169-72 (Mason CJ); 186-8 (Deane and Gaudron JJ).

⁹⁰ *Nintendo Co Ltd v Centronics Systems* (1994) 181 CLR 134, 160 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

⁹¹ *Ibid* 160-1 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

⁹² (1994) 174 CLR 155, 188 (Deane and Gaudron JJ).

⁹³ (1994) 179 CLR 297, 306-7 (Mason CJ, Deane and Gaudron JJ).

⁹⁴ *Tasmanian Dam Case* (1983) 158 CLR 1, 283.

⁹⁵ (1979) 142 CLR 397, 414-5 citing '29A *Corpus Juris Secundum* "Eminent Domain", par 6.'

the Court must consider *the extent of the public interest to be protected and the extent of regulation essential to protect that interest.*⁹⁶

Through this statement, Deane located the boundary between regulation and acquisition, and hence the limits of the just terms guarantee, by scrutinising the relationship between legislative means and ends. If Parliament's means were necessary and appropriate to a regulatory purpose, the law fell outside the scope of s 51(xxxi). This inquiry was satisfied on a case-by-case basis, by weighing the particular circumstances. Accordingly, Deane's approach in the *Tasmanian Dam Case* ensured a significant role for the Court in determining the operation and effect of the constitutional guarantee.

In the *Tasmanian Dam Case*, Deane held that ss 9 and 10 of the *World Heritage Properties Conservation Act 1983* (Cth) were regulatory laws.⁹⁷ These laws were designed to prohibit certain specified conduct in relation to the relevant land in Tasmania. As he had in the context of s 51(xxix), Deane held that s 9(1)(h) did not infringe the just terms guarantee as it 'only' prohibited acts done without the consent of the Minister involving damage associated with the construction of a dam.⁹⁸ Thus it could be regarded as no more than a necessary regulation of property in the public interest. Deane similarly held that s 10 was a valid regulatory law because it was of a 'limited nature' as 'a prohibition addressed *only* to corporations.'⁹⁹ Consequently, the just terms guarantee was not activated by these provisions.

In contrast, Deane held that s 11 of the *World Heritage Properties Conservation Act 1983* (Cth) and the *World Heritage (Western Tasmania Wilderness) Regulations 1983* (Cth) were acquisitory laws, as they froze development of the land.¹⁰⁰ These provisions operated without reference to the nature of the threat to the land (and protective measures), were indefinite in duration, and applied to a large

⁹⁶ Quoted by Deane in *Tasmanian Dam Case* (1983) 158 CLR 1, 284 (emphasis added).

⁹⁷ As discussed in chapter 1, s 9(1)(h) had already survived Deane's proportionality test in the context of s 51(xxix). For convenience, this chapter describes laws fairly characterised as with respect to the acquisition of property as 'acquisitory laws' and laws 'concerned with the adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity' as 'regulatory' laws. This is the classification adopted in Simon Evans, 'When Is An Acquisition of Property Not an Acquisition of Property?' (2000) 11 *Public Law Review* 183, 191.

⁹⁸ *Tasmanian Dam Case* (1983) 158 CLR 1, 285.

⁹⁹ *Ibid* (emphasis added).

¹⁰⁰ *Ibid* 285-7.

area.¹⁰¹ Deane concluded that the size and scope of the legislative freeze produced by these provisions meant that they could not be characterised as mere regulation. Accordingly, they effected an acquisition of property for the purpose of s 51(xxxi).¹⁰²

Deane's reasoning demonstrated the similarities between his tests in relation to ss 51(xxix) and (xxxi). In both contexts Deane inquired whether the law was a 'drastic or peculiar means' of achieving the end, paying particular attention to the degree of its impact on private property rights.¹⁰³ In both contexts, Deane was also willing to scrutinise strictly Parliament's measures. Deane's application of proportionality reasoning in the *Tasmanian Dam Case* suggests that the operation of the just terms guarantee may be fixed by reference to whether a judge perceives Parliament as effecting a regulatory goal with sufficient sensitivity to the competing social interests. Thus, as in chapter 1, the question may be asked whether Deane's approach moved beyond the realm of legitimate judicial review and through the level of scrutiny imposed constituted a 'judicial trespass on the sovereignty of Parliament.'¹⁰⁴ In this context, however it is arguable that the text of the 'just terms' guarantee, as both a constitutional guarantee and head of power, presupposes that the Court must balance these two purposes when determining the reach of the guarantee. One way of balancing these purposes is by imposing definitional limits on the guarantee through the concept of 'property' or 'acquisition'. However, an advantage of Deane's approach was that it avoided complex definitions of this nature, and openly engaged in balancing reasoning to find the limits of the constitutional guarantee. Further, a strict application of proportionality reasoning, sensitive to the impact on individual rights, may be seen as consistent with the Court's 'democratic mandate' to give full effect to the express guarantees of the Constitution.¹⁰⁵

¹⁰¹ Ibid 285-6.

¹⁰² Ibid.

¹⁰³ For discussion of proportionality in the context of s 51(xxix), see *ibid* 259-68.

¹⁰⁴ HP Lee, 'Proportionality in Australian Constitutional Adjudication' in Geoffrey Lindell (ed) *Future Directions in Australian Constitutional Law* (1994) 126, 149.

¹⁰⁵ Although not speaking specifically to Deane's application of proportionality reasoning in this context, see G.J. Lindell, 'Recent Developments in the Judicial Interpretation of the Australian Constitution' in Geoffrey Lindell (ed) *Future Directions in Australian Constitutional Law* (1994) 1, 27.

Moving from Deane's s 51(xxxi) jurisprudence to his understanding of s 117, Deane's reasoning in *Street* revealed a more opaque, and less persuasive, approach to defining the limits of the latter section.

3 *Section 117*

Section 117 provides that:

A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

Prior to 1989, and the Court's decision in *Street*, s 117 had been interpreted narrowly.¹⁰⁶ In *Henry v Boehm*,¹⁰⁷ a majority of the Court had limited the section to discrimination on the basis of permanent residence and had assessed the existence of 'discrimination' from the perspective of the formal operation of the law. Decided two years after the Court's decision in *Cole* had revolutionised the interpretation of s 92, s 117 stood ready in *Street* to be freed from this formalistic interpretation and given its place as a real guarantee of individual liberty.

The facts of *Street* could have provided no better vehicle for the Court to consider a challenge to *Henry*. Both cases concerned applications by barristers for admission to practice in a State in which they did not reside. *Street*, a resident of New South Wales, challenged the admission rules of the Queensland Bar Association, which required him to practice in Queensland, or, following amendment to the Rules, to swear his intention to practice principally in Queensland. *Street* argued that the Rules discriminated against him as an out-of-State resident contrary to s 117.¹⁰⁸

¹⁰⁶ See discussion in Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 405-7.

¹⁰⁷ (1973) 128 CLR 482 ('*Henry*').

¹⁰⁸ Section 117 is not a limitation on State legislative power. Rather the guarantee operates to confer an immunity on the individual. This operation of s 117 was discussed by Brennan J: *Street* (1989) 168 CLR 461, 502-3.

In seven separate reasons, the Court in *Street* unanimously overturned *Henry*, and the formalism inherent in its approach to s 117.¹⁰⁹ Deane described the guarantee of s 117 as follows:

[Section] 117 protects a non-resident from being subjected to disability or discrimination of the type to which it refers regardless of whether the disability or discrimination is *directly imposed or is the indirect result of the operation of the relevant legislative provisions* ... If the substance of what is involved is disability or discrimination of the type referred to in s 117, mere differences in the form of the relevant legislation will not be effective to take it beyond the reach of the constitutional guarantee.¹¹⁰

All members of the Court agreed that the existence of out-of-State discrimination was assessed for the purposes of s 117 according to the substantive effect, and not the form, of the legislation.¹¹¹ Returning to the language of s 117, the Court emphasised that the section required a comparison between the hypothetical position of the plaintiff (assuming he or she was a resident of the State) against the plaintiff's actual situation under the law.¹¹² The section precluded the differential treatment of citizens on the ground of residence. Deane observed that differential treatment meant 'some *superimposed* incapacity or disadvantage' whether 'direct or indirect'.¹¹³ Applying these principles to the facts of *Street*, the Court unanimously held that the imposition of residence requirements in the Queensland admission rules was contrary to s 117, and could not be excused as falling within one of the exceptions to the provision.

There are three significant elements of Deane's reasoning in *Street* that speak to his vision of the role of the Court in the interpretation of constitutional guarantees. As foreshadowed, the first was Deane's rights 'manifesto',¹¹⁴ and his understanding of the rights-rich nature of the Australian Constitution. The significance of that passage for Deane's jurisprudence beyond s 117 is examined

¹⁰⁹ Ibid 485 (Mason CJ); 516-7 (Brennan J); 527-8 (Deane J); 543-4 (Dawson J); 560-1 (Toohey J); 568-70 (Gaudron J); and 586-7 (McHugh J).

¹¹⁰ Ibid 528 (emphasis added).

¹¹¹ Ibid 487-8 (Mason CJ); 508 (Brennan J); 545 (Dawson J); 559 (Toohey J); 569 (Gaudron J); 582 (McHugh J).

¹¹² Ibid 489 (Mason CJ); 506 (Brennan J); 525 (Deane); 545 (Dawson J); 558 (Toohey J); 566-7 (Gaudron J); 582 (McHugh J). This approach had been adopted by Stephen J in his dissenting reasons in *Henry* (1973) 128 CLR 482, 501-2. On the legacy of Stephen J in constitutional interpretation, including in s 117, see Sir Anthony Mason, 'Justice of the High Court' in Timothy L. H. McCormack and Cheryl Saunders (eds), *Sir Ninian Stephen: A Tribute* (2007) 3, 17-24.

¹¹³ *Street* (1989) 168 CLR 461, 528 (emphasis added).

¹¹⁴ Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (3rd ed, 2002) 1100.

in part 2 of this chapter. The second distinctive feature of Deane's reasoning in *Street* was his reliance on 'general' interpretive principles as the basis of recasting the section as a significant constitutional guarantee. Third was Deane's method of limiting the operation of the guarantee to exclude from its protection certain State measures protective of their residents. Deane's approach to this question, although substantially similar to a majority of the Court, sat uncomfortably with much of his jurisprudence, particularly his earlier decisions on the respective importance of individual and State rights in constitutional interpretation.

(a) *Principle and precedent in Deane's reasoning in Street*

Deane's distinctive approach to his reasoning in *Street* was framed by his observations in his rights 'manifesto'¹¹⁵ on the nature of the Constitution as a document rich in rights and fundamental guarantees. It was from this perspective that Deane reflected on the 'tendency in some judgments' of the Court to '*distort the content of some ... constitutional guarantees by restrictive legalism or by recourse to artificial formalism.*'¹¹⁶ The Court's decisions on s 117, Deane argued, followed the trend of legalism and formalism: substituting 'yet another formularised formal criterion of operation for the words of the Constitution.'¹¹⁷ Such formalism was inconsistent with the importance of a number of the Constitution's provisions as vital protections of the liberty, dignity and equality of 'the people'. Thus, rejecting formalism, Deane turned to the:

long-settled general principle of construction that the provisions of a national constitution must be broadly interpreted and applied: their substance should not be confounded by narrow technicality or legalism.¹¹⁸

Deane's emphasis on this 'long-settled general principle' of construction in *Street* displayed two points of connection with his jurisprudence outside s 117. First, it confirmed Deane's commitment to the rejection of formalism in constitutional interpretation. Deane's preference for this principle of

¹¹⁵ Ibid.

¹¹⁶ *Street* (1989) 168 CLR 461, 522 (emphasis added).

¹¹⁷ Ibid 524.

¹¹⁸ Ibid 527.

interpretation in *Street* was therefore consistent with his earlier decisions in *Hematite*, *Kingswell* and his recognition in *Polyukhovich* that Ch III was not concerned merely with 'labels'. As he confirmed in *Street*, a substantive interpretation of constitutional guarantees was necessary lest formalism deny 'the people' the protections intended for their benefit.

Second, Deane's priority on general interpretive principles was matched by a minimalist treatment of authority. In *Polyukhovich* and *Kingswell* Deane's reasons had been structured so as to examine first the 'fundamental concepts' of the Constitution, or the significant rights-purpose of s 80, before assessing whether precedent stood in the way of the interpretation he preferred. In *Street*, Deane's analysis also exhibited this trend, considering the relevance of *Henry* very briefly as one of 'four additional matters' at the conclusion of his judgment.¹¹⁹ Although the Court in *Street* unanimously overruled *Henry*,¹²⁰ Deane's treatment of the decision distinguished his reasons from the rest of the Court. In contrast to Mason CJ¹²¹ and Brennan J,¹²² in particular, Deane displayed no reticence in departing from a long-standing decision of the Court.¹²³ Nor did Deane refer to the Court's contemporary decision in *John v Federal Commissioner of Taxation*¹²⁴ as a basis for overruling such a decision.¹²⁵ Instead, after emphasising at the commencement of his decision that *Henry* constituted 'a triumph of form over substance',¹²⁶ Deane saw no reason at the conclusion of his reasons to provide more than a single sentence explanation of his rejection of that decision.

¹¹⁹ Ibid 532.

¹²⁰ Ibid 489 (Mason CJ); 519 (Brennan J); 532 (Deane); 549 (Dawson J); 560 (Toohey J); 569-70 (Gaudron J); 588 (McHugh J).

¹²¹ Mason CJ stated that '[n]eedless to say I am reluctant to depart from an earlier decision of this Court.' Ibid 489. Dawson J observed that reopening authority 'is not to be done lightly.' Ibid 549.

¹²² Brennan J expresses his deference to precedent as follows:

Giving the majority judgments in *Henry v Boehm* the great respect which they command both as a considered authority of this Court and as the writing of some of its most distinguished jurists, I am unable to accommodate their Honours' approach to s 117 to its text and purpose. I am unable to regard *Henry v Boehm* as an authority which ought to be maintained.

Ibid 519.

¹²³ Ibid 532. Aside from Deane, Gaudron J's language is the least deferential, although her discussion of the reasons for departing from authority is extensive: ibid 566-70.

¹²⁴ (1989) 166 CLR 417, 438-40.

¹²⁵ Compare *Street* (1989) 168 CLR 461, 489 (Mason CJ); 549 (Dawson J); 560 (Toohey J); 569-70 (Gaudron J); 588 (McHugh J).

¹²⁶ Ibid 523.

Another distinctive element of Deane's reasons in *Street* was his attitude towards American jurisprudence on the 'privileges and immunities clause' in Article IV 2 of the United States Constitution. The Court was divided in the warmth of its reception to American law, with Mason CJ being the most enthusiastic in his acceptance of American law.¹²⁷ Brennan and Toohey JJ, although disagreeing on the relevance of the Privileges and Immunities clause, were also of the opinion that American law (with respect to the Fourteenth Amendment) could be useful to the High Court in framing the test for s 117.¹²⁸ In contrast, McHugh J expressed caution in allowing the American model to inform the interpretation of s 117.¹²⁹ For McHugh J, the Privileges and Immunities clause could only be used for the limited purpose of identifying categories of discrimination that fall within s 117.¹³⁰ McHugh therefore rejected the relevance of the American model to framing exceptions or limitations to the Australian guarantee.¹³¹ However, Deane stood apart from both approaches, by simply not responding to the relevance of American law to the interpretation of s 117. This aspect of Deane's reasoning in *Street* was particularly striking given that his opening gambit had implied a comparison between the Australian Constitution and United States constitutional system and its 'Bill of Rights'. However, Deane's failure to engage with the example of American constitutional law may reflect his preference for finding the meaning of constitutional provisions in their purpose, consistent with the 'long-established principles' of its interpretation, rather than in the insights of case law, be it Australian or foreign.

(b) Federal concessions to the scope of s 117

As he had in relation to s 51(xxxi), Deane recognised that s 117 did not provide an absolute guarantee from State-based discrimination. Deane defined the limits of s 117 in the following terms:

¹²⁷ Ibid 491-3.

¹²⁸ Ibid 514 (Brennan J); 552 (Toohey J).

¹²⁹ Ibid 584-5.

¹³⁰ Ibid 585.

¹³¹ Ibid. The differences between McHugh J's approach and the other members of the Court were examined in *Transport Accident Commission v Sweedman* (2004) 10 VR 31, 60 (Nettle JA).

The words of s 117 must, of course, be construed in their context in a constitution which is founded upon the *existence* of the various States as distinct entities under the federation ... Those words ['disability or discrimination'], construed in their *constitutional context*, convey the notion of some superimposed incapacity or disadvantage in the sense that the incapacity or disadvantage, regardless of whether it be direct or indirect, *does not flow naturally* from the structure of the particular State, the limited scope of its legislative powers or the nature of the particular right, privilege, immunity or other advantage or power to which it relates.¹³²

The first point of interest emerging from this passage was that Deane's approach, although not unambiguous, appeared to frame these limitations as components of the definition of 'discrimination' in s 117, rather than as clearly identifiable exceptions to the guarantee.¹³³ Simpson has described this as a 'more holistic view'.¹³⁴ This approach, at least in form, distinguished Deane from the majority of the Court in *Street*.

Mason CJ, for instance, adopted a two-phased approach to s 117.¹³⁵ Thus, Mason CJ asked whether the resident had been subject to a disadvantage, and only then considered whether an exception applied. These limitations were derived from the 'purpose' of the section, to promote national unity, and prevented the guarantee from 'extending beyond the object which it was designed to serve'.¹³⁶ All the members of the Court, except Deane and Gaudron JJ, adopted this two-step approach.¹³⁷

Deane's application of his test to the facts in *Street*, more so than the above passage, evinced his preference for a 'holistic view'.¹³⁸ Deane inquired as to whether the Queensland Bar Association Rules imposed a disadvantage on Street that was not of a kind that flowed naturally from the public interest in ensuring professional standards in the Queensland Bar. Deane's analysis was

¹³² *Street* (1989) 168 CLR 461, 528 (emphasis added).

¹³³ Simpson argued that Deane's approach is not unambiguous. However, she interpreted Deane's approach as favouring the discrimination, rather than exception, path. See Amelia Simpson, 'Sweedman v Transport Accident Commission: State Residence Discrimination and the High Court's Retreat into Characterisation' (2006) 34 *Federal Law Review* 363, 373.

¹³⁴ *Ibid.*

¹³⁵ *Street* (1989) 168 CLR 461, 491-3. Mason CJ's approach is examined in Simpson, above n 133, 373.

¹³⁶ *Street* (1989) 168 CLR 461, 491.

¹³⁷ *Ibid* 491-3 (Mason CJ); 512-4 (Brennan J); 548 (Dawson J); 559-60 (Toohey J); 583-4 (McHugh J).

¹³⁸ Amelia Simpson, 'Sweedman v Transport Accident Commission: State Residence Discrimination and the High Court's Retreat into Characterisation' (2006) 34 *Federal Law Review* 363, 373.

broadly similar to that of Gaudron J,¹³⁹ an agreement in approach reinforced by their later joint judgment in *Goryl*.

It is unclear whether approaching s 117 from a holistic perspective will ultimately produce different results from a two-step analysis.¹⁴⁰ In *Street* it did not. Importantly, as Simpson observes, both approaches

clearly involve judicial evaluation of the policy objectives underlying a State law and the reasonableness with which the law pursues those objectives.¹⁴¹

Deane's s 51(xxxi) jurisprudence, as well as his approach to s 51(xxix), displayed his level of comfort with the flexibility and value judgment involved in this process. What was distinctive about *Street*, however, was the degree to which Deane was willing to protect State interests in this evaluation process. In this way, Deane's approach in *Street* sat uncomfortably with elements of his reasoning in earlier decisions. This part concludes with a discussion of this aspect of Deane's reasoning in *Street*.

(i) Deane's three broad illustrations of exceptions to s 117

In *Street* Deane offered three illustrations of State laws and initiatives which disadvantaged out-of-State residents but would not infringe s 117. First, Deane accepted that a residence requirement in a franchise law for either the State legislature or federal senators would not violate s 117.¹⁴² All members of the Court, except Mason CJ, confirmed the exclusion of franchise laws from the operation of s 117. As residence requirements are logical preconditions for franchise laws, themselves essential to the organization of State legislatures, these laws must be valid exclusions from the operation of s 117.¹⁴³

¹³⁹ Gaudron J has been recognised as a leader in discrimination law. See, for example, Henrik Kalowski, 'Gaudron, Mary Genevieve' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 293, 294 and Jenny Morgan, 'Equality and Discrimination: Understanding Context' (2004) 15 *Public Law Review* 314.

¹⁴⁰ In *Goryl*, Dawson and Toohey JJ noted the existence of two streams of thought on the limitations to s 117, but suggested that this was 'probably a difference in approach rather than in principle.' *Goryl* (1994) 179 CLR 463, 485.

¹⁴¹ Amelia Simpson, '*Sweedman v Transport Accident Commission*: State Residence Discrimination and the High Court's Retreat into Characterisation' (2006) 34 *Federal Law Review* 363, 374.

¹⁴² *Street* (1989) 168 CLR 461, 528.

¹⁴³ Michael Mathieson, 'Section 117 of the Constitution: Unfinished Rehabilitation' (1999) 27 *Federal Law Review* 393, 417-8.

Second, Deane exempted from s 117 some kinds of competency standards for medical or legal practitioners.¹⁴⁴ In Deane's view, such State laws were valid because of 'the *obvious need* to protect the public from unqualified and incompetent practitioners.'¹⁴⁵ These standards were limited to those competency requirements that imposed '*no more than* regulation of a kind *necessary* to protect the public'.¹⁴⁶ Thus in *Street*, Deane recognised the legitimate interest of the State in the competency of members of the Bar, but considered the residence requirement to be incapable of guaranteeing that standard. Accordingly, the Queensland Bar could not demonstrate that the Rules were *necessary*, and so the 'superimposed disadvantage' on out-of-State barristers was contrary to s 117.¹⁴⁷ This exclusion mirrored Deane's assessment of the distinction between regulatory and acquisitional laws under s 51(xxxi).¹⁴⁸ In the context of both guarantees, Deane admitted an exception to the constitutional guarantee only to the extent that the parliamentary regulation was *necessary*.¹⁴⁹ Both tests therefore confirmed Deane's willingness to strictly scrutinise the manner in which the Australian Parliament implemented its policy objectives. In *Street*, however, it was Brennan J, not Deane, who expressly acknowledged the relevance of proportionality reasoning to defining the limits of s 117.¹⁵⁰

Deane's most controversial exception to s 117 was that of State rental subsidies and other residence-based welfare benefits.¹⁵¹ Deane stated that these benefits flowed from 'the scope of State powers and responsibility under the constitutional division of governmental authority'.¹⁵² Mason CJ and Gaudron J also held that some kinds of State welfare benefits would be exempt from

¹⁴⁴ *Street* (1989) 168 CLR 461, 528-9.

¹⁴⁵ *Ibid* 529 (emphasis added).

¹⁴⁶ *Ibid* (emphasis added).

¹⁴⁷ See, to like effect, Mason CJ's conclusion that an exception to s 117 for professional standards could be 'justified as a proper and necessary discharge of the State's responsibility to the people of that State, which includes its responsibility *to protect the interests of the public*.' *Street* (1989) 168 CLR 461, 492 (emphasis added).

¹⁴⁸ See above text accompanying n 94.

¹⁴⁹ See the discussion of 'necessity' as a level of proportionality analysis in Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1, 7-8.

¹⁵⁰ *Street* (1989) 168 CLR 461, 512-3.

¹⁵¹ *Ibid* 529. See, for example, commentary in: Michael Mathieson, 'Section 117 of the Constitution: Unfinished Rehabilitation' (1999) 27 *Federal Law Review* 393, 420.

¹⁵² *Street* (1989) 168 CLR 461, 529.

s 117.¹⁵³ In contrast, Brennan and McHugh JJ were not willing to extend their exceptions this far: Brennan J stating that s 117 required that 'the doors of State universities, hospitals and other institutions' be open to non-residents.¹⁵⁴

Deane's broad exception for welfare benefits appears at first to be inconsistent with other elements of his jurisprudence. For example, this thesis has demonstrated Deane's vision of equality as an important constitutional principle in various contexts.¹⁵⁵ However, it was Brennan J, not Deane, who utilised the concept of equality as a basis for framing the exclusions from s 117.¹⁵⁶ Thus Brennan J argued in *Street* that:

the guarantee of equality of treatment is qualified only by *necessary implication* from the Constitution itself. ... *Nothing less than* the need to preserve the institutions of government and their ability to function can justify the erection by a government of a barrier to the legal need and social unity of the Australian people.¹⁵⁷

Given the prominence of equality in Deane's jurisprudence, and his later claim that equality was one of 'two constant themes'¹⁵⁸ pervading his jurisprudence, it was surprising that Deane did not craft his limitation to s 117 through that concept, and that he subordinated the equality guarantee to the protection of State welfare benefits. In this way, Deane's exclusion also appeared to subordinate the interests of 'the people of Australia' to the interests of 'the people of the States', and preferenced State identity, in contrast to Deane's passionate decisions in *Breavington*, *McKain* and *Stevens*.¹⁵⁹

The degree to which Deane protected State welfare benefits also appeared to stand at odds with Deane's attitude in *QEC* to the protection of the States from

¹⁵³ Mason CJ exempted schemes assisting the 'indigent, the aged or the ill.' Dawson J, discussing Stephen J's dissent in *Henry*, noted that State schemes financed by State taxes might be exempt where a residential qualification was reasonable, but noted that this question had to be left for another day. Gaudron J exempted special benefits, 'especially if that benefit is funded by taxes levied against its members': *ibid* 492 (Mason CJ); 546-8 (Dawson J); 572 (Gaudron J). Mathieson critiques the 'labour-desert theory' implicit in Dawson and Gaudron JJ's analysis: Mathieson, above n 151, 418-20.

¹⁵⁴ *Street* (1989) 168 CLR 461, 521.

¹⁵⁵ See for example, Deane's description of his list of rights in *Street* as protecting the 'liberty, the dignity or the *equality* of the citizen under the Constitution.' *Ibid* 522 (emphasis added).

¹⁵⁶ As discussed in chapter 5 below, *Leeth* demonstrated that Brennan, Deane and Toohey JJ shared a strong commitment to equality as a constitutional principle.

¹⁵⁷ *Street* (1989) 168 CLR 461, 512-3 (emphasis added).

¹⁵⁸ Deane, quoted in Tony Stephens, *Sir William Deane: The Things that Matter* (2002) 94 (emphasis added).

¹⁵⁹ See above chapter 2 n 186.

discriminatory Commonwealth laws.¹⁶⁰ In *QEC* the Court recognised a narrow implication restricting the Commonwealth's power to discriminate against the States because 'the continued existence of the States as viable political entities' was an essential precondition of a federal system of government and the nature of the Constitution.¹⁶¹ In *QEC*, however, the Court was adamant that this principle was not directed towards the identity and extent of particular powers preserved to the States (the reserved powers doctrine) but merely preserved the 'independent' existence of the States.¹⁶²

As Mathieson suggests, Deane's exclusion of State welfare laws from the protection of s 117 appeared to go beyond what was necessary to preserve the continued existence of the States as viable entities.¹⁶³ The question may be asked, why do the States receive greater protection from the operation of an express constitutional guarantee than under an implied limitation on Commonwealth legislative power? The apparent inconsistency in Deane's reasoning between these aspects of his jurisprudence was particularly striking given that in *Street* Deane emphasised that the *same* principles must govern the interpretation of both constitutional guarantees and heads of power.¹⁶⁴

It is possible that Deane's protection of State rights in the context of ss 117 was a consequence of Deane's subtle understanding of the Court's ultimate duty to protect 'the people'. In both *Street* and his s 51(xxxi) jurisprudence, Deane was willing to protect welfare schemes at federal and state levels. For example, in *Mutual Pools*, Deane explained that s 51(xxxi) operated only in respect of laws fairly characterised as with respect to the 'acquisition of property'.¹⁶⁵ Deane (and Gaudron J) continued, excluding from the scope of the just terms guarantee:

laws defining and altering rights and liabilities under a [Commonwealth] government scheme involving the expenditure of government funds to provide social security benefits or for other public purposes.¹⁶⁶

¹⁶⁰ Michael Mathieson, 'Section 117 of the Constitution: Unfinished Rehabilitation' (1999) 27 *Federal Law Review* 393, 413-4.

¹⁶¹ *QEC* (1985) 159 CLR 192, 245-6.

¹⁶² See discussion above chapter 2, text accompanying n 134.

¹⁶³ Michael Mathieson, above n 160, 411.

¹⁶⁴ *Street* (1989) 168 CLR 461, 527.

¹⁶⁵ (1993) 179 CLR 155, 188 (Deane and Gaudron JJ).

¹⁶⁶ *Mutual Pools* (1994) 179 CLR 155, 189-90.

As any application of s 51(xxxi) would have crippled the Commonwealth's welfare schemes, Deane's exclusion struck a balance in favour of the continuing viability of the welfare system at the Commonwealth level over the property rights of the individual. It is possible that, in the context of s 117, similar concerns lay at the heart of Deane's exemption for welfare benefits. Certainly the viability of State-based hospital or other welfare schemes could have been equally threatened if a State was unable to restrict the demand for such services on the basis of residence. Seen in this light, these exclusions to the Constitution's express rights in ss 51(xxxi) and 117 may reflect Deane's social justice concerns, and his commitment to the protection of 'the people', particularly, as he attested in his swearing-in speech, 'the poor' and the 'weak'.¹⁶⁷

If Deane's understanding of 'the people' did lie behind his broad exemption for State welfare benefits from s 117, it may resolve the apparent consistency issue between his approaches to the protection of the States across different components of his jurisprudence. However, this explanation of Deane's approach may then raise larger issues regarding the legitimacy of his interpretative philosophy. If the concept of 'the people' may, in some contexts, strengthen the constitutional guarantees, and in other contexts, support an exclusion from, or limitation to, those rights, can such a concept provide a principled foundation for constitutional interpretation? These are questions for consideration in chapter 5 where Deane's most forthright reliance on 'the people', in *Leeth*, is explored. It remains for this chapter to consider one of the consequences of Deane's reasoning in *Street*. That is, the significance of his rights 'manifesto' as an indicator of his understanding of the fundamental nature of the Constitution and its influence on the implication of constitutional rights.

¹⁶⁷ Transcript of the Ceremonial Sitting of the Occasion of the Swearing-in of the Honourable Mr Justice Deane as a Justice of the High Court of Australia at Canberra, Tuesday 27 July 1982, 17.

B *Part 2 The wider significance of express rights*

This chapter commenced with Deane's bold opening passage of his reasons in *Street*. There Deane affirmed that individual rights were protected under the Constitution by 'a significant number of express and implied guarantees.'¹⁶⁸ In *Street* this vision of the Constitution reinforced his commitment to interpret those guarantees broadly, consistent with their importance for the protection of the liberty, equality and dignity of 'the people' of Australia. However, Deane's sentiments in this passage in *Street* spoke beyond the confines of the Court's decision on s 117. Deane's 'manifesto'¹⁶⁹ was a response to arguments that the Australian Constitution was not concerned with the individual. These were arguments that became of increasing significance in the debate over the legitimacy of the Court's *implication* of constitutional rights.

The balance of this chapter examines Deane's understanding of the *presence* of this 'significant number' of express guarantees in the Constitution as a foundation for his implication of constitutional guarantees. Chapter 5 then explores how Deane utilised the *content* of the Constitution's express guarantees, particularly s 117 in *Leeth*, in support of constitutional rights implications.

(a) *The significance of silence on rights*

As foreshadowed in the introduction to this thesis, the lack of a formal Bill of Rights in the Australian Constitution has traditionally been regarded as a critical indicator of the Constitution's fundamental nature and purpose. It was on this basis, therefore, that Sir Owen Dixon famously remarked extra-curially that the lack of a Bill of Rights in the Australian context went 'deep in legal thinking.'¹⁷⁰ In 2000, the Court's Chief Justice, Gleeson CJ, continued this analysis, reflecting extra-curially that:

¹⁶⁸ *Street* (1989) 168 CLR 461, 521.

¹⁶⁹ Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (3rd ed, 2002) 1100.

¹⁷⁰ Sir Owen Dixon, 'Concerning Judicial Method' (1956) 29 *Australian Law Journal* 468, 469.

all Australians are controlled, not only by what the founders said in their written document, but also, and perhaps even more comprehensively, by what they did not say... Silence, whether deliberate or not, binds us conclusively. Concern about how much importance attaches to what the founders meant to say may be trivial compared to the importance of the subjects that they left untouched.¹⁷¹

This understanding of the nature of the Constitution, the significance of the framers' intentions, and the Court's role in constitutional interpretation, infused the reasoning of members of the Court in the key cases of Deane's era. For example, in *Polyukhovich*, McHugh J drew on the framers' failure to incorporate a guarantee against retrospective criminal laws as a factor precluding the implication of such a guarantee from Ch III.¹⁷² More generally, Mason CJ remarked on the significance of the framers' decision not to incorporate a Bill of Rights in *ACTV*, stating:

In light of this well recognised background it is difficult if not impossible to establish a foundation for the implication of general guarantees of fundamental rights and freedoms. To make such an implication would run counter to the prevailing sentiment of the framers that there was no need to incorporate a comprehensive Bill of Rights in order to protect the rights and freedoms of citizens. That sentiment was one of the unexpressed assumptions on which the Constitution was drafted.¹⁷³

It was in anticipation of statements such as these that in 1989 Deane offered his views in *Street* on the inappropriateness of drawing negative inferences from the absence of a 'Bill of Rights' in the Australian Constitution.

In *Theophanous*, in 1994, Deane systematically engaged with the argument that the framers' decision not to incorporate certain rights expressly in the Constitution must prevent the Court from implying broad constitutional guarantees from the 'fundamental concepts' of the Constitution.¹⁷⁴ Following the pattern of Deane's responses to arguments based on the framers' intentions in *Breavington* and *Incorporation Case*, in *Theophanous* Deane offered two key answers to this 'no Bill of Rights' argument. First, he advanced his 'living force' theory of constitutional interpretation: a 'general' answer to why the framers' intentions regarding a 'Bill of Rights' could not influence the interpretation of the Constitution. This aspect of Deane's reasoning in *Theophanous* is examined

¹⁷¹ Murray Gleeson, *The Rule of Law and the Constitution* (2000) 56.

¹⁷² *Polyukhovich* (1991) 172 CLR 501, 720 (McHugh J).

¹⁷³ *ACTV* (1992) 177 CLR 106, 136.

¹⁷⁴ *Theophanous* (1994) 182 CLR 104, 166-74.

in chapter 6. Second, Deane offered a 'particular' answer. It is this that holds present interest.

Amongst his guarantees in *Street* and *Theophanous* were provisions traditionally perceived as rights, such as ss 80, 116 and 117.¹⁷⁵ However, Deane extended his catalogue to incorporate ss 90, 109 and 118, provisions which Deane had proclaimed as incorporating guarantees of equality and the rule of law. The reason Deane could claim this extensive list of guarantees in *Street* was articulated *Theophanous*, that is:

in a constitutional context, the word 'rights' is commonly used as referring not only to rights in the sense of expressly conferred free standing rights enforceable against either the world or particular persons who are under a corresponding duty but also to *privileges and immunities which are inherent in, or flow from, constitutional restrictions upon legislative, executive or judicial power*.¹⁷⁶

On Deane's interpretation, in number – if not in substance – the Australian Constitution demonstrated a greater interest in, and level of commitment to, the protection of rights than that of the American Bill of Rights. On this basis, Deane reasoned that it was 'misleading' to draw adverse comparisons between the Australian and American Constitutions.

Deane's vision of the Australian Constitution's collection of 'rights' in *Street* and *Theophanous* is easy to criticise. It cannot be said that any of the 'rights' collected were rhetorically or substantively as strong as those contained in the American constitutional documents. Scattered throughout the Australian Constitution, and expressed as limitations flowing from the division and organization of governmental power, the rights of the Australian Constitution lack the unequivocal commitment to the protection of individual liberty – and its enforcement by the judiciary against executive and legislative interference – which is the essence of the American Bill of Rights.¹⁷⁷

¹⁷⁵ *Street* (1989) 168 CLR 461, 521-2. In *Theophanous* Deane said that: the Australian Constitution ... contains a *very large number of provisions* confining the legislative and executive powers of the Commonwealth and/or the States *whose obvious effect is to confer privileges and immunities upon the citizen*.'

In his footnote to this statement Deane observed that '[s]ome obvious examples are ss 41, 80, 92, 116 and 117.' *Theophanous* (1994) 182 CLR 104, 168 (emphasis added).

¹⁷⁶ *Theophanous* (1994) 182 CLR 104, 168 (emphasis added).

¹⁷⁷ See generally Adrienne Stone, 'Australia's Constitutional Rights and the Problem of Interpretive Disagreement' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (2006) 137.

Further, to accept Deane's entire catalogue of rights in *Street* requires an acceptance of his view of the underlying concept of the Constitution. Deane's vision involved the following three assumptions: that the source of the Constitution's legitimacy was 'the people', that the text must be interpreted for their 'benefit', and that 'the people' benefit from judicially-enforceable limits on legislative and executive power. In this way, Deane's statements in *Street* and *Theophanous* regarding the extent of rights-protection in the Constitution appear to beg the key question – what is the nature of the Australian Constitution?

However, Deane's core 'Bill of Rights' argument does not require agreement with the content of Deane's collection of rights in its entirety. Deane's list reinforces that the Constitution does not speak exclusively to the 'power' of the institutions of government. Thus, as Williams observed, at the 'heart' of Australian constitutionalism 'is the notion of the expression and limitation of power', a fact potentially demonstrated by Deane's list of 'rights' in *Street*.¹⁷⁸ Particularly significant was Deane's affirmation of the separation of powers principle as the 'most important', guarantee of individual liberty. The long recognition by the Court of the separation principle as a constitutional implication, as well as implications of a federal character in the *Melbourne Corporation Case*, affirmed that implications limiting parliamentary supremacy could be drawn from the text and structure of the Constitution. Thus, as Kirk argues, the existence of constitutional implications limiting parliamentary supremacy undermines a textual presumption against rights implications.¹⁷⁹

Seen in this light, Deane was correct to suggest that adverse conclusions drawn from the mere absence of a 'Bill of Rights' in the Australian Constitution were 'misleading'. Thus, the absence of a 'Bill of Rights' should not be regarded as imposing a general textual prohibition on the implication of constitutional rights. Chapters 5 and 6 explore the next step in Deane's analysis, that is, how he employed 'the people' to support his constitutional implications, and

¹⁷⁸ John Williams, 'The Emergence of the Commonwealth Constitution' in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003) 1, 27. Williams argues that although the framers were concerned with 'finding practical means' to establish the union between the colonies, 'it does not mean that the Constitution is free from 'rights provisions': *ibid*.

¹⁷⁹ Jeremy Kirk, 'Constitutional Implications (II): Doctrines of Equality and Democracy' (2001) 25 *Melbourne University Law Review* 24, 29.

whether his answer offered a principled and compelling approach to the interpretation of the Constitution.

Conclusion

Deane's vision of the Constitution's express rights was of provisions providing real protection to the individual. Consistent with this vision, Deane extended the reach of ss 80, 51(xxxi) and 117 through a substantive approach to their operation. Under this approach, mere drafting devices of the Commonwealth or State Parliaments could not defeat the operation of these provisions. In this way Deane confirmed his understanding of the Court's role, expressed through his s 51 jurisprudence, to give effect to the 'words' of the Constitution, free from artificial formalism. In addition to this 'settled' principle of interpretation, however, Deane's approach in this area was consistent with his underlying belief that the Constitution must be interpreted for the benefit of 'the people', and that the people were best protected through judicially-enforceable rights.

However, Deane's decisions on ss 51(xxxi) and 117 also recognised that these guarantees were not absolute. Accordingly, Deane applied proportionality reasoning in the context of s 51(xxxi) to distinguish between genuinely regulatory laws, and those laws effecting an acquisition of property. In *Street*, Deane also limited the guarantee of s 117, by reference to the concept of 'discrimination', and the limitations flowing from the 'context' of s 117 within the federal compact. These techniques secured a significant role for the Court in determining the reach of these guarantees. In the *Tasmanian Dam Case*, Deane evinced his willingness to apply strict necessity analysis, demonstrating limited judicial deference to the pursuit of regulatory purposes by Parliament. In *Street*, however, Deane's exemption of State social welfare schemes from the guarantee of s 117 raised the question of whether his jurisprudence offered a principled approach to the protection of 'the people' under the Constitution, or instead was infused with Deane's conception of the weight to be attached to rights (of equality or social welfare) in contemporary Australian society. The ability of 'the people' to provide a secure and principled foundation for the implication of

constitutional rights was a question attaching with greater force to Deane and Toohey JJ's equality guarantee in *Leeth*.

Chapter 5 'TWO CONSTANT THEMES': *LEETH* AND THE IMPLIED GUARANTEE OF LEGAL EQUALITY

Introduction

This is the first of two chapters which consider the implied rights recognised by Deane, and other members of the Court, in 1992. These rights were the implied guarantee of legal equality, applied by Deane and Toohey JJ in a joint judgment in *Leeth*, and the implied freedom of political communication, developed by Deane in joint judgments with Toohey in 1992 in *Nationwide News* and *ACTV*, and expanded by Deane in his three single judgments in 1994 in *Theophanous*, *Stephens* and *Cunliffe*. As outlined in the introduction to this thesis, these cases sparked strong and diverse responses within the legal community on the legitimacy of the Deane's reasoning to derive and apply these broad constitutional rights.¹

In *Nationwide News*, Deane and Toohey JJ outlined the interpretive principles they applied to derive each of these implied constitutional rights.² They explained that the Court may derive implications from two main sources in the Constitution.³ First, Deane and Toohey JJ maintained that implications, including constitutional rights, may be derived from:

three main general doctrines of government which underlie the Constitution and are implemented by its provisions.⁴

These doctrines were federalism, the separation of powers principle and representative government.⁵ In their joint judgments in *Nationwide News* and

¹ See above introduction n 55.

² *Nationwide News* (1992) 177 CLR 1, 69. Deane and Toohey JJ did not suggest that these were the exclusive sources of constitutional implications. However, these categories did capture the implications that Deane derived throughout his jurisprudence.

³ *Ibid.*

⁴ *Ibid* 69-70.

ACTV, Deane and Toohey JJ derived the implied freedom of political communication from the Constitution's doctrine of representative government. Deane's understanding of this constitutional guarantee in these two cases and his later extension of the implied freedom in his trilogy of cases in 1994 is explored in chapter 6.

Second, Deane and Toohey JJ indicated in *Nationwide News* that guarantees could be derived from 'the fundamental rights and principles recognized by the common law at the time the Constitution was adopted as the compact of the Federation.'⁶ Three months prior to *Nationwide News*, in *Leeth*, Deane and Toohey JJ had applied this approach to hold that the Constitution contained an implied guarantee of legal equality. This chapter examines the significance of *Leeth*, although a joint judgment, as an expression of Deane's constitutional philosophy.

Part 1 of this chapter explores the three stages of Deane and Toohey JJ's reasoning in this case. It highlights the connections between, and departures from, Deane and Toohey JJ's analysis in *Leeth* and Deane's earlier decisions. It also examines the logical and doctrinal hurdles facing Deane and Toohey JJ's implied guarantee of legal equality. Ironically it is another of Deane's iconic decisions – Deane's joint judgment with Gaudron J in *Mabo (No 2)* – that underscores some of the key limitations of Deane and Toohey JJ's reasoning in *Leeth*.

Part 2 of this chapter considers the broader issues attending Deane and Toohey JJ's interpretive methodology in *Leeth*. It focuses on the ability of 'the people' to serve as a concept through which to import extensive limitations on the Commonwealth Parliament of the nature proposed by Deane and Toohey JJ in *Leeth*. Given that *Leeth* most clearly embodied what Deane described as the 'two constant themes'⁷ pervading his jurisprudence, a lingering question arising from *Leeth* was whether the limitations of Deane and Toohey JJ's reasoning in

⁵ Deane and Toohey JJ indicated that responsible government may be a possible fourth 'main general doctrine' underlying the Constitution or an aspect of the Constitution's observance of representative government. See *ibid* 71 fn 25.

⁶ *Ibid* 69.

⁷ Deane, quoted in Tony Stephens, *Sir William Deane: The Things that Matter* (2002) 94.

that case affects the persuasiveness of Deane's constitutional philosophy as a whole. However, before turning to the detail of Deane and Toohey JJ's reasoning in *Leeth*, it is necessary to outline briefly the nature of the dispute in that case.

A *Leeth: An overview*

Leeth concerned a challenge to s 4 of the *Commonwealth Prisoners Act 1967* (Cth).⁸ That section required that a court sentencing a federal offender have regard to the non-parole periods prescribed by the laws of the State or Territory where the offender was convicted. The provision was enacted in recognition of the fact that Commonwealth offenders, pursuant to s 120 of the Constitution, are housed in State or Territory prisons. However, although designed to reduce the administrative load on State and Territory prison facilities, a consequence of this provision was that offenders convicted of the same federal offence could serve different minimum terms depending upon where the offender was convicted. *Leeth* argued that s 4 of the *Prisoners Act* was invalid on one of two bases. First, that the Act violated the separation of powers principle as it required a court to treat federal offenders unequally and thereby required the court to act contrary to judicial process. Second, that the Act infringed an implied guarantee of the equality of the people of the Commonwealth.

Mason CJ, Brennan, Dawson and McHugh JJ upheld s 4. However, the majority judges responded differently to *Leeth*'s second argument. Mason CJ, Dawson and McHugh JJ, in a joint judgment, strongly rejected the existence of an implied guarantee of legal equality.⁹ Brennan J, in contrast, remarked fleetingly that there would be 'much force' to *Leeth*'s argument that the Act infringed an implied equality guarantee had the legislation required the Court to impose different maximum sentences.¹⁰ Such a law, according to Brennan J, would be:

offensive to the constitutional unity of the *Australian people* 'in one indissoluble Federal Commonwealth', recited in the first preamble to the *Commonwealth of Australia Constitution Act 1900*.¹¹

⁸ Henceforth the '*Prisoners Act*'.

⁹ *Leeth* (1992) 174 CLR 455, 467.

¹⁰ *Ibid* 475.

¹¹ *Ibid* (emphasis added).

However, Brennan J found that the *Prisoners Act* ensured that federal offenders were eligible for parole 'under the same laws'.¹² The point of distinction under the *Prisoners Act* was therefore the 'rational' and 'necessary' ground that federal offenders were incarcerated in facilities shared by State and Territory offenders.¹³ Thus Brennan J, like Mason CJ, Dawson and McHugh JJ, found the section valid.

Deane, Toohey and Gaudron JJ dissented. Gaudron J found that s 4 infringed the Constitution's guarantee that Ch III courts must exercise judicial power consistent with judicial process.¹⁴ This was because judicial process required 'the like treatment of like persons in like circumstances' and that 'genuine differences be treated as such'.¹⁵ Gaudron J found s 4 invalid on the basis that differentiating between Commonwealth prisoners according to the location of their conviction was not a 'genuine difference'. Although she found it unnecessary to decide Leeth's argument that the Constitution contained a general guarantee of legal equality,¹⁶ in *Kruger* Gaudron J would later remark that there was 'no room for any implication of a constitutional right of equality beyond that deriving from Ch III'.¹⁷

Deane and Toohey JJ, in contrast, accepted that the Constitution contained an implied guarantee of legal equality.¹⁸ The doctrine of legal equality had two components: first, the recognition that all persons were subject to the law, and second, the recognition of 'the underlying or inherent theoretical equality of all persons under the law and before the Courts'.¹⁹ In their view, the location of a prisoner's conviction was an arbitrary basis upon which to distinguish between federal offenders. Thus s 4 was inconsistent with the Constitution's guarantee of legal equality.²⁰

¹² Ibid 479.

¹³ Ibid.

¹⁴ Ibid 502-3.

¹⁵ Ibid 502.

¹⁶ Ibid 501.

¹⁷ *Kruger v Commonwealth* (1997) 190 CLR 1, 113 ('*Kruger*').

¹⁸ *Leeth* (1992) 174 CLR 455, 486.

¹⁹ Ibid 485.

²⁰ Ibid 491-2.

Deane and Toohey JJ's reasoning in *Leeth* was in three stages. First, they argued that the Constitution incorporated common law rights and guarantees by implication. According to Deane and Toohey JJ, one such common law right was the guarantee of legal equality. Next, they identified aspects of the Constitution's text which manifested the common law right to legal equality. This included guarantees such as s 117, the preamble, and implications derived from the separation of powers and the nature of the federal system. Finally, they assessed whether s 4 violated the constitutional guarantee.

Leeth squarely raised the degree to which a joint judgment can be regarded as a true reflection of Deane's constitutional vision, rather than as an expression of a compromise between Deane and Toohey JJ's approaches. At each stage of their analysis, Deane and Toohey JJ's reasoning illustrated important similarities in style and substance with Deane's earlier jurisprudence. However, each stage of their reasoning also reflected important points of departure from the patterns of Deane's jurisprudence. The extent to which these differences reflected the natural extension of Deane's own constitutional vision, or a departure from that vision, is considered in this part, as is the persuasiveness of Deane and Toohey JJ's analysis in *Leeth*.

B *Part 1: Recurring themes and inconsistencies in Deane's reasoning in Leeth*

1 *Step 1: 'Fundamental concepts' reasoning and the common law*

Deane and Toohey embraced an interpretive approach in *Leeth* which substantially mirrored Deane's 'fundamental concepts' reasoning. Thus Deane and Toohey JJ held that constitutional implications may be derived from underlying doctrines or principles, principles themselves incorporated:

by implication drawn both from the *nature of the Federation* and from any particular express provisions of the Constitution which reflect or implement those doctrines or principles. In the context of that approach, specific provisions of the Constitution which reflect or implement some *underlying doctrine or*

principle are properly to be seen as a manifestation of it and not as a basis for denying its existence by invoking the inappropriate rule of *expressio unius*.²¹

Chapters 2 and 3 have explored Deane's commitment to 'fundamental concepts' reasoning in the context of implications derived from his understanding of federalism and the separation of powers. For example, in *Breavington*, Deane derived the principle that Australia was a unitary legal system, and his choice of law rule, from the 'general context' of the Constitution as an instrument designed to establish a 'new system of law.'²² In *Breavington* it was only after Deane examined this general context, and the Constitution's underlying principles, that he turned to consider particular provisions of the text,²³ concluding that s 118 served only to make 'plain'²⁴ what was '*manifest*' from the '*general nature*'²⁵ of the Constitution.

In the above passage from *Leeth*, both Deane and Toohey JJ clearly advanced a similar interpretive principle, holding that implications, including implications of broad constitutional rights, could be drawn from general doctrines manifested by aspects of the constitutional text and its general frame. In two respects, however, Deane and Toohey JJ's reasoning in *Leeth* was distinct from the 'fundamental concepts' reasoning Deane had applied in earlier cases. These distinctions were: first, Deane and Toohey JJ's reliance on the framers, and second, the role of the common law as a source of constitutional rights implications.

(a) The framers and 'fundamental concepts' reasoning

Prior to *Leeth* Deane had said little to explain the legitimacy of his 'fundamental concepts' reasoning as a tool in constitutional interpretation. In *QEC*, for example, Deane had been careful to acknowledge that his interpretive approach was not precluded by the *Engineers' Case*.²⁶ However, in light of the pattern of

²¹ *Leeth* (1992) 174 CLR 455, 484-5 (emphasis added) (citation omitted). Part of Deane and Toohey JJ's citation following this passage is extracted below n 28.

²² *Breavington* (1988) 169 CLR 41, 120 (emphasis added).

²³ *Ibid* 121-2.

²⁴ *Ibid* 129.

²⁵ *Ibid* 121 (emphasis added).

²⁶ *QEC* (1985) 159 CLR 192, 245.

his jurisprudence prior to 1992, *Leeth* represented what was an unusual step for Deane in justifying his interpretive approach. That step was arguing that 'fundamental concepts' reasoning followed the '*general approach of the framers*.'²⁷ Deane and Toohey JJ then significantly extended their reference to the framers in *Leeth* with the following footnote to their judgment, where they remarked:

note the many statements in the Convention Debates by the opponents of express guarantees of fundamental rights to the effect that such guarantees were 'unnecessary' (see, e.g., *Official Record of the Debates of the Australasian Federal Convention, Melbourne*, 1898, vol.1, pp 667, 687, 688) or dealt with matters which were covered by 'the true spirit of federation ... infused into this Constitution' (ibid., p 679) or were effected by 'the ordinary operation of the common law' and 'embodied in the Constitution as a part of the unwritten law' (ibid., vol 2, p.1776).²⁸

Goldsworthy has observed that by referring to the framers in *Leeth* Deane and Toohey JJ attempted to locate their interpretive approach within the 'conventional', originalist, approaches to constitutional interpretation.²⁹ However, Deane and Toohey JJ's reference to the framers raised two significant issues for their analysis. The first was the accuracy of their assessment of the framers' intentions towards the constitutional protection of 'fundamental rights.' The second was the consistency of this aspect of Deane and Toohey JJ's reasoning in *Leeth* with Deane's approach to relevance of the framers' intentions throughout his jurisprudence.

(i) The accuracy of Deane and Toohey JJ's reliance on the framers' intentions

The accuracy of Deane and Toohey JJ's invocation of the framers to support their implication has been widely questioned.³⁰ Accordingly, it requires only brief mention in this chapter.

²⁷ *Leeth* (1992) 174 CLR 455, 484 (emphasis added).

²⁸ Ibid 485 fn 57.

²⁹ Jeffrey Goldsworthy, 'Implications in Language, Law and the Constitution' in Geoffrey Lindell (ed) *Future Directions in Australian Constitutional Law* (1994) 150, 179.

³⁰ See, for example, ibid 176; Dennis Rose, 'Judicial Reasonings and Responsibilities in Constitutional Cases' (1994) 20 *Monash University Law Review* 195, 209; George Winterton, 'The Separation of Judicial Power as an Implied Bill of Rights' in G Lindell (ed) *Future Directions in Australian Constitutional Law* (1994) 185, 205; Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 420 citing with approval Lindell n 32, 34 fn 129.

As discussed in chapter 4, the conventional understanding of the Australian Constitution was that it was drafted with 'faith in the democratic process to protect Australian citizens against unwarranted incursions upon the freedoms which they enjoy.'³¹ As Lindell has argued, a more compelling interpretation of the statements by the framers cited by Deane and Toohey JJ to the effect that constitutional rights protection was 'unnecessary' was therefore that the extracts from the Convention Debates reflected the 'faith' of the framers that the democratic process provided sufficient protection for individual liberties.³² Deane and Toohey JJ's interpretation of the framers' intentions was particularly ironic given that, as Zines has observed, 'we do know for certain' that the framers considered and rejected a proposal to insert an Australian equivalent of the Fourteenth Amendment of the United States Constitution.³³

In this light, Deane and Toohey JJ's reference to the Convention Debates in their footnote in *Leeth* undermined their reliance on the 'general approach of the framers' was to allow fundamental rights to be protected by implication from the Constitution. As a result, Deane and Toohey JJ's reliance on the framers' intentions in support of their interpretive approach was unpersuasive.³⁴ The question of the coherence and consistency of this aspect of *Leeth* within Deane's jurisprudence requires more detailed examination of the pattern of Deane's decision-making on this topic.

(ii) The consistency of Deane's reliance on the framers' intentions in Leeth and his wider jurisprudence

Chapter 1 has demonstrated that a theme of Deane's constitutional jurisprudence was his belief that the framers' subjective intentions were

³¹ ACTV (1992) 177 CLR 106, 182 (Mason CJ).

³² G.J. Lindell, 'Recent Developments in the Judicial Interpretation of the Australian Constitution' in Geoffrey Lindell (ed) *Future Directions in Australian Constitutional Law* (1994) 1, 34, fn 129. See similarly, Goldsworthy, above n 29, 176.

³³ Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 419 citing J.A. La Nauze, *The Making of the Australian Constitution* (1972) 229-32. See also John Williams, 'The Emergence of the Commonwealth Constitution' in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003) 1, 25-7.

³⁴ On this basis Rose refers to Deane and Toohey JJ's judgment in *Leeth* as displaying a lack of 'judicial reasoning.' Dennis Rose, 'Judicial Reasonings and Responsibilities in Constitutional Cases' (1994) 20 *Monash University Law Review* 195, 209. Compare Rose's critique of Deane's citation from Inglis Clark in *Polyukhovich* as displaying a similarly misleading selectivity in the use of sources. *Ibid* 202-3.

irrelevant to constitutional interpretation. With language of increasing intensity in cases such as *Breavington* and the *Incorporation Case*, (and later emphatically described as his 'living force' theory in *Theophanous*), Deane affirmed that the Constitution must be interpreted consistently with the intentions of 'the people'. On this basis, the intentions of the 'framers', expressed through the 'passing comments'³⁵ of delegates at the Constitutional Conventions, could not control the meaning of the Constitution.

Deane and Toohey JJ's explicit reference to the 'general approach of the framers' to support their implication in *Leeth* appears to be inconsistent with this approach. If the Court may not look to the framers' intentions regarding the meaning of the constitutional text, why may the Court consider the 'general approach of the framers' to the implication of constitutional rights? If *the people* are the basis of Deane's 'living force' theory of interpretation, as his decisions in *Breavington*, the *Incorporation Case* and *Theophanous* attest, surely it should have been the 'general approach of *the people*' that Deane invoked in support of his interpretive principle in *Leeth*.

There may be three explanations for Deane's choice to refer to the framers in this way in *Leeth*. First, Deane and Toohey JJ's footnote to the Convention Debates in *Leeth* may reflect an attempt to rebut the argument that the framers were not interested in the protection of rights in the Constitution. This thesis has examined a number of instances of Deane marshalling statements from historical commentaries or the Convention Debates to rebut the reliance by other members of the Court on statements made by the framers during the Convention Debates. For example, in *Breavington*, Deane reflected that the 'passing comments' of the framers could not support the view that s 118 was a mere procedural provision, and that that interpretation was inconsistent with the understanding of prominent framers such as Inglis Clark.³⁶ However, Deane and Toohey JJ's footnote in *Leeth* cannot be taken in isolation from their remarks in the text of their judgment, particularly Deane and Toohey JJ's reference to the 'general approach of the framers' in support of their reasoning. In this context it is difficult to regard Deane and Toohey JJ's footnote as merely their attempt to

³⁵ *Breavington* (1988) 169 CLR 41, 133.

³⁶ *Ibid.*

rebut the inference that the framers' intentions precluded the implication of constitutional rights, such as a guarantee of legal equality.

A second interpretation of this aspect of Deane and Toohey JJ's analysis in *Leeth* is that it reflected a concession by Deane to Toohey J's views on the relevance of the framers' intentions in constitutional interpretation. Previous chapters have indicated that Toohey J had not previously endorsed Deane's passionate rejection of reliance on the framers' intentions. Even if it is assumed that Deane wrote the judgment in *Leeth*, some concession to Toohey J's approach may be expected in a joint judgment.

A final interpretation is also possible. As discussed in chapter 3, in *Polyukhovich* Deane rejected an analysis that a guarantee prohibiting federal retrospective criminal laws should not be implied from the separation principle because such an implication was contrary to the intention of the framers. In *Polyukhovich* Deane had referred to the fact that 'the framers took an altogether different approach to the incorporation of rights', and therefore their intentions could not preclude the implication of the guarantee from Ch III in that case.³⁷ Given that *Polyukhovich* and *Leeth* were handed down a mere ten months apart, it is possible that Deane and Toohey JJ's reference to the 'general approach of the framers' amplified Deane's earlier statements in *Polyukhovich*.

If *Leeth* indicated that Deane was open to the relevance of the framers' intentions in constitutional interpretation, Deane's single judgment in *Theophanous* in 1994 emphatically repositioned his approach. Chapter 6 argues that *Theophanous* demonstrated Deane's reliance on the intentions of 'the people' as the platform for both his 'fundamental concepts' reasoning, as well as his adoption of the 'living force' theory of interpretation.³⁸ In light of *Theophanous*, *Leeth* arguably represented, at most, a notable aberration in what was Deane's generally consistent vision of 'the people' (and not the framers' intentions) as the foundation of his interpretive philosophy.

³⁷ *Polyukhovich* (1991) 172 CLR 501, 617.

³⁸ *Theophanous* (1994) 182 CLR 104, 166-74.

(b) *The role of the common law in Deane's jurisprudence*

Deane and Toohey JJ's reliance on common law rights in their 'fundamental concepts' reasoning in *Leeth* was a remarkable feature of their decision. The richness and flexibility of the common law provided the Court with a mechanism to incorporate an extensive array of constitutional guarantees, an 'implied bill of rights'.³⁹ *Leeth* itself demonstrated the potential reach of Deane and Toohey JJ's interpretive approach, as their legal equality guarantee was broad enough to allow the Court to assess the reasonableness of federal legislation.⁴⁰ As such, Deane and Toohey JJ's reasoning in *Leeth* signalled a significant change to the relationship between the legislature and the Court, effected not by s 128 but by judicial reasoning.

Despite the commitment to the constitutional protection of the rights of 'the people' that pervades Deane's jurisprudence, the reliance on the common law in *Leeth* broke from the pattern of Deane's jurisprudence in two ways. First, *Leeth* extended Deane's 'fundamental concepts' approach beyond the 'general doctrines' of government that had, prior to 1992, been the source of his reasoning. Second, *Leeth* represented a departure from the tenor of Deane's earlier remarks in *Mabo (No 2)* regarding the commitment to equality in the common law, and Australian society.

(i) *The common law and 'fundamental concepts' reasoning*

Prior to *Leeth*, Deane had derived his rights implications from his understanding of the two general doctrines of government – federalism and separation of powers.⁴¹ Both doctrines had long pedigrees as fundamental principles from which constitutional implications could be derived. In *Breavington*, for example, Deane applied 'fundamental concepts' reasoning to

³⁹ Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 419-20. Compare, in support of an interpretive principle providing constitutional protection for common law rights: John Toohey, 'A Government of Laws, and Not of Men?' (1993) 4 *Public Law Review* 158, 170.

⁴⁰ Kirk argued that '[f]ew conceivable constitutional guarantees accord a greater role to judges than a general guarantee of legal equality.' Jeremy Kirk, 'Constitutional Implications (II): Doctrines of Equality and Democracy' (2001) 25 *Melbourne University Law Review* 24, 34.

⁴¹ Three months after *Leeth* Deane and Toohey JJ recognised rights implied from the third doctrine of government, representative government, in *Nationwide News* and *ACTV*. For the timing of Deane's decisions in these cases see Appendix A.

resolve an aspect of federal dynamics. Deane's reasoning in that case had rested heavily on his understanding of the intention of 'the people of Australia,' as articulated in the preamble to the Constitution.⁴² Deane reasoned in *Breavington* that the intention of 'the people' was manifested in a variety of features of the text and structure of the Constitution. However, the unifying theme of his unusual collection of provisions was what Deane believed to be the 'fundamental concept', or 'fundamental constitutional truth,' underlying the Australian Constitution, that Australians were one people, and the Constitution established a unitary system of law.

Deane's reasoning in *Breavington* provided an interesting point of comparison to *Leeth*. In *Leeth* Deane and Toohey JJ also relied on the preamble of the Constitution.⁴³ They argued that the commitment to legal equality expressed in the preamble was also manifest through varied elements of the text and from structural implications such as the separation of powers principle. Given Deane's previous commitment to the principle of equality as a constitutional value, his existing methodology (as applied in *Breavington*) would seem to provide him with ample scope to recognise an equality guarantee. The judgments of both Brennan and Gaudron JJ also provided two different illustrations of a guarantee of legal equality (of some form) derived from the text and structure of the Constitution. In this context, why did Deane extend his 'fundamental concepts' reasoning in *Leeth* to encompass common law rights?

The extension of Deane's 'fundamental concepts' reasoning to incorporate common law rights may reflect the influence of Toohey J on the joint judgment in *Leeth*. Chapter 3 discussed Toohey J's enigmatic reference to fundamental rights as a limitation on legislature power in *Polyukhovich*.⁴⁴ More pointedly, his extra-curial paper, 'A Government of Laws, and Not of Men,' presented at a conference in Darwin a few months after *Leeth*, examined the role of the common law as a foundation for constitutional implications and an 'implied bill of rights.'⁴⁵ In this context, *Leeth* may highlight a topic on which Toohey J influenced Deane's constitutional thought. This influence was permanent,

⁴² *Breavington* (1988) 169 CLR 41, 120.

⁴³ See further below text accompanying n 96.

⁴⁴ *Polyukhovich* (1991) 172 CLR 501, 687.

⁴⁵ John Toohey, 'A Government of Laws, and Not of Men?' (1993) 4 *Public Law Review* 158, 170.

stretching beyond the derivation of the equality guarantee in *Leeth*, as Deane later endorsed the role of the common law as a source of constitutional implications in both *Nationwide News*⁴⁶ and *Theophanous*.⁴⁷

(ii) Questions raised by *Mabo (No 2)*: the historical insensitivity of Deane and Toohey JJ's common law equality guarantee in *Leeth*

A frequent criticism of Deane and Toohey JJ's reasoning in *Leeth* relates to their claim that the doctrine of legal equality was recognised in the common law as a fundamental right.⁴⁸ To the extent that Deane and Toohey JJ address these concerns in *Leeth*, their response was contained in the following passage:

putting to one side the position of the Crown and some *past anomalies*, notably, discriminatory treatment of women, the essential or underlying theoretical equality of all persons under the law and before the courts is and has been a fundamental and generally beneficial doctrine of the common law and a basic prescript of the administration of justice under our system of government.⁴⁹

Given the breathtaking scale of their legal equality guarantee, commentators have questioned whether this brief discussion by Deane and Toohey, particularly their reference to 'past anomalies' in common law history, provides a sufficient explanation of the nature of the common law's commitment to the principle of legal equality.⁵⁰

Deane and Toohey JJ's dismissive reference to discrimination against women as an anomaly of common law history is all the more striking when compared against Deane's reasoning in *Mabo (No 2)*, and its sensitivity to the history of discrimination faced by Indigenous Australians. The significance of *Mabo (No 2)* as an event in Australian legal history, its further synergies with Deane's reliance on 'the people' throughout his jurisprudence, and the temporal

⁴⁶ *Nationwide News* (1992) 177 CLR 1, 69-70 (Deane and Toohey JJ).

⁴⁷ *Theophanous* (1994) 182 CLR 104, 171.

⁴⁸ See, for example, Doyle's reflection that 'discerning a thorough-going doctrine of legal equality in the common law at 1900 requires some judicial athleticism, if not a certain degree of gymnastic ability.' John Doyle (1995) 'Courts Unmaking the Laws' in Australian Institute of Judicial Administration (ed) *Courts in a Representative Democracy*, Australian Institute of Judicial Administration, 148 quoted in George Winterton, 'Constitutionally Entrenched Common Law Rights: Sacrificing Means to Ends?' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions* (1996) 121, 132.

⁴⁹ *Leeth* (1992) 174 CLR 455, 486 (emphasis added).

⁵⁰ Kirk argued that Deane and Toohey JJ's treatment of the 'past anomalies' in *Leeth* was 'less than convincing.' Jeremy Kirk, 'Constitutional Implications (II): Doctrines of Equality and Democracy' (2001) 25 *Melbourne University Law Review* 24, 38.

coincidence of *Leeth* and *Mabo (No 2)*, mean that Deane and Gaudron JJ's reasoning in that case warrants further attention in this chapter.

As is well known, a majority of the Court in *Mabo (No 2)* held that common law native title survived the original acquisition of sovereignty by the Crown.⁵¹ The careful craftsmanship of Deane and Gaudron JJ's decision in *Mabo (No 2)* has been examined by Berns.⁵² Berns explained that Deane and Gaudron JJ's reasons traced a rhetorical arc from 'formal legal language' to the emotive account of the 'past acts of barbarism' perpetrated on Indigenous Australians. At the height of this arc, Deane and Gaudron JJ famously observed that:

The acts and events by which that dispossession in legal theory was carried into practical effect constitute *the darkest aspect of the history of this nation*. The nation as a whole *must remain diminished* unless and until there is an acknowledgement of, and retreat from, those *past injustices*.⁵³

For present purposes, three aspects of this passage from Deane and Gaudron JJ's reasons in *Mabo (No 2)* are significant.

First, the passage underscored, in both form and substance, the strength of Deane's commitment to the protection of disadvantaged groups in Australian society and his willingness for the Court to engage with highly politicised issues. This aspect of Deane and Gaudron JJ's decision in *Mabo (No 2)* confirmed a well-established pattern in Deane's constitutional jurisprudence prior to June 1992.⁵⁴ Second, as Deane and Gaudron JJ themselves acknowledged, this passage from *Mabo (No 2)*, and their characterisation of the 'conflict and oppression' of the past century as a '*national legacy of unutterable shame*',⁵⁵ was 'unusually emotive'⁵⁶ language for a judgment of the High Court. Deane and Gaudron JJ argued that it was necessary to set out 'the full facts' of the acts of disposition because '[l]ong acceptance of legal propositions ... can of itself

⁵¹ Much has been written on Court's reasoning in *Mabo (No 2)* and its legal and political significance. See, by way of introduction, Garth Nettheim, 'Mabo' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 466.

⁵² Sandra S Berns, 'Constituting a Nation: Adjudication as Constitutive Rhetoric' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 84, 105-9.

⁵³ *Mabo (No 2)* (1992) 175 CLR 1, 109 (emphasis added).

⁵⁴ See, for example, Deane's analysis in *Dietrich* discussed above chapter 3 part 1.

⁵⁵ *Mabo (No 2)* (1992) 175 CLR 1, 104 (emphasis added).

⁵⁶ *Ibid* 120.

impart legitimacy and preclude challenge.⁵⁷ In this way, Deane's decision in *Mabo (No 2)* spoke to Deane's understanding of the nature of the Court's role in rectifying injustice, both by confessing past wrongs and by ensuring that contemporary legal principle and legal practice manifested the inherent equality of the Australian people.

Finally, the above passage from *Mabo (No 2)* was significant because of the echoes of Deane's earlier decisions. A decade before *Mabo (No 2)*, Deane had explored the Commonwealth's power under s 51(xxvi) in the *Tasmanian Dam Case*. Discussing the 1967 referendum, Deane observed that it had become clear that the exclusion of the people of the Aboriginal race from s 51(xxvi) restricted the Commonwealth's power to enact laws for the benefit of Indigenous Australians. That power, Deane argued, was significant because it had become 'increasingly clear that Australia, as a nation, must be diminished until acceptable laws be enacted to mitigate the effects of past barbarism.'⁵⁸ The similarity in language and tone between these extracts from Deane's decisions in the *Tasmanian Dam Case* and *Mabo (No 2)* suggests that Deane played a significant role in crafting the language of the latter decision, or at least that of its most controversial passage.⁵⁹

Deane and Gaudron JJ's reasons in *Mabo (No 2)* established their sensitivity to the practical effects of past injustice on Indigenous Australians. Consistent with the 'theory and practice, form and substance'⁶⁰ dichotomy pervading Deane and Gaudron JJ's reasons, they acknowledge that '[i]n theory' Indigenous Australians could have sought the protection of the common law in respect of

⁵⁷ Ibid.

⁵⁸ *Tasmanian Dam Case* (1983) 158 CLR 1, 272-3 (emphasis added). See also, *Gerhady v Brown* (1985) 159 CLR 70, 149.

⁵⁹ See also the similarity between the language of *Mabo (No 2)* and Deane's later speeches as Governor-General. For example in 1996 Deane said:

It should, I think, be apparent to all well-meaning people, that true reconciliation between the Australian nation and its indigenous peoples, is not achievable in the absence of *acknowledgment by the nation of the wrongfulness of the past dispossession, oppression and degradation of the Aboriginal peoples*. ... Where there is no room for national pride, or national shame, about the past, there can be no national soul.'

Sir William Deane, 'Some Signposts from Daguragu' (1997) 8 *Public Law Review* 15, 21 (emphasis added).

⁶⁰ Sandra S Berns, 'Constituting a Nation: Adjudication as Constitutive Rhetoric' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 84, 105-9.

the abuses perpetrated against them.⁶¹ However, they emphasised that '[i]n practice *there is an element of the absurd about the suggestion*'⁶² that their land rights could have been vindicated in a common law court. It was this acknowledgment of the practical obstacles facing Indigenous Australians in achieving equality, and the sensitivity of Deane and Gaudron JJ to that history of inequality and injustice, that stood in contrast to the tenor of Deane and Toohey JJ's remarks in *Leeth*, a decision handed down only three weeks later.

In this context, what is to be made of Deane and Toohey JJ's claim of the existence of a fundamental common law doctrine of legal equality? Chapter 4 has demonstrated that in *Cheatle*, Deane, as part of the unanimous joint judgment, employed an evolutionary interpretive approach to define the meaning of 'trial by jury' in s 80. In *Cheatle* the Court recognised that an 'essential feature' of the common law institution of trial by jury, its 'representative' nature, could adapt to reflect contemporary social standards, including contemporary standards of equality.

In *Leeth*, however, use of an evolutionary interpretive method in order to move beyond the 'past anomalies' in the discriminatory treatment of women to recognise a guarantee of legal equality faces a particular challenge. While the phrase 'trial by jury' held an identifiable historical meaning, (albeit one unpalatable by contemporary standards), the scale of the 'past anomalies' in the common law may be regarded as calling into question the existence and extent of the common law's commitment to equality. Thus in *Kruger v Commonwealth*, when rejecting the existence of a general equality guarantee, Dawson J emphasised that 'to dismiss the discriminatory treatment of women at common law ... as "past anomalies" ... is to *treat the doctrines of the common law with selectivity*.'⁶³ Without an identifiable and core commitment to a right of legal equality in the common law, in 1900, the *Cheatle* analysis cannot enable the Court to adapt that right to reflect contemporary social standards. Accordingly, Deane and Toohey JJ did not establish the necessary common law foundation for the implication of their constitutional guarantee according to their 'fundamental concepts' reasoning.

⁶¹ *Mabo (No 2)* (1992) 175 CLR 1, 93 (emphasis added).

⁶² *Ibid* (emphasis added).

⁶³ *Kruger* (1997) 190 CLR 1, 66 (emphasis added).

2 *Step 2: Constitutional manifestations of the equality guarantee*

Consistent with Deane's use of 'fundamental concepts' reasoning across his jurisprudence, the next stage in Deane and Toohey JJ's analysis in *Leeth* was to marshal a collection of 'particular provisions' and elements of the nature of the Constitution which manifested the equality principle.

(a) *'Particular provisions'*

Chapter 4 has examined Deane's list of thirteen provisions in the Constitution that he claimed embody fundamental constitutional guarantees protecting the liberty, dignity and *equality* of 'the people'.⁶⁴ In *Leeth* Deane and Toohey JJ listed eleven provisions as manifesting the doctrine of legal equality in the Constitution.⁶⁵

Included amongst Deane and Toohey JJ's list in *Leeth* are ss 116 and 117. By recognising that an express constitutional right can support a wider implied right, Deane and Toohey JJ's 'fundamental concepts' reasoning in *Leeth* provided a vehicle for significantly extending the Constitution's protection of individual rights.⁶⁶ For example, if the doctrine of legal equality was manifested through a section precluding residence-based discrimination (s 117), could s 116 establish a robust constitutional implication precluding any form of discrimination on the grounds of religion? Could s 80 support a range of substantive guarantees of elements of a fair trial and fair judicial process? Could expanded rule of law guarantees be drawn from ss 109 and 118, and substantive voting rights from ss 24, and 41? Clearly, the potential of Deane and

⁶⁴ *Street* (1989) 168 CLR 461, 521-2.

⁶⁵ *Leeth* (1992) 174 CLR 455, 487. These were ss 24, 25, 51(ii), 51(iii), 86, 88, 90, 92, 99, 116 and 117. Sections 86 and 90 were cited twice by Deane and Toohey JJ. Saunders commenced her analysis of concepts of equality in the Constitution by stating that '[i]n a variety of different guises, equality is a familiar theme of the Australian Constitution.' Cheryl Saunders, 'Concepts of Equality in the Australian Constitution' in Geoffrey Lindell (ed) *Future Directions in Australian Constitutional Law* (1994) 209, 209.

⁶⁶ Particularly when building on Deane's list of rights in the *Street* (1989) 168 CLR 461, 521-2 and *Theophanous* (1994) 182 CLR 104, 168 fn 10.

Toohey JJ's fundamental concepts reasoning was not exhausted by their implication of a guarantee of legal equality.

In *Leeth*, however, the number and variety of the provisions listed by Deane and Toohey JJ as manifesting the equality guarantee undermined the persuasiveness of their implication in that case. As Kirk observed, Deane and Toohey JJ's analysis required that the eleven constitutional provisions touching on aspects of equality in the Federation were inserted in the text 'out of excessive caution.'⁶⁷ However the range and number of these provisions suggests that, on the question of equality and discrimination, the framers departed from their 'general approach' towards implications and determined to protect this right expressly rather than by implication.⁶⁸

Deane and Toohey JJ's reliance on s 117 illustrated a further source of criticism of their application of 'fundamental concepts' reasoning in *Leeth*. Section 117 serves multiple purposes in the Constitution, only one of which is the protection of the individual from discrimination.⁶⁹ In *Street*, for example, Deane recognised that some discriminatory laws were exempt from s 117.⁷⁰ Does this mean that the federal principles and issues of State sovereignty that provided the basis for exclusions to s 117 could also be the source of constitutional implications? How was the Court to balance the principles and purpose of that section and the limitations flowing from the constitutional purpose and structure? As Claus remarked, the essence of Deane and Toohey JJ's reasoning in *Leeth* was that the text was a 'signpost' of wider doctrines and concepts underlying the text.⁷¹ However, as 'signposts can point in more than one direction',⁷² Deane and Toohey JJ's approach conferred a considerable discretion on the Court to frame the nature and scope of implications limiting legislative power. These were not issues considered by Deane and Toohey JJ in *Leeth*.

⁶⁷ Jeremy Kirk, 'Constitutional Implications (II): Doctrines of Equality and Democracy' (2001) 25 *Melbourne University Law Review* 24, 41. Although compare Deane's argument in *Breavington* that ss 106, 107 and 108 confirmed that Australia was a unitary system of law, and '[t]he presence of s 118 serves to make that position plain': *Breavington* (1988) 169 CLR 41, 129.

⁶⁸ Kirk, above n 67, 41.

⁶⁹ *Street* (1989) 168 CLR 461, 528-9.

⁷⁰ *Ibid.*

⁷¹ Laurence Claus, 'Implication and the Concept of a Constitution' (1995) 69 *Australian Law Journal* 887, 904.

⁷² *Ibid.*

Statements from Deane and Gaudron JJ's reasons in *Mabo (No 2)* further reinforce the selectivity in Deane and Toohey JJ's examination of their analysis of provisions manifesting their equality guarantee. In *Mabo (No 2)*, in the midst of their description of the history of violence and injustice faced by Indigenous Australians, Deane and Gaudron JJ drew attention to the two references to Indigenous Australians in the original text of Constitution: ss 51(xxvi) and 127.⁷³ Section 51(xxvi) was mentioned by Deane and Toohey JJ in *Leeth* as a head of power 'necessarily' authorising discrimination, to the extent that the discrimination is 'reasonable capable of being seen as appropriate and adapted to the circumstance of that membership.'⁷⁴ However the original purpose of s 51(xxvi),⁷⁵ and the inclusion of s 127 in the Constitution in 1901, were not mentioned by Deane and Toohey JJ in *Leeth*. Given that *Leeth* and *Mabo (No 2)* were decided only three weeks apart, the absence of such discussion in Deane and Toohey JJ's reasons in *Leeth* is particularly striking. The original form of these provisions was surely more relevant to the issue of the Constitution's commitment to the principle of legal equality, as assessed in 1901, than in identifying a common law right of native title in *Mabo (No 2)*. Indeed, in *Kruger*, Dawson J turned to ss 51(xxvi) and 127 as illustrations of aspects of the Constitution that 'do not support the suggested doctrine of equality.'⁷⁶

For these reasons, Deane and Toohey JJ's references to the constitutional text as manifesting the equality guarantee in *Leeth* were unconvincing, and reinforced the degree of discretion that their 'fundamental concepts' reasoning could confer on the Court in identifying the nature of the underlying doctrine and the reach of the constitutional implication. This criticism of Deane and Toohey JJ's reasoning in *Leeth* applies with equal force to the other manifestations of the guarantee marshalled in their reasons.

⁷³ *Mabo (No 2)* (1992) 175 CLR 1,106 (Deane and Gaudron JJ). See also *Tasmanian Dam Case* (1983) 158 CLR 1, 272 (Deane J).

⁷⁴ *Leeth* (1992) 174 CLR 455, 489. Justice French remarked on Deane and Toohey JJ's recognition of the race power as an exception to the equality guarantee in his examination of the Court's engagement with the meaning of the race's power in Robert French, 'The Race Power: A Constitutional Chimera' in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003) 180, 196.

⁷⁵ See generally French, above n 74, 196.

⁷⁶ *Kruger* (1997) 190 CLR 1, 64.

(b) *The separation of powers principle*

Deane and Toohey JJ also rely on implications derived from two underlying doctrines of government as manifesting the Constitution's commitment to equality: federalism and the separation of powers principle. As Deane and Toohey JJ's reference to federalism was intimately connected to their reliance on 'the people' in *Leeth*, this aspect of their reasons is discussed in that context below.

Deane and Toohey JJ's reliance on the separation principle in *Leeth* illustrated the points of connection between *Leeth* and Deane's earlier decisions and reinforced the flexibility available to the Court under Deane and Toohey JJ's 'fundamental concepts' reasoning to frame the nature and scope of constitutional implications. In a manner evocative of Deane's reasons in *Polyukhovich*,⁷⁷ Deane and Toohey JJ stated that the provisions of Ch III:

not only identify the possible repositories of Commonwealth judicial power. They also dictate and control the manner of its exercise. They are not concerned with mere labels or superficialities. They are concerned with matters of substance.⁷⁸

Deane and Toohey JJ continued, observing that Ch III required that 'courts' exercise judicial power consistent with the 'essential attributes of a court' and 'judicial process'.⁷⁹ Mirroring Deane's reasoning in *Polyukhovich*, Deane and Toohey JJ continued that '*at the heart of that obligation*', was:

the duty of a court to extend to the parties before it *equal justice*, that is to say, to treat them *fairly and impartially as equals before the law* and to *refrain from discrimination on irrelevant or irrational grounds*.⁸⁰

In this passage, Deane and Toohey JJ made a persuasive case that the Constitution included a guarantee of *procedural* equality in the exercise of federal judicial power by Ch III courts. However, as Rose has argued, Deane and Toohey JJ's reasoning stops well short of embodying a constitutional guarantee of *substantive* equality.⁸¹ This may have been Deane and Toohey JJ's meaning when they asserted in *Leeth* that Ch III incorporated the equality

⁷⁷ *Polyukhovich* (1991) 172 CLR 501, 607.

⁷⁸ *Leeth* (1992) 174 CLR 455, 486-7.

⁷⁹ *Ibid* 487.

⁸⁰ *Ibid* (emphasis added).

⁸¹ Dennis Rose, 'Judicial Reasonings and Responsibilities in Constitutional Cases' (1994) 20 *Monash University Law Review* 195, 208.

guarantee 'to a significant extent'.⁸² However, Deane and Toohey JJ's reliance on a procedural guarantee flowing from Ch III as a manifestation of the general doctrine of equality in the Constitution mirrored their use of s 117 as a 'signpost'⁸³ for the existence of the broader guarantee of legal equality of the people of the Commonwealth.

Deane and Toohey JJ's reliance on the separation principle in *Leeth* also raised interesting comparisons with Deane's Ch III jurisprudence. Deane displayed a consistent interest in rights flowing from Ch III throughout his High Court decisions, signalled as early as his swearing-in speech. *Leeth* provided Deane with an opportunity to extend the reach of Ch III guarantees. However, in contrast to Gaudron J, Deane and Toohey declined to decide the Ch III argument in *Leeth*, indicating, without deciding, that the argument may have faced 'difficulty'.⁸⁴ It is possible that Deane and Toohey JJ's failure to determine this argument may have reflected differences between these judges regarding the scope of Ch III rights.⁸⁵ Whatever the reason, *Leeth* resulted in Deane pursuing a general equality guarantee, in preference to a guarantee derived from Ch III. In this way, *Leeth* may signal the weight Deane attached to these different themes in his constitutional philosophy.

(c) *The nature of the Federation and 'the people'*

The final aspect of the Constitution cited by Deane and Toohey JJ in *Leeth* as manifesting the equality guarantee was the nature of the Federation as a compact of 'the people'. Deane and Toohey JJ's reliance on 'the people' in *Leeth* took two forms.

⁸² *Leeth* (1992) 174 CLR 455, 486.

⁸³ Laurence Claus, 'Implication and the Concept of a Constitution' (1995) 69 *Australian Law Journal* 887, 904.

⁸⁴ *Leeth* (1992) 174 CLR 455, 493.

⁸⁵ See, for example, the discussion in chapter 3 of the differences between Deane and Toohey JJ's understanding of consequences of the separation of powers principle Ch III in *Re Tracey* and the constitutional protection from retrospective criminal law in *Polyukhovich*.

(i) *QEC, federal implications and 'the people'*

First, as mentioned in chapter 2, Deane and Toohey JJ referred to the principle in the *Melbourne Corporation Case*. They argued that the recognition of an implication protecting the capacity of the States to function, and, as recognised in *QEC*, restricting the Commonwealth's power to discriminate against the States, exemplified the 'general approach of the framers' to incorporate important principles and guarantees by implication.⁸⁶ In a much criticised passage in their judgment,⁸⁷ Deane and Toohey JJ argued in *Leeth* that:

The States themselves, are, of course, *artificial entities*. ... it would be somewhat surprising if the Constitution, which is concerned with matters of substance, embodied a general principle which protected the States and their instrumentalities from being singled out by Commonwealth laws for discriminatory treatment but provided no similar protection of the people who constitute the Commonwealth and the States.⁸⁸

This description of the States as 'artificial entities', and the Constitution's concern with 'matters of substance', echoed Deane's language in earlier decisions, such as *Metwally*.⁸⁹ Some seven years prior to *Leeth*, in *QEC*, Deane had also intimated that there may be a 'general guarantee' protecting the equality of 'the people', which could provide a foundation for the narrower guarantee protecting the States from discriminatory treatment by the Commonwealth.⁹⁰ In *Leeth*, Deane and Toohey JJ asserted the inverse proposition, that is, that the framers' willingness to protect the States from discriminatory treatment by constitutional implication was a factor favouring a 'similar protection' for 'the people'.⁹¹

This aspect of Deane and Toohey JJ's reasoning in *Leeth* faces a number of challenges. First, an issue of coherence flows from Deane's earlier statements in *QEC*. Reading Deane's judgments together, his analysis suggests a self-reinforcing implication: the equality of 'the people' may provide a platform for an implication protecting the States from discriminatory treatment (*QEC*),

⁸⁶ *Leeth* (1992) 174 CLR 455, 484.

⁸⁷ See, for example, *Kruger* (1997) 190 CLR 1, 64 (Dawson J). See also, Jeremy Kirk, 'Constitutional Implications (II): Doctrines of Equality and Democracy' (2001) 25 *Melbourne University Law Review* 24, 39 and Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 416.

⁸⁸ *Leeth* (1992) 174 CLR 455, 484 (emphasis added).

⁸⁹ *Metwally* (1984) 158 CLR 447, 476-7.

⁹⁰ *QEC* (1985) 159 CLR 192, 247-8.

⁹¹ *Leeth* (1992) 174 CLR 455, 484.

which in turn is the basis for (or reinforces the existence of) an implication guaranteeing the equality of the people (*Leeth*). Second, commentators have also drawn attention to the different status of the Commonwealth and the States, and 'the people', in the Constitution.⁹² The limitation on Commonwealth legislative power to protect the continued existence of the States as political entities is a limitation based firmly on the text and structure of the Constitution, as Deane recognised in *QEC*.⁹³ Thus, as Zines argued, whether 'artificial' or not, the existence of the States was a matter on which the Constitution is predicated.⁹⁴ In contrast, the Constitution's reference to 'the people' is limited. Before the text of the Constitution can be said even to reflect the role of 'the people' to a degree approximating the textual manifestation of the federal system (for example, by endorsing Deane's thirteen guarantees in *Street*) it is first necessary to accept Deane's premise that the Constitution is designed to protect 'the people' through express and implied constitutional rights. As the discussion of the 'particular provisions' rallied by Deane and Toohey JJ in *Leeth* indicated, however, the text itself does not provide a clear indication that the Constitution was intended to protect the individual from discriminatory laws of the Commonwealth. This is particularly so given that, as Deane and Toohey JJ recognised, 'almost all laws discriminate'.⁹⁵ Without greater textual support, therefore, any comparison between a federal implication for the benefit of the States, and a general equality guarantee protective of 'the people', appears to beg the question in issue in *Leeth*.

(ii) *Preamble and 'the people'*

The second way in which Deane and Toohey JJ employed the concept of 'the people' to support the equality guarantee in *Leeth* was through the reference to

⁹² See above n 87.

⁹³ Deane described the Constitution as 'predicated upon ... an *assumption* of the continued existence of the States as viable political entities': *QEC* (1985) 159 CLR 192, 245 (emphasis added).

⁹⁴ Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 416. Note likewise, Leslie Zines, 'The Sovereignty of the People' in Michael Coper and George Williams (eds), *Power, Parliament and the People* (1997) 91, 103-4.

⁹⁵ *Leeth* (1992) 174 CLR 455, 488-9.

the preamble to the Constitution.⁹⁶ Deane and Toohey JJ argued that the preamble made 'plain'⁹⁷ that the Constitution's

conceptual basis was the free agreement of 'the people' – *all the people* – of the federating Colonies to unite in the Commonwealth under the Constitution. Implicit in that free agreement was the notion of the *inherent equality of the people as the parties to the compact*.⁹⁸

This passage was again evocative of Deane's earlier jurisprudence. In *Hematite* and *Breavington*, for example, Deane had relied on the conceptual basis of the Constitution to support his interpretation of the Constitution as an instrument designed for the protection of 'the people of Australia' and the creation of a new nation.⁹⁹ As discussed in chapter 2, however, Gummow J's analysis in *McGinty* highlighted the tension in the text between concepts of 'the people of Australia' and 'the people of the States'.¹⁰⁰ Deane did not recognise the possibility that the conceptual basis of the Constitution contained a federal dimension in *Leeth*, or in any other decision. Thus Deane consistently interpreted the Constitution as manifesting the '*fundamental constitutional truth*' he recognised in *Stevens v Head*, that is, that 'the people' in 1900 had agreed to form one single nation, free from the discriminatory and divisive remnants of colonial (now State) boundaries.¹⁰¹

In *Leeth*, Deane and Toohey JJ extended this thread of Deane's reasoning in two ways. First, in the above passage, Deane and Toohey JJ indicated that the people's agreement carried with it a recognition of, and commitment to, the constitutional protection of their 'inherent equality'. Part 2 of this chapter examines further the persuasiveness of Deane's vision of popular sovereignty as a foundation for constitutional guarantees, and its consequences for Deane's wider constitutional philosophy.

⁹⁶ Ibid 486. Brennan J also supported his equality guarantee by reference to the preamble. *Leeth* (1992) 174 CLR 455, 475. However, Brennan J's conclusion that s 4 of the *Prisoners Act* distinguished between federal offenders on a rational and necessary ground made it unnecessary for him to explore the existence of an equality guarantee in detail. Thus, in contrast to Deane and Toohey JJ, Brennan J referred only to the preamble in his reasons in *Leeth*.

⁹⁷ *Leeth* (1992) 174 CLR 455, 486.

⁹⁸ Ibid 486 (emphasis added).

⁹⁹ See *Hematite* (1983) 151 CLR 599, 660 and *Breavington* (1988) 169 CLR 41, 120. See also Deane's statement in *Duncan* (1983) 158 CLR 535, 589.

¹⁰⁰ *McGinty* (1996) 186 CLR 140, 275. See above chapter 2 n 210.

¹⁰¹ *Stevens v Head* (1993) 176 CLR 433, 461 (emphasis added).

A second innovation in *Leeth* was Deane and Toohey JJ's reference to the preamble as evincing the assent of 'all the people' to the Constitution. In *Leeth*, Deane and Toohey JJ appeared to rely on the extent of public participation in the constitutional referenda of the 1890s in a manner not exhibited by Deane in his earlier decisions. Deane and Gaudron JJ's reasoning in *Mabo (No 2)* again drew attention to the limitations of his aspect of Deane and Toohey JJ's reasoning in *Leeth*.

In *Mabo (No 2)* Deane and Gaudron JJ stated that,

the Australian Aborigines were, *at least as a matter of legal theory*, included among the people who, 'relying on the blessing of Almighty God', agreed to unite in an indissoluble Commonwealth of Australia.¹⁰²

On its face, this remark was not inconsistent with Deane and Toohey JJ's suggestion in *Leeth* that 'all the people' agreed, equally, to the terms of the Australian Constitution. However, in a judgment that was replete with allusion to the dichotomy between legal theory and practice,¹⁰³ Deane and Gaudron JJ's statement that the 'Australian Aborigines' united to form the Commonwealth 'at least as a matter of legal theory' invited the question of whether this statement was true as a matter of *practice*.¹⁰⁴ In this way, Deane and Gaudron JJ's statement in *Mabo (No 2)* drew attention to the accuracy of Deane and Toohey JJ's claim that in 1900 the Constitution effected the free agreement of 'all the people'. This was an issue pursued by Dawson J in *Kruger*, who observed that:

a degree of equality was lacking in the free agreement of which their Honours spoke, in that the referendum expressing that agreement excluded most women and many Aborigines.¹⁰⁵

Like Deane and Toohey JJ's willingness to pass over 'past anomalies' in order to recognise the existence of a common law commitment to legal equality in 1900, Deane and Toohey JJ's failure to acknowledge the historical inequalities in

¹⁰² *Mabo (No 2)* (1992) 175 CLR 1, 106 (Deane and Gaudron JJ) (emphasis added).

¹⁰³ Sandra S Berns, 'Constituting a Nation: Adjudication as Constitutive Rhetoric' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 84, 105-9.

¹⁰⁴ See also Deane's acknowledgment, while Governor-General, of the restrictions on qualification to be a delegate at a Constitutional Convention, and the significance of those qualifications on a sense of 'belonging' to the new nation. See, for example, 'Opening of the Exhibition, "Belonging: A Century Celebrated" State Library of New South Wales' Sydney, 3 January 2001, quoted in Sir William Deane, *Directions: A Vision for Australia* (2002) 16.

¹⁰⁵ *Kruger* (1997) 190 CLR 1, 67.

participation in the movement towards federation suggests a selective reliance on the historical record.

Had Deane and Toohey JJ recognised in *Leeth* that eligibility to vote at the constitutional referenda was an evolving concept, just as the Court conceived eligibility for jury service in *Cheatle*, Deane and Toohey JJ could have deflected some of the criticism associated with their reliance on the Preamble. Two years after *Leeth*, in *Theophanous*, Deane emphasised the significant changes to electoral laws in the Federation since 1901, which removed restrictions on the franchise of women and Indigenous Australians. Deane described these changes in *Theophanous* as responding to 'the *increasing* appreciation and assertion of the *intrinsic equality of all human beings*.'¹⁰⁶ Eligibility to vote at contemporary referenda, and the Australian system of compulsory voting, may provide potent symbols that the Australian Constitution now reflects the voice of 'all of the people', at least on questions of constitutional change. However, Deane and Toohey JJ did not explicitly pursue an evolutionary interpretive approach in *Leeth*; a somewhat surprising approach in light of their later endorsement of a 'living force' interpretation in decisions such as *Theophanous* and *McGinty*.¹⁰⁷

3 *Step 3: applying the equality guarantee*

Deane and Toohey JJ applied their equality guarantee by asking two questions.¹⁰⁸ First, did the law discriminate between federal offenders? In *Leeth*, Deane and Toohey JJ concluded that the *Prisoners Act* did differentiate between Commonwealth prisoners on the basis of the location of their conviction.¹⁰⁹ Second, was the discrimination justified? Deane and Toohey JJ recognised that two classes of discriminatory laws would stand outside the equality guarantee.¹¹⁰ The first exception was for laws enacted under a head of power that authorised discrimination. This exclusion mirrored Deane's earlier

¹⁰⁶ *Theophanous* (1994) 182 CLR 104, 174 (emphasis added).

¹⁰⁷ Deane's 'living force' theory is discussed further in chapter 6. For Toohey J's endorsement of a 'living force' theory, see *McGinty* (1996) 186 CLR 140, 200.

¹⁰⁸ See discussion in Jeremy Kirk, 'Constitutional Implications (II): Doctrines of Equality and Democracy' (2001) 25 *Melbourne University Law Review* 24, 34.

¹⁰⁹ *Leeth* (1992) 174 CLR 455, 491.

¹¹⁰ *Ibid* 488-90.

reasoning in *QEC*. In that case Deane had found that s 51(xxxv) authorised the Commonwealth to isolate particular industrial disputes for expedited settlement.¹¹¹ On this basis, some laws discriminating against the State did not violate the *Melbourne Corporation* principle. In *Leeth*, however, Deane and Toohey JJ did not believe that the *Prisoners Act* was enacted under a head of power that authorised discriminatory treatment of Commonwealth prisoners.¹¹²

Also excluded from the ambit of their equality guarantee, was a law that 'discriminates between people on grounds which are *reasonably capable* of being seen as providing *a rational and relevant basis* for the discriminatory treatment'.¹¹³ Deane and Toohey JJ concluded, however, that the *Prisoners Act* imposed 'an extraordinary degree of *disproportionality*' in the length of non-parole periods fixed for federal offenders.¹¹⁴ This aspect of their analysis offered important insights into the constitutional values informing Deane and Toohey JJ's interpretive approach.

Deane and Toohey JJ's application of the proportionality test in *Leeth* displayed a preference for national over federal considerations. In *Leeth*, Deane and Toohey JJ argued that, by requiring a Court to consider location as the *sole* factor in determining non-parole periods, the *Prisoners Act* 'operated arbitrarily'.¹¹⁵ This conclusion was in contrast to that of Brennan J, who, mirroring the language of Deane and Toohey JJ, regarded discrimination on the basis of location to be both rational and 'necessary'.¹¹⁶ For Deane and Toohey JJ, however, such discrimination was inconsistent with the recognition that Australia was 'one country and the criminal laws of the Commonwealth are part of one system of law to which all within the Commonwealth are equally subject'.¹¹⁷

¹¹¹ *QEC* (1985) 159 CLR 192, 251-2.

¹¹² *Leeth* (1992) 174 CLR 455, 490.

¹¹³ *Ibid* 488 (emphasis added).

¹¹⁴ *Ibid* 490 (emphasis added).

¹¹⁵ *Ibid* 491.

¹¹⁶ *Ibid* 479. Similarly, although strongly resisting the legitimacy of the equality guarantee, Mason CJ, Dawson and McHugh JJ argued that it was 'hardly surprising' that Parliament would seek uniformity of minimum terms. This goal was consistent, in their view, with 'good prison administration.' *Ibid* 466. These descriptions of the law suggest that Mason CJ, Dawson and McHugh JJ may have regarded the *Commonwealth Prisoners Act* as satisfying a 'rational and relevant' discrimination test, had they accepted the existence of a general equality guarantee.

¹¹⁷ *Ibid* 492.

The diametrically opposed conclusions of Deane and Toohey JJ on the one hand, and Brennan J on the other, underlined the extent of the discretionary jurisdiction conferred on the Court under an equality guarantee. Deane and Toohey JJ's legal equality guarantee required the Court to balance issues such as prison administration, federalism, national unity and the degree of discretion afforded to the Executive under the *Prisoners Act* against a prisoner's rights in order to assess the rationality, or proportionality, of the Commonwealth law. In such a task, a judge's vision of the constitutional importance of such factors (and other values) would inevitably play a significant role in an assessment of the validity of the Commonwealth law. That Deane and Brennan JJ reached opposite conclusions on the validity of the *Prisoners Act* further demonstrated the different approaches of these judges to the degree of deference due to Parliament by the Court under proportionality analysis. Recognising that innovation in constitutional interpretation should be matched by an 'appropriate' degree of deference to the legislature, Deane and Toohey JJ's reasoning fails to meet this standard.¹¹⁸

The next part assesses the issues attending Deane and Toohey JJ's reliance on the concept of popular sovereignty in *Leeth* as the foundation of implied constitutional rights of this scale.

C Part 2: 'The people' and rights implications

A few short months after *Leeth*, John Toohey presented a paper titled 'A Government of Laws, and Not of Men' at a conference in Darwin.¹¹⁹ In that much criticised extra-curial paper, he argued that the assumption that Parliaments are capable of protecting fundamental human rights does not accord to contemporary Australian practice. In this environment he queried whether a court should be empowered to 'imply limits upon the powers with respect to subject matter granted by the Constitution so as to protect core

¹¹⁸ See Allan's criteria: TRS Allan, 'The Common Law as Constitution: Fundamental Rights and First Principles' in Cheryl Saunders (ed) *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 146, 166.

¹¹⁹ John Toohey, 'A Government of Laws, and Not of Men?' (1993) 4 *Public Law Review* 158. This was strongly criticised by Rose: Dennis Rose, 'Judicial Reasonings and Responsibilities in Constitutional Cases' (1994) 20 *Monash University Law Review* 195, 210-2.

liberal-democratic values.¹²⁰ As foreshadowed in the introduction to this thesis, Toohey continued:

If such an approach to constitutional adjudication were adopted, the courts would over time articulate the content of the limits on power arising from fundamental common law liberties. It would then be a matter for the Australian people whether they wished to amend their Constitution to modify these limits. In that sense, an implied 'bill of rights' might be constructed.¹²¹

Clearly this analysis resonated with the approach to rights-implications Deane and Toohey JJ adopted in *Leeth*.¹²² Similarly, Toohey J's paper mirrored the strength of the commitment to judicial rights-protection and the sovereignty of the people that was a key theme in *Leeth*. However, Toohey J's analysis openly extended the *Leeth* approach. Under Toohey's interpretive principle, the people's role was to limit the development of implied rights protection by the Court by referenda. In neither *Leeth*, nor in Deane's earlier jurisprudence, was the role for 'the people' expressed in this way.

Deane's later decisions, particularly *Theophanous*, suggested that he shared the essence of Toohey's approach. As will be explained in chapter 6, in *Theophanous* Deane connected his 'fundamental concepts' reasoning to the intentions of 'the people'. In *Theophanous* Deane argued that the people intended that fundamental common law rights would be protected by implication, except where counteracted by the text.¹²³ Similarly, in *Leeth*, Deane and Toohey JJ turned to the concept of sovereignty as the foundation of the equality guarantee, arguing that it was the implicit understanding of 'the people' that 'all the people' were equal.

Leeth, and its extension by Toohey in his conference paper, reflected a paradigm shift in the concept of what it meant to have a Constitution, and the role for the judge as its interpreter.¹²⁴ As Kirby J would later explain, a 'modest conception'¹²⁵ of the role of the Court had prevailed in Australian legal history prior to *Leeth*. This conception was founded on the premise that those limiting and declaring the rights of the Australian community should be answerable to

¹²⁰ Toohey, above n 119, 169.

¹²¹ Ibid 170. See also discussion above introduction n 52.

¹²² Note also Toohey J's earlier remarks in *Polyukhovich* (1991) 172 CLR 501, 687. See discussion in chapter 3 above n 132.

¹²³ *Theophanous* (1994) 182 CLR 104, 171.

¹²⁴ See generally M.J. Detmold, 'The New Constitutional Law' (1994) 16 *Sydney Law Review* 228.

¹²⁵ *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 427.

'the people', and the values of that community, through the democratic process. This normative claim carries particular strength when, as in *Leeth*, the Court purported to imply fundamental rights of such flexibility to allow the Court to incorporate its 'own notions of fundamental rights.'¹²⁶

To the extent that Deane's constitutional philosophy rested on concepts of popular sovereignty, Deane's jurisprudence continually faced challenges on the grounds of historical accuracy and doctrinal indeterminacy. This thesis has argued that although there are historical challenges to the suggestion that 'all the people' assented to the Constitution, the level of popular involvement, and the contemporary requirement of popular vote at referenda, establishes a solid foundation for Deane's statement that 'the people' provide the source of legal authority of the Constitution. While it is true that 'the people' do not wield exclusive power to amend the Constitution (as referenda must be initiated by Parliament),¹²⁷ it has become widely accepted that 'the people' are (at least part of) the source of the Constitution's legal authority.

The greater challenge of concepts of 'the people' therefore lies in determining what, if any, influence that concept should have on the interpretation of the Constitution.¹²⁸ In the context of the discussion of the implication of fundamental constitutional rights in this chapter, three main interpretations of the influence of popular sovereignty on constitutional interpretation are possible.¹²⁹ Each has vastly different consequences for the derivation of implied constitutional rights.

First, as in *Leeth*, Deane and Toohey JJ endorsed a vision of judicially-enforceable rights as flowing from 'the people'. As Deane had explained in *Metwally*, his vision was that the Constitution was designed for the 'governance

¹²⁶ Ibid. Winterton has questioned whether fundamental rights reasoning intrudes into Kirby's 'Coda' in *Durham*: George Winterton, 'Justice Kirby's Coda in *Durham*' (2002) 13 *Public Law Review* 165.

¹²⁷ Note Winterton's exploration of the meaning of sovereignty in the sense of the power to amend and the authority of the Constitution. George Winterton, 'Popular Sovereignty and Constitutional Continuity' (1998) 26 *Federal Law Review* 1. Compare Simon Evans, 'Why is the Constitution Binding? Authority, Obligation and the Role of the People' (2004) 25 *Adelaide Law Review* 103.

¹²⁸ George Winterton, 'Popular Sovereignty and Constitutional Continuity' (1998) 26 *Federal Law Review* 1, 135-42.

¹²⁹ The role of 'the people' in Deane's 'living force' theory of constitutional interpretation discussed below part 2 of chapter 6.

and protection' of 'the people', a protection secured not through parliamentary supremacy, but through constitutional limitations on legislative power.¹³⁰ For Deane, it was therefore the judicial process, by virtue of its independence, and the characteristics of judicial reasoning, which assured that the interests of 'all the people' were protected.¹³¹ Deane's vision of the connection between 'the people' and the Constitution, particularly as manifested in *Leeth*, clearly effected a substantial swing in power from the Parliament to the judiciary.¹³² As foreshadowed in the introduction to this thesis, questions were raised regarding the democratic legitimacy of this vision of 'the people' and its influence on constitutional interpretation. The essence of Deane's answer to that challenge was contained in two propositions, apparent with varying degrees of specificity throughout his jurisprudence. First, Deane believed that Australian democracy encompassed more than simple majoritarianism. The sovereignty of 'the people' as reflected in the Constitution therefore recognised that judicial review was necessary to protect minority interests in the community.¹³³ Second, Deane believed that it was the intention of 'the people' that the Constitution must be interpreted according to its status as an instrument of 'the people', and consistent with its 'fundamental concepts'. As Deane's decisions indicated, however, his concept of 'the people' was also infused with his belief about the importance of the protection of the disadvantaged in the Australian community and the benefits of judicial, over political, processes.¹³⁴

A second way in which concepts of popular sovereignty can influence constitutional interpretation is to reinforce the paradigm of majoritarian democracy and the principle of parliamentary supremacy. This vision of the relationship between 'the people' and the Constitution underpinned the reasoning of the *Engineers' Case*, and Sir Owen Dixon's rhetoric of 'strict and

¹³⁰ *Metwally* (1984) 158 CLR 447, 477.

¹³¹ Deane's vision of the judicial process as the key protection for individual liberty was portrayed most clearly through his decisions on Ch III and the separation principle, discussed above, chapter 3.

¹³² See, for example, discussion in John Gava, 'The Rise of the Hero Judge' (2001) *University of New South Wales Law Journal* 747, 747 and Leslie Zines, 'The Sovereignty of the People' in Michael Coper and George Williams (eds), *Power, Parliament and the People* (1997) 91, 104.

¹³³ As Wright has observed, however, the argument that democracy is more than 'unmitigated majoritarianism', and judicial review is essential to democracy is both 'simple but circular.' Harley G.A. Wright, 'Sovereignty of the People - The New Constitutional Grundnorm?' (1998) 26 *Federal Law Review* 165, 181.

¹³⁴ These choices were forcefully apparent in Deane's free speech cases, discussed in chapter 6 below.

complete legalism.¹³⁵ Under this vision of the relationship between 'the people' and the Constitution, the Court's role was to enforce the division of power effected by the Constitution.¹³⁶ This role was reflected in the guarantee of s 128, that constitutional change would occur through the voice of 'the people', expressed through referenda. During Deane's time on the Court, this vision of the role of 'the people' was pointedly reflected in, for example, Mason J's affirmation of parliamentary supremacy in the interpretation of s 109 in *Metwally*.¹³⁷

Finally, lying between these approaches, the concept of 'the people' may support the judicial protection of the integrity of the democracy process. Under this model, advanced prominently in the work of Ely,¹³⁸ the Court may imply limitations on legislative power which protect the representative nature of the democratic process.¹³⁹ Kirk has similarly suggested a link between popular sovereignty and the protection of citizenship rights.¹⁴⁰ With this vision of the relationship between 'the people' and the Constitution, the Court continues in its traditional role of policing the limits of parliamentary power, recognising that judicial intervention may be necessary to ensure the integrity of that process to enable 'the people' to exercise their democratic power.

As Zines has observed, the challenge with linking an interpretive principle to the concept of popular sovereignty is that the concept itself tells us very little.¹⁴¹ The *choice* of a particular vision of popular sovereignty, like the choice of an interpretive theory, cannot be supplied by the text of the Constitution itself.¹⁴²

¹³⁵ See further discussion in introduction above n 18.

¹³⁶ Compare Sir Daryl Dawson, 'The Constitution - Major Overhaul or Simple Tune-up?' (1984) 14 *Melbourne University Law Review* 353, 365.

¹³⁷ *Metwally* (1984) 158 CLR 447, 462-3.

¹³⁸ Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980).

¹³⁹ On the link between Ely's representative-reinforcing approach, and the constitutional protection of equality rights, see Cheryl Saunders, 'Concepts of Equality in the Australian Constitution' in Geoffrey Lindell (ed) *Future Directions in Australian Constitutional Law* (1994) 209, 230-1.

¹⁴⁰ Jeremy Kirk, 'Constitutional Interpretation and a Theory of Evolutionary Originalism' (1999) 27 *Federal Law Review* 323, 345.

¹⁴¹ Leslie Zines, 'The Sovereignty of the People' in Michael Coper and George Williams (eds), *Power, Parliament and the People* (1997) 91, 107 (emphasis added).

¹⁴² See McHugh J's statement in *McGinty* that:

The Constitution contains no injunction as to how it is to be interpreted. Any theory of constitutional interpretation must be a matter of conviction based on some theory external to the Constitution itself.

McGinty (1996) 186 CLR 140, 230.

Because of the inherent flexibility, and uncertainty, of the concept of sovereignty, however, the greater the reliance on 'the people' in support of a particular answer to the meaning of the Constitution, the greater the scope for criticism of the Court's reasoning.

As has been seen, the strongest and most repeated criticism of Deane's constitutional jurisprudence was that it preferred flexible standards, derived from broad doctrines of government, through which to impose strict scrutiny on Parliament. This criticism also attached with particular force to Deane and Toohey JJ's reasoning in *Leeth*. For these reasons, Deane and Toohey JJ's reliance on the preamble, and the principle of popular sovereignty it adopted, was an insufficient foundation for their equality guarantee. Accordingly, their guarantee effects a substantial transfer of power from the legislative to the judicial arm, without clear historical, textual, or democratic foundation.

Conclusion

This chapter has argued that even though a joint judgment, *Leeth* represented the clearest expression by Deane of the 'two constant themes' of his jurisprudence – equality and 'the people'.¹⁴³ The expansive nature of the equality guarantee in *Leeth*, and Deane's overt reliance on the intrinsic equality of 'the people' as the foundation of the guarantee, marks *Leeth* out as the pinnacle of these themes in Deane's jurisprudence.

However, Deane and Toohey JJ's reasoning leaves unaddressed significant textual, historical and doctrinal obstacles to their implication of a guarantee of legal equality. The concept of 'the people', a particularly important plank in Deane and Toohey JJ's reasoning, is itself too fluid a concept to provide a secure foundation for such a guarantee. Further, the guarantee imposes a 'rationality' limitation on legislative power of unparalleled scope, enabling the Court to 'censor' the Parliament.¹⁴⁴ As it applied in *Leeth*, Deane and Toohey JJ utilised the guarantee to preference the formal equality of Commonwealth prisoners

¹⁴³ Deane, quoted in Tony Stephens, *Sir William Deane: The Things that Matter* (2002) 93-4. See also Malcolm Farr, 'Last Past the Post', *Daily Telegraph-Mirror* (Sydney), 23 August 1995, 11.

¹⁴⁴ Leslie Zines, 'A Judicially Created Bill of Rights?' (1994) 16 *Sydney Law Review* 166, 182.

over significant federal and administrative considerations. As a consequence, the decision may be likely to remain 'on cold storage' for some time.¹⁴⁵

Given that Deane and Toohey JJ's reasons in *Leeth* utilised interpretive principles, and manifested a commitment to constitutional values, that are evident throughout Deane's jurisprudence, the question arises whether *Leeth*, with all its limitations, casts doubt on the persuasiveness and legitimacy of Deane's constitutional vision in its entirety? If Deane's vision of 'the people' leads to the implication of a guarantee which grants the Court extraordinary supervisory power over the Commonwealth Parliament, can 'the people' be considered a legitimate and 'untainted' interpretive tool in constitutional interpretation in a post-Deane Court?

These questions remain to be addressed in the final chapter of this thesis. Chapter 6 explores Deane's reasoning in the free speech cases. Like *Leeth*, these cases were notable moments in Deane's time on the High Court. As in *Leeth*, in both principle and substance these cases also built on themes well established in Deane's constitutional jurisprudence prior to September 1992. Through these cases it is possible to reflect on both the broad themes and pervasive principles of his interpretive approach, and the symbolic and substantive role of 'the people' in his constitutional philosophy.

¹⁴⁵ G. J. Lindell, 'Expansion or Contraction? Some Reflections about the Recent Judicial Developments on Representative Democracy' (1998) 20 *Adelaide Law Review* 111, 128.

Chapter 6 THE FREE SPEECH CASES: CONSOLIDATING DEANE'S CONSTITUTIONAL PHILOSOPHY

Introduction

Three months after *Leeth*, in September 1992, the Court handed down *ACTV* and *Nationwide News*. The recognition in these cases of an implied constitutional freedom of political communication has been described as a 'seismic shift'¹ in the Court's constitutional jurisprudence. In 1994, the trilogy of *Theophanous*, *Stephens* and *Cunliffe* effected the aftershock. The intense and varied reaction to these cases has been foreshadowed in the introduction to this thesis.

This chapter argues that Deane's understanding of the implied freedom of political communication (like his reasoning in *Leeth*) rested on principles of constitutional interpretation, and reflected a commitment to the judicial protection of key constitutional values, well-established in Deane's constitutional jurisprudence in 1992. Thus, Deane's free speech cases cannot be regarded as a 'seismic shift' in *his* jurisprudence. Rather they represented a consolidation and clarification of his existing constitutional philosophy; a philosophy Deane, in the free speech cases, explicitly linked to the concept of popular sovereignty.

Theophanous itself exemplifies this role of the free speech cases in Deane's constitutional philosophy. It was in *Theophanous* that Deane outlined his comprehensive 'living force' theory of interpretation.² *Theophanous*, *Stephens* and *Cunliffe* were decisions which history revealed as his final single judgments on constitutional law.³ Deane's 'living force' theory, and his analysis in

¹ HP Lee, 'The Implied Freedom of Political Communication' in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003) 383, 383.

² *Theophanous* (1994) 182 CLR 104, 171-3.

³ Watson's observations on the schedule of then Prime Minister Paul Keating suggest that Deane was not approached regarding the vice-regal post until June 1995. It is therefore

Theophanous, did more than explain Deane's concept of the role of the framers' intentions in constitutional interpretation. It integrated Deane's focus on contemporary meaning with his commitment to 'fundamental concepts' reasoning and proportionality analysis and explained how each of these aspects of his interpretive approach flowed from his concept of the sovereignty of 'the people'. As Deane utilised the free speech cases, and *Theophanous*, to draw together the key threads in his interpretive approach, these cases provide a significant platform from which to examine the coherence and consistency of his constitutional philosophy.

Part 1 of this chapter considers Deane's 'fundamental concepts' reasoning and the interaction between his vision of federalism and representative government as fundamental doctrines of the Constitution. This part also examines how Deane related his interpretive principle, and its content, to his understanding of the concept of 'the people'. It was the flexibility of this concept that exposed Deane's interpretive approach in these cases to criticism. In some of his free speech cases, Deane's analysis lacked both the sufficient independent support for his definition of the concept of 'representative government', and appropriate deference to legislative policy to support an extensive constitutional right of the form he advanced. These limitations in Deane's reasoning extended beyond his 'fundamental concepts' analysis in these cases, to his application of 'living force' and proportionality analysis. These aspects of Deane's reasoning are explored in parts 2 and 3 of this chapter.

Part 2 argues that Deane's reliance on the agreement of 'the people' to the Constitution, both through referenda in the 1890s and through contemporary acquiescence to the constitutional system,⁴ offered a persuasive foundation for evolutionary theories of constitutional interpretation. Consequently, Deane's 'living force' theory stands both as a unifying theory for Deane's own constitutional jurisprudence, and as a valuable and innovative contribution to Australian constitutional theory. Tempering this positive development, however, Deane's application of that theory in *Theophanous* demonstrated the

extremely unlikely that when writing his judgment in *Theophanous*, in late 1994, Deane could have had in mind that this case would represent his last, single, constitutional decision. See Don Watson, *Recollections of a Bleeding Heart* (2002) 597.

⁴ *Theophanous* (1994) 182 CLR 104, 171.

potential for the personal values of judges to infuse constitutional interpretation when Deane's 'living force' theory was applied without analysis of credible sources of the contemporary meaning and intentions of 'the people'.

Part 3 of this chapter examines Deane's application of proportionality reasoning in his free speech cases. Deane's approach in this area was broadly consistent with his wider jurisprudence, as he employed the test to strengthen the Constitution's protection of 'the people'. More clearly than in other contexts, however, the free speech cases revealed Deane's belief that 'the people' must be protected *from* the power of the majority, as exercised through Parliament and their elected representatives. Thus Deane's free speech cases confirmed his vision of the Court's role in strengthening the constitutional protection of disadvantaged, and disenfranchised, groups in Australian society. Before turning to these aspects of Deane's decisions, however, a brief overview of Deane's reasoning across his free speech cases is appropriate in order to locate the detail of Deane's analysis in its broader context.

A *Deane's implied freedom of political communication: An overview*

As is well known, Deane saw the implied freedom of political communication as an expansive and robust guarantee of individual liberty. Deane derived the implied freedom from the doctrine of 'representative government', one of the three 'general doctrines of government' upon which the Constitution was structured.⁵ In *Nationwide News* Deane and Toohey JJ explained that:

the doctrine of representative government ... is ... of government by representatives directly or indirectly elected or appointed by, and ultimately responsible to, the people of the Commonwealth. The rational basis of that doctrine is the thesis that *all powers of government ultimately belong to, and are derived from, the governed*.⁶

Deane argued that the flow of information regarding 'the exercise and discharge of governmental powers and functions' was essential to the doctrine

⁵ *Nationwide News* (1992) 177 CLR 1, 69-70 (Deane and Toohey JJ).

⁶ *Ibid* 70 (emphasis added). See also *Theophanous* (1994) 182 CLR 104, 180.

of representative government and its underlying thesis of popular sovereignty.⁷ Accordingly, the Constitution contained, by implication, a constitutional guarantee that 'the people' may communicate on such subjects, between themselves and with their representatives.⁸

Deane's definition of the subjects of political communication covered by the constitutional freedom was extremely broad. It included criticism of the fitness for public office of members of Commonwealth⁹ and State Parliaments,¹⁰ and members of federal administrative tribunals,¹¹ as well as the broadcasting of political advertising.¹² In addition, Deane extended the guarantee to protect discussion related to the 'interests of the nation as a whole or of particular localities, communities or individuals.'¹³ Thus in *Cunliffe* Deane's freedom also protected the discussion of Commonwealth immigration policy, and the provision of assistance to persons seeking immigration or refugee status.¹⁴

Deane's implied freedom operated as a limitation on federal legislative power,¹⁵ and the legislative power of the States.¹⁶ However, the guarantee was not absolute. Thus Deane held that laws burdening political speech may be valid provided that the burden was proportionate to the pursuit of a valid public interest, with a stricter standard imposed on laws targeting communication by virtue of its political content.¹⁷ In addition, the guarantee conferred a constitutional defence to defamation actions. Thus, in *Theophanous*, Deane reasoned that the implied freedom precluded the liability in defamation for the author or a publisher of defamatory statements made regarding the

⁷ *Nationwide News* (1992) 177 CLR 1, 72 (Deane and Toohey JJ).

⁸ *ACTV* (1992) 177 CLR 106, 174 (Deane and Toohey JJ).

⁹ See, particularly, *Theophanous* (1994) 182 CLR 104, 179.

¹⁰ *Stephens* (1994) 182 CLR 211, 257.

¹¹ *Nationwide News* (1992) 177 CLR 1, 78-9 (Deane and Toohey JJ).

¹² *ACTV* (1992) 177 CLR 106, 171 (Deane and Toohey JJ).

¹³ *Nationwide News* (1992) 177 CLR 1, 72 (Deane and Toohey JJ). Deane applied this concept of the implied freedom in *Stephens*: *Stephens* (1994) 182 CLR 211, 257.

¹⁴ *Cunliffe* (1994) 182 CLR 272, 336-41. For commentary on the extension of the implied freedom to communication relating to executive action, and the attending 'difficult problems of line drawing' see further Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 388-89.

¹⁵ In *Cunliffe* Deane described this as the implied freedom's 'primary operation': *Cunliffe* (1994) 182 CLR 272, 336.

¹⁶ *Theophanous* (1994) 182 CLR 104, 166. Affirmed in *Stephens* (1994) 182 CLR 211, 257. Deane also expressed the 'tentative view' that the implication limited the power of the Territory legislatures. See *Theophanous* (1994) 182 CLR 104, 164.

¹⁷ *Nationwide News* (1992) 177 CLR 1, 76-7. Affirmed by Deane in *Cunliffe* (1994) 182 CLR 272, 337. The details of Deane's proportionality test are examined below at n 104.

performance of official functions by 'parliamentarians, judges or other holders of high office.'¹⁸ In framing his defence, Deane went further than any other member of the Court in *Theophanous*, although he resiled from his position in order to form a clear majority in favour of a constitutional defence.¹⁹

B *Part 1: 'Fundamental concepts' reasoning in Deane's free speech cases*

1 *Constitutional implications from 'representative government': recurring themes*

Deane and Toohey JJ's decision in *Nationwide News* stood as a clear endorsement of Deane's 'fundamental concepts' reasoning. As discussed in chapter 5, in *Nationwide News* Deane and Toohey JJ observed that implications could be drawn from federalism, the separation of powers principle and representative government, as the 'three main general doctrines of government' underlying the Constitution.²⁰ Although ironically a joint judgment, *Nationwide News* was the first acknowledgment by Deane of his consistent adherence to 'fundamental concepts' reasoning in these three areas of his constitutional jurisprudence. Chapters 2 and 3 have indicated that although Toohey J often shared Deane's vision regarding the nature of implications that could be drawn from federalism and the separation of powers principle, this was not uniformly the case.²¹ In *Nationwide News*, however, in their joint judgment, both Deane and Toohey JJ clearly endorsed this defining feature of Deane's interpretive philosophy.

Deane and Toohey JJ argued in *Nationwide News* that the doctrine of representative government 'presupposes an ability of represented and representatives to communicate information, needs, views, explanations and advice,' as well as the ability of the people to communicate amongst themselves

¹⁸ *Theophanous* (1994) 182 CLR 104, 185-7.

¹⁹ *Ibid* 187-8.

²⁰ *Nationwide News* (1992) 177 CLR 1, 69.

²¹ Compare, for example, Deane and Toohey JJ's different approaches in their decisions in *Breavington* and *Polyukhovich* discussed above in chapters 2 and 3.

on matters concerning the exercise of governmental powers 'on their behalf.'²² In this way, a constitutional guarantee of the exchange of information between the people and their representatives, and amongst the people themselves, was seen by Deane and Toohey JJ as a necessary requirement for the health and integrity of Australia's system of representative government.²³ This content and derivation of the implied freedom of political communication by Deane and Toohey JJ in *Nationwide News* was later endorsed by Deane in *Theophanous* as accurately expressing his constitutional vision.²⁴

Deane and Toohey JJ's reasoning in *Nationwide News* recognised that constitutional text played an important but not decisive role in defining the existence, coverage and operation of the implied freedom.²⁵ Thus in *Nationwide News*, Deane and Toohey JJ pointed to those sections of the Constitution that required or presumed the exercise of 'ultimate power of governmental control' by the people: ss 7 and 24 and s 128.²⁶ However, as was the case in Deane's reasoning in *Breavington*, and *Polyukhovich*, in his free speech cases Deane did not confine the content of the implied freedom by reference to these provisions of the text alone. Rather, as Deane explained in *Theophanous*, ss 7, 24 and 128 were manifestations of the wider doctrine of 'representative government' and its 'central thesis' of popular sovereignty.²⁷

Deane's vision of the intersection between federalism and representative government confirmed the coherence of Deane's interpretive approach throughout his jurisprudence. The 1994 decisions of *Stephens* and *Theophanous* concerned actions in defamation brought by politicians against newspapers over allegations that they had misused their public office.²⁸ One question for the Court in these cases was whether the implied freedom operated to limit the ability of State legislatures to restrict political speech. In *Stephens* a further

²² *Nationwide News* (1992) 177 CLR 1, 72.

²³ *Ibid* 72-4.

²⁴ *Theophanous* (1994) 182 CLR 104, 163-4.

²⁵ Comparing the role of the text in the reasoning of Deane and Toohey JJ and other members of the Court, see Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 379.

²⁶ *Nationwide News* (1992) 177 CLR 1, 71-2.

²⁷ *Theophanous* (1994) 182 CLR 104, 180.

²⁸ *Stephens* concerned a defamation action commenced over allegations that an overseas trip taken by members of the Legislative Council of Western Australia in their official capacity was a 'mammoth junket.' Extracts from the articles are set out in the judgment of Mason CJ, Toohey and Gaudron JJ at *Stephens* (1994) 182 CLR 211, 228-9. The facts of *Theophanous* are outlined below n 75.

question was whether the implied freedom derived from the Commonwealth Constitution extended to protect the discussion of subjects touching on the 'governmental and political matters' of a State.²⁹

On this second question, the extension of the implied freedom derived from the Commonwealth Constitution to cover the discussion of *State* political matters, Deane's reasoning turned to the nature of the modern Australian Federation. In *Nationwide News* Deane and Toohey JJ explained the connection between federalism and representative government as follows:

Under the Australian federal system, ... it is *unrealistic* to see the three levels of government – Commonwealth, State and Local – as isolated from one another or as operating otherwise than in an *overall national context*.³⁰

'As a *practical matter*', they observed, moneys employed for public purposes at all levels of government were levied by the Commonwealth, and political parties were integrated across the levels of government.³¹ In *Stephens*, Deane confirmed the approach he had adopted in his earlier joint judgment with Toohey J in *Nationwide News*.³² Thus in *Stephens* Deane reasoned that in order to ensure the proper functioning of the system of representative government at the Commonwealth level, it was necessary to extend the protection flowing from the Commonwealth Constitution to political discussion of State matters.³³

As was the essence of Deane's 'fundamental concepts' reasoning, Deane followed his consideration of the nature of Australian federalism with an examination of the constitutional text. In *Nationwide News*, Deane and Toohey JJ cited a range of constitutional provisions as evincing the extension of the implied freedom to cover State political subjects. For example, they argued that ss 10, 30 and 31 demonstrated that the Constitution was 'structured upon an assumption of representative government within the States.'³⁴ Further, ss 12, 15

²⁹ A further question in *Stephens* was whether an implied freedom could be derived from the Western Australian Constitution. This question is not examined in this thesis.

³⁰ *Nationwide News* (1992) 177 CLR 1, 75 (emphasis added).

³¹ *Ibid.* Likewise, Mason CJ, Toohey and Gaudron JJ emphasised that the 'interaction between the various tiers of government' made it '*unrealistic*' to confine the operation of the freedom to matters relating solely to the Commonwealth government. *Theophanous* (1994) 182 CLR 104, 122 (emphasis added). See also *ACTV* (1992) 177 CLR 106, 142 (Mason CJ).

³² *Stephens* (1994) 182 CLR 211, 257.

³³ *Ibid.*

³⁴ *Nationwide News* (1992) 177 CLR 1, 75.

and 29 evinced the assumption of a degree of 'co-operation of the governments and Parliaments of the States in the electoral process.'³⁵

Deane's extension of the implied freedom of political communication to State political discussion, blending text and policy in his reasoning, has much to recommend it. For example, as Lindell has argued, to exclude State political speech from the coverage of the implied freedom protected by the Commonwealth Constitution 'encourages arid exercises in line drawing' by the Court.³⁶ As the *Tasmanian Dam Case* itself illustrated, issues can quickly move from the State to the national political arena and from State election issues to become federal election issues.³⁷

Deane's reasoning on the first question, whether the implied freedom operated as a limitation on State legislative power as it related to political speech on federal matters, also started from his understanding of the nature of Australian federalism. Thus, in *Theophanous* Deane explained that 'common sense'³⁸ required the extension of the implied freedom to limit State legislative power. He argued that, 'it would border on the absurd' if State laws, themselves ultimately deriving their authority from the Constitution, could undermine the operation of the guarantee which rested on a fundamental doctrine of that instrument.³⁹

Deane's analysis then turned from logic and policy to the constitutional text, and the effect of Federation on the legal status of the States. Deane argued that upon the commencement of the Constitution, the Colonies were 'transformed' into States; their functioning continued by virtue of the Constitution under ss 106 and 108.⁴⁰ These provisions, Deane argued, presupposed that State laws were restricted by fundamental implications of the Constitution.⁴¹ The joint judgment of Mason CJ, Toohey and Gaudron JJ reached a similar conclusion in

³⁵ Ibid.

³⁶ G. J. Lindell, 'Expansion or Contraction? Some Reflections about the Recent Judicial Developments on Representative Democracy' (1998) 20 *Adelaide Law Review* 111, 139.

³⁷ Zines has reflected on the election issues surrounding the *Tasmanian Dam Case* in Leslie Zines, 'The *Tasmanian Dam Case*' in H. P. Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003) 262, 265.

³⁸ *Theophanous* (1994) 182 CLR 104, 166 (emphasis added).

³⁹ Ibid (emphasis added).

⁴⁰ *Theophanous* (1994) 182 CLR 104, 164-5. However, s 106 is expressed to be 'subject to the Constitution.' The significance of these words in s 106 for this line of reasoning is discussed in Nicholas Aroney, *Freedom of Speech in the Constitution* (1998) 165.

⁴¹ *Theophanous* (1994) 182 CLR 104, 165.

Theophanous. However, as was the case in *Duncan*, it was an interesting feature of *Theophanous* that it was Deane's reasoning on this question that, amongst the majority judges, placed greatest emphasis on the text of the Constitution.⁴²

These two aspects of Deane's free speech cases, relating to the connections between representative government and federalism, reinforce the consistency of Deane's application of 'fundamental concepts' reasoning in the different aspects of his jurisprudence. However, the next section explores aspects of Deane's interpretive methodology in the free speech cases that demonstrated innovations unique to his analysis in the his free speech cases. These points of departure relate to Deane's explicit reliance on 'the people' in the free speech cases, and to the level of criticism this reliance elicited from other members of the Court.

2 Innovations in Deane's 'fundamental concepts' reasoning in the free speech cases: questions of legitimacy

(a) The intentions of 'the people' and 'fundamental concepts' reasoning

A distinctive feature of Deane's use of 'fundamental concepts' reasoning in the free speech cases, and specifically his decision in *Theophanous*, related to his explanation of the role of 'the people' in his jurisprudence. That Deane's most detailed exposition of the concept of 'the people' would arise in the free speech cases was to be expected. Under Deane's interpretive approach, the content of the implied freedom was to be found directly in the doctrine of 'representative government', and, consequently, its 'central thesis' of the sovereignty of 'the people'. In *Theophanous*, Deane significantly extended his explanation of the connection between 'the people' and his 'fundamental concepts' reasoning in two ways. First, Deane tied the legitimacy of his approach to the people's

⁴² Ibid.

intentions, and the role of 'the people' as legal sovereign.⁴³ Second, Deane turned to his concept of 'the people' to define the scope and operation of the implied freedom of political communication.

(i) 'Fundamental Concepts' and the intentions of 'the people'

As foreshadowed, Deane's analysis in *Theophanous* contained an extensive rebuttal of the relevance of the framers' intentions in constitutional interpretation. Within that section of his reasons, Deane explained the connection between his 'fundamental concepts' reasoning and 'the people' as follows:

There is absolutely nothing in the provisions of the Constitution which suggests *an intention on the part of the people* either that the ordinary rules of construction should be ignored or that the failure to include a detailed list of their constitutional 'rights' should be treated as somehow precluding or impeding the implication of rights, privileges and immunities from either the Constitution's express terms or *the fundamental doctrines upon which it was structured and which it incorporated as part of its very fabric*.⁴⁴

This passage marked an important shift in Deane's jurisprudence, alluded to in chapter 5.⁴⁵ Prior to *Theophanous*, the only instances of Deane exploring the legitimacy of his approach to deriving constitutional implications from 'fundamental concepts' came in 1985 in *QEC*, and, in 1992 in *Leeth*.⁴⁶ These statements had linked the legitimacy of Deane's 'fundamental concepts' reasoning to the *Engineers' Case* and the 'general approach of the framers'. However, in the above passage from *Theophanous*, Deane implicitly affirmed the central importance of his statement during argument in *Capital Duplicators* (No 2), a year prior to *Theophanous*, that the Court's role in constitutional interpretation was to determine 'what the people meant'⁴⁷ when they adopted the Constitution. Thus, in *Theophanous* Deane explained that it was '*the duty of the courts*' to give effect to the intentions of the people, as expressed in the

⁴³ Of course, it was also in *Theophanous* that Deane explained why the people are legal sovereigns: *ibid* 171. The unique consequences of this explanation for Deane's 'living force' theory of interpretation are examined below n 75.

⁴⁴ *Ibid* 171 (emphasis added).

⁴⁵ See above chapter 5 n 27.

⁴⁶ *QEC* (1985) 159 CLR 192, 245 and *Leeth* (1992) 174 CLR 455, 484-5.

⁴⁷ *Capital Duplicators Pty Ltd v Australian Capital Territory* (No 2), Transcript of Argument, 21 April 1993, 158.

provisions of the text, and to those implications 'legitimately to be drawn' from its terms and the fundamental doctrines it incorporated.⁴⁸

It was also in *Theophanous* that Deane provided his clearest explanation of why the people's intentions represented the foundation of all aspects of his interpretive approach, including his 'fundamental concepts' reasoning. As foreshadowed, Deane explained:

The present legitimacy of the Constitution as the compact and highest law of our nation lies exclusively in the original adoption (by referenda) and the subsequent maintenance (by acquiescence) of its provisions by *the people*.⁴⁹

It was therefore the *agreement* of 'the people' that gave the Constitution its legitimacy, and demanded that the Constitution be interpreted consistently with their intentions.

This explanation by Deane in *Theophanous* of the legitimacy of the Constitution has been criticised. For example, as discussed in chapter 5, the participation of 'the people' at referenda was not truly representative by contemporary standards.⁵⁰ Studies have also indicated that the knowledge of the Australian people regarding the existence and content of the Constitution is limited.⁵¹ In these circumstances, can the original assent or current acquiescence of the people provide a complete explanation for the legal force of the Constitution? These questions may continue to surround attempts to provide a purely national explanation for the legal force of the Constitution.⁵² However, even if it is accepted that the original assent and contemporary acquiescence of 'the people' are incomplete explanations of the legal force of the Constitution, the people are at least *part* of this explanation. Once importance is placed on the

⁴⁸ *Theophanous* (1994) 182 CLR 104, 171 (emphasis added). Deane's explicit reference to the legitimacy of constitutional implications in this passage anticipates, or acknowledges, the increasing controversy surrounding his interpretive approach.

⁴⁹ *Ibid* (emphasis added). Compare this brief explanation with Mason CJ's detailed exposition in *ACTV* (1992) 177 CLR 106, 137-8.

⁵⁰ See, for example, Deborah Cass and Kim Rubenstein, 'Representation/s of Women in the Australian Constitutional System' (1995) 17 *Adelaide Law Review* 3, 27-30.

⁵¹ For example, Williams explored the limited knowledge of the Australian community regarding the Constitution in George Williams, 'The High Court and the People' in Hugh Selby (ed) *Tomorrow's Law* (1995) 271. However, contrast Meagher's observation that the 'great majority do accept and respect' the system of constitutional government established by the Constitution: Dan Meagher, 'New Day Rising? Non-Originalism, Justice Kirby and Section 80 of the Constitution' (2002) 24 *Sydney Law Review* 141, 146-7.

⁵² See, for example, the recent examination by Simon Evans, 'Why is the Constitution Binding? Authority, Obligation and the Role of the People' (2004) 25 *Adelaide Law Review* 103.

agreement of the people in an explanation of the legal force of the Constitution, it follows that it is to the *people's* intentions, rather than the intentions of 'the framers' or the Imperial Parliament, that the Court must turn to interpret the Constitution. It is for this reason, discussed in part 2 of this chapter, that Deane's 'living force' theory offered a secure and principled foundation for interpreting the Constitution in a manner that takes account of changes in meaning of the Constitution over time.

It is difficult to imagine, however, how the Court could credibly ascertain the intentions of 'the people', past and present, regarding the principles that should guide the Court in its interpretation. As the Court has itself disagreed regarding the 'ordinary principles' guiding its interpretation, Deane's claim that his approach was consistent with popular intentions appears to be an exercise in 'public rhetoric.'⁵³ In this context, Deane's reliance on 'the people' to support his 'fundamental concepts' reasoning appeared, somewhat circularly, to be an attempt to locate his interpretive approach within the 'ordinary rules of construction' intended by 'the people'.

(ii) *'The people', popular sovereignty and the content of the 'fundamental concepts' of the Constitution*

Deane's explanation of the role of 'the people' in his constitutional philosophy, and his 'fundamental concepts' reasoning in particular, took a further step in *Theophanous*. Affirming his analysis with Toohey J in *Nationwide News*, Deane observed that the implied freedom of political communication was derived from the doctrine of representative government, a doctrine forming 'part of the fabric of the Constitution.'⁵⁴ Evoking his earlier reasoning in *Nationwide News*, Deane observed in *Theophanous* that the doctrine of representative government:

reflects both the central thesis and the theoretical foundation of our Constitution and the nation which it established, namely, *that all powers of government ultimately belong to, and are derived from the governed* or in Madison's words, that '[t]he people, not the government, possess the absolute sovereignty.'⁵⁵

⁵³ Brian Galligan, 'The Australian High Court's Role in Institutional Maintenance and Development' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions* (1996) 184, 201.

⁵⁴ *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 180.

⁵⁵ *Ibid* (emphasis added).

In *Theophanous*, and throughout his free speech cases, Deane employed this understanding of the concept of popular sovereignty to inform the meaning of the Constitution, including the *content* of its 'fundamental concepts.' This principle pervaded Deane's jurisprudence, but, in his last single constitutional judgment, he displayed with particular force the role of his vision of 'the people' in shaping the content of his implied freedom of political communication.

In *Theophanous* the question was whether the implied freedom operated as a defence to actions in defamation. Brennan J, in dissent, emphasised that the Constitution was not an instrument of rights, but defined the limitations on executive and legislative action.⁵⁶ For Deane, and a majority of the Court, however, the Constitution's protection of political speech extended into the realm of private rights. Deane's analysis in *Theophanous* drew heavily on his understanding of the concept of popular sovereignty. Thus Deane argued that:

It is not unreasonable that those who undertake the exercise of those powers, ordinarily from remuneration from the public purse, should be required to bear the burden of whatever is necessary to ensure full accountability to, and open scrutiny by, those whom they represent and whose powers they exercise.⁵⁷

It was therefore because politicians, and persons of high public office, exercised public power that their private reputation 'must be subordinated to the need for *open and effective scrutiny and discussion of their official conduct and suitability*.'⁵⁸ Only by ensuring that such discussion was free from the 'chilling effect' imposed by the threat of defamation proceedings, did Deane consider that the constitutional commitment to 'representative government' could be assured.

This thesis has demonstrated that the essence of Deane's reasoning was the concept that public power is derived from 'the people' and, as he stated in *Metwally*, must be exercised for the 'benefit' of the governed.⁵⁹ For example, in his ASIS Secrets Case Statement, Deane emphasised the importance of the principle of open justice as a vital guarantee of 'public trust' in the independence of the judiciary. It was to vindicate that trust that Deane issued

⁵⁶ Ibid 153.

⁵⁷ Ibid 183.

⁵⁸ Ibid (emphasis added).

⁵⁹ See, for example *Metwally* (1984) 158 CLR 447, 476-7.

such a statement, affirming the independence of the Court from executive interference in the strongest terms. In *Theophanous*, Deane was equally concerned that the Court cast the freedom of political communication as a vital guarantee of 'public trust' in the exercise of power by elected members of federal Parliament. It was this imperative of accountability, and the obligations of public service, that pervaded Deane's reasoning in *Theophanous* and controlled the boundaries of the implied freedom.⁶⁰ It was only in *Theophanous*, however, that Deane explicitly tied his reasoning to *his* understanding of popular sovereignty. However, chapter 5 has indicated that Deane's vision of 'the people' was not mandated by the constitutional text. The role of the text and concepts of 'representative government' and popular sovereignty under Deane's 'fundamental concepts' reasoning was the framework for the forceful critique of Deane's reasoning by McHugh J.

(iii) *McHugh J's critique of Deane's 'top-down reasoning'*

As foreshadowed, McHugh J in *McGinty* famously criticised Deane and Toohey JJ in *Nationwide News* as adopting illegitimate 'top-down' reasoning, inconsistent with the principle of the *Engineers' Case*.⁶¹ McHugh J argued that under Deane and Toohey JJ's methodology, the Court introduced an 'overarching and freestanding provision equivalent to a hypothetical s 129', to the effect that:

Subject to this Constitution, representative democracy is the law of Australia, notwithstanding any law to the contrary.⁶²

The essence of McHugh J's critique of Deane's approach in the free speech cases was therefore the degree to which Deane's reasoning relied on fundamental principles. Thus, in the free speech cases it was the extent of Deane's reliance on popular sovereignty, as the 'central thesis' of representative government, that sparked McHugh's critique.

⁶⁰ Deane's reasoning in *Cunliffe* also reinforced concepts of public service, in the wider sense of a spirit of volunteerism. This aspect of Deane's reasoning is explored in part 3 of this chapter.

⁶¹ *McGinty* (1996) 186 CLR 140, 231-2.

⁶² *Ibid* 234.

As previous chapters have demonstrated, when Deane's reasoning relied on popular sovereignty extensively, or exclusively, to derive constitutional guarantees, his reasoning lacked compelling doctrinal foundation. This was because, as addressed in chapter 5, the concept of popular sovereignty may support a variety of interpretive principles and concepts of democracy. In this context, McHugh J's concern regarding the indeterminacy of the key underlying principle of Deane's free speech cases has force. By turning principally to the concept of 'the people' to frame his implied freedom of political communication, Deane's approach may be criticised as relying on an inherently 'vague' and political assumption in the interpretation of the Constitution.⁶³

However, McHugh J's critique that Deane engaged in illegitimate 'top-down' reasoning may ultimately prove unhelpful in assessing the persuasiveness of Deane analysis in the free speech cases, for two reasons. First, McHugh's statement in *McGinty* was a prominent illustration of the 'labelling' of the jurisprudence of High Court judges.⁶⁴ As Justice Keith Mason observed extra-curially, the phrase 'top-down' reasoning is not a term of art, but 'a term of abuse.'⁶⁵ Labelling Deane's reasoning in the free speech cases in this way has the potential to attach a global stigma to Deane's jurisprudence, because of the pervasive role of 'fundamental concepts' reasoning throughout Deane's decision-making. However, the label of 'top-down reasoning' can mask the real degree of difference between Deane and McHugh JJ's process of implication in the free speech cases. Thus, as Aroney and Kirk have observed, McHugh J's derivation of the implied freedom of political communication also turned to underlying concepts of representative government to give meaning to the 'text and structure' of the Constitution.⁶⁶ It was Deane and McHugh JJ's understanding of the constitutional significance of 'the people', and Deane's

⁶³ As Stone has observed, for example, the degree of scepticism towards Parliament and the political process that was inherent in Deane's (and Toohey J's) decision in *ACTV* does not necessarily flow from the concept of 'representative government' itself. Adrienne Stone, 'Freedom of Political Communication, the Constitution and the Common Law' (1998) 26 *Federal Law Review* 219, 235.

⁶⁴ Cheryl Saunders, 'Interpreting the Constitution' (2004) 15 *Public Law Review* 289, 291.

⁶⁵ Keith Mason, 'What is Wrong with Top-Down Legal Reasoning?' (2004) 78 *Australian Law Journal* 574, 574.

⁶⁶ Nicholas Aroney, 'Justice McHugh, Representative Government and the Elimination of Balancing' (2006) 28 *Sydney Law Review* 505, 509 and Jeremy Kirk, 'Constitutional Implications (II): Doctrines of Equality and Democracy' (2001) 25 *Melbourne University Law Review* 24, 51-2.

explicit reliance on that concept, rather than role of 'fundamental concepts' in constitutional interpretation that distinguished their approaches.

The second reason that McHugh J's critique of Deane's 'top-down' reasoning in the free speech cases is unhelpful is that it diverts attention from an assessment of the detail of Deane's application of 'fundamental concepts' reasoning in particular cases. Deane's reasoning in *Cunliffe*, for example, illustrates that significant legitimacy issues can arise from Deane's use of 'fundamental concepts' reasoning, considered *on its own merits*, in the free speech cases. This was because of Deane's failure to provide a detailed examination of history, principle or policy sufficient to support the derivation of an implied freedom of the scope and effect he advanced. This part concludes with an examination of Deane's reasoning in *Cunliffe*, particularly, its insights into his vision of 'the people', and the weaknesses of Deane's application of 'fundamental concepts' reasoning in that case.⁶⁷

The Court in *Cunliffe* considered the validity of Pt 2A of the *Migration Act* 1958 (Cth), provisions that established a registration scheme for persons giving advice to aliens seeking visas, entry permits or refugee status in Australia.⁶⁸ The scheme was designed to protect aliens from incompetent or unscrupulous advisers.⁶⁹ Persons not registered as migration agents who gave immigration advice or assistance, whether for a fee or voluntarily, were liable to penalties under the Act. The first question for the Court was whether the provision of immigration advice and assistance was communication on 'governmental and political' matters for the purpose of the implied freedom.

According to Deane, discussion of immigration policy, and the provision of immigration advice were 'among the *most important of all political communications and political discussions in this country*.'⁷⁰ The thrust of Deane's argument appeared to be that immigration had been central to establishing Australian identity, and those people who constituted 'the people of Australia'. To this end Deane cited the *Year Book of Australia*, to demonstrate that the

⁶⁷ Deane's application of proportionality reasoning is examined below n 141.

⁶⁸ Henceforth '*Migration Act*'.

⁶⁹ *Cunliffe* (1994) 182 CLR 272, 333.

⁷⁰ *Ibid* 341 (emphasis added).

'modern history and development of Australia have been largely based on immigration from other places'.⁷¹ With this understanding of the nature of modern Australian society,⁷² Deane concluded that advice regarding entry to Australia was a central concern to the nation, and so a 'governmental and political matter' covered by the Constitution's implied freedom. In this way, Deane's extension of the guarantee in *Cunliffe* was consistent with his approach to the constitutional protection of the individual and his concern regarding the rights of the disadvantaged and vulnerable in society.

However, Deane did not support his extension of the concept of 'representative government' in *Cunliffe* with compelling analysis. It is possible that Deane was correct to regard immigration assistance as a significant component and contributor to the nature and composition of the Australian body politic (past and present). Even so, that does not appear to bring the provision of advice to an individual applicant for entry into the Australian body politic within the concept of political speech, as a necessary ingredient of the concept of 'representative government'. In this way, Deane's reasoning in *Cunliffe* stands in contrast with the application of 'fundamental concepts' analysis by Deane and Toohey JJ in *ACTV*. In their 1992 decision, and its twin decision in *Nationwide News*, Deane and Toohey JJ recognised that the provisions of ss 7, 24 and 128 manifested the Constitution's 'general doctrine' of 'representative government.' Although it may not be universally agreed that judges *should* reason from underlying concepts and principles of the Constitution, as Zines has argued, Deane and Toohey JJ's recognition of the 'representative government' in those cases, and its use to imply the constitutional protection of speech criticising public officers, was reasonably open on a construction of the text and history of the Constitution.⁷³ In *Cunliffe*, in contrast, it was Deane's vision of the nature of Australian society itself that formed the basis of his extension of the guarantee, unsupported by an analysis of the history or purpose of the concept of 'representative government'.

⁷¹ *Ibid.*

⁷² Deane's use of 'living force' analysis in his free speech cases is discussed below in part 2 of this chapter.

⁷³ Compare Zines' discussion that the recognition of a doctrine of 'representative government', and an implication derived from that principle, was a reasonable conclusion, consistent with the Court's approach to federal implications and the separation of powers principle. Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 391.

The criticism that Deane's decisions in the free speech cases exhibited the application of individualised standards was not limited to his use of 'fundamental concepts' reasoning in that context. Rather than temper his reliance on the flexible concept of representative government in these cases with greater deference to Parliament, Deane adopted a stringent scrutiny of the legislative interference with political speech. Before turning to Deane's application of proportionality analysis, it is necessary to consider Deane's use of 'living force' methodology in *Theophanous* to attempt to support his broad constitutional defence to defamation proceedings from the contemporary understanding of 'the people'. Although Deane's theory of 'living force' interpretation has much to offer, its application in *Theophanous* was unpersuasive.

C *Part 2: 'Living force' methodology and Theophanous*

Two months after the Court delivered judgment in *ACTV* and *Nationwide News* a Melbourne newspaper published a letter to the editor imputing that Theophanous, then a member of the House of Representatives and Chairperson of a legislative committee on immigration, was unfit to hold public office. In February 1993, Theophanous commenced defamation proceedings against the author of the letter, and the newspaper. The newspaper argued that the Constitution guaranteed a freedom to comment on the official conduct and capacity of political figures.

One of the arguments raised against the existence of a constitutional defence before the Court was that such a defence was contrary to the framers' intentions. It was argued that by declining to follow the example of the United States Bill of Rights, the framers intended to leave the question of political speech and defamation to the common law and Parliament. As part of his detailed and adamant rejection of this argument, Deane advanced his 'living

force' theory. Relying heavily on Inglis Clark's *Studies in Australian Constitutional Law*,⁷⁴ Deane explained his 'living force' theory as follows:

the Constitution must be construed as 'a living force' representing the will and intentions of all contemporary Australians, both women and men, and not as a lifeless 'declaration of the will and intentions of men long since dead.'⁷⁵

This part assesses whether Deane's 'living force' theory provides a persuasive theory of constitutional interpretation. It proceeds in three stages.

First, it examines *Theophanous* as an illustration of Deane's understanding of the operation of his theory. Consistent with his earlier jurisprudence, Deane conceived the Constitution as bearing directly on private rights and cast the constitutional defence in the broadest possible terms. In this way, *Theophanous* illustrated an ambitious application of his methodology, but one arguably displaying insufficient foundation for the implication of a constitutional right of the magnitude envisaged by Deane.

Next, this part clarifies a continuing controversy regarding the role of historical meaning in Deane's 'living force' theory. It argues that Deane's reliance on 'the people' confirmed the relevance of history in his interpretive theory. Finally, this part argues that because of Deane's unique concept of 'the people' as the legal force of the Constitution in *Theophanous*, his 'living force' theory offers a principled explanation for progressive theories of constitutional interpretation. For this reason, Deane's 'living force' theory in *Theophanous* (as distinct from its application) represented a significant contribution to Australian constitutional thought.

(a) Deane's application of 'Living force' reasoning in *Theophanous*

Deane applied his 'living force' theory in *Theophanous* to identify the contemporary content of the doctrine of 'representative government.' Deane began by acknowledging that when the Constitution came into force, the operation of State defamation laws may not have been regarded as inconsistent

⁷⁴ Andrew Inglis Clark, *Studies in Australian Constitutional Law* (1901) 21-2.

⁷⁵ *Theophanous* (1994) 182 CLR 104, 173.

with the Constitution's commitment to 'representative government'.⁷⁶

Accordingly, the implied freedom of political communication may not have operated at that time as a constitutional right to limit liability in defamation for political speech. However, applying 'living force' reasoning, Deane next examined possible changes to the meaning of the doctrine of 'representative government' in the years since Federation.

Deane began by outlining the '*dramatic changes*' that had occurred in Australian society since 1901.⁷⁷ He listed amongst these changes the introduction of universal adult franchise, improvements in education, and the development of the mass media. Importantly, in light of the themes of Deane's jurisprudence, he also referred to 'the *increasing* appreciation and assertion of the *intrinsic equality of all human beings*,'⁷⁸ as a significant change in Australian society since the commencement of the Constitution. Other members of the Court have acknowledged the importance of ensuring that the implied freedom of political communication is applied in a manner consonant with contemporary values, including contemporary standards of 'equality'.⁷⁹ 'These developments' Deane contended, underlined the 'manifest wisdom'⁸⁰ of Inglis Clark's 'living force' theory.

The most pointed illustration offered by Deane of social change as it pertained to concepts of political communication was that of contemporary jargon.⁸¹

Deane noted the entry of phrase 'stop writ' into Australian language, evincing, he argued:

a *widespread public perception* that such proceedings represent a valued source of tax-free profit for the holder of high public office who is defamed and an effective way to 'stop' political criticism, particularly at election times.⁸²

Although conceding that this public perception might be 'exaggerated or unjustified,' Deane argued that this term evinced the 'chilling effect' that

⁷⁶ Ibid.

⁷⁷ *Theophanous* (1994) 182 CLR 104, 174 (emphasis added).

⁷⁸ Ibid (emphasis added).

⁷⁹ For example, Toohey J observed that it was 'the current perception' of representative government' that was 'embodied in the Australian Constitution': *McGinty* (1996) 186 CLR 140, 201. McHugh J also observed that the content of phrase 'chosen by the people' will '*change from time to time*': *Langer v Commonwealth* (1996) 186 CLR 302, 342 (emphasis added).

⁸⁰ *Theophanous* (1994) 182 CLR 104, 174.

⁸¹ Ibid.

⁸² Ibid (emphasis added).

defamation proceedings had on political speech.⁸³ It was on this basis that Deane held that the contemporary concept of 'representative government' required '*unrestricted public access to political information and to all political points of view.*'⁸⁴ Accordingly, Deane recognised that the concept of 'representative government' extended to confer a broad constitutional defence to defamation proceedings.

That Deane turned to popular jargon to identify the meaning of the contemporary concept of 'representative government' is telling of his understanding of the judicial role in applying 'living force' interpretation. It was not the expressions of the people's representatives that held the meaning of the implied freedom; an approach consistent with Deane's rejection of the relevance of the framers' subjective intentions to constitutional interpretation. However, in *Theophanous* Deane appears to stretch his aversion to the people's representatives too far. In the search for the intentions of 'the people', the statements of *part* of the people, their representatives, would appear relevant (albeit not determinative) to this inquiry. Alternatively, Deane could have turned to the reports of the various Australian Law Reform Commissions in support of his identification of the contemporary meaning of 'representative government'. Without extending his search for the meaning of 'representative government' as understood by contemporary Australians beyond the term 'stop writ', Deane's analysis in *Theophanous* was unpersuasive in its assessment of contemporary *Australian* constitutional principles.⁸⁵ In this way, Deane's approach exposes his analysis to the criticism that it rested not on external standards but on *his* vision of the nature of 'representative government.'

However, recognising that theories may be applied well, or badly, can lessons be learned from Deane's 'living force' theory? One issue that must first be resolved is the uncertainty surrounding the role of historical meaning in Deane's theory.

⁸³ Ibid.

⁸⁴ Ibid (emphasis added).

⁸⁵ See, in that regard, Mason CJ, Toohey and Gaudron JJ's citation to the New South Wales Law Reform Commission: *Theophanous* (1994) 182 CLR 104, 131 fn 94.

(b) *The role of history in Deane's 'living force' theory*

In 1997, Goldsworthy offered a detailed defence of moderate originalism in constitutional interpretation.⁸⁶ As part of his analysis, Goldsworthy critiqued Deane's 'living force' theory, observing that although Deane 'argued at length' in favour of a 'non-originalist' approach,⁸⁷ Deane's remarks in *Theophanous* were 'far from straightforward.'⁸⁸

The tension Goldsworthy perceived in Deane's theory flowed from Deane's reliance on an extensive quotation from Inglis Clark's *Studies in Australian Constitutional Law*.⁸⁹ According to Inglis Clark, a 'living force' approach required that the Constitution be interpreted not according to 'the commands of men who have ceased to exist' but rather as a declaration of 'the will and intentions of the present inheritors and possessors of sovereign power.'⁹⁰ As Goldsworthy notes, this contention is entirely inconsistent with an approach to constitutional interpretation which derives the meaning of the Constitution from the framers.⁹¹ However, Deane's quotation from Inglis Clark continued:

so long as the present possessors of sovereignty convey their commands in the language of their predecessors that language must be interpreted by the judiciary consistently with a proper use of it as an intelligible vehicle of the *conceptions and intentions of the human mind, and consistently with the historical associations* from which particular words and phrases derive the whole of their meaning in juxtaposition with their context.⁹²

Certainly Inglis Clark's reference to the 'historical associations' of the language of the text raised the possibility that historical meaning remained a component in Inglis Clark's, and accordingly Deane's, understanding of 'living force' interpretation. According to Goldsworthy, the Inglis Clark passage

⁸⁶ See Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1.

⁸⁷ As defined by Goldsworthy, non-originalism 'holds that the meaning of statutory or constitutional provisions at any particular time depends entirely on the concepts, values and purposes of that time, rather than those of the law-makers.' Ibid 35.

⁸⁸ Ibid 16 (emphasis added).

⁸⁹ *Theophanous* (1994) 182 CLR 104, 171-2 citing Andrew Inglis Clark, *Studies in Australian Constitutional Law* (1901) 21-2.

⁹⁰ Andrew Inglis Clark, *Studies in Australian Constitutional Law* (1901) 21-2.

⁹¹ Goldsworthy, above n 86, 17.

⁹² Inglis Clark, above n 90, 21-2 quoted in *Theophanous* (1994) 182 CLR 104, 172 (emphasis added).

reintroduced the principle of 'original, intended meaning'⁹³ into Deane's 'living force' theory.⁹⁴ However, Goldsworthy's analysis suggests that history intruded indirectly into Deane's 'living force' theory. Another explanation for the continued relevance of historical meaning (but not the framers' subjective intentions) in Deane's 'living force' theory is preferable and based on his concept of the sovereignty of 'the people'.

(i) *Retaining a role for history: Deane's reliance on 'the people'*

As discussed above, Deane explained in *Theophanous* that the legitimacy of the Constitution stemmed from the people's acceptance of the Constitution, by their 'original adoption (by referenda)' and 'subsequent maintenance (by acquiescence)' of its terms.⁹⁵ Thus, Deane argued that the original act of adopting the Constitution was a necessary but not sufficient explanation of the legitimacy of the Constitution. Rather, the Constitution's legitimacy, according to Deane, stemmed from its acceptance by both original and contemporary Australians.

In this way, Deane's 'living force' theory recognised that history was not irrelevant in his interpretive approach. Historical meaning was instead the starting point, but not the end point, for constitutional interpretation.⁹⁶ Deane's application of 'living force' theory in *Theophanous* underlined this understanding of his theory. In *Theophanous*, Deane confirmed his reasoning in *Nationwide News*, that the implied freedom of political communication was sourced from the doctrine of representative government, a doctrine incorporated in the Constitution at its commencement.⁹⁷ Thus Deane's

⁹³ Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1, 17 (emphasis added).

⁹⁴ See also Kirk, who argued that this passage revealed Inglis Clark as an originalist: Jeremy Kirk, 'Constitutional Interpretation and a Theory of Evolutionary Originalism' (1999) 27 *Federal Law Review* 323, 333 fn 76.

⁹⁵ *Theophanous* (1994) 182 CLR 104, 171.

⁹⁶ See Sir Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 13, 19. Note also Goldsworthy who says that original, intended meaning is not 'irrelevant to its current interpretation. An attempt to ascertain that meaning must be, at the very least, the starting point for interpretation.' See Jeffrey Goldsworthy, 'Interpreting the Constitution in its Second Century' (2000) 24 *Melbourne University Law Review* 677, 710.

⁹⁷ *Nationwide News* (1992) 177 CLR 1, 69 (Deane and Toohey JJ).

examination of representative government in *Theophanous* recognised the original understanding of 'the people' in 1900, but demonstrated that that concept did not necessarily continue to bind contemporary Australians.

Turning to Deane's concept of 'the people' to explain the role of historical and contemporary meaning in his interpretive theory offers two important advantages for both the consistency and persuasiveness of this aspect of Deane's interpretive philosophy.

(ii) *Consistency benefits of interpreting Deane's 'living force' theory through his concept of 'the people'*

Interpreting Deane's 'living force' through the prism of his concept of sovereignty explained his regular reliance on historical meaning in his decisions prior to *Theophanous*. For example, in *Kingswell* Deane had explored the historical meaning of 'trial by jury' and the significance of that institution for the protection of individual liberties. Likewise, in the *Incorporation Case* Deane's analysis considered the historical meanings of the categories of trading and financial corporations, as well as contemporary issues to interpret s 51(xx). In these, and many other cases, Deane's reasoning prior to *Theophanous* evinced both a commitment to contemporary context, and a recognition that historical meaning was an important component of, and tool in, constitutional interpretation.

In addition, turning to 'the people' rather than Inglis Clark to explain the continued relevance of historical meaning in Deane's 'living force' theory is consistent with Deane's attitude towards the framers, and 'the people', in his constitutional jurisprudence. If Goldsworthy's interpretation of Deane's 'living force' theory is accepted, the intentions of one framer hijacked Deane's interpretive approach. However, previous chapters have illustrated Deane's strong rejection of the relevance of the framers' intentions to constitutional interpretation. In *Theophanous*, Deane insisted that the framers' intentions were irrelevant to the question of whether rights could be implied from the general

doctrines of government underlying the Constitution.⁹⁸ Turning to Deane's concept of popular sovereignty as the touchstone of his 'living force' theory therefore puts beyond doubt that historical sources could be utilised in constitutional interpretation for the purpose of determining the intentions of 'the people', rather than to give effect to the intention of the framers.⁹⁹

(c) Deane's 'living force' theory as a persuasive theory of progressive interpretation

In all but the most extreme version of originalist theories, it is recognised that constitutional meaning may evolve, consistent with the purpose of constitutions to serve as a blueprint of government for future generations.¹⁰⁰ Under Deane's theory such movement in meaning is not regarded as a concession to the functionality of constitutions. Rather, movement from historical to contemporary meaning under Deane's 'living force' theory is a consequence of the legal basis of the Constitution. Further, Deane's concept of sovereignty provides a mechanism to limit the degree of change effected through progressive interpretive theories. Thus, consistent with the dual sovereignty of the people, past and present, the Court when applying 'living force' theory must explain how the people's intentions have changed over time.¹⁰¹ The ability of the Court to establish the change in meaning therefore provides an important 'outer limit' to the flexibility inherent in a progressive interpretative approach.¹⁰²

As discussed above, *Theophanous* was an unsatisfactory illustration of Deane's 'living force' theory because Deane did not adequately explain the existence of a contemporary meaning of 'representative government' sufficient to support his broad understanding of the implied freedom of political communication as

⁹⁸ *Theophanous* (1994) 182 CLR 104, 171.

⁹⁹ Compare with *Capital Duplicators Pty Ltd v Australian Capital Territory (No 2)*, Transcript of Argument, 21 April 1993, 158.

¹⁰⁰ See discussion in Jeremy Kirk, 'Constitutional Interpretation and a Theory of Evolutionary Originalism' (1999) 27 *Federal Law Review* 323, 366.

¹⁰¹ Note Meagher's observation that any modern theory which accepts movement in meaning must require the articulation of what those changes were. Dan Meagher, 'New Day Rising? Non-Originalism, Justice Kirby and Section 80 of the Constitution' (2002) 24 *Sydney Law Review* 141, 150.

¹⁰² *Ibid.*

a constitutional defence to defamation proceedings. However, by recognising the sovereignty of both 'the people' in 1900 and contemporary Australians, Deane's theory explained *why* constitutional meaning may evolve beyond 1900 to recognise contemporary meaning and values. Deane's theory offered an interpretive approach consistent with the acceptance that the people, at least in part, play a role in the explanation of the legal force of the Constitution. It was for these reasons that Deane's 'living force' theory, as a theory of evolutionary interpretation, has much to offer. Whether Deane's theory will gain widespread acceptance will likely depend on whether it can be wrested from the perception that it is inherently intertwined with Deane's strongly rights-based interpretive approach.¹⁰³

D *Part 3: Proportionality reasoning in the free speech cases*

As is well known, the Court in the free speech cases accepted that the implied freedom was not absolute.¹⁰⁴ Stone has examined the standard of review adopted by members of the Court to limit the implied freedom.¹⁰⁵ Her analysis located Deane's approach to defining the limits of the freedom against that of other members of the Court, and assessed the utility and legitimacy of the various approaches. Consistent with the purpose of this thesis, however, the focus of this part is on the insights that Deane's proportionality analysis provided regarding the coherence of his interpretive approach, the value he attached to political speech in the Australian constitutional system, and his understanding of the Court's role in constitutional interpretation.

¹⁰³ Kirby's acceptance of Deane's 'living force' theory may not assist in separating Deane's theory from perceptions of radicalism.

¹⁰⁴ ACTV (1992) 177 CLR 106, 142-4 (Mason CJ); 159 (Brennan J); 169 (Deane and Toohey JJ); 217-8 (Gaudron J); 234-5 (McHugh J).

¹⁰⁵ See, for example, Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668.

1 *Deane's two-tiered balancing analysis*

Previous chapters have demonstrated that since 1983, proportionality reasoning has been a significant component of Deane's constitutional jurisprudence.¹⁰⁶

When Deane and Toohey JJ recognised the implied freedom of political communication in 1992, and conceded that the freedom was not absolute, it was therefore not surprising that Deane turned to proportionality reasoning to define the limits of the guarantee.¹⁰⁷

Nor was it surprising that Deane imposed a strict standard of review. In the free speech cases, Deane adopted a 'two-tiered approach', imposing different levels of scrutiny according to the manner in which the law affected speech.¹⁰⁸ Thus, a law imposing 'an incidental and remote' burden on communication (such as criminal laws) would not infringe the implied freedom if it was '*reasonably capable of being seen as necessary or appropriate and adapted to the legitimate legislative aim being pursued by Parliament.*'¹⁰⁹ However, for laws targeting the content of communication, Deane imposed a stricter test for validity. Such laws would be consistent with the implied freedom '*only if* the restriction on political communication was '*justified*' as either 'conducive to the overall availability of the effective means of ... communications ... in a democratic society,'¹¹⁰ or if the restriction:

does not go beyond what is *necessary* either for the preservation of an ordered society or for the protection or vindication of the legitimate claims of individuals to live peacefully and with dignity in such a society.¹¹¹

¹⁰⁶ On the significance of proportionality reasoning as a tool in constitutional interpretation generally, see further: Brad Selway, 'The Rise and Rise of the Reasonable Proportionality Test in Public Law' (1996) 7 *Public Law Review* 212.

¹⁰⁷ What was somewhat 'surprising' however, as Kirk observed, was that Deane did not employ the language of proportionality until his judgment in *Cunliffe*. *Cunliffe* (1994) 182 CLR 272, 340 discussed in Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1, 17.

¹⁰⁸ See further Stone's discussion of the 'two-tiered review' employed by Mason CJ and McHugh J, and the 'slightly different' approach of Deane and Toohey JJ. Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668, 678-9. Stone identified the difference in approach between Mason CJ and McHugh J on the one hand, and Deane and Toohey JJ on the other, as turning on the latter's greater interest in the actual operation of the law rather than its purpose. *Ibid.*

¹⁰⁹ *Cunliffe* (1994) 182 CLR 272, 339 (emphasis added).

¹¹⁰ *Ibid* (emphasis added).

¹¹¹ *Ibid* (emphasis added).

In both tiers, Deane balanced the interest in free speech against other social interests and rights in a free and just society.¹¹² However, where the law targeted political communication by its content, Deane's test was 'pre-weighted' in favour of free speech.¹¹³ Although Deane was credited with introducing the phrase 'proportionality' into Australian constitutional jurisprudence, it was only in *Cunliffe* that Deane explicitly utilised the language of proportionality in this analysis.¹¹⁴

In contrast to Deane, Brennan J adopted a single proportionality test in the free speech cases. Brennan J's test asked whether the burden on political speech was reasonably capable of being seen as appropriate and adapted to achieving a legitimate end.¹¹⁵ Consistent with Brennan J's approach in other areas, his test, in both form and application, displayed an appreciable level of judicial deference to Parliament, incorporating a 'margin of appreciation' to Parliament.¹¹⁶

Deane's preference for a 'two-tiered' test in the free speech cases was significant for a number of reasons, relating both to Deane's vision of the implied freedom and to the intersections between his free speech cases and his wider constitutional philosophy. First, as Stone has observed, the two-tiered model of Deane and Toohey JJ, and Mason CJ and McHugh J in the free speech cases was 'reminiscent' of the American First Amendment law.¹¹⁷ The influence of First Amendment jurisprudence on the development of the implied freedom has been of interest to commentators.¹¹⁸ Deane's acceptance of features of the First Amendment jurisprudence was made all the more striking by his rejection in

¹¹² On the appropriateness of balancing by the Court in this context see further Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668.

¹¹³ *Ibid* 686.

¹¹⁴ *Cunliffe* (1994) 182 CLR 272, 340.

¹¹⁵ *ACTV* (1992) 177 CLR 106, 157-9. The single proportionality test of Brennan and Gaudron JJ is explored further in Stone, above n 112, 676-8.

¹¹⁶ *ACTV* (1992) 177 CLR 106, 157-9. See also *Cunliffe* (1994) 182 CLR 272, 324-5.

¹¹⁷ Stone, above n 112, 678. The fact that Deane would consider the United States model stood in contrast to Deane's refusal to reflect on the relevance of the 'privilege and immunities' clause to the interpretation of s 117 in *Street*. See discussion above chapter 4 n 127.

¹¹⁸ See further Gerald N Rosenberg and John M Williams, 'Do Not Go Gently Into That Good Right: The First Amendment in the High Court of Australia' (1997) *Supreme Court Review* 439. Stone has explored the dominance of First Amendment concepts of the free-market model of political communication and representative democracy in the Australian implied freedom in Adrienne Stone, 'Incomplete Theorizing in the High Court - Review Essay: Cass R Sunstein, Legal Reasoning and Political Conflict' (1998) 26 *Federal Law Review* 195, 202-3.

Theophanous of the balance between free speech and individual reputation struck by the United States Supreme Court in *New York Times Co v Sullivan*,¹¹⁹ as providing insufficient protection to free speech in the Australian context.¹²⁰

Second, Deane's strict and tiered test aligned his approach in the free speech cases with that of McHugh J.¹²¹ In this area, Deane and McHugh JJ both favoured a strict test protecting political speech, in preference to the flexibility of the single proportionality test.¹²² Given McHugh J's extensive critique of Deane's derivation of the implied freedom from fundamental concepts of 'representative government,' the similarity between Deane and McHugh JJ in this area reinforces that it is possible to over-emphasise the distance between the interpretive philosophies of these Justices.

Finally, Deane's strict scrutiny approach mirrored his balancing approach in *Re Tracey*. In *Re Tracey*, Deane held that military tribunals could exist as a limited exception to the separation of federal judicial power, that is, *only* to the extent that military justice could be justified as *necessary*.¹²³ In this area, Deane started from the proposition that the separation of powers principle must be protected, and carved out a narrow exception limited to the minimum jurisdiction necessary to maintain military discipline in the defence forces. Deane's approach in this context rejected the flexibility of a 'reasonably appropriate and adapted' test of other members of the Court. Similarly, Deane's two-tiered approach to limiting the implied freedom of political communication, and the strict test for laws targeting the content of political speech, preferred free speech over other interests. This approach reinforced Deane's vision of the underlying concept of representative government, like the separation of powers principle, as an important constitutional guarantee of individual liberties.

¹¹⁹ (1964) 376 US 254.

¹²⁰ *Theophanous* (1994) 182 CLR 104, 185.

¹²¹ ACTV (1992) 177 CLR 106, 234-5. See discussion in Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668, 678-9. McHugh J's approach to proportionality analysis in this context has been examined extensively in Nicholas Aroney, 'Justice McHugh, Representative Government and the Elimination of Balancing' (2006) 28 *Sydney Law Review* 505, 519-34.

¹²² On significance of the preference for rules over flexibility see Stone, above n 121, 681-7.

¹²³ *Re Tracey* (1988) 166 CLR 518, 583. See discussion above chapter 3 n 155.

The balance of this chapter examines two threads in Deane's application of his strict proportionality reasoning in his free speech cases. The first is Deane's commitment to protect 'the people', that is, the 'few',¹²⁴ the 'weak' and the 'poor' of society in his application of proportionality analysis. The second is Deane's commitment to the spirit of public service. Both principles were threads woven throughout his constitutional jurisprudence.¹²⁵ Deane's free speech cases, particularly *ACTV* and *Cunliffe*, however, provide clear illustrations of these components of Deane's constitutional philosophy and their impact on his concept of the judicial role in constitutional interpretation.

(a) ACTV: 'the people' vs political process and majority power

In *ACTV* media organisations challenged the validity of Part IIID of the *Broadcasting Act 1942* (Cth).¹²⁶ This Part introduced prohibitions on political advertising by radio and television during an election period and allocated 'free time' to political parties proportionate to their respective voting shares obtained at the previous election. The purpose of the legislation was to reduce the threat of corruption in the political process, by decreasing the financial burden of political campaigning. The Court, by majority, upheld a challenge by the media broadcasters who argued that the regulation imposed a disproportionate burden on political speech.¹²⁷

Because the legislation targeted the content of speech, Deane and Toohey JJ applied the stricter proportionality analysis.¹²⁸ They found that the legislation was a disproportionate means of achieving its objective.¹²⁹ Particularly

¹²⁴ *Richardson* (1988) 164 CLR 261, 316.

¹²⁵ Public service and the protection of the disadvantaged were also themes taken up by Deane while Governor-General. See, for example, Deane's Opening of the National Conference of the Council of Homeless Persons, Melbourne, 4 September 1996 in Sir William Deane, *Directions: A Vision for Australia* (2002) 71.

¹²⁶ The legislative scheme, and the significance of the case is explored further in HP Lee, 'The Implied Freedom of Political Communication' in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003) 383.

¹²⁷ Mason CJ, Deane, Toohey and Gaudron JJ held that Part IIID was invalid in its entirety. In contrast Dawson J upheld the part in its entirety. Brennan and McHugh JJ found a middle path. McHugh J upheld the Part *only* in its application to the territories. In contrast, Brennan J found *only* those provisions dealing with State elections to be invalid.

¹²⁸ *ACTV* (1992) 177 CLR 106, 170-1 (Deane and Toohey JJ).

¹²⁹ *Ibid* 174 (Deane and Toohey JJ).

significant was the fact that the legislation allocated 'free time' to established political parties, and excluded advertising by special interest groups.¹³⁰ Under this system, how could minority voices be heard?¹³¹ How could disadvantaged groups, those unable to gain representation in Parliament, express their views and protect their interests if 'free time' depended on prior success at elections? Through this analysis, Deane and Toohey JJ in *ACTV* clearly conceived the implied freedom as protecting minority interests from the exercise of power by the majority. Thus, the implied freedom protected the ability of parliamentarians, and all candidates for political office (not simply members of established political parties) to communicate with the electorate as well as the ability of 'the people' to communicate with each other about governmental and political matters. In this way, Deane and Toohey JJ's reasoning in *ACTV* resonated with Deane's emphasis on the protection of the 'few' Tasmanian land-owners from the exercise of majority power by 'Canberra' in *Richardson*.¹³²

Deane and Toohey JJ's application of proportionality reasoning in *ACTV* has been justly criticised as displaying insufficient deference to Parliament. Except in relation to the interference with State legislatures, Brennan J concluded that 'it was open to the Parliament' to determine that the threat posed by electoral advertising was sufficiently grave to require a ban of the nature effected by the legislation.¹³³ Missing from Deane and Toohey JJ's analysis was an adequate explanation of why the intentions and purpose of Parliament, as the representatives of 'the people', were not relevant to a consideration of how to best preserve the health of the nation's system of representative democracy. Affording a level of deference to Parliament's assessment in this context would not appear to be inconsistent with Deane's ultimate touchstone in constitutional interpretation, that is, the intentions of 'the people'. A greater degree of deference than that displayed by Deane and Toohey JJ would not have substituted the intentions of the people's representatives for 'the people' but rather it would give due weight to what had been significant public

¹³⁰ Ibid 175 (Deane and Toohey JJ).

¹³¹ Deane and Toohey JJ observed that under the free time system it was 'at least possible that an independent candidate who was not a member of the previous Parliament or legislature would be unsuccessful in any application for free time.' Ibid 172.

¹³² *Richardson* (1988) 164 CLR 261, 316.

¹³³ *ACTV* (1992) 177 CLR 106, 161.

engagement with this issue.¹³⁴ Such an analysis would have gone some way to deflecting the criticism that Deane and Toohey JJ's reasoning displayed an inherently 'paternalistic' attitude towards 'the people', and their ability to protect their interests and to weigh competing social objectives in a rational and considered manner.¹³⁵

ACTV highlighted a further dimension of Deane's understanding of the Court's role to protect 'the people'. As Fraser has argued, Deane and Toohey JJ's analysis did not consider whether their approach 'might diminish the civic freedoms available to many' by protecting the freedom of 'the wealthy few'.¹³⁶ 'Civic freedom', Fraser argued, was the 'power to participate *as an equal* in the life and governance of a political community'.¹³⁷ In *ACTV*, however, Deane and Toohey JJ demonstrated a commitment to formal equality – equality of access to the media to all seeking to engage in political speech. Accordingly, their concern was not with the effects of the concentration of power on the political process, nor with the ability, in practice, of minority interests to participate in that system.¹³⁸ Thus it appeared to be the risk posed by the majoritarian political process, not the distribution of power and wealth in the Australian community, that was of primary concern for Deane and Toohey JJ in this context. Although Deane's scepticism of majoritarian democracy as a protection of individual liberty in this context was consistent with *his* vision of the role of 'the people' under the Constitution, as discussed previously, that vision was not mandated by the language of the constitutional text.¹³⁹ Accordingly, Deane's proportionality reasoning required greater analysis of external sources, whether history, principle, precedent or policy, to justify the choices he made in applying his proportionality reasoning.

¹³⁴ Zines observed that the nature of the ban on political advertising had been extensively debated in the community, and the media, as the legislation had progressed through the Houses of Parliament. Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 392.

¹³⁵ Andrew Fraser, 'False Hopes: Implied Rights and Popular Sovereignty in the Australian Constitution' (1994) 16 *Sydney Law Review* 213, 226.

¹³⁶ *Ibid* 225.

¹³⁷ *Ibid* (emphasis added).

¹³⁸ Although, in his speech at the presentation of the 45th Walkley Awards for Excellence in Journalism, Sydney, 7 December 2000, when Governor-General, Deane acknowledged that the growth in the electronic media has the potential to 'distort and mislead and to undermine the integrity and identity of smaller vulnerable societies or communities.' Sir William Deane, *Directions: A Vision for Australia* (2002) 75-6.

¹³⁹ See further Adrienne Stone, 'Freedom of Political Communication, the Constitution and the Common Law' (1998) 26 *Federal Law Review* 219, 235.

(b) *Cunliffe: public service and volunteerism*

As discussed above, *Cunliffe* concerned the validity of amendments to the *Migration Act*. Mason CJ, Deane, Toohey and Gaudron JJ held that the implied freedom covered advice and assistance to immigrants and refugees relating to their immigration status. However, Toohey J also held that the registration scheme for migration agents was a proportionate restriction on that communication. In the result, Brennan, Dawson, Toohey and McHugh JJ, with Mason CJ, Deane and Gaudron JJ dissenting, upheld Part 2A of the *Migration Act* in its entirety.

Deane's application of proportionality reasoning in *Cunliffe* reflected both his concern for the disadvantaged and his commitment to concepts of public service. Deane recognised in *Cunliffe* the 'particular vulnerability'¹⁴⁰ of immigrants as a significant factor in his application of proportionality reasoning. Accordingly, Deane upheld the registration scheme in so far as it imposed licensing standards on persons giving immigration advice for a fee. Such standards, he argued, were reasonably proportionate to Parliament's protective purpose.¹⁴¹ In contrast, Deane found that the registration requirements imposed on volunteers were 'arbitrary and extreme.'¹⁴² This was because the risk posed by unqualified volunteers was outweighed by the benefit to immigrants of such advice and assistance.

Deane's analysis in *Cunliffe* manifested his belief in the social, and moral, benefits of volunteerism in Australian 'democratic society.'¹⁴³ That belief was not shared by all of the other members of the Court. For example, Toohey J emphasised the consequences for immigration applicants of poor immigration advice, and Parliament's desire to 'protect from exploitation persons applying for entry permits.'¹⁴⁴ Those consequences were the same irrespective of whether the advice was provided for a fee or voluntarily. For Toohey J, the value of

¹⁴⁰ *Cunliffe* (1994) 182 CLR 272, 343.

¹⁴¹ *Ibid* 343-4.

¹⁴² *Ibid* 344.

¹⁴³ *Ibid* 339 (emphasis added).

¹⁴⁴ *Ibid* 383.

volunteerism was therefore not itself a factor weighing heavily in assessing the proportionality of the legislative burden on political speech.

As chapter 1 has indicated, to the extent that proportionality reasoning encompasses a balancing process, it is inevitable that members of the Court will reach different conclusions on the validity of a law.¹⁴⁵ However, in recognition of the innovation of the free speech guarantee, and the inherent flexibility of the concept of 'representative government', an appreciable degree of deference to legislative decision-making is warranted in the application of proportionality reasoning in this context.¹⁴⁶ Throughout the free speech cases, members of the Court considered the question of the level of deference due to Parliament in this context. Brennan J, for instance, argued forcefully that in applying balancing reasoning, the Court must allow a 'margin of appreciation' to Parliament.¹⁴⁷ This margin makes explicit that the Court's role is to assess whether a measure was 'reasonably' appropriate and adapted, not to assess itself the appropriateness of the law. Thus in *ACTV*, Brennan explained that it was for Parliament to assess whether the law '*would tangibly minimise the risk of corruption*'; the Court's task was to determine whether that assessment 'could be reasonably made.'¹⁴⁸

In his free speech cases, as in *Richardson*, Deane also emphasised the distinction between assessing whether a measure was appropriate (a question for Parliament) or '*reasonably*' appropriate.¹⁴⁹ However, the pattern of Deane's reasoning in the free speech cases suggests that Deane displayed only limited deference to Parliament's choices in this field. Instead, Deane utilised proportionality reasoning to strengthen the protection of individual rights and freedoms against interference by Parliament. It was in *Cunliffe* that Deane explicitly acknowledged the connection between his understanding of the level of deference due to Parliament and his concept of 'the people'. Thus, when applying a strict proportionality test, Deane argued that:

¹⁴⁵ Compare HP Lee, 'Proportionality in Australian Constitutional Adjudication' in Geoffrey Lindell (ed) *Future Directions in Australian Constitutional Law* (1994) 126, 147.

¹⁴⁶ Compare TRS Allan, 'The Common Law as Constitution: Fundamental Rights and First Principles' in Cheryl Saunders (ed) *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 146, 166.

¹⁴⁷ *ACTV* (1992) 177 CLR 106, 159.

¹⁴⁸ *Ibid* (emphasis added).

¹⁴⁹ Compare *Richardson* (1988) 164 CLR 261, 307.

the courts do not arrogate to themselves legislative powers. They do no more than discharge the judicial function directly or indirectly *entrusted* to them by the Constitution *adopted by the people as the compact of our nation*.¹⁵⁰

This vision of the relationship between the Court and 'the people' explains Deane's application of proportionality reasoning in the free speech cases. As previous chapters have discussed, however, the constitutional text does not mandate a vision of 'the people' strengthening the protection of individual rights from interference by their elected representatives. Without a sustained analysis of the foundation, in text, history, or fundamental constitutional principles, to support his understanding of the nature of the Court's duty, the level of deference afforded by Deane to Parliament in the free speech cases was not compelling.

Conclusion

Deane's vision for the implied freedom of political communication continues to exercise considerable influence on the jurisprudence of the current High Court. Deane's role, however, has been as antithesis rather than paragon of the Court's current interpretive approach in this area. Indeed, Deane's reasons in *Theophanous* were ostensibly the means by which the Court in *Lange* could recast the implied freedom.¹⁵¹ The nature of Deane's influence in this field flowed from his level of comfort with broad and general theories of constitutional values and constitutional interpretation, and his understanding of concept of 'the people' as a foundation for broad constitutional rights and guarantees.

To a greater extent than any other topic in his constitutional jurisprudence, Deane's free speech cases, and *Theophanous* in particular, embodied the three pillars of his interpretive method: 'fundamental concepts', 'living force' and proportionality reasoning. In the free speech cases, Deane also explained with greatest clarity the manner in which these three interpretive principles were

¹⁵⁰ *Cunliffe* (1994) 182 CLR 272, 340 (emphasis added).

¹⁵¹ The Court in *Lange* observed that although Deane gave his concurrence with the answers of the joint judgment in *Theophanous*, the reasoning only had the direct support of three judges. It was on this basis that the Court reconsidered the nature of the implication and its relationship to the common law. See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 555.

ties to his concept of 'the people'. As his earlier jurisprudence demonstrated, consistent with his vision of the Court's duty to protect minority interests, Deane employed each of these techniques to increase the scope of the implied freedom and the judicial protection of individual rights. Each principle of interpretation conferred considerable discretion on the Court. Thus each may also be criticised as being potentially flexible enough to enable the Court to give effect in the interpretation of the Constitution to idiosyncratic principles of democracy and fairness.

As understood by Deane, these interpretive principles were tied to his belief in the anti-majoritarian commitment of the Constitution to 'the people'. However, Deane's interpretive principles can be employed to achieve more moderate applications of the implied freedom of political communication. Deane's 'living force' theory in particular need not be utilised to extend the protection of individual rights by implication in the manner undertaken by Deane. Rather, Deane's explanation of legal sovereignty provides a principled foundation for a moderate theory of progressive constitutional interpretation. For this potential to be realised, however, it may be necessary to demonstrate that this aspect of Deane's approach can be excised from his bold, 'activist', rights vision in the free speech cases.

CONCLUSION

On 16 February 1996, Deane was sworn in as Australia's twenty-second Governor-General. Deane's time as Governor-General coincided with events of great national pride and celebration, such as the 2000 Sydney Olympics and the Centenary of Federation in 2001. It was also a time of 'national mourning': the Port Arthur massacre in 1996; the Thredbo landslide in 1997; and the Interlaken canyoning accident in 1999. At these official events Deane conveyed the spirit of national optimism or grief with simple and powerful words and gestures.

One of Deane's first acts as Governor-General was to change the official toast, from 'the Queen of Australia' to become:

To the Queen of Australia and *the people of Australia*.¹

This was not mere 'nit-picking', nor a purely symbolic gesture.² For Deane, recognition of 'the people' as sovereign was essential to his understanding of the Australian nation and its constitutional system.

Deane's Australia was a vibrant, wealthy, lucky country, with abundant potential. It was a safe haven for people of all faiths and cultures, a nation strengthened by a commitment to multiculturalism and the distinctly Australian values of 'mateship' and a 'sense of fair play'.³ Consistent with this vision for Australia, Deane championed the causes of the disadvantaged,⁴ and of reconciliation,⁵ as a means of serving *all* the people of the nation. For

¹ Tony Stephens, *Sir William Deane: The Things that Matter* (2002) 6. The Prime Minister (John Howard) said that he had 'followed the decision that was taken by the Governor-General' to ensure that future visiting heads of State would toast 'the Queen and the people of Australia.' Richard McGregor, 'Deane's Changes in Place on Roasted Toast to Queen', *The Australian* 5 November 1999, 6.

² Michael Kirby, 'Stirring Up the Constitution: Greg Craven's *Conversations with the Constitution*' (2005) *Quadrant* 58, 60.

³ See, for example, Australia Day Message, Canberra, 26 January 2000, quoted in Sir William Deane, *Directions: A Vision for Australia* (2002) 13.

⁴ For illustrations of Deane's speeches on the treatment of the disadvantaged as a reflection of the worth of a democratic nation, see *ibid*, 79-80, 87, 92-3.

⁵ For example, in Deane's opening address to the 1997 Religion and Cultural Diversity Conference in Melbourne, where he reflected on the 'shameful acts' of the dispossession of Indigenous Australians and the 'forcible removal of their children' as matters 'which must be

example, in language evoking his judgment with Gaudron J in *Mabo (No 2)*, Deane urged the nation to acknowledge the errors and injustice of the past.⁶ For Deane, the treatment of Indigenous Australians and the disadvantaged was therefore a test of the health of the Australian democracy.⁷ Deane's perception of the vice-regal role, as more than merely ceremonial, polarised commentators. On the one hand there was support for his voice for the disadvantaged; the voiceless in the community. On the other, was a concern that Deane's engagement with social issues and criticism of government policy inappropriately politicised the vice-regal office.⁸

Deane's willingness to be a voice for 'the people' did not emerge suddenly on his assumption of vice-regal office on 16 February 1996. Deane's constitutional jurisprudence shared his later interest in protecting the disadvantaged from interference by the Parliament, and also attracted criticism that Deane had illegitimately expanded the judicial role into the political sphere. This thesis has demonstrated that central to Deane's constitutional vision, and his understanding of the judicial function, was his concept of 'the people'.

A Deane's 'fundamental constitutional truth' and its influence on his interpretive philosophy

For Deane, 'the people' were the source of the Constitution's legitimacy. In *Theophanous*, Deane explained that the Constitution's authority stemmed from the original assent of 'the people', by referenda, and the contemporary acquiescence of Australians to their constitutional system.⁹ Consistent with this principle, Deane believed that the Constitution's meaning derived from the

profoundly regretted by us all as a nation.' Quoted in Sir William Deane, 'Religion and Cultural Diversity: Global Challenges and Local Responsibilities' (1997) August *Migration Action* 3, 4. This Conference was held two days prior to the delivery of judgment by the Court in *Kruger* (1997) 190 CLR 1.

⁶ Compare, for example, *Mabo (No 2)* (1992) 175 CLR 1, 109 (Deane and Gaudron JJ) and Deane's Sydney Peace Prize Lecture, Sydney, 8 November 2001, quoted in Sir William Deane, *Directions: A Vision for Australia* (2002) 30.

⁷ See, for example, Sir William Deane, *Directions: A Vision for Australia* (2002) 79-80, 92-3.

⁸ See discussion in George Winterton, 'The Evolving Role of the Governor-General' (Paper presented at The Australian Constitution in Troubled Times, Canberra, 7-9 November 2003) 219.

⁹ *Theophanous* (1994) 182 CLR 104, 171.

intentions of 'the people' and that all governmental power must be exercised for their benefit.

The influence of Deane's vision of 'the people' can be seen throughout his constitutional jurisprudence in a number of ways. One aspect of Deane's vision was his understanding of the identity of 'the people' as 'the people of Australia'.¹⁰ Deane's High Court decisions thus evince a preference for national over federal solutions to contemporary Australian problems, favouring 'the people of Australia' over the interests of 'the people' of the several States. For example, chapter 1 explored Deane's consistent extension of the Commonwealth's legislative power under s 51(xx), (xxix), and (xxxv). Also, chapter 2 explored constitutional implications where Deane rejected a strict division of power along federal lines. Thus in *Duncan*, for example, Deane recognised co-operation as the Constitution's 'positive objective',¹¹ allowing the Commonwealth and the States to work together to achieve social objectives. Five years later, in *Breavington*, Deane limited the States' power to determine the choice of law rules binding on their courts. Instead, Deane held that the Constitution created a unitary legal system, and guaranteed a single choice of law rule applying throughout the Federation. Only this approach, Deane argued, could guarantee 'the people of Australia' protection from the dilemma of the inconsistent legal commands of State laws. This connection between Deane's vision of federal relationships and his concept of 'the people' has not gained the notoriety that attached to his use of popular sovereignty in *Leeth* and in his free speech cases.¹² However, this was a significant aspect of Deane's understanding of the role of 'the people' in his constitutional philosophy.

A further aspect of Deane's vision of 'the people' was his insistence that legal sovereignty flowed from 'all the people'. Deane signalled this aspect of his understanding of 'the people' most clearly at the beginning and end of his High Court career. In his swearing-in speech, in 1982, Deane affirmed that the source of law and judicial power in the Australian constitutional system was not the

¹⁰ *Stevens v Head* (1993) 176 CLR 433, 460 (emphasis added).

¹¹ *Duncan* (1983) 158 CLR 535, 589.

¹² Although note the examination of these issues (not limited to Deane's vision) in Graham Nicholson, 'The Concept of "One Australia" in Constitutional Law and the Place of Territories' (1997) 25 *Federal Law Review* 281.

Parliament, as the representatives of 'the people', but the people themselves: 'all manner of people.'¹³ Twelve years later, in his decision in *Theophanous* in 1994, Deane explained that the source of the Constitution's legitimacy was not derived from either the Imperial or Australian Parliaments but the assent of 'the people' to the Constitution. This understanding of 'the people' as legal sovereigns, as distinct from the acts and intentions of their representatives, had two significant consequences for Deane's constitutional jurisprudence.

The first manifestation of this vision of 'the people' was Deane's 'living force' theory of constitutional interpretation. Expressed most completely in *Theophanous*, Deane rejected a role for the framers' subjective intentions in constitutional interpretation. This was because the authority of the Constitution rested on the adoption of the Constitution by 'the people' themselves, not the acts of their representatives at the Constitutional Conventions (the framers). For Deane, the Convention Debates could therefore be utilised as a tool in constitutional interpretation only to the extent that they elucidated 'what the people ... meant when they adopted the Constitution.'¹⁴ The Debates could not be used to substitute the intentions of one or more of the people's representatives for the intentions of the sovereign people themselves. Deane's approach was consistent with the rule in *Cole* and its rejection of the role of the framers' subjective intentions in constitutional interpretation. However, Deane's approach was uniquely premised on his concept of the sovereignty of 'the people'.

Deane's 'living force' approach also endorsed a progressive theory of constitutional interpretation. Deane's theory required that the meaning of the Constitution was not bound to the past but moulded to contemporary needs and circumstances. This theory also reflected Deane's vision of the source of legal sovereignty. Thus, under his 'living force' theory, the Court's task was to give effect to the intentions of 'the people' in 1900 *and* the intention of modern Australians as expressed through their acquiescence to the Australian

¹³ Transcript of the Ceremonial Sitting of the Occasion of the Swearing-in of the Honourable Mr Justice Deane as a Justice of the High Court of Australia at Canberra, Tuesday 27 July 1982, 17-18.

¹⁴ *Capital Duplicators Pty Ltd v Australian Capital Territory (No 2)*, Transcript of Argument, 21 April 1993, 158.

constitutional system. Consistent with this vision, Deane demonstrated in *Theophanous* that the contemporary meaning of the Constitution was not to be found exclusively in the will and intentions of Parliament, as the current representatives of 'the people', but in the broader community values of 'all of the people' of Australia.

Deane's concept of 'the people' as 'all the people' was also reflected in his commitment to the judicial protection of the disadvantaged and vulnerable. More controversial than his 'living force' theory, and more pervasive in his jurisprudence, this aspect of Deane's vision of 'the people' was manifested in his extension of the constitutional protection of individual rights against interference from Parliament or the Executive. This occurred in his constitutional jurisprudence in a number of ways.

For example, Deane extended the rights-function of a number of constitutional provisions. Thus, as discussed in chapter 4, in his decisions on the Constitution's express rights in ss 51(xxxi), 80 and 117, Deane adopted broad definitions of the text of these provisions. He also applied those guarantees to give effect to 'substance over form', ensuring that the protections afforded to the individual could not be avoided by drafting techniques of the Parliaments of the Commonwealth or the States. Deane also recast a number of provisions as constitutional rights, including s 90 as an equality guarantee in *Hematite*, and his limitation on certain retrospective laws flowing from s 109 in *Metwally*. Deane's rights-based interpretation of ss 90 and 109 derived from his understanding of the Constitution as more than an instrument dividing power between the 'artificial entities' of government, but as 'ultimately concerned with the protection and governance of the people.'¹⁵ Deane's reinterpretation of these provisions, and others, as constitutional rights was confirmed in *Street* when Deane listed his '*significant number*' of express and implied rights contained in the Australian Constitution, despite the absence of a formal Bill of Rights.¹⁶

Deane further pursued his vision of the Constitution as an instrument protective of the rights of 'the people' through his 'fundamental concepts'

¹⁵ *Metwally* (1984) 158 CLR 447, 476-7.

¹⁶ *Street* (1989) 168 CLR 461, 521-2 (emphasis added).

reasoning. This interpretive principle allowed Deane to derive constitutional implications from the doctrines of government underlying the Constitution and the common law rights manifested in the Constitution's text. In Deane's hands this interpretive approach yielded, among other implications, procedural and substantive guarantees of due process and the implied freedom of political communication. These implied constitutional rights flowed from Deane's conviction that the essential nature of the Constitution, its 'central thesis',¹⁷ was that all power flowed from and for the benefit of all 'the people'.

Finally, Deane employed 'proportionality' reasoning to strengthen the constitutional protection of individual rights. Deane's proportionality concept required the Court to evaluate the connection between legislative means and ends. Although not always employing the language of 'proportionality', Deane utilised the concept extensively as a tool in the characterisation process, and as a mechanism for defining the boundaries of a number of express and implied constitutional guarantees. Consistent with his belief that the Constitution protected 'all manner of people', Deane's application of proportionality reasoning strictly scrutinised the necessity of legislative interference with individual rights and displayed only limited deference to the policy objectives of Parliament.

These interpretive principles pervaded Deane's High Court constitutional jurisprudence and combined to form a cohesive vision of the Constitution and the Court's role in its interpretation. That vision was founded on Deane's understanding of the 'fundamental constitutional truth,' that the Constitution's legitimacy flowed from 'the people'. But how compelling is Deane's vision?

B *Deane's constitutional jurisprudence: a final evaluation*

This thesis has utilised Coper's description of propositions commanding 'common consent' on the nature of judicial reasoning as its starting point for

¹⁷ *Theophanous* (1994) 182 CLR 104, 180.

evaluating Deane's constitutional jurisprudence.¹⁸ This framework recognised that the text of the Constitution rarely compelled a single answer in constitutional interpretation. The Court may therefore legitimately turn to precedent and history, as well as policy, to assist in its task, and judges may honestly disagree on the 'correct' meaning of the Constitution. This framework also recognises that judicial choice in constitutional interpretation is not unlimited. Tools used in constitutional interpretation must provide genuinely external standards and reference points, and not represent devices to hide the personal values of the judge.¹⁹

Within this 'common ground', however, this thesis has imposed two criteria to assess the persuasiveness of Deane's constitutional jurisprudence. First, was a consideration of the 'rigor' of Deane's analysis. This entailed a scrutiny of the nature of Deane's reliance on text, history, precedent and policy in support of his interpretation of the Constitution's meaning. Did these factors reasonably support the conclusion reached by Deane? Further, did Deane utilise these sources in a consistent and principled manner? Second, this thesis assessed the relationship Deane struck between the Court and Parliament in his constitutional jurisprudence, and the consistency of that approach with the division of responsibility under the Constitution between the legislative and judicial branches. Assessing this aspect of Deane's reasoning, this thesis looked beyond his occasional invocations of legalism, to the practical effect of his reasoning. In the context of Deane's considerable innovation and imagination in his constitutional jurisprudence, this thesis has endorsed Allan's proposition that creativity in judicial reasoning must be matched with both a high standard of judicial exposition and analysis and an 'appropriate deference' to Parliament.²⁰

Against this framework, Deane's implied constitutional rights in *Metwally*, *Polyukhovich* (in respect of retrospective criminal laws), *Leeth* and *Theophanous* have correctly been subject to extensive criticism. Deane's implied rights in

¹⁸ Michael Coper, 'Concern About Judicial Method' (2006) 30 *Melbourne University Law Review* 554, 572.

¹⁹ *Ibid* 567.

²⁰ TRS Allan, 'The Common Law as Constitution: Fundamental Rights and First Principles' in Cheryl Saunders (ed) *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 146, 166.

these cases were not supported by compelling analysis of the text, or precedent. For example, Deane's extension of constitutional protection to preclude retrospective criminal laws in *Polyukhovich* rested on an unsustainable definition of the judicial function and was contrary to the long-standing acceptance of the Commonwealth's power to enact retrospective laws. Further, in Deane and Toohey JJ's decision in *Leeth*, Deane attributed views to 'the framers' in support of his approach that were unsupported by a fair reading of the historical record. In these, and other ways, Deane's decisions in these four iconic implied rights cases reflected his pursuit of a rights-protective vision of the Constitution that was insufficiently supported by considered analysis of text, policy or precedent.

More significant to an examination of the persuasiveness of Deane's wider constitutional vision was his reliance on 'the people' in these decisions. *Metwally*, *Polyukhovich*, *Leeth* and *Theophanous* illustrate that the concept of 'the people' was itself incapable of supporting the implication of judicially-enforceable fundamental rights of the nature proposed by Deane. This was because, despite Deane's emphatic endorsement of 'the people' to strengthen the judicial protection of fundamental rights, the concept of 'the people' may inform a number of visions of democracy, and of judicial review, under the Constitution. Thus, when a sole or dominant factor in constitutional interpretation, Deane's concept of 'the people' may function as a device capable of allowing the Court to interpret what the Constitution *should* mean. Such an interpretive principle oversteps the judicial role in constitutional interpretation and justly exposes the Court to criticism.

However, despite their significance as indicators of Deane's concept of 'the people' and its role in his constitutional philosophy, these four cases do not fairly represent the valuable insights offered by Deane's constitutional jurisprudence. Across his thirteen years of service on the High Court, Deane applied his concept of 'the people' to support both traditional interpretive principles, and to underpin his distinctive trilogy of interpretative principles: 'living force', 'fundamental concepts' and proportionality reasoning. In contrast to Deane's decisions in *Metwally*, *Leeth*, *Theophanous* and *Polyukhovich* (regarding retrospective criminal laws), in many other cases Deane's reasoning offered

compelling solutions to contemporary constitutional issues, infused with his recognition of the role of the sovereign people.

1 *Deane's fusion of 'the people' and 'traditional' interpretive techniques*

Although Deane's innovative trilogy of interpretive principles has attracted the greatest commentary, in many of his decisions Deane blended his vision of 'the people' with the application of established principles of interpretation. For example, as discussed in chapter 1, Deane's decisions on the scope of Commonwealth legislative power explicitly endorsed the *Engineers' Case* as the starting point for his analysis. In the *Tasmanian Dam Case*, *Wooldumpers* and the *Incorporation Case*, Deane relied on the *Engineers' Case* to extend Commonwealth legislative power. Deane's reliance on the *Engineers' Case* in these cases coincided with his own preference for national, over federal, solutions, based on his understanding of the Court's duty to 'the people of Australia'. It is true that the text of the Constitution does not unequivocally compel this preference for national over federal interpretations of s 51, or Deane's vision of 'the people of Australia' rather than 'the people of the States'. However, Deane's conclusions on the reach of s 51 in these cases were reasonably open, and supported by a considered analysis of history, precedent, policy and the application of long-established interpretive principles.

Deane also fused his people-based approach with established principles of constitutional interpretation in his examination of express constitutional rights. Across his decisions on ss 51(xxxi), 80 and 117, Deane endorsed a broad interpretation of the constitutional text, and the rejection of formalism in its application. Both the extension of judicially-enforceable rights, and the principle that the meaning of the text must not be frustrated by formalism were supported by Deane's commitment to interpret the Constitution in a manner consistent with the sovereignty of 'all the people', not simply by reference to the intentions of their representatives. Although Deane's decisions in *Kingswell* and the *Incorporation Case* have not gained the approval of a majority of the Court at this time, Deane's reasoning in the areas of s 51 and express rights illustrate the

blending of his vision of 'the people' with long-established interpretive principles to offer compelling answers to a range of constitutional questions.

2 *Deane's three signature interpretive principles*

(a) *'Living force' theory*

Deane's 'living force' theory represented a significant and positive innovation in Australian constitutional theory. Deane's theory explained that the Court's role was to interpret the Constitution consistent with the meaning of 'the people' as legal sovereign. This approach cut through the complex rule in *Cole v Whitfield* to permit reference to the Convention Debates where it assisted the Court in determining 'what the people meant' when they adopted the Constitution in 1900. Deane's decision in *Wooldumpers* offered an illustration of this element of his 'living force' theory. There, Deane relied on the Convention Debates to determine the historical nature of industrial disputes, and the people's intentions when they granted the Commonwealth power with respect to the 'prevention and settlement' of interstate industrial disputes under s 51(xxxv).²¹ The concern expressed in 1900 regarding the escalation of disputes was a factor supporting the extension of the 'prevention' limb of s 51(xxxv).

Further, Deane's concept of 'the people' provides an explanation of the legitimacy of an evolutionary interpretive approach. Under Deane's approach, the interpretation of the Constitution must respond to the dual acts of sovereignty: the assent of both the original and contemporary people to the Constitution. Deane's jurisprudence does not itself display a persuasive illustration of the benefits of this approach. Although frequently utilising contemporary meaning (for example, in the *Tasmanian Dam Case*, *Wooldumpers* and *Theophanous*), Deane did not support his understanding of the intentions of contemporary Australians in these cases with compelling analysis of external sources. However, *in theory*, Deane's 'living force' approach required the Court to justify its articulation of the Constitution's contemporary meaning, and the

²¹ *Wooldumpers* (1989) 166 CLR 311, 328-30.

nature of the evolution in meaning from 1900. As such, Deane's 'living force' theory remains a potentially valuable tool in constitutional interpretation. Whether Deane's theory can survive its association with his controversial decision in *Theophanous*, and the endorsement of another controversial judicial 'activist', Kirby J, remains to be seen.²²

(b) 'Fundamental concepts' reasoning

In *Polyukhovich*, as part of his derivation of a guarantee precluding retrospective criminal laws, Deane explained the source of his judicial process guarantee in 'fundamental concepts' reasoning. The wide acceptance of the latter guarantee is a testament to the persuasive force of Deane's reasoning (and that of Gaudron J) in this field. Deane's 'fundamental concepts' analysis turned to the underlying principles and doctrines manifested by the text, in this case, by the reference to a 'court' in s 71. The strength of Deane's judicial process implication therefore derived from his very reliance on 'fundamental concepts' reasoning: utilising the history and purpose of that doctrine to frame the limits of this guarantee.²³ Ironically, *Polyukhovich* therefore illustrated the extremes of Deane's 'fundamental concepts' approach: the modest and compelling derivation of a procedural due process guarantee alongside the overreaching and unsupported extension of constitutional protection to preclude retrospective criminal laws.

Other illustrations of Deane's 'fundamental concepts' reasoning, if less compelling than his judicial process guarantee, remain reasonably open interpretations of the Constitution. In *Duncan*, and in *QEC*, for instance, Deane recognised the importance of construing the text in context, and required the Court to engage openly with the underlying principles and values that inform the Constitution. Although Deane's decisions in *Duncan* and *Breavington* inevitably involved a degree of choice in framing the underlying doctrines of

²² See, for example, *Brownlee v The Queen* (2001) 207 CLR 278, 321-22 (Kirby J). See also Michael Kirby, 'Andrew Inglis Clark and the High Court of Australia' in Richard Ely and James Warden (eds), *A Living Force: Andrew Inglis Clark and the Ideal of Commonwealth* (2001) 378.

²³ Compare Fiona Wheeler, 'Due Process, Judicial Power and Chapter III in the New High Court' (2004) 32 *Federal Law Review* 205, 210-11.

the Constitution, Deane's choice was informed by fair and considered analysis of text, history and principle.

What then of Deane's use of 'fundamental concepts' reasoning to derive the implied freedom of political communication? Certainly, Deane's reliance on popular sovereignty in this context provided a platform of sufficient flexibility to tempt a judge to extend the implied freedom by reference to their own personal standards and principles. However, as has been widely accepted, the content of the implied freedom cannot be derived from the text of the Constitution alone. Reference to the Constitution's 'fundamental concepts', including the doctrine of representative government, and its underlying commitment to popular sovereignty, is therefore a necessary step in framing the content of the implied freedom. In that context, a modest definition of these principles, matched by greater judicial deference to Parliament would have provided much needed stability and certainty in Deane's use of 'fundamental concepts' reasoning in this field.

(c) *Proportionality analysis*

Deane's proportionality analysis provides a valuable tool in constitutional interpretation. For example, in his s 51(xxxi) and military tribunal decisions, Deane utilised proportionality reasoning to find the limits of the Constitution's guarantees of just terms, and the military exception to Ch III. Deane struck a balance in those cases between the Commonwealth's regulatory and defence objectives and the rights of 'the people' by limiting Commonwealth power to what was necessary to give effect to its purpose. That Deane struck the balance in favour of individual rights in this way was a conclusion that this thesis has shown was well-supported by the text, as well as history, precedent and policy.

Deane's use of proportionality reasoning in his free speech cases expressed a similar priority to his decisions on the military justice exception. His pre-weighted test in the free speech cases imposed a strict scrutiny of laws targeting political speech. However, Deane's decisions in this area fail to accord sufficient deference to Parliament. A greater degree of judicial deference in this context would not have been inconsistent with Deane's understanding of the Court's

duty to 'the people' in constitutional interpretation. Rather, it would recognise that the deliberations of the people's representatives were relevant to a consideration of how to best preserve the health of the nation's system of representative democracy. As an area of significant judicial innovation, the call for a greater degree of judicial deference to legislative policy-making in the context of Deane's free speech cases was particularly strong.

Similar issues attend Deane's use of proportionality reasoning in the characterisation context. Questions of degree are inevitably involved when assessing the sufficiency of a law's connection to a head of power.²⁴ Proportionality reasoning brings competing policy interests into the open, and exposes the Court's evaluation and assessment of those issues. The fact that proportionality analysis invites the Court to consider the impact of a law on common law rights and freedoms, rather than purely 'federal' considerations, does not render the test illegitimate in this context.²⁵ Once it is recognised that sovereign power flows from 'the people', the impact of a law on the interests of 'the people' becomes a relevant consideration in the assessment of whether the law is an extreme means to achieve its ends, and so, whether the law can be fairly characterised as being with respect to a head of power. On the other hand, as Deane himself affirmed, the Court's ultimate test is whether a law is 'reasonably' appropriate and adapted to achieving an object within power. That assessment requires a degree of deference to Parliament that Deane's decisions in the *Tasmanian Dam Case*, and *Richardson*, may not have exhibited.

C Judging Deane: the bigger picture

Deane's High Court decisions on constitutional law reward a systematic analysis. This thesis has argued that Deane's constitutional philosophy was based on a rich, people-based, vision of the Constitution. His jurisprudence revealed a number of innovative contributions to Australian constitutional theory and a wealth of moderate rights-based decisions. A wider perspective

²⁴ HP Lee, 'Proportionality in Australian Constitutional Adjudication' in Geoffrey Lindell (ed) *Future Directions in Australian Constitutional Law* (1994) 126, 147.

²⁵ Compare Leslie Zines, 'Constitutionally Protected Individual Rights' in Paul Finn (ed) *Essays on Law and Government* (1995) 136, 139.

deepens an understanding of Deane's jurisprudence beyond his iconic decisions in *Leeth* or the free speech cases, and contextualises his contribution to the controversial Mason Court era.

An examination of Deane's constitutional jurisprudence also speaks more broadly to questions of judicial method and the judicial role. Deane reminds us that judges can come to the Court with fully-formed visions of the Constitution, and of the judicial function. With recent speculation on the views of new, and potential, appointees to the Court, studies of the jurisprudence of its past and current members are an important step in informing debate on judicial process. Such studies may not lead to accurate predictions of the judicial philosophy of new members of the Court. Deane himself observed that he had undergone a 'seachange' on his appointment to the High Court, departing from the mould of a 'lawyer's lawyer' to engage with the question of what the law '*should be*.'²⁶ However, examinations of the jurisprudence of prominent judges, like Deane, are necessary if public debate is to extend beyond the labelling of judges as 'activist', or 'conservative', to a deeper engagement with these important questions.

²⁶ Deane, quoted in Tony Stephens, *Sir William Deane: The Things that Matter* (2002) 45-6 (emphasis added).

Appendix A DEANE'S KEY CONSTITUTIONAL CASES: BY DATE

1982

6 August 1982 *Hammond v Commonwealth* (1982) 152 CLR 188

1983

1 July 1983 *Commonwealth v Tasmania* ('Tasmanian Dam Case') (1983)
158 CLR 1

5 August 1983 *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599

6 September 1983 *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983)
158 CLR 535

1984

4 April 1984 *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311

22 November 1984 *University of Wollongong v Metwally* (1984) 158 CLR 447

1985

27 February 1985 *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159
CLR 351

14 March 1985 *Hilton v Wells* (1985) 157 CLR 57

5 September 1985 *Queensland Electricity Commission v Commonwealth* (1985)
159 CLR 192

18 November 1985 *Kingswell v The Queen* (1985) 159 CLR 264

1986

- 20 March 1986 *Brown v The Queen* (1986) 160 CLR 171
21 October 1986 *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556

1988

- 10 March 1988 *Richardson v Forestry Commission* (1988) 164 CLR 261
2 May 1988 *Cole v Whitfield* (1988) 165 CLR 360
18 August 1988 *Breavington v Godleman* (1988) 169 CLR 41
8 November 1988 *Commonwealth v Brian Toohey* (Unreported, High Court of Australia, Deane J, 8 November 1988)
6 December 1988 *Davis v Commonwealth* (1988) 166 CLR 79
8 December 1988 *Mabo v Queensland (No 1)* (1988) 166 CLR 186

1989

- 10 February 1989 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518
10 February 1989 *Re Federated Storemen and Packers Union of Australia; Ex parte Wooldumpers (Victoria) Limited* (1989) 166 CLR 311
16 November 1989 *Street v Queensland Bar Association* (1989) 168 CLR 461

1990

- 8 February 1990 *New South Wales v Commonwealth ('Incorporation Case')* (1990) 169 CLR 482

1991

- 27 June 1991 *Re Nolan; Ex parte Young* (1991) 172 CLR 460
14 August 1991 *Polyukhovich v Commonwealth* (1991) 172 CLR 501
19 December 1991 *McKain v R W Miller & Company (South Australia) Pty Ltd* (1991) 174 CLR 1

1992

- 3 June 1992 *Mabo v Queensland (No 2)* (1992) 175 CLR 1
- 25 June 1992 *Leeth v Commonwealth* (1992) 174 CLR 455
- 30 September 1992 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106
- 30 September 1992 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1
- 15 October 1992 *Capital Duplicators Pty Ltd v Australian Capital Territory (No 1)* (1992) 177 CLR 248
- 13 November 1992 *Dietrich v The Queen* (1992) 177 CLR 292
- 8 December 1992 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1

1993

- 18 March 1993 *Stevens v Head* (1993) 176 CLR 433
- 26 August 1993 *Cheatle v The Queen* (1993) 177 CLR 541

1994

- 9 March 1994 *Mutual Pools and Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155
- 9 March 1994 *Health Insurance Commission v Peverill* (1994) 179 CLR 226
- 9 March 1994 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297
- 9 March 1994 *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270
- 20 April 1994 *Goryl v Greyhound Australia Pty Ltd* (1994) 179 CLR 463
- 1 June 1994 *Re Tyler; Ex parte Foley* (1994) 181 CLR 18
- 4 October 1994 *Nintendo Co Ltd v Centronics Systems* (1994) 181 CLR 134
- 12 October 1994 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104
- 12 October 1994 *Stephens v West Australian Newspapers Limited* (1994) 182 CLR 211
- 12 October 1994 *Cunliffe v Commonwealth* (1994) 182 CLR 272

1995

- 23 February 1995 *Brandy v Human Rights and Equal Opportunity Commission*
(1995) 183 CLR 245
- 16 March 1995 *Western Australia v Commonwealth ('Native Title Act Case')*
(1995) 183 CLR 373
- 16 March 1995 *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323
- 7 April 1995 *Re Australian Education Union; Ex parte Victoria* (1995) 184
CLR 188
- 21 September 1995 *Grollo v Palmer* (1995) 184 CLR 348

Appendix B DEANE'S CONSTITUTIONAL CASES: BY SUBJECT

Section 51

Section 51(ii)

MacCormick v Federal Commissioner of Taxation (1984) 158 CLR 622

Deputy Commissioner of Taxation v Truhold Benefit Pty Ltd (1985) 158 CLR 678

State Chamber of Commerce and Industry v Commonwealth ('Second Fringe Benefits Tax Case') (1987) 163 CLR 329

Air Caledonie International v Commonwealth (1988) 165 CLR 462

South Australia v Commonwealth (1991) 174 CLR 235

Australian Tape Manufacturers Association Ltd v Commonwealth (1993) 176
CLR 480

Northern Suburbs General Cemetery Reserve Trust v Commonwealth (1993) 176
CLR 555

Mutual Pools and Staff Pty Ltd v Commonwealth (1993) 179 CLR 155

Section 51(xx)

State Superannuation Board v Trade Practices Commission (1982) 150 CLR 282

Fencott v Muller (1983) 152 CLR 570

Commonwealth v Tasmania ('Tasmanian Dam Case') (1983) 158 CLR 1

Davis v Commonwealth (1988) 166 CLR 79

New South Wales v Commonwealth ('Incorporation Case') (1990) 169 CLR 482

Bourke v State of New South Wales (1990) 170 CLR 276

Re Dingjan; Ex parte Wagner (1995) 183 CLR 323

Section 51(xxi) and (xxii)

D.M.W. v C.G.W. (1982) 151 CLR 491

In the Marriage of Cormick (1984) 156 CLR 170

V v V (1985) 156 CLR 228

R v Cook; Ex parte C. (1985) 156 CLR 249

Re F; Ex parte F (1986) 161 CLR 376

Fisher v Fisher (1986) 161 CLR 438

P v P (1994) 181 CLR 583

Section 51(xxix)

Commonwealth v Tasmania ('Tasmanian Dam Case') (1983) 158 CLR 1

Kirmani v Captain Cook Cruises Pty Ltd (No 1) (1985) 159 CLR 351

Richardson v Forestry Commission (1988) 164 CLR 261

Davis v Commonwealth (1988) 166 CLR 79

Queensland v Commonwealth ('Tropical Rainforests Case') (1989) 167 CLR 232

Polyukhovich v Commonwealth (1991) 172 CLR 501

Horta v Commonwealth (1994) 181 CLR 183

Section 51(xxxi)

R v Smithers; Ex parte McMilian (1982) 152 CLR 477

Commonwealth v Tasmania ('Tasmanian Dam Case') (1983) 158 CLR 1

MacCormick v Federal Commissioner of Taxation (1984) 158 CLR 622

Clunies-Ross v Commonwealth (1984) 155 CLR 193

*R v Ludeke; Ex parte Australian Building Construction Employees and Builders
Labourers Federation* (1985) 159 CLR 636

Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106

Mutual Pools and Staff Pty Ltd v Commonwealth (1994) 179 CLR 155

Australian Tape Manufacturers Association Ltd v Commonwealth (1994) 176
CLR 480

Georgiadis v Australian and Overseas Telecommunications Corporation (1994) 179
CLR 297

Re Director of Public Prosecutions; Ex parte Lawler (1994) 179 CLR 270

Nintendo Co Ltd v Centronics Systems (1994) 181 CLR 134

Health Insurance Commission v Peverill (1994) 179 CLR 226

Section 51(xxxv)

R v Coldham; Ex parte Australian Social Welfare Union (1983) 153 CLR 297

R v Duncan; Ex parte Australian Iron and Steel Pty Ltd (1983) 158 CLR 535

Federated Clerks' Union (Aust) v Victorian Employers' Federation (1984) 154
CLR 472

Queensland Electricity Commission v Commonwealth (1985) 159 CLR 192

R v Ludeke; Ex Parte Queensland Electricity Commission (1985) 159 CLR 178

*R v Ludeke; Ex parte Australian Building Construction Employees and Builders
Labourers Federation* (1985) 159 CLR 636

Re Lee; Ex parte Harper (1986) 160 CLR 430

*Australian Building Construction Employees and Builders Labourers Federation v
Commonwealth* (1986) 161 CLR 88

Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd (1987) 163 CLR 117

*Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers Union
of Australia* (1987) 163 CLR 656

*Re Federated Storemen and Packers Union of Australia; Ex parte Wooldumpers
(Victoria) Limited* (1989) 166 CLR 311

O'Toole v Charles David Pty Ltd (1991) 171 CLR 232

Nationwide News Pty Ltd v Wills (1992) 177 CLR 1

Re Australasian Meat Industry Employees' Union; Ex parte Aberdeen Beef Co Pty Ltd
(1993) 176 CLR 154

Re State Public Services Federation; Ex parte Attorney-General (WA) (1993) 178 CLR
249

Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees (1994) 181 CLR 96

Re Australian Education Union; Ex parte Victoria (1995) 184 CLR 188

Ch III (excluding s 80)

Hammond v Commonwealth (1982) 152 CLR 188

Stack v Coast Securities (No 9) Pty Ltd (1983) 154 CLR 261

Hilton v Wells (1985) 157 CLR 57

Kirmani v Captain Cook Cruises Pty. Ltd. (No. 2) (1985) 159 CLR 461

R v Murphy (1985) 158 CLR 596

Crouch v Commissioner for Railways (Qld) (1985) 159 CLR 22

Attorney-General (NSW) v Commonwealth Savings Bank (1986) 160 CLR 315

Australian Building Construction Employees and Builders Labourers Federation v Commonwealth (1986) 161 CLR 88

Commonwealth v Evans Deakin Industries Ltd (1986) 161 CLR 254

Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd (1987) 163 CLR 117

Re Cram; Ex parte Newcastle Wallsend Coal Co. Pty. Ltd (1987) 163 CLR 140

Commonwealth v Brian Toohey (Unreported, High Court of Australia, Deane J, 8 November 1988).

Re Tracey; Ex parte Ryan (1989) 166 CLR 518

Mickelberg v The Queen (1989) 167 CLR 259

McWaters v Day (1989) 168 CLR 289

Harris v Caladine (1991) 172 CLR 84

Re Nolan; Ex parte Young (1991) 172 CLR 460

Polyukhovich v Commonwealth (1991) 172 CLR 501

Smith, Kline & French Laboratories v Commonwealth (1991) 173 CLR 194

Mellifont v Attorney-General (Qld) (1991) 173 CLR 289

Precision Data Holdings Ltd v Wills (1991) 173 CLR 167

Dietrich v The Queen (1992) 177 CLR 292

Chu Kheng Lim v Minister for Immigration (1992) 176 CLR 1

Leeth v Commonwealth (1992) 174 CLR 455

P v P (1994) 181 CLR 583

Re Tyler; Ex parte Foley (1994) 181 CLR 18

Owners of 'Shin Kobe Maru' v Empire Shipping Co Inc (1994) 181 CLR 404

Brandy v Human Rights and Equal Opportunity Commission (1995) 183 CLR 245

Re Dingjan; Ex parte Wagner (1995) 183 CLR 323

Grollo v Palmer (1995) 184 CLR 348

Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Qld) (1995) 184 CLR 620

Section 90

Hematite Petroleum Pty Ltd v Victoria (1983) 151 CLR 599

Evda Nominees Pty Ltd v Victoria (1984) 154 CLR 311

Gosford Meats Pty Ltd v New South Wales (1985) 155 CLR 368

Philip Morris Ltd v Commissioner of Business Franchises (Vic) (1989) 167 CLR 399

Coastace Pty Ltd v New South Wales (1989) 167 CLR 503

Harper v Minister for Sea Fisheries (1989) 168 CLR 314

Mutual Pools and Staff Pty Ltd v Federal Commissioner of Taxation (1992) 173
CLR 450

Capital Duplicators Pty Ltd v Australian Capital Territory (No 1) (1992) 177
CLR 248

Capital Duplicators Pty Ltd v Australian Capital Territory (No 2) (1993) 178
CLR 561

Rainsong Holdings Pty Ltd v Australian Capital Territory (1993) 178 CLR 634

Section 92

Ackroyd v McKechnie (1986) 161 CLR 60

Miller v TCN Channel Nine Pty Ltd (1986) 161 CLR 556

Cole v Whitfield (1988) 165 CLR 360

Bath v Alston Holdings Pty Ltd (1988) 165 CLR 411

Castlemaine Tooheys Ltd v South Australia (1990) 169 CLR 436

Barley Marketing Board (NSW) v Norman (1990) 171 CLR 182

Cunliffe v Commonwealth (1994) 182 CLR 272

Section 109

New South Wales v Commonwealth and Carlton (1983) 151 CLR 302

R v Duncan; Ex parte Australian Iron and Steel Pty Ltd (1983) 158 CLR 535

Belton v General Motors-Holden Ltd (1984) 154 CLR 632

University of Wollongong v Metwally (1984) 158 CLR 447

Gerhady v Brown (1985) 159 CLR 70

Smith v Smith (1985) 161 CLR 217

Australian Mutual Provident Society v Goulden (1986) 160 CLR 330

Commercial Radio Coffs Harbour v Fuller (1986) 161 CLR 47

Flaherty v Girgis (1986) 162 CLR 574

Breavington v Godleman (1988) 169 CLR 41

Union Steamship Co of Australia Pty Ltd v King (1988) 166 CLR 1

Mabo v Queensland (No 1) (1988) 166 CLR 186

McWaters v Day (1989) 168 CLR 289 ;*R v L* (1991) 174 CLR 379

Botany Municipal Council v Federal Airports Authority (1992) 175 CLR 453

P v P (1994) 181 CLR 583

Western Australia v Commonwealth (the Native Title Act Case) (1995) 183 CLR 373

Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Qld) (1995) 184 CLR 620

Section 117

Street v Queensland Bar Association (1989) 168 CLR 461

Goryl v Greyhound Australia Pty Ltd (1994) 179 CLR 463

Section 118

Breavington v Godleman (1988) 169 CLR 41

McKain v R W Miller & Company (South Australia) Pty Ltd (1991) 174 CLR 1

Stevens v Head (1993) 176 CLR 433

Goryl v Greyhound Australia Pty Ltd (1994) 179 CLR 463

Implied freedom of political communication

Nationwide News Pty Ltd v Wills (1992) 177 CLR 1

Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106

Theophanous v Herald & Weekly Times Ltd (1994) 182 CLR 104

Stephens v West Australian Newspapers Limited (1994) 182 CLR 211

Cunliffe v Commonwealth (1994) 182 CLR 272

Appendix C DEANE'S CONSTITUTIONAL CASES: BY NAME

- Ackroyd v McKechnie* (1986) 161 CLR 60
- Air Caledonie International v Commonwealth* (1988) 165 CLR 462
- Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth* (1987) 162 CLR 271
- Attorney-General (NSW) v Commonwealth Savings Bank* (1986) 160 CLR 315
- Australian Building Construction Employees and Builders Labourers Federation v Commonwealth* (1986) 161 CLR 88
- Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106
- Australian Mutual Provident Society v Goulden* (1986) 160 CLR 330
- Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480
- Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182
- Bath v Alston Holdings Pty Ltd* (1988) 165 CLR 411
- Belton v General Motors-Holden Ltd* (1984) 154 CLR 632
- Botany Municipal Council v Federal Airports Authority* (1992) 175 CLR 453
- Bourke v State of New South Wales* (1990) 170 CLR 276
- Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245
- Breavington v Godleman* (1988) 169 CLR 41
- Brown v The Queen* (1986) 160 CLR 171
- Capital Duplicators Pty Ltd v Australian Capital Territory (No 1)* (1992) 177 CLR 248
- Capital Duplicators Pty Ltd v Australian Capital Territory (No 2)* (1993) 178 CLR 561
- Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436
- Cheatle v The Queen* (1993) 177 CLR 541
- Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1

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- Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1982) 154 CLR 120
- Clunies-Ross v Commonwealth* (1984) 155 CLR 193
- Coastace Pty Ltd v New South Wales* (1989) 167 CLR 503
- Cole v Whitfield* (1988) 165 CLR 360
- Commercial Radio Coffs Harbour v Fuller* (1986) 161 CLR 47
- Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254
- Commonwealth v Tasmania ('Tasmanian Dam Case')* (1983) 158 CLR 1
- Crouch v Commissioner for Railways (Qld)* (1985) 159 CLR 22
- Cunliffe v Commonwealth* (1994) 182 CLR 272
- D.M.W. v C.G.W.* (1982) 151 CLR 491
- Davis v Commonwealth* (1988) 166 CLR 79
- Deputy Commissioner of Taxation v Truhold Benefit Pty Ltd* (1985) 158 CLR 678
- Deputy Commissioner of Taxation v State Bank (N.S.W.)* (1991) 174 CLR 219
- Dietrich v The Queen* (1992) 177 CLR 292
- Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311
- Federated Clerks' Union (Aust) v Victorian Employers' Federation* (1984) 154 CLR 472
- Fencott v Muller* (1983) 152 CLR 570
- Fisher v Fisher* (1986) 161 CLR 438
- Flaherty v Girgis* (1986) 162 CLR 574
- Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297
- Gerhady v Brown* (1985) 159 CLR 70
- Goryl v Greyhound Australia Pty Ltd* (1994) 179 CLR 463
- Gosford Meats Pty Ltd v New South Wales* (1985) 155 CLR 368
- Grollo v Palmer* (1995) 184 CLR 348
- Hammond v Commonwealth* (1982) 152 CLR 188
- Harper v Minister for Sea Fisheries* (1989) 168 CLR 314
- Harris v Caladine* (1991) 172 CLR 84

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- Health Insurance Commission v Peverill* (1994) 179 CLR 226
- Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599
- Hilton v Wells* (1985) 157 CLR 57
- Horta v Commonwealth* (1994) 181 CLR 183
- In the Marriage of Cormick* (1984) 156 CLR 170
- Kingswell v The Queen* (1985) 159 CLR 264
- Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351
- Kirmani v Captain Cook Cruises Pty. Ltd. (No. 2)* (1985) 159 CLR 461
- Leeth v Commonwealth* (1992) 174 CLR 455
- Mabo v Queensland (No 1)* (1988) 166 CLR 186
- Mabo v Queensland (No 2)* (1992) 175 CLR 1
- MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622
- McKain v R W Miller & Company (South Australia) Pty Ltd* (1991) 174 CLR 1
- McWaters v Day* (1989) 168 CLR 289
- Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289
- Mickelberg v The Queen* (1989) 167 CLR 259
- Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556
- Mutual Pools and Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155
- Mutual Pools and Staff Pty Ltd v Federal Commissioner of Taxation* (1992) 173
CLR 450
- Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1
- New South Wales v Commonwealth ('Incorporation Case')* (1990) 169 CLR 482
- New South Wales v Commonwealth and Carlton* (1983) 151 CLR 302
- Nintendo Co Ltd v Centronics Systems* (1994) 181 CLR 134
- Nolan v Minister of State for Immigration and Ethnic Affairs* (1988) 165 CLR 178
- Northern Land Council v Commonwealth* (1986) 161 CLR 1
- Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176
CLR 555
- O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232

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- Owners of 'Shin Kobe Maru' v Empire Shipping Co Inc* (1994) 181 CLR 404
- P v P* (1994) 181 CLR 583
- Philip Morris Ltd v Commissioner of Business Franchises (Vic)* (1989) 167 CLR 399
- Polyukhovich v Commonwealth* (1991) 172 CLR 501
- Port McDonnell Professional Fishermen's Association v South Australia* (1989) 168 CLR 340
- Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167
- Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192
- Queensland v Commonwealth ('Tropical Rainforests Case')* (1989) 167 CLR 232
- R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297
- R v Cook; Ex parte C* (1985) 156 CLR 249
- R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535
- R v L* (1991) 174 CLR 379
- R v Ludeke; Ex parte Australian Building Construction Employees and Builders Labourers Federation* (1985) 159 CLR 636
- R v Ludeke; Ex Parte Queensland Electricity Commission* (1985) 159 CLR 178
- R v Murphy* (1985) 158 CLR 596
- R v Pearson; Ex parte Sipka* (1983) 152 CLR 254
- R v Smithers; Ex parte McMilian* (1982) 152 CLR 477
- Rainson Holdings Pty Ltd v Australian Capital Territory* (1993) 178 CLR 634
- Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96
- Re Australasian Meat Industry Employees' Union; Ex parte Aberdeen Beef Co Pty Ltd* (1993) 176 CLR 154
- Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188
- Re Cram; Ex parte Newcastle Wallsend Coal Co. Pty Ltd* (1987) 163 CLR 140
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- Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323
- Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270
- Re F; Ex parte F* (1986) 161 CLR 376

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