2006 Sir Maurice Byers Lecture

The implications of the Constitution

Delivered by D F Jackson QC* on 30 March 2006

Introduction

It was in 1974 that I first met Maurice Byers. He was solicitor-general for the Commonwealth and I was a minnow, junior counsel for Queensland in a number of constitutional cases arising from the initiatives of Mr Whitlam's government.

The first group of those cases was argued in 1975. His skills as an advocate were obvious and impressive, his knowledge of the Constitution instructive. I took silk shortly afterwards and appeared on quite a number of occasions against him, and sometimes for similar interests, but unfortunately I did not ever have the privilege of appearing with him. I had a lot to do with him, too, when he was chairman of the Constitutional Commission and I was chairman of one of its advisory committees. We always got on well, he took with good humour the badinage of a youthful Queenslander – a term which he used quite frequently but not always as one of endearment – and he was kind enough to put some constitutional work my way.

Maurice Byers was a big man, and a man of big ideas. He could visualise the broader picture and the longer picture, and he could utilise the big sweep. One thing that he appreciated well was that whilst we have a written Constitution, the words cannot tell you everything. Some things have to be implied. How and what are the subject of this lecture.

What are constitutional implications?

First a question of definition. Obviously enough 'constitutional implications' refers to matters which are not dealt with by the express words of the Constitution. But not every principle or rule of conduct which deals with issues which might be regarded as 'constitutional' should be regarded as a constitutional implication.

I would exclude immediately some constitutional conventions. Some aspects of the relationship between the houses of parliament and their members, of the appointment, resignation and removal of ministers, of the role of the governor-general, and the position of the prime minister and cabinet are dealt with by provisions of the Constitution, or statutes made pursuant to constitutional provisions, but many aspects are not, being regulated by 'conventions'. Some such conventions may in reality be rules of law[1], but if compliance with them is not justiciable, whilst a political scientist might describe them as implications of, or from, the Constitution, a lawyer, I think, would not.

A second area which reflects implications of the Constitution concerns the approaches to interpretation of the Constitution.

The question arises particularly, though not only, in relation to the legislative powers of the Commonwealth under s51 of the Constitution, which gives it the power to legislate with respect to thirty-nine enumerated subjects. Because valid Commonwealth legislation will render inoperative inconsistent state legislation, the approach taken to the legislative powers in s51 will affect the exercise or potential exercise of state legislative powers.

Jackson QC under the watchful eye of Sir Maurice Byers.

That gives rise to a number of questions of significance. Should the subject matter of a head of Commonwealth power be interpreted widely or narrowly? Is the meaning of the words fixed as at federation, or does it alter as concepts change? Is the presence of one head of power to be regarded as limiting the ambit of another? Is the validity of a law to be determined by looking at its operation as a matter of form, or of substance, or both? Other questions arise in relation to provisions other than s51: should constitutional prohibitions be read widely or narrowly?

It is possible, of course, to categorise issues of this kind as simply being questions of interpretation, and no more. But I think that does not give account sufficiently to the fact that the adoption of one interpretive approach or another does involve the making of an assumption as to the way in which the Constitution *should* work. That there is a relationship between the approach to interpretation and implications more commonly so called can be seen directly in the *Melbourne Corporation* doctrine, to the effect that the Commonwealth's legislative powers cannot be so exercised as to effect a sufficiently significant impairment of the existence of a state or the exercise by it of its powers. The need to apply such a doctrine will depend on the ambit of the legislative power in question, absent such a restriction.

What then are the characteristics of constitutional implications? I suppose that the simplest definition is that such an implication is:

- a principle of law derived by the courts from the Constitution which has constitutional force and effect; but
- which is not set out in the text of the Constitution in express terms.

Those two aspects mean that constitutional implications are amongst the most controversial issues in constitutional law.

* I would like to acknowledge the considerable assistance of Patrick Flynn, barrister.

One thing that he appreciated well was that whilst we have a written Constitution, the words cannot tell you everything.

First, because a constitutional implication once made has the force and effect of an express constitutional provision, it means that that principle is entrenched, subject only to a subsequent High Court overruling or recasting of the decision, or to amendment by referendum. Thus the implication *In Re Wakim, Ex parte McNally*[2] that federal courts cannot be invested with state jurisdiction has the same legal effect as if those words appeared in the text of the Constitution. The cross-vesting scheme there under consideration could only be resuscitated by a referendum or if the High Court could be persuaded to re-open and overrule *Re Wakim*.[3]

These are important consequences. They occur in a setting where, because the principle the subject of the implication is *not* in the text of Constitution, there is immediately room for argument as to whether such a principle is properly the subject of an implication, and as to what exactly it should be. Whether a particular constitutional implication should be made will almost invariably be a question about which reasonable judges, constitutional lawyers and citizens can reasonably differ, sometimes with unreasonable vigour and quite unreasonably.

Secondly, because a constitutional implication is something 'not set out in the Constitution in express terms', there can be significant debate about where the process of determining the content of an express term ends and the process of making an implication begins, an issue also related to the propriety of making an implication.

Sue v Hill[4] is an illustration of determining the content of an express term of the Constitution, as distinguished from drawing an implication. The High Court was concerned with s44(i) of the Constitution which disqualifies from membership of either house of the federal parliament a person who is a citizen of a foreign power. The issue was whether 'foreign power' in 1999 included the United Kingdom, bearing in mind the relationship of the Commonwealth of Australia to the United Kingdom as at federation, and that the Constitution is itself a statute passed by the United Kingdom Parliament. *Sue v Hill* raised the issue of the difference between meaning and its application, what is sometimes called connotation and denotation.[5] It was held that while in 1901 the United Kingdom was not a foreign power, developments since that time meant that in 1999 the United Kingdom was a foreign power. But, on any view, the case was an example of determining how the express term 'foreign power' in section 44(i) of the Constitution[6] was to be construed.

An example a little further along the continuum from construction of an express term of the Constitution towards an implication from it is *Cheatle v The Queen*.[7] In Cheatle, the question was whether the words 'the trial on indictment of any offence against any law of the Commonwealth shall be by jury' in section 80 of the Constitution meant that the jury's verdict must be unanimous. The High Court expressed the issue in the case as being whether section 80 'carries with it a requirement' that a conviction be unanimous. There is a respectable argument that this question actually involves determining whether the words 'and any conviction shall be after a unanimous verdict by the jurors' should be *implied* into section 80.

Constitutional implications, however, more typically involve higher levels of abstraction, and wider considerations, to arrive at the subject of the implication. Again I use an example.

In *Hwang v Commonwealth*[8] McHugh J, sitting as a single justice on a strike out application, had to decide whether the parliament of the Commonwealth had power to enact the *Australian Citizenship Act 2005*. The question arose because there is no section 51 head of power relating to 'citizenship' in express terms, although there is an express power in section 51 to make laws with respect to 'naturalization and aliens' and an express power to make laws with respect to 'immigration'.

It was held that the parliament did have the power to enact the Act, there being two independent bases for that conclusion:

- First, the 'indisputable fact that Australia has emerged has an independent sovereign nation' was itself sufficient to authorize the parliament with respect to citizenship (which, McHugh J held, happened in 1942 at the latest, upon the adoption of the *Statute of Westminster*) given that the parliament has implied legislative powers 'arising from its nature and status as a polity'.[9]
- Secondly, the power arose by implication partly[10]:
  - out of the references to 'the people of the Commonwealth', a phrase which is found in covering clause 5, section 24 and section 25 of the Constitution;
  - out of the parliament's express powers to make laws with respect to immigration, naturalization and aliens, and thus to define who were the 'people of the Commonwealth'; and
  - out of the express and implied incidental powers of the parliament to make laws governing or affecting matters that are incidental or ancillary to the subject matter of other grants of power.

The first such basis – the sovereign nation concept – is on any view an implication. No part of the text of the Constitution expressly refers to the legislative powers of the parliament arising from its nature and status as a polity. Nevertheless that has been recognised as a source of power since the *Communist Party*[11] case in 1951. I mention it later.

The second basis on which McHugh J found the Citizenship Act valid is still an implication, but one more closely derived from the text of particular provisions of the Constitution, and hence more closely related to the construction of express terms of the Constitution. It illustrates the difficulty in drawing a bright line

between construction of an express term and deriving an implication from the text of specific provisions

Theories of implication in Australian constitutional law

I move next to the tests which the High Court has applied in determining whether implications may be made. There is a preliminary question: should implications be made at all?

It may be thought obvious to say that implications are needed because it is impossible for the framers of any legal document to provide, in express terms, for every eventuality.[12] There was, however, a time in Australian constitutional history following the *Engineers' Case*[13] when, as Sir Owen Dixon pointed out in *West v Commissioner of Taxation (NSW)*[14], a notion seemed to gain currency that no implications could be made in interpreting the Constitution because this was contrary to the *Engineers'* Case.

The Engineers' Case, decided in 1920, saw the rejection of the proposition that the Commonwealth's legislative powers in section 51 must be construed in accordance with the 'reserved state powers' doctrine. That doctrine had been to the effect that because section 107 of the Constitution saved the powers of the state parliaments as they were at federation, it was necessary to read the Commonwealth's section 51 heads of legislative power narrowly so as to avoid, if possible, intruding into an area 'reserved' for state powers. The court in *Engineers'* was very clear that:

> The doctrine of 'implied prohibition' finds no place where the ordinary principles of constructions are applied so as to discover in the actual terms of the instrument their expressed or necessarily implied meaning.

You will note immediately the reference to 'expressed or necessarily implied' meaning. It is evident from this passage that *Engineers'* did not reject the process of making implications into the Constitution, but merely stated that the particular implication being contended for could not be discerned from the Constitution; that is, there was no implication that particular areas of legislative power were 'reserved' for the states, and therefore no implied prohibition on the Commonwealth legislating in those areas.

In *West v Commissioner of Taxation (NSW)*[15], Dixon J commented in strong terms that Engineers' did not hold that no implications could be made in the Constitution, and that any rule that no implications were permitted 'would defeat the intention of any instrument, but of all instruments a written constitution seems the last to which it could be applied'. Eight years later, in 1945, in *Australian National Airways Pty Limited v The Commonwealth*[16], he again stressed that the Constitution was an instrument of government and said:

> We should avoid pedantic and narrow constructions in dealing with an instrument of government and I do not see why we should be fearful about making implications.

It is now clear from those and other cases that constitutional implications are part of Australian constitutional law. What then are the tests by which such implications have been drawn?

I first refer to 'necessity'. The passage noted earlier from *Engineers'* refers to meanings which were 'necessarily implied' from the *actual terms* of the Constitution. 'Necessity' is an established, though not the only, test of implication in Australian constitutional law.

One reason, I think, why such a test was applied was by analogy with the tests adopted for implying terms in contracts, and in the interpretation of statutes.[17] It is an approach with which lawyers are familiar and, as an established approach to interpretation, it could be pointed to as justification for making an implication.

Another, somewhat related, reason was that a more 'literalist' approach to constitutional interpretation was taken in earlier days. To adopt 'necessity' as a criterion implied that the High Court had no choice about making the particular implication, thus giving the implication greater 'legitimacy'.

As I have suggested, the adoption of any particular constitutional implication is subject to the criticism that it represents the choice of the members of the High Court at the time the question arises for decision, rather than being something which is truly 'already there' in the Constitution. Constitutional entrenchment of a doctrine can be an exception to the principle of parliamentary sovereignty, and is open to an objection that it is anti-democratic unless it can be rigorously justified. Sir Victor Windeyer was hardly a naïve man but even he felt it necessary to say, in *Victoria v The Commonwealth* (the '*Payroll Tax Case*')[18] that 'our avowed task is simply the revealing or uncovering of implications that are already there'.

Despite such attractiveness as the 'necessarily implied from the express terms' test might have from a legitimacy point of view, it is clear that other criteria have been used by the High Court to give effect to implications. This was recognised by Sir Anthony Mason in the *Australian Capital Television* Case.[19]

There he pointed out that several important implications had been made which were not necessarily implied from the actual terms of the Constitution, as the test in *Engineers'* suggested was necessary. For example, he considered that the implied prohibition against the Commonwealth making a law which would prevent a state from continuing to exist, or destroy or curtail its capacity to function as a government (as first recognised in *Melbourne Corporation v The Commonwealth (The State Banking Case)*[20] and confirmed in later cases such as *Queensland Electricity Commission v Commonwealth*[21]) was derived from the 'federal nature of the Constitution' rather than being necessarily implied by the Constitution's actual words.

He went on to say that it might not be right to say that no implication will be made unless it is necessary, and that in cases where the implication is sought to be derived from the actual terms of the Constitution, it may be sufficient that the relevant intention is manifested according to accepted principles of interpretation, but that where the implication was structural rather than textual the term sought to be implied must be logically, or practically, necessary for the preservation of the integrity of that structure.[22]

Such a classification divided implications into two classes, textual implications where necessity was not the only criterion, and structural implications, where it was. I shall come in a moment to whether these tests establish the outer limits of when implications might be drawn, but I should first say a little more about each.

Textual implications shade, of course, into questions of construction of express provisions. That is particularly so where the question is really based on a single provision of the Constitution, as in the *Cheatle* example given earlier.

The test in such a case is whether the implication conforms to the accepted principles of interpretation, that is, principles of statutory interpretation, modified as appropriate to recognise that the instrument being construed is no ordinary statute but is a Constitution.[23] The issue is then closely related to construction of an express term.[24]

Structural implications, on the other hand, cannot be tied to specific words in specific sections (or if they can, must be tied to many sections), but depend on the structure of the Constitution. The most well-established structural implication in the Australian Constitution is the basal separation of legislative, executive and judicial powers. As Dixon CJ, McTiernan, Fullagar and Kitto JJ said in *R v Kirby; Ex parte Boilermakers' Society of Australia*[25]:

> If you know nothing of the history of the separation of powers, if you made no comparison of the American instrument of government with ours, if you were unaware of the interpretation it had received before our Constitution was framed according to the same plan, you would still feel the strength of the logical inferences from Chaps I, II and III and the form and contents of ss1, 61 and 71. It would be difficult to treat it as a mere draftman's arrangement. Section 1 positively vests the legislative power of the Commonwealth in the parliament of the Commonwealth. Then s61, in exactly the form, vests the executive power of the Commonwealth in the Crown. They are counterparts of s71 which in the same way vests the judicial power of the Commonwealth in this court, the federal courts the parliament may create and the state courts it may invest with federal jurisdiction. This cannot all be treated as meaningless and of no legal consequence.

It is coming to be recognised, I think, that some constitutional implications may be made without satisfying either of the tests already referred to.

APLA Ltd v Legal Services Commissioner (NSW)[26], decided in September last year, involved a challenge to the constitutional validity of a regulation made under the *Legal Profession Act 1987* (NSW), prohibiting lawyers advertising their services in relation to personal injury claims. It was part of the overall reforms made in New South Wales in response to what was seen as the 'insurance' crisis. It was common ground in the proceedings that the regulation purported to prohibit advertising by lawyers of their services in relation to personal injury causes of action provided under federal law, including the Trade Practices Act and class actions under the Federal Court of Australia Act, as well as causes of action arising at common law or under New South Wales legislation.

The challenge was made on four grounds, the one of present relevance being that the regulation was inconsistent with Chapter III of the Constitution. The challenge on that ground, was rejected 5-2, the dissentients being McHugh J and Kirby J. McHugh J (at [73]) stated that Chapter III gives rise to 'certain implications' and

> those implications provide a shield against any legislative forays that would harm or impair the nature, quality and effects of federal jurisdiction and the exercise of federal judicial power conferred or invested by the Constitution or laws of parliament of the Commonwealth.

One of the particular implications was that the states could not enact legislation to alter or interfere with the working of the federal judicial system set up by Chapter III. McHugh J held that:

> the provision of legal advice and information concerning federal law should be seen as indispensable to the exercise of the judicial power of the Commonwealth and protected by Ch III;

and that the Regulation at issue infringed that rule.

Kirby J agreed with that result although his reasoning was a little different. He considered that the *Lange* protection, to which I shall come, covered communications relating to the judicial branch of government as well as communications relating to the executive and legislative branches of governments.

The difference between McHugh and Kirby JJ and three judges of the majority (Gleeson CJ and Heydon J, and Gummow J), seemed in the end to turn on what was required by the nature of judicial power, rather than by any dispute as to the correct method of constitutional interpretation to employ. Those three majority justices seemed to contemplate an implied constitutional protection derived from Chapter III for communications between lawyers and their clients once the lawyer/client relationship was in existence, but not before. The basis upon which that protection was contemplated to exist is of interest.

Gleeson CJ and Heydon J said:

> [30] The rule of law is one of the assumptions upon which the Constitution is based. It is an assumption upon which the Constitution depends for its efficacy. Chapter III of the Constitution, which confers and denies judicial power, in accordance with its express terms and its necessary implications, gives practical effect to that assumption. The effective exercise of judicial power, and the maintenance of the rule of law, depend upon the providing of professional legal services so that citizens may know their rights and obligations, and have the capacity to invoke judicial power.[27]

They said, however:

> [30] … The regulations in question are not directed towards the providing by lawyers of services to their clients. They are directed towards the marketing of their services by lawyers to people who, by hypothesis, are not their clients.
>
> [32] … It is not self-evident that the public interest requires an unrestricted capacity on the part of lawyers to promote their services.

> More to the point, it is not required by the Constitution. It is a topic on which the Constitution has nothing to say in express terms. If it is said to be a matter of implication, then it is necessary to identify, with reasonable precision, the suggested implication. This has not been done.
>
> [33] ... There is nothing in the text or structure of the Constitution, or in the nature of judicial power, which requires that lawyers must be able to advertise their services. It may or may not be thought desirable, but it is not necessary.[28]

They thus refer to three possible sources of the implications: the text of the Constitution, the structure of the Constitution (being Mason CJ's two limbs), and also 'the effective exercise of judicial power, and the maintenance of the rule of law'. But the nature of 'judicial power' is not fully described in the Constitution, and the 'rule of law' is not mentioned at all. Chapter III refers to the 'judicial power of the Commonwealth', but does not describe what judicial power is. Indeed, in *Nicholas v The Queen*[29] , Gummow J referred to the judgment of Windeyer J in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*[30] to the effect that the concept of judicial power transcended 'purely abstract conceptual analysis' and 'inevitably attracts consideration of predominant characteristics', together with 'comparison with the historic functions and processes of courts of law'. He referred also to *R v Humby; Ex parte Rooney*[31] where Mason J said of the notion of '[u]surpation of the judicial power' by infringement of Ch III that it was a concept 'which is not susceptible of precise and comprehensive definition'. Similarly, in *Polyukhovich v The Commonwealth*[32], Deane J said that the Constitution intended that the judicial power of the Commonwealth would be exercised by Chapter III courts 'acting as courts with all that notion essentially requires'.

In the APLA Case, Gummow J said[33] that the doctrines respecting the judicial power of the Commonwealth were derived from the actual terms found in Ch III. He went on to quote from the

Boilermakers' Case joint judgment:

> No part of the judicial power can be conferred in virtue of any other authority or otherwise than in accordance with the provisions of Ch III. The fact that affirmative words appointing or limiting an order or form of things may have also a negative force and forbid the doing of the thing otherwise was noted very early in the development of the principles of interpretation. In Ch III we have a notable but very evident example.[34]

He then said that the formulation of principle in that joint judgment also involved 'very general considerations' which 'explain the provisions of Ch III of the Constitution', and that accordingly, the body of authority concerned with judicial power did not readily 'observe any dichotomy that may have been posited by Mason CJ in *Australian Capital Television*'[35] and concluded:

> It is neither of the essential nature of a court nor an essential incident of the judicial process that lawyers advertise. [The impugned Regulation] operates well in advance of the invocation of jurisdiction. It does not prevent prospective litigants from retaining lawyers, nor prevent lawyers or others from publishing information relating to personal injury legal services and the rights and benefits conferred by federal law. [36]

There thus appears to be recognition, by at least Gleeson CJ and Heydon J, and seemingly Gummow J, that there is a general implied prohibition upon legislation which abrogates any right which is essential for the effective exercise of judicial power, without the implication also needing to meet the test of being necessarily implied from the text or structure of the Constitution. The word 'essential' may be necessity in another guise, but the essentiality is tied to a concept at a high level of abstraction – the nature of judicial power, rather than to the text or structure of the Constitution.

Of course, it may be argued that this is merely a question of construction of the express term 'judicial power' in section 71 (a textual implication), and the continued effective exercise of judicial power is itself necessarily implied from the structure of the Constitution (a structural implication), and that these matters are so obviously the source of the implications derived from 'judicial power' that it is not necessary to recite the incantation of 'text and structure' to derive the implication in each case. But the point is that there does seem to be a negative implication derived from the nature of 'judicial power' as a free-standing concept.

The other interesting point revealed by *APLA* is that arguably Hayne J, and certainly Callinan J, were not convinced that questions relating to the nature of judicial power should be the subject of any real or perceived relaxation of the requirement that any implication be implied from the text or necessarily implied from the structure of the Constitution.

Hayne J discussed Mason CJ's criteria in *Australian Capital Television* for determining whether an implication could be made in the Constitution in the two categories of case (textual and

structural) and said[37] that it did not need to be decided whether it was necessary to show logical or practical necessity in every case where the structure of the Constitution was said to carry an implication. Nor was it necessary to decide whether attempting to distinguish between structural and textual bases for an implication (for the purpose of articulating different tests for when an implication is to be drawn) had difficulties that are insuperable. Rather he regarded the critical point as being that any implication had to be 'securely based'. Always, the question must be: what is it in the text and structure of the Constitution that founds the asserted implication?

Callinan J strongly favoured a necessity approach. He said:

> [470] The particular, indeed rigorous, application of the 'necessity rule' to the Australian Constitution is required by reason of a number of features unique to our Constitution and its composition: the prolonged and fully recorded debates and deliberations preceding it to which modern lawyers have ready access and which show clearly, in most instances, why proposals were adopted or discarded; the substantial public acceptance in Australia of the Constitution before its passage through the parliament of the United Kingdom; its generally comprehensive and explicit language; the availability of one, and one only mechanism for its amendment, a referendum under s128; the reluctance, in many referenda of the people of Australia to change it; and, despite the last its enduring efficacy.
>
> [471] A case of this kind, in which the question posed, among other things, as to the expansiveness of the power of the Court itself, and the impact of its decisions upon the respective polities of the Federation, is an occasion for especial caution and restraint.[38]

May I note in relation to the tests to be applied that one of the decisions of the High Court in which Sir Maurice Byers' advocacy was successful, albeit delivered to a not unreceptive High Court, was *The Commonwealth v Queensland*[39] (the 'Queen of Queensland' Case) in which Sir Johannes Bjelke Peterson's government had enacted legislation, the *Appeals and Special Reference Act 1973*, to enable matters, including constitutional matters, to go to the Privy Council otherwise than via the High Court.

I shall not, of course, notwithstanding the passage of years, say who gave advice to the premier that the law would be held valid by the High Court. Suffice it to say that it was not those who had to appear to support it, but rather persons of a more academic bent, not resident in this country.

The Appeals and Special Reference Act was held invalid, but it is interesting to note that the principal judgment, that of Sir Harry Gibbs, referred[40] to the legislation as violating 'the principles that underlie Ch III'. He said that it would be 'contrary to the inhibitions which, if not express, are clearly implied in Ch. III.' The principle underlying Chapter III, it was said, was that questions arising as to the limits of Commonwealth and state powers, having a peculiarly Australian character, and being of fundamental concern to the Australian people, should be decided finally in an Australian Court, the High Court of Australia. Some of that might be described as derived from textual analyses. Some might be described as based on structural considerations. What is interesting is that a relatively declamatory statement of constitutional position was stated at the time to be founded on principles underlying Chapter III.

Constitutional law is an area which is dynamic, rather than static. Constitutional implications may derive from concepts (such as 'judicial power'), from negatives or positive implications from parts of the text, and from 'necessary' implications from the structure. Views change as new cases present themselves for decision. I think it possible that a broader, more overall, test may be adopted, perhaps akin to that mentioned by Hayne J, namely that the implication must be 'securely based' – always with the qualification (useful for 'legitimacy') that an implication must be 'founded in the text and structure' of the Constitution.

Some implications

Let me attempt to list the more significant implications which have been, sometimes might be, drawn from the Constitution. I shall start with Chapter III, the judiciary chapter, some of the relevant implications from which already having been mentioned.

Implied prohibition upon state jurisdiction being vested in federal courts

The negative implication against state jurisdiction being vested in federal courts which was held to exist in *Re Wakim, Ex parte McNally*[41] may perhaps be regarded as a textual implication, a negative implication deriving from the terms expressly used. In one sense, the negative implication arose inexorably from a textual conclusion reached as early as 1921 in *Re Judiciary and Navigation Acts*[42], i.e. that Chapter III was the exclusive source for vesting judicial power in Chapter III courts. As Chapter III conferred the power of vesting jurisdiction on federal courts only on the Commonwealth parliament, it followed that a state parliament could not validly confer jurisdiction on a federal court.

It is interesting that although the decision in *Re Wakim* attracted criticism on the grounds that it was inconvenient for 'co-operative federalism', or wrong as a matter of technical construction[43], one criticism which was not levelled at *Re Wakim* to any significant extent was that the High Court had usurped its proper judicial role. That is because of the greater 'legitimacy' of textual implications.

Inability of a state to confer constitutional jurisdiction on the Privy Council

This is the *Queen of Queensland Case* issue. It is no longer a live issue since the abolition of appeals to the Privy Council.[44]

Continued existence of the state supreme courts

Another implication is that of the continued existence of the state supreme courts. This is said to be implied from section 73(ii) of the Constitution, which gives a right of appeal from the Supreme Court of each state to the High Court. The implication arises because the right of appeal would be rendered nugatory if the Constitution permitted a state to abolish its Supreme Court.[45]

Implications from the nature of judicial power

The following implications arise in the Constitution from the nature of 'judicial power':

- That the judiciary shall be absolutely independent.
- An implied prohibition against parliament passing a bill of attainder.[46]
- An implied prohibition against Commonwealth laws authorising detention otherwise than by curial order, where that detention is properly characterized as punitive rather than incidental to a section 51 head of power.[47]
- An implied prohibition against state courts invested with federal jurisdiction from acting in a way which would undermine public confidence in the judicial functions of that court, such as by being seen as being party to and responsible for a political decision of the executive government.[48] This is, of course, the holding in *Kable v Director of Public Prosecutions (NSW)*, one of Sir Maurice Byers' forensic triumphs.

Possible implications arising from the rule of law

A possibly fertile source for future implications may derive from Gleeson CJ and Heydon J's citation in *APLA*, with approval, of Sir Owen Dixon's statement in the *Communist Party*[49] case that the rule of law is one of the assumptions upon which the Constitution is based, and their statement that it is an assumption 'upon which the Constitution depends for efficacy'. Sir Owen Dixon had said:

> it is government under the Constitution and that is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption.

Gleeson CJ, writing extra-judicially, has helpfully collected statements by High Court Justices of matters said to be required by the principle of the rule of law, some of which are[50]:

- that judicial decisions are to be made according to legal standards rather than undirected considerations of fairness[51];
- that citizens have a right to privileged communications with legal advisers[52];
- that the content of the law should be accessible to the public[53];
- that access to the courts should be available to citizens who seek to prevent the law from being ignored or violated, subject to reasonable requirements as to standing[54];
- that courts have a duty to exercise a jurisdiction which is regularly invoked[55]; and
- that the criminal law should operate uniformly in circumstances which are not materially different.[56]

No doubt there are other aspects. As I have said constitutional law is dynamic, not static.

Continued existence and functioning of the states

The relative importance of the states has diminished markedly since federation. Some of this is due to the financial dependence of the states on Commonwealth revenues, but much is due to the greater exercise by the Commonwealth of its legislative powers.

Melbourne Corporation dealt with Commonwealth legislation which purported to direct that state governments use only the Commonwealth Bank for banking business. The structural implication which saw that law being held void, as later explained by Mason J in *Queensland Electricity Commission v The Commonwealth*[57] had two elements:

- an implied prohibition against discrimination which involved placing on the states special burdens or disabilities (as developed by Dixon J in *Melbourne Corporation*); and
- an implied prohibition against laws of general application which operate to destroy or curtail the continued existence of the states or their capacity to function as governments (as held by Rich J and Starke J in *Melbourne Corporation*).

The manner in which the *Melbourne Corporation*[58] structural implication was derived was described by Dixon J as:

> but a consequence of the conception upon which the Constitution is framed. The foundation of the Constitution is the conception of a central government and a number of state governments centrally organized. The Constitution predicates their continuing existence as independent entities. Among them it distributes the powers of governing the country. The framers do not appear to have considered that power itself forms part of the conception of a government. They appear rather to have conceived of the states as bodies politic whose existence and nature are independent of the powers allocated to them. The Constitution on this footing proceeds to distribute the power between state and Commonwealth and to provide for their inter-relation, tasks performed with reference to the legislative powers chiefly by ss51, 52, 107, 108 and 109.

These tests can be difficult to satisfy, as the *Native Title Act Case (Western Australia v The Commonwealth*[59]) demonstrates.

In more recent cases a question has arisen whether there are in reality two tests, namely:

> whether, looking to the substance and operation of the federal laws, there has been, in a significant manner, a curtailment or interference with the exercise of state constitutional power.[60]

Implied freedom of communication on political and government matters

The High Court was subjected to a good deal of criticism as to its proper judicial role as a result of its decisions in *Nationwide News Pty Ltd v Wills*[61], *Theophanous v Herald and Weekly Times Ltd*[62] *and Australian Capital Television v The Commonwealth*.[63] The implied freedom of political communication held to exist in those cases is an example of an implication which has retreated to somewhat less controversial shores, by moving to become more a textual, perhaps structural also, implication.

The implied freedom of political communication there held to exist was drawn from the principle of representative government, arguably an unexpressed assumption underlying the Constitution. As stated by Deane and Toohey JJ in *Nationwide News*:

> The implication of the Constitution which is of central importance in the present case flows from the third of these general doctrines of government which underlie the Constitution and form part of its structure. That doctrine can be conveniently described as the doctrine of representative government, that is to say, of government by representatives directly or indirectly elected or appointed by, and ultimately responsible to, the people of the Commonwealth.[64]

Following the disquiet at the perceived use of a somewhat free-standing concept of 'representative government' to make implications in the Constitution, the Court in a unanimous judgment in *Lange v Australian Broadcasting Corporation*[65] re-cast the reasoning underlying the implied freedom of political communication so as to anchor the reasoning back more firmly to the text and structure of the Constitution. There was a focus in *Lange* on specific sections of the Constitution:

> Sections 7 and 24 and the related sections of the Constitution necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors.
>
> In addition, the presence of s128, and of ss6, 49, 62, 64 and 83, of the Constitution makes it impossible to confine the receipt and dissemination of information concerning government and political matters to an election period. Those sections give rise to implications of their own. Section 128, by directly involving electors in the states and in certain Territories in the process for amendment of the Constitution, necessarily implies a limitation on legislative and executive power to deny the electors and their representatives information concerning the conduct of the executive branch of government throughout the life of a federal parliament.[66]

The *Lange* test for determining whether the implied freedom of political communication is now to the effect that a law which effectively burdens freedom of communication about government or political matters by its terms, operation or affect will be invalid if the law is not reasonably appropriate and adopted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.[67]

As McHugh J said in *Coleman v Power*[68], of the implied freedom of political communication, as reformulated in *Lange*:

> the text and structure of the Constitution enable the court to determine whether the freedom has been infringed without resort to political or other theories external to the Constitution.

Principles of interpretation

I mentioned earlier that the principles of interpretation of the Constitution are themselves in a significant way implications.

In relation to Commonwealth powers in s51 the current approach can be seen for example in *Grain Pool of Western Australia v The Commonwealth*[69] where it was said that the general principles included the following:

> First, the constitutional text is to be construed 'with all the generality which the words used admit'. Here the words used are 'patents of inventions'. This, by 1900, was 'a recognised category of legislation (as taxation, bankruptcy)', and when the validity of such legislation is in question the task is to consider whether it 'answers the description, and to disregard purpose or object'. Secondly, the character of the law in question must be determined by reference to the rights, powers, liabilities, duties and privileges which it creates. Thirdly, the practical as well as the legal operation of the law must be examined to determine if there is a sufficient connection between the law and the head of power. Fourthly, as Mason and Deane JJ explained in *Re F; Ex parte F*
>
> > In a case where a law fairly answers the description of being a law with respect to two subject-matters, one of which is and the other of which is not a subject-matter appearing in s51, it will be valid notwithstanding that there is no independent connexion between the two subject-matters.

This passage was referred to with approval by Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ in *Bayside City Council v Telstra Corporation Ltd*.[70]

Executive power; powers deriving from the Commonwealth's existence as a polity.

There is some overlap between these topics. The executive power of the Commonwealth is the power in the Constitution with the least definition, section 61 simply providing that:

> The executive power of the Commonwealth is vested in the queen and is exercisable by the governor-general as the queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

On one view, determining the content of the phrase the 'executive power of the Commonwealth' is an simple exercise in construction of an express term of the *Cheatle* kind. But the express terms are, in this case, at such a high level of abstraction that it is strongly arguable that something closer to implication is occurring when a court determines the bounds of Commonwealth executive power.

In *Barton v The Commonwealth*[71], Mason J said that the executive power:

> enables the Crown to undertake all executive action which is appropriate to the position of the Commonwealth under the Constitution and to the spheres of responsibility vested in it by the Constitution. It includes the prerogative powers of the Crown, that is, the powers accorded to the Crown by the common law.

The statement that the Crown can undertake 'all executive action which is appropriate to the position of the Commonwealth under the Constitution' again envisages some pre-existing concept of the nature of 'executive action' embodied by the Constitution.

It was this pre-existing concept of the nature of executive action which led the full court of the Federal Court in the *Tampa* case[72] to hold that the executive government of the Commonwealth had power under the Constitution to prevent the entry of non-citizens into Australia in the absence of any legislation providing this power. As French J said:

> The power to determine who may come into Australia is so central to its sovereignty that it is not to be supposed that the government of the nation would lack under the power the conferred upon it directly by the Constitution, the ability to prevent people no part of the Australian community, from entering.[73]

That is speaking of executive action. The existence of the Commonwealth as a polity has been regarded as potentially giving rise to a power to legislate to protect its own existence and the unhindered play of its intimate activities.[74] The ambit of the doctrine remains to be determined.

Other parts of the Constitution

I have dealt so far with the chapters of the Constitution dealing with legislative, executive and judicial powers. There are, of course, other parts.

Chapter 4, 'Finance and trade', has given rise to many issues of interpretation, particularly of ss90 and 92, but they seem not properly to be regarded as implication, rather than interpretation.

Chapter 5, 'The states', contains a number of provisions which might be a source of implications. Thus there is s116 (no establishment of a religion or religious test, free exercise of religion), s117 (no discrimination by a state against a resident of another)[75], and s118 (requiring the recognition throughout the Commonwealth of the laws etc of every state).

It has sometimes been suggested that these provisions, together with some fragments of others, are instances of a further underlying principle of, to put it shortly, equality. That is they should be seen not as islands standing separately in the ocean, but rather as the above surface projections of a reef of underlying principle.

My skills at leading the High Court along such a path were not those of Sir Maurice. In *Leeth v The Commonwealth*[76] I was able to attract three justices along that path, but three out of seven is not enough. The heresy was later put down in *Kruger v The Commonwealth*.[77]

Conclusion

The division of the Commonwealth's powers into legislative, executive and judicial powers is the Constitution's striking structural feature. As was said in the *Boilermakers Case* this is not 'a mere draftsman's arrangement'.[78] This division can only be given practical effect if some implications are made about the nature and attributes of the three types of power. It is difficult to see *all* the incidents or attributes of each type of power properly described as either implied from the text of the Constitution according to the accepted rules of construction or necessarily implied from the structure of the Constitution. Many of them seem base it. The course of judicial discussion will determine the extent to which those assumptions become part of it.

*I would like to acknowledge the considerable assistance of Patrick Flynn, barrister.

1 See *Egan v Willis* (1998) 195 CLR 424.

2 (1999) 198 CLR 511.

3 Unlikely, given that *Re Wakim* was itself a reventilation of *Gould v Brown* (1998) 193 CLR 346.

4 (1999) 199 CLR 462.

5 See McHugh J in *Re Wakim* 198 CLR at 551- 552.

6 One would expect, of course, that the subject matter was such as to require the adoption of the view that 'foreign power' was to be construed as at the time when the issue arose.

7 (1993) 177 CLR 541. The example was first used to illustrate this point by Jeremy Kirk in 'Constitutional implications (I) nature, legitimacy, classification, examples' (2000) 24 MULR 645 at 648, the first of two articles containing a very useful discussion of the topic, sufficiently comprehensive if I may say so as to leave little to implication.

8 (2005) 80 ALJR 125; (2005) 222 ALR 83.

9 ibid [9].

10 ibid [10].

11 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

12 Implications are familiar in the law of contract, where there is a substantial body of law determining when implications can be made in a written contract. They are also familiar in the construction of ordinary statutes. A fortiori a constitution.

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

14 (1937) 56 CLR 657 at 681.

15 56 CLR at 681-2.

16 (1945) 71 CLR 29 at 85, quoted by Mason J in *Australian Capital Television Pty Limited v The Commonwealth* (1992) 177 CLR 106 at 134.

17 *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 52 ALJR 20 at 26; *Codelfa Construction Pty Ltd v state Rail Authority of NSW* (1982) 149 CLR 337 and Callinan J. in *APLA Ltd v Legal Services Commissioner* (2005) 79 ALJR 1620 at 1710, [470].

18 (1971) 122 CLR 353 at 401-402.

19 *Australian Capital Television Pty Limited v The Commonwealth* (1992) 177 CLR 106 at 134-5.

20 (1947) 74 CLR 1.

[21] (1985) 159 CLR 192.

[22] 177 CLR at 135.

[23] See Gleeson CJ in *Singh v Commonwealth of Australia* (2004) 78 ALJR 1383; (2004) 209 ALR 355; [2004] HCA 43 at [20].

[24] McHugh J's second basis for upholding the Citizenship Act in Hwang was a textual implication, and the method of constitutional implication it exemplifies undoubtedly conforms to well-established notions of constitutional interpretation.

[25] (1956) 94 CLR 254 at 274.

[26] (2005) 79 ALJR 1620.

[27] 79 ALJR at [30].

[28] 79 ALJR at [30], [32]-[33].

[29] (1998) 193 CLR 173 at 233 [148].

[30] (1970) 123 CLR 361 at 394.

[31] (1973) 129 CLR 231 at 249-250.

[32] (1991) 172 CLR 501 at 607.

[33] 79 ALJR at [241].

[34] 94 CLR at 270.

[35] 79 ALJR at [241].

[36] At [248].

[37] 79 ALJR at [389].

[38] 79 ALJR at [470] – [471] *In Bayside City Council and ors v Telstra Corporation Limited* and ors (2004) 216 CLR 595 at 663, [146]-[149], however, he appeared to give a broad application to the Melbourne Corporation principle.

[39] (1975) 134 CLR 298.

[40] 134 CLR at 314-5.

[41] (1999) 198 CLR 511.

[42] (1921) 29 CLR 257 at 264 – 267.

[43] See, to take but one example, Rose 'The bizarre destruction of cross-vesting' in *The High Court at the Crossroads: Essays in Constitutional Law,* Stone and Williams (eds), Federation Press, Sydney, 2000.

[44] Australia Acts 1986, s11.

[45] *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51 at 114.

[46] *Polyukhovich v The Commonwealth* (1991) 172 CLR 501.

[47] *Chu Ken Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; *Al-Kateb v Godwin* (2004) 219 CLR 562.

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

[49] *APLA v Legal Services Commissioner (NSW)* 79 ALJR at [30] (footnote 21), citing Dixon J in *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193.

[50] Gleeson, 'Courts and the rule of law' in Saunders and LeRoy (eds) *The Rule of Law,* Federation Press, Sydney, 2003 at 180-181.

[51] *Federal Commissioner of Taxation v Westraders Pty Limited* (1980) 144 CLR 55 at 60 per Barwick CJ.

[52] *Baker v Campbell* (1983) 153 CLR 52 at 71 per Gibbs CJ; *Corporate Affairs Commission v Yuill* (1991) 172 CLR 319 at 346 per McHugh J; Carter v Northmore Hale Davy & Leake (1995) 183 CLR 121 at 161 per McHugh J.

[53] *Incorporated Council of Law Reporting (Q) v Federal Commissioner of Taxation* (1971) 125 CLR 659 at 672 per Windeyer J.

[54] *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 28 at 35 per Gibbs CJ.

[55] *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197 at 239 per Brennan J; Jago v District Court (NSW) (1989) 168 CLR 23 at 76 per Gaudron J.

[56] *Taikato v The Queen* (1996) 186 CLR 454 at 465-466 per Brennan CJ, Toohey, McHugh and Gummow JJ.

[57] (1985) 159 CLR 192.

[58] *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 1 at 81-82.

[59] (1995) 183 CLR 373.

[60] *Austin v The Commonwealth* (2003) 215 CLR 185 at 249, [124; 265, [168] per Gaudron, Gummow and Hayne JJ.

[61] (1992) 177 CLR 1.

[62] (1994) 182 CLR 104.

[63] (1992) 177 CLR 106.

[64] 177 CLR at 70.

[65] (1997) 189 CLR 520.

[66] 189 CLR at 561

[67] The Lange principle is a limitation on legislative power. The limitation applies to invalidate both state and Commonwealth laws.

[68] (2004) 220 CLR 1 at [88].

[69] (2000) 202 CLR 479 at 492, [16].

[70] (2004) 216 CLR 595 at 625, [28].

[71] (1974) 131 CLR 477.

[72] *Ruddock v Vardalis and Others* (2001) 110 FCR 491

[73] 110 FCR at [193].

[74] See *Burns v Ransley* (1949) 79 CLR 101 at 106, *R v Sharkey* (1949) 79 CLR 121 at 148-149, *The Communist Party Case* 83 CLR 187-8, *Davies v The Commonwealth* (1988) 166 CLR 79.

[75] The provision which allowed Mr AW Street to break down the 'dingo fence'. *Street v Queensland Bar Association* (1989) 168 CLR 461.

[76] (1992) 174 CLR 455.

[77] (1997) 190 CLR 1.

[78] (1956) 94 CLR 254 at 274.