The Constitution and Its Working

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Source Text:

Prepared from the printed entry in The Cambridge History of the British Empire Volume VII Part 1: Australia, edited by J. Holland Rose, M.A., Vere Harmsworth Professor of Naval History in the University of Cambridge; Fellow of Christ's College, Cambridge , A. P. Newton, M.A., Rhodes Professor of Imperial History in the University of London; Fellow of King's College, London , E. A. Benians, M.A. Fellow and Senior Tutor of St John's College, Cambridge, Advisor for the Dominion of Australia, Ernest Scott Professor of History in the University of Melbourne
Published by Cambridge University Press, Cambridge 1933, pp. 455-90

All quotation marks retained as data
All unambiguous end-of-line hyphens have been removed, and the trailing part of a word has been joined to the preceding line.

First Published: 1933
Languages: French

942/1 *Australian Etexts 1910-1939 prose nonfiction federation*

2001
Creagh Cole Coordinator
Final Checking and Parsing

The Constitution and Its Working

The Cambridge History of the British Empire Volume 7 Part 1

Cambridge

Cambridge at the University Press

1933

The Cambridge History of the British Empire

Chapter XVI The Constitution and its Working

THE Act passed by the Imperial Parliament in 1900 "to constitute the Commonwealth of Australia" provides by Section 9 that "the constitution of the Commonwealth shall be as follows". "The constitution" has therefore a technical meaning, which limits it to the eight chapters following and dealing respectively with the Parliament, the Executive Government, the Judicature, Finance and Trade, the States, New States, Miscellaneous, and the alteration of the constitution, with a schedule. Within the technical meaning will also fall any "alterations of the constitution" made in pursuance of Section 128. At the time of writing only three such alterations have been made, viz. one as to the times of Senate elections (1906) and two as to State debts (1910 and 1928).

This constitution belongs to the type which Bryce and Dicey have made familiar as "rigid constitutions", and which the Privy Council has more recently, though not more happily, described as "controlled constitutions".[1] It is of course far from exhausting even for Australia that law which is commonly thought of as "constitutional", not to speak of the customs and conventions of the constitution. These are part of the common heritage, and, apart from their direct application in particular matters, they form a background profoundly affecting the working and the interpretation of "the constitution" itself.[2]

The Commonwealth was established by royal proclamation under the Act of 1900, as from 1 January 1901. The preamble to the Act and the proclamation issued thereunder by the Crown describe the new political community as a "Federal Commonwealth". Neither before federation, nor since, has Australia given heed to federation as an abstract problem of political science, though in one Australian case[3] the Privy Council ventured on some speculations as to the nature of a truly federal government. She has been content to recognise federalism as something differing from the unitary parliamentary government, with which the several colonies had been familiar, by certain outstanding facts. These are, first, that the powers of government are now divided between two legislative authorities—a central Legislature affecting the whole territory and population of the Commonwealth, and a number of Legislatures affecting severally the State territories and persons and things therein; secondly, that corresponding with these legislative authorities are ministries responsible to them respectively; and, thirdly, that there are Commonwealth courts exercising their jurisdiction through Australia, and State courts limited to jurisdiction within the State. Neither Commonwealth created State, nor State

Commonwealth; a higher power binds both, so that neither may destroy or limit the power of the other. The division of power is not conventional merely: it is a matter of law, enforced by the duty of the courts to treat as null and unauthorised by law any act purporting to be the act of the one or the other—even if it is an Act of Parliament—which passes beyond the proper sphere of the authority claiming to do it. Such is federalism as it lies on the surface, and as it is understood by those who live under it in Australia.

Some other matters are suggested from the observation of other governments of the federal type.

1. The Commonwealth was constituted by the coalescing of the several colonies which together filled the continent of Australia and the island of Tasmania. These colonies, while under the Crown and the Imperial Parliament, were separate and independent in their relation to each other. On the formation of the Commonwealth they became the States therein. While certain powers of the colonies became vested in the Commonwealth Parliament and Executive, there was no severance of existing political units. Herein the foundation of the Commonwealth of Australia differs from the foundation of the Dominion of Canada, where the act of confederation involved the dissolution of the legislative union of Upper and Lower Canada, which were resolved into the Provinces of Ontario and Quebec.

The question of severance was raised in regard to Queensland and Western Australia, each of which had always been marked out for division into distinct colonies; and power to form new States is given by Section 124. In recent years there has been a "New State" movement, principally in New South Wales, for an extensive division of the existing States into smaller Provinces, and this movement has been associated with schemes for the re-constitution of the Commonwealth on Canadian or South African lines. The Northern Territory of South Australia, which had been governed by that State as a distinct administrative area, was in 1909 by agreement taken over by the Commonwealth, and is now administered by the Commonwealth under various Acts of Parliament, of which the latest is an Act of 1926.[1]

2. The primary question, as soon as a federal system is determined upon, concerns the mode of distribution of power between the two authorities. The United States pursued the plan of committing to the Federal Legislature power over such subjects as were specifically enumerated, while the States remained in possession of a general power of government limited only by the withdrawal of a few specified matters and by the paramount authority of the Federal Government in such matters as had

been committed to it. The two-fold object of Canadian federalism on the other hand—the substitution for Upper and Lower Canada of a federal union for an incorporate union, in addition to the inclusion of the other Provinces of British North America within a federal unit—involved not merely the organisation of a Dominion Government and the determination of its powers, but also the organisation of new provincial Governments and the grant of powers to them. The British North America Act, not unnaturally in the circumstances, lodged the general legislative power in the Dominion, not in the Provinces, and committed to the Provincial Legislatures merely such matters as were specially enumerated. But the provincial matters were assigned to their Legislatures as exclusive powers, while, over and above the general grant, certain other matters were assigned to the Dominion Parliament as exclusive. This is not the place to consider either the reasons for the Canadian system, or its working.[1] It is enough to say that the framers of the Australian constitution, familiar with at any rate the legal side of the United States and Canadian systems, deliberately preferred the United States system, not from any aspiration for purity of federal theory, but from political exigency and practical expediency. The constitution was framed by men who were members of Parliament in the colonies; it must be such as would commend it to these Parliaments. As the object of federation was to establish unity in certain specific matters, it was natural that the subject of federal powers should be approached from that standpoint. The grant of specific powers to the Commonwealth Government and the retention of general powers by the States involved a minimum of disturbance to existing organisation. The Canadian system, in its efforts to avoid the embarrassments of overlapping jurisdictions, appeared to those who looked at it from without to present greater legal complexity than the United States system. Moreover, the whole Canadian constitution was marked by a subordination of the Provinces to the Dominion for which no opinion in Australia was prepared; and the vesting of the general power of legislation in the Dominion Parliament was tendentious. In the result, therefore, the essence of the Australian system is the grant of power to the Commonwealth Parliament to make laws on the thirty-nine matters enumerated in Section 51, and the provision of Section 107 that every power of the Parliament of a colony which has become a State shall continue, unless it is exclusively vested in the Commonwealth Parliament or withdrawn from the State. The powers of the Commonwealth Parliament are powers granted by the constitution; the powers of the States are based upon the general power, to “make laws for the peace, order and good government” of the respective colonies “in all cases whatsoever”, held by the several Parliaments under their

constitutions at the institution of the Commonwealth—the "reserved" or "residuary" power as it is commonly called.

3. The powers of the Commonwealth Parliament are not in general exclusive powers. Section 52 of the constitution makes exclusive the legislative power over the administrative departments transferred to the Commonwealth, viz. posts, telegraphs and telephones; defence; lighthouses, etc.; and quarantine (Section 69); and Section 90 makes the imposition of duties of customs and excise exclusive. Some other matters are exclusive in so far as they may confer on the Commonwealth power over matters outside the former control of the colonial Legislatures, e.g. external affairs (Section 51 (XXIX)), the relations of the Commonwealth with the islands of the Pacific (Section 51 (XXX)), or fisheries in Australian waters beyond territorial limits (Section 51 (X)). Others again become exclusive by reason of restrictions or prohibitions imposed by the constitution on the exercise of State powers, and not laid on the exercise of Commonwealth powers, e.g. the raising of military forces (Section 114), the coining of money, the making anything but gold or silver legal tender (Section 115), and the extensive matters within the scope of the general provision of Section 92 that trade, commerce and intercourse among the States shall be absolutely free. In the main, however, within the territorial limits of the States, the powers of the Commonwealth Parliament are not exclusive, and the general scheme of the constitution is contained in Section 109, whereby, "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".

4. The States being a continuation of the prior colonies, with their plenary powers, have of course a complete organisation of government—legislative, executive and judicial—resting upon their own authority, with a background of imperial legislation. The short-lived and ineffective Federal Council (1885–1900) was without an executive or judiciary of its own, and without financial power: for that it was dependent on the co-operation of the constituent colonies. The Commonwealth under the Constitution is not a mere instrument of legislation for several distinct political communities. It is itself a territorial community, a political unity, and it is fully organised under the constitution in the legislative, executive and judicial modes in which government manifests itself. It can fulfil itself without dependence on the States.

5. Subject to the supremacy of Commonwealth laws within the sphere of Commonwealth power, the Commonwealth and State Governments are in their relations independent and not hierarchical. There is no such supervision of the State in the exercise of its functions as belongs to the

Dominion over the Provinces in Canada. The State Governor is appointed by the King on the advice of the British ministry after informal consultation with the State ministry, as before federation. A proposal in the Constitution Convention that communications between the States and the Colonial Office should pass through the Governor-General of the Commonwealth was rejected. Such Instructions as might be issued to the State Governors were to be issued by the Secretary of State, not by the Governor-General. State legislation is not subject to any veto of the Commonwealth Government; if it is to be disallowed, it must be by the King on the advice of the Secretary of State. Though the Commonwealth Parliament, within the matters committed to it, can over-ride State legislation, it is doubtful whether it can formally repeal a State law on any matter that is not within the exclusive power of the Commonwealth.

It is no exception to this relation that the constitution and all laws made by the Commonwealth Parliament thereunder are declared binding on the courts and judges of every State.[1] They are by the same provision binding on the people: the duality of government exists with unity in law. The courts have to enforce the law; to ascertain it may involve the consideration of the competence of the several law-making authorities and the relation of their enactments in view of the paramountcy of Commonwealth laws within the Commonwealth sphere. But there are three respects in which the judicial system is in a position of exception to the general federal scheme. In the first place, the High Court of Australia is a general court of appeal from State courts, and is not therefore like the Supreme Court of the United States restricted to special matters deemed to be of national or federal concern (Section 73). Secondly, the Commonwealth Parliament, instead of setting up distinct federal courts, may invest the State courts with federal jurisdiction, i.e. may make them *pro tanto* federal authorities in matters wherein they had no jurisdiction, or could have no jurisdiction under State laws (cf. Section 77). Finally, the High Court by the constitution itself (Section 75) has, and any federal or State court by Act of the Commonwealth Parliament (Section 77) may have, jurisdiction over the States themselves as juristic entities, whether the States consent thereto or not.

Section 128 provides for the alteration of the constitution. The proposed alteration must be passed by an absolute majority in both Houses, and on submission to the electors "if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law" the measure, on receiving the royal assent, becomes effective, and the constitution is altered. But, just as Section 57 makes special provision for parliamentary deadlocks in the

case of ordinary legislation, Section 128 provides that a proposed alteration, twice passed within a prescribed time by one House and rejected by the other, may be submitted to the electors on the vote of one House alone. The section is qualified by the requirement that an alteration of the proportionate representation of any State in either House, or its minimum representation in the House of Representatives, or its territorial limits, shall be effected only with the assent of the State concerned.

As Dicey observes, "the foundations of a federal State are a complicated contract";[1] and when the foundations are laid, much of the structure will have a contractual aspect. The relation of the two chambers of the Legislature owes much of its elaboration in the constitution to the competing claims of responsible government, with its emphasis on the Lower House, and State rights, with its equality of States in the Senate. The provisions concerning the appropriation and issue of public money (Sections 81–83) appear no more than the familiar arrangements for good housekeeping and parliamentary control; but at the back of them is the interest of the States in "surplus revenue of the Commonwealth" (Section 95). And there are of course many specific provisions which on the face of them are terms of a bargain.

In the first place, there are various arrangements of a business kind. Property of the States connected with transferred departments has to be taken over (Section 85); obligations and liabilities connected with this administration have to be provided for (Section 84). Temporary arrangements have to be made for the period of transition, to diminish the dislocation involved in a new system, and these are certain to be formidable matters of contention as being at once those in which present interests are most deeply engaged and which can be most clearly understood and calculated. This is the significance of the elaborate provisions contained in Sections 86–96 of the constitution. In the next place it is deemed prudent to provide at once against the aggrandisement of a new authority which the States recognise as a possible rival of all of them, and against the perversion of its powers to the profit or loss of particular States. The States, too, undertake reciprocal obligations to abstain from various kinds of unfederal conduct, in relation to the Commonwealth, to each other as political entities, or to individuals considered as residents of different States. Thus, the power of taxation granted to the Commonwealth Parliament in general terms is subject to the qualification that it must be exercised so as not to discriminate between States or parts of States (Section 51 (II)). The Commonwealth has control over foreign and inter-State commerce (Section 51 (I)); but it may not by any law or regulation of trade, commerce or revenue give preference to one

State or part thereof over another (Section 99). Neither Commonwealth nor State may tax the property of the other (Section 114). The provision for the freedom of inter-State trade and commerce is in general and absolute terms (Section 92) as befits a matter which was one of the principal objects of federation; but at present it has been construed as binding the States alone.[1] The States may not impose duties of customs or excise (Section 90); nor may they grant bounties save for mining, or with the consent of the Commonwealth Parliament (Section 91).

The intricacies of the States' bargain stand out most clearly in regard to rivers and railways; here we are in every phrase in the midst of *Realpolitik*. Railways are owned and worked by State Governments; and as railway charges may easily be made a means of protecting State industries and frustrating the freedom of inter-State commerce or of coaxing traffic from competing State systems, the Commonwealth Parliament may forbid any preference or discrimination by a State which is undue or unreasonable or unjust to any State, due regard being had to the financial responsibilities incurred by any State in connection with the construction and maintenance of its railways (Section 102). But the less legitimate considerations of politics are to be counteracted by the intervention of a non-political authority, the Inter-State Commission, without whose decision no preference is to be taken to be undue, unreasonable or unjust (Section 102); and the Commission itself is bound by the provision that no rate is unlawful if necessary for the development of territory, and if it applies equally to goods from within and those from without the State (Section 104). In the case of rivers, the conflicting interests of States largely coincide with the conflicting claims of navigation and irrigation. So far as rivers may fall in their navigable character under the Commonwealth power over inter-State trade and commerce, the power is subject to the provision that the Commonwealth may not abridge the right of a State or the residents therein to the reasonable use of the waters thereof for conservation or irrigation (Section 100.) As between the conflicting claims of States and their respective powers over the waters flowing through their territories, the constitution is silent; the States are left to their “common law” rights, whatever they may be, with the fact that the constitution has provided a tribunal—the High Court—in which the respective powers and rights of States *inter se* may be ascertained and determined.

As already mentioned, the States may not without the consent of the Commonwealth raise naval or military forces (Section 114); in return, the Commonwealth is to protect every State against invasion, and on the application of the Executive Government of the State against domestic violence (Section 119). As between the several States, their residents

(being British subjects) are protected in every State against disability or discrimination by State law or administration (Section 117)> Section 116, forbidding the Commonwealth to establish any religion, or prohibit any religious observance or the free exercise of any religion, or to impose any religious test as a qualification for public office, is an expression of the Australian policy of excluding denominationalism from public institutions; it can hardly be regarded as belonging to the class of "minority" safeguards now familiar in constitutions.

A federal constitution in fact is unlikely to limit itself to the mere distribution of the heads of governmental power, leaving the exercise of the power unreservedly to political discretion, checked only by the political sanctions of a Parliamentary system; it will impose, even where the traditions of Parliamentary Government are strongest, restrictions on the exercise of powers granted or inherent. It thus at once impresses more deeply the legal stamp on the political system, and brings into the foreground the notion of a public law of which the subjects are the political communities themselves. Even at the beginning, it seemed of course that the Commonwealth and the States should be named in the specification of the original jurisdiction of the High Court of Australia (Section 75); but it is the experience of a quarter of a century that has emphasised this character of federalism, and has produced problems, still unsolved, as to the nature of the juristic personality which, as "the Crown", plays so many parts, and as to the law which enters into the justiciable controversies of these high contracting parties.

The matters of the legislative power of the Parliament of the Commonwealth, enumerated in Section 51 of the constitution, in substance define the sphere of Commonwealth authority, and by grouping them a fairly clear picture can be made of the main purposes of federation. The freedom of inter-State trade, commerce and intercourse was indeed so fundamental as to be provided for by the constitution itself (Section 92). But this having been done, a number of matters at once became the obvious subject of a single controlling authority. If a State is bound to allow the free passage of all persons and things from and to another State, control over entry to and egress from Australia must be subject to a single authority: foreign trade and commerce, immigration and emigration are necessarily federal powers. Equally, freedom of inter-State trade and commerce demands that such regulation as there is shall not be controlled by diverse, independent authorities; trade and commerce among the States is associated with foreign trade as a Commonwealth power. Allied to these matters are the grant of bounties, quarantine, and coastal lighting and buoying. Some of these matters belong to the Commonwealth for another

reason—they are matters which have some external aspect and on which it had been desired that Australia should have a single voice and a single policy. In addition to emigration and immigration, there are the questions of aliens and naturalisation, the influx of criminals, the relations of Australia with the islands of the Pacific, fisheries in Australian waters beyond territorial limits, and, generally, "external affairs"—all of them testifying to the expansion of self-government into matters wherein Australian standards or interests touched the interests or feelings of other countries within or without the Empire. Such matters naturally connect themselves with "the naval and military defence of the Commonwealth and of the several States", which, with inter-State free trade and the "single voice" in external matters, was a primary object of federation. Currency and legal tender and weights and measures were obviously national in character; copyrights, patents and trade-marks equally belong as of course to the larger territorial unit. The close financial and commercial relations throughout Australia, emphasised by the crisis of 1893 and the difficulties of the 'nineties, pointed to trading and financial corporations (foreign or domestic), banking, insurance, bankruptcy and insolvency, bills of exchange and promissory notes as federal matters. Marriage and divorce, and matrimonial causes, were federal from the close social and domestic ties throughout Australia, and from the recent prominence of such matters as deceased wife's sister marriages and the extension of the grounds for divorce, which had been matters of controversy with the British Government during the growing period of Australian self-government. Co-operation in the administration of justice is dealt with by a federal power to provide for the service and execution of process and of judgments of the State courts throughout the Commonwealth and for the mutual recognition of laws and judicial proceedings. In addition to the direct powers of the Commonwealth are some which require the consent of the State affected—e.g. the construction or acquisition of railways. There are also general powers enabling the Parliament of the Commonwealth on any matter referred to it by the Parliament of any State to make laws applicable to such State, or at the request of a State to exercise any power which could be exercised only by the Parliament of the United Kingdom or the Federal Council of Australasia. These last powers present difficulties of interpretation which in part at least account for the fact that they have been in practice inoperative.

There remains a group of Commonwealth powers which may be described as auxiliary. The first of these is the power of "taxation". It is indeed subject to the provision against State discrimination already mentioned; but it is not limited as to subject or mode; it includes direct as

well as indirect taxation. In so far as the power to impose duties of customs and excise is withdrawn from the States, the Commonwealth power of taxation is exclusive. But, for the rest, the taxing powers of Commonwealth and States are concurrent in the strictest sense, so that in the field of direct taxation both Legislatures are competent to act effectively in the same matter. Both do in fact impose land tax, income tax and death duties. Borrowing on the public credit of the Commonwealth is another necessary power of finance. The Commonwealth may enact laws for the acquisition (including of course the compulsory acquisition) of the property of any State or person for any purpose in respect of which it may make laws. Finally, the Commonwealth may make laws incidental to the execution of any power lodged in any part of its government (Section 51 (XXXIX))—a power more important than it seems, as the law reports of the Commonwealth bear witness, and tempting resort to it to close up every inconvenient gap which the enumeration of powers may have left open. Some part of the tendency to develop new fields of federal authority from the "incidental power" was effectively checked by the Privy Council;[1] but, during the war, the existence of the incidental power facilitated the extension of federal activities related to naval and military defence.

It was not the greater or less importance of matters that determined the distribution of powers between Commonwealth and State. It was indeed true that the matter which still at the close of the nineteenth century was the keenest political interest of the country and the most warmly debated—fiscal policy—was committed to the Commonwealth Parliament. But, speaking generally, the matters which were ordinarily associated in the public mind in Australia with the activities of government were beyond the Commonwealth range and were left in the exclusive power of the States. Such important matters of administration as the public lands, mining, education, health, charities, railways, roads and local government remained with the States. The law of property and contract and most matters of civil right were matters of State law exclusively. Primary and secondary production were becoming increasingly regulated matters; but, nevertheless, occupations and industries and industrial relations, and all trade and commerce, except so far as it was foreign or inter-State, was State and not Commonwealth territory in the constitutional distribution of authority. The State power thus embraced those social matters which in all countries were arousing the deepest concern, as well as those matters of public economy which, in a new country, and particularly in a country enjoying a sheltered position without the distraction of foreign affairs, must engross the greatest amount of public attention and constitute in ordinary times the politics of the country. So much is this the case that invalid and

old age pensions, and conciliation and arbitration in industrial disputes, appear exotics in the enumerated matters of Commonwealth power. No doubt some sound "federal" reasons for their inclusion could be found. But, perhaps, the inclusion of "invalid and old age pensions" in the constitution was as much due to the tactical need for gaining for the federal movement a political interest and support which the other matters of federal power failed to evoke. To a great extent this is true also of the power in relation to industrial disputes.

Such disputes on a large scale do indeed affect foreign and inter-State commerce; the geographical area of a dispute may well lie within more than one State, and therefore as a whole be outside the authority of any State. Actually, the Shipping Strike of 1890 and the Shearers' Strike of 1894 were recent enough for everyone to realise that a single dispute might have an all-Australian character. But, as in the case of pensions, the provision was one which would give some assurance of the democratic character of the constitution, for social and economic programmes were taking the place of political liberty and the structure and forms of government, as the touchstone of democracy. Its greatest supporters never dreamed that the carefully restricted power of the Commonwealth Parliament to make laws with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State" would play in the political history and the legal controversies of the first twenty-five years of the Commonwealth, and in the intensity of public interest that has been invoked, a greater part than the whole of the rest of the constitution put together.

The respective fields of Commonwealth and State authority are determined mainly by the distribution of legislative power, and the chapter of the constitution on "Executive Government" adds little to the federal delimitation of powers. It makes explicit provision for a Commonwealth executive, whose functions extend to the execution and maintenance of the constitution and of the laws of the Commonwealth: the Commonwealth therefore is not dependent on the machinery of the States. It provides also for the transfer, either immediately or on some event, of certain State departments of administration to the Commonwealth, and under Section 52 the legislative power of the Commonwealth Parliament becomes exclusive in these matters upon such transfer. The most important of these departments are naval and military defence, postal, telegraphic and the like services, and customs and excise; others enumerated are lighthouses, etc., and quarantine (Section 69). But many of the matters of legislative power set out in Section 51 are primarily matters of public service and administration to which the legislative power is essential indeed but

ancillary, a means of limiting or extending or effectuating that administrative action in which the service itself consists. Such for instance are "census and statistics", and "astronomical and meteorological observations". Though expressed in terms of legislative power, it is the administrative service which is prominent in fact. Having regard to the importance attached during the federal movement to the "single voice"—the constitution of an authority empowered to represent Australia and every part of it in all external relations—it is curious that in the constitution itself this essentially executive function is not expressly provided for but is left to inference. "External affairs" is a matter set out among the legislative powers, and most of the matters calling for a single representative are specifically set out in the same chapter. The parliamentary system, established by the constitution, with its association of executive responsibility with legislative power, in part explains the method and facilitates the inference. But it left and leaves a good many doubts and difficulties as to executive power where there has been no Commonwealth legislation.

The chapter on "Judicial Power" addresses itself to three matters. One of these is the provision of a supreme court of appeal for Australia which should serve as an alternative to or substitute for the appeal to the King in Council from existing courts; the second is the establishment of a judicature, both appellate and original, exercising jurisdiction as a federal organ, in certain classes of matter deemed to be of Australian and not merely State interest, so that in judicial as well as in legislative and executive power, the Commonwealth authority should be complete and independent of the States. The third object takes account of the fact that the constitution is a pact binding the several organs of Commonwealth Government as well as the States, the Commonwealth Parliament as well as its executive. The first two objects are expressed in the jurisdiction assigned to the Commonwealth judiciary: the third is attained in the provisions for the security of tenure and emoluments of Justices of federal courts, which are of an exceptional kind.

The pivot of the judicial power is the High Court of Australia, to which an appeal lies from the Supreme Courts of the States, or from any court, State or federal, exercising federal jurisdiction (Section 73). In all such cases the judgment of the High Court is final and conclusive, subject to the Crown's prerogative to grant leave to appeal to the King in Council. This qualification however is itself subject to two qualifications. No appeal is permitted to the King in Council from a decision of the High Court on any question, however arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and States, or of any two or more States,

unless the High Court certifies that the question is one that ought to be determined by the King in Council. Secondly, the Parliament has power to make laws limiting the matters in which leave to appeal from judgments of the High Court may be sought (Section 74).

The matters in which the Commonwealth judiciary may have an original jurisdiction are enumerated in Sections 75 and 76—matters arising under any treaty, affecting consuls or other representatives of other countries, matters to which the Commonwealth is a party, or in which a *mandamus*, prohibition, or injunction is sought against a Commonwealth officer, matters between States, or to which the State is a party at the suit of a resident in another State; matters between residents of different States: in all of these the High Court has an original jurisdiction of which Parliament cannot deprive it. In four other cases, among them matters arising under the constitution or involving its interpretation, and matters arising under any law made by the Parliament, the Parliament may confer original jurisdiction on the High Court.

For matters where the High Court has or may have original jurisdiction, the Parliament may constitute other federal courts, or may confer federal jurisdiction upon State Courts. This last power the Parliament very fully availed itself of in the Judiciary Act 1903; the effect of which has been the subject of judicial controversy from that time to the present.

Having surveyed the division of power in the constitution between Commonwealth and State, and the distribution of Commonwealth power among the organs of the Commonwealth Government, we turn to consider the organisation of the Commonwealth Government itself. The States were already in existence as political entities; it was no part of the plan to re-organise their government, and Section 106 expressly preserves the constitutions of the States with the powers possessed by the States under the Colonial Laws Validity Act 1865, or otherwise, to alter their own constitutions. The Parliament of the Commonwealth consists of the King, the Senate and the House of Representatives (Section 1). The King is represented in relation to the Parliament by the Governor-General, subject to the familiar qualifications of the reservation of bills for and the disallowance of Acts by the Crown. Men and women alike are eligible to either House. The Senate combines the federal principle and the "Second Chamber". Equal representation is assigned to each of the six Original States, each State is a single constituency for the purpose of the election of senators, and the term of service for a senator is six years—so arranged that half the senators from each State retire every three years, under a system which is designed to secure that senatorial elections are held at the same time as elections for the House of Representatives. The large

constituency, the continuity of the Senate—it is liable to dissolution only in the special circumstances described in Section 57—the longer term of service of senators, and the limitation on its financial powers, mark the attempt to reproduce in the Senate something of the character of a Second Chamber. But the Senate is not merely elected; its electors are the same persons as the electors for the House of Representatives, and the qualification of senators is the same as that of members of the House.

The House of Representatives is constituted by direct election in single member districts, the number of members to which each State is entitled being in proportion to the number of its people. This is ascertained from time to time; and the following table shows the representation of the several States in 1901 and 1928 respectively:

New South Wales	26	28
Victoria	23	20
Queensland	9	10
South Australia	7	7
Western Australia	5	5
Tasmania	5	5

Adult suffrage, with the principle of one elector one vote, prevails. The number of electors voting rose from 53 and 55.7 per cent. for the Senate and House respectively in 1901 to 77.7 and 78.3 in 1917. A decline in the percentage in 1919 and 1922—in the latter year the proportion of electors voting had fallen almost to the level of 1901— was followed by the introduction of compulsory voting, so that the high percentage recorded at the 1925 election—91.3 per cent. for both Houses—testifies rather to the efficacy of the law than to the intensity of political interest. In 1919 preferential voting was established both for Senate and House elections, thereby in the House preventing the election of a member on a mere plurality vote, but not making provision for the representation of minorities in the case of Senatorial elections, where it is still possible for one party with a small majority to capture the whole of the vacant seats. The House is elected for a term of three years, but is liable to dissolution.

In ordinary legislation the Senate and House have equal powers. But in finance, a detailed and complicated scheme marks the dual character of the Senate as a Second Chamber and as a States House. The preponderance of the House in relation to the "ordinary annual services of government" and therefore the primary responsibility of the Government to a single authority—the House—was essential to Cabinet government; the Senate was therefore placed under the common disability of the States Legislative Councils that it might not amend finance measures. But it received power to make "requests", and it was protected against coercion through any form of tacking, whether by lumping various projects of taxation in the same measure, or by including schemes of expenditure outside the "ordinary annual service of government" in the Appropriation Bill, or by joining bills

of legislative policy with finance measures. These provisions have not yet been proved to be necessary to guard the Senate; but such of them as have a legal as distinguished from a mere political sanction have jeopardised the validity of some important legislation. The Senate may not waive its rights, and as it is open to a litigant to attack the validity of a financial measure on the ground of transgressions of the constitution, Taxing Acts are carefully scanned for flaws, inadvertent or innocent in intent though they may be. The High Court, however, has not favoured this class of objection.

After much debate, the framers of the constitution determined to provide for conflicts between the Senate and the House on any measure of legislation, and Section 57 provides that, after the second rejection of a House Bill by the Senate in a single or successive sessions, there may be a double dissolution, to be followed after the election by a joint sitting of the new Senate and the House, whereat an absolute majority of the total number of members may carry the measure.

The Senate in action has been neither the House of States nor the model Second Chamber. For the first function it was disqualified from the fact that it was divided on the same party lines as the House of Representatives: and the States as political entities found their means of action in an extra-constitutional body, the Premiers' Conference, through which their representations to the Commonwealth Government were made. For the same reason, the Senate has had little value as a Second Chamber. Whenever the Opposition is in a majority there, the possibility arises of the recurrence of the struggle, familiar enough in the Australian States, between an Upper House and a ministry supported by a majority in the Lower House. This in fact happened after the general election of 1913,[1] with this variation from the common experience that the Left was represented by the Upper House (where twenty-nine Labour Senators faced seven Liberals), the Right by the ministry and the Lower House (the Liberal ministry had a majority of one over their Labour opponents). After a brief testing of the situation, the ministry made up its mind that it was impossible to carry on effectively with a Senate in which their political opponents completely controlled the legislative business, and accordingly it took steps to force a situation which would permit a dissolution of the Senate. Two bills repealing Acts of the previous Parliament were introduced, and as soon as one of them had been a second time rejected by the Senate, the Government advised, and the Governor-General granted, a double dissolution under Section 57. The election resulted in the return of a Labour majority to both Houses. There was, and remains, controversy as to the constitutional propriety of the dissolution. It was argued against the Government that Section 57 could be properly resorted to only in the

extreme case where the Senate had made it impossible for the Government to carry on by rejecting its financial proposals; that the application of the Section in the circumstances that had arisen was in effect a denial of the Senate's right to exercise any independent judgment in matters of legislation, and that the confessed intention of the Government to bring about a dissolution by submitting to the Senate bills which that Chamber was certain to reject, was, in lawyers' language, a fraud upon the power. On the other hand, the Government claimed that it was meeting what was an attempt on the part of the Senate to usurp control of the Executive Government and to introduce a dual responsibility which would make government impossible by any party which had not a majority in both Houses: that this was the very thing which the framers of the constitution had seen to be possible and which the machinery of Section 57 had been devised to prevent.

Two years later the political position in the Senate again embarrassed a Government. The Hughes Government, having come to the conclusion that conscription was necessary to maintain the Australian forces at the front, found itself deserted by the majority of the Labour Party, and holding office by a majority in the House of Representatives composed of Liberals and a faithful remnant of Labour men. But in the Senate it was in a hopeless minority, unable therefore to carry a bill to authorise conscription, unable to proceed by executive act under the ample powers of the War Precautions Act, since any regulations issued might be put out of operation by a vote of either House, and unable to mend the situation by a dissolution except by a resort to the very course which its members had denounced in 1914, a course, too, involving delay which in the circumstances might have grave consequences. The Government therefore decided to submit the question of conscription to the electors by *referendum*. Such a course, not being authorised by the constitution, was without legal value, whatever its result, but the Government hoped that, if the majority of the electors declared for conscription, the Senate would acquiesce, and refrain from using its legal powers to nullify the Government action. The rejection of conscription by the electors prevented the Senate from being put to the test.[1] From the general election of 1917 to that of 1929 the Senate always contained a majority of Government supporters.

The foregoing account implies the existence of the Cabinet system in the Commonwealth Government. But the terms of the constitution itself are, in common with other Dominion constitutions—the Irish Free State constitution is an exception—suggestive and allusive rather than direct upon the subject of the actual working executive. They do, however, contain not merely the usual absolution of certain offices from the

disqualification attaching to offices of profit, but require that ministers shall be, or within three months become, members of one or other House of the Parliament (Section 64). A parliamentary executive is thus ensured by the constitution, to the exclusion of a “Presidential” executive; and as the constitution provides that ministers hold office during pleasure, it imposes a barrier to any system of elective ministries with a fixed tenure, which, at times of political instability, has often suggested itself as an alternative. In practice, the Labour party on assuming office, whether in Commonwealth or State, submits the choice of ministers to the parliamentary caucus which consists of the party members of both Houses, the Prime Minister merely having the allotment of portfolios among the members so chosen. The whole Labour system does in fact specifically challenge the position which constitutional usage assigns to the Prime Minister. This has been demonstrated more in State politics in New South Wales than in Commonwealth politics, but it was formally asserted by the dissentient members of Mr Hughes's Cabinet when it split on the conscription issue in 1916.

The working of the system has not been marked by any tension between the Governor-General and his ministers, whatever party has been in office. On three occasions—in 1904, 1905 and 1909—a Governor-General has refused a dissolution of the House of Representatives asked for by his ministers; and when, in 1914, Lord Novar granted the double dissolution asked for by the ministry, it was after taking the whole political situation into his personal consideration, and not upon any theory that he was bound to act on the advice tendered.[1] Nor does the “new status of the Dominions”, or the definition of the office of Governor-General at the Imperial Conference of 1926, alter the position, except to emphasise the fact, already well recognised in Australia, that in the exercise of his office he is as independent of instructions from the British Government in those matters which lie in his personal discretion as in those which belong to the responsibility of his ministers.

Relations with the British Government belong properly to the consideration of Australia's position in the Empire, and are the subject of another chapter in this volume.[2] Such questions therefore as the treaty power and the consultation of a Dominion Government, raised by the Australian Government as to the Anglo-French Convention respecting the New Hebrides in 1907, or the larger question raised on the discussions of the Declaration of London in 1911, or the long drawn out negotiations concerning naval defence, are not considered here. But within the strict limits of the working of the constitution, it may be said that the constitution, so far as concerns the relation of the British and the

Commonwealth Governments, has worked harmoniously. There were broad differences of opinion from 1904 to 1911 as to the validity, in view of the Imperial Merchant Shipping Act (1894), of certain of the provisions of the Commonwealth Navigation Bill. But these in the main were overcome by discussion, and an amended bill was assented to, the remaining questions of validity being left to judicial determination should the occasion arise. In 1906, the British Government was embarrassed by an Australian Customs Tariff Bill which, conferring preference on British goods, made the preference conditional on the goods being imported in British ships manned by white labour. The bill was reserved for the royal assent on the representation that it was in conflict with treaties, and on this ground, with the concurrence of the Commonwealth Government, the royal assent was with-held, the incident serving as an illustration of the need for severing the British and Dominion adhesion to commercial treaties. The provision in the Australian Postal Act of 1901–10, requiring that all contracts of the Australian Government for the carriage of mails should provide for the manning of the ships by white labour, raised no difference as to constitutional powers or their exercise: but it involved the consequence that the British Government, being unable to adopt such a limitation, could not associate itself with the Commonwealth's contracts.

The relations of the British and Commonwealth Governments might have been less happyif, at the beginning of the Commonwealth, the British Government had taken a view of federal government as established by the constitution which was pressed upon them on several occasions by the States Governments. The constitution had not dealt expressly with the "channel of communications"; indeed, a clause providing that all State communications with the Secretary of State should pass through the Governor-General had been deliberately eliminated. Nor, as has been seen, did the constitution, in assigning "external affairs" to the Commonwealth, assign it to the Commonwealth executive; it merely specified the subject among the matters upon which the Commonwealth Parliament might make laws. When therefore, in 1902, the Netherlands Government complained to the British Government of a breach of treaty in South Australia, and the British Government requested the Commonwealth Government to enquire into the matter, the South Australian Government protested that it was to it, and not to the Commonwealth, that the British Government should have addressed itself, and that the report which the Commonwealth Government had asked for from the State Government should be made directly to the British Government. The treaty was in force before federation and by the accession to it of South Australia through its own Government. The responsibility lay with the State Government for the conduct of its own

officers, which was the matter complained of; that Government was not the instrument of the Commonwealth Government and its responsibility was to the British Government. Even assuming that the matter might be brought within the sphere of the Commonwealth Government by the exercise of some of the heads of legislative power, there was no Commonwealth legislation, and there was no inherent power in the Commonwealth executive, which would enable them to act effectively. In a despatch dated 15 April 1903,[1] the Secretary of State, after affirming that the object of the new constitution was not merely to create new legislative and executive machinery, but to set up a new political entity for dealing with all political matters arising between Australia, or any part of it, and any other part of the Empire or foreign state, declared that, for this entity, the Commonwealth Government alone could speak, and for everything affecting external communities taking place within its boundaries was alone responsible. He added that the distribution of powers between federal and State authorities was a matter of purely internal concern of which no external country or community could take cognisance, and that the question at issue was not one as to the powers of the Commonwealth Parliament but as to the responsibility of the Commonwealth, which was the measure of the sphere of the Commonwealth executive. Some part of the statement may have been exceptionable as a matter of constitutional law, for the relations of independent states in international law furnish but an imperfect analogy to constitutional relations established by municipal law.

In a number of other incidents, the States Governments claimed that they and not the Commonwealth Government were the appropriate authorities with which the British Government should deal; and in particular they protested that they as well as the Commonwealth should have been invited to the Imperial Conference in 1907. In some instances they took a plainly untenable view of the constitution, as where they treated the Commonwealth as a mere agent or instrument for the exercise of functions in which the States remained principals, or where they asserted a right to be consulted in all matters other than those within the exclusive powers of the Commonwealth. They were on firmer ground when they pointed out that some of the matters suggested for discussion at the Imperial Conference were within the exclusive power of the States, and others (e.g. taxation) within the concurrent power of Commonwealth and States. But the “single voice” and a single responsible authority was as important from the standpoint of the British Government as of the Commonwealth Government, and was steadily insisted upon. From the establishment of the Commonwealth, the British Government has declined to accede to treaties

on behalf of the States: the request must come from the Commonwealth Government, which must be the acceding party. In this, as in some other cases, the Commonwealth Government may be without the constitutional powers to carry out the matter dealt with; e.g. matters resolved on at the Imperial Conference may be such that the Commonwealth Government can do no more than endeavour to secure the co-operation of the States, or treaties emanating from the League of Nations or the International Labour Office may require legislation which only the States can pass. The occasional divorce of power and responsibility is characteristic of federal systems; its inconvenience can be diminished in practice by such rules as that the State legislation necessary to carry out a Commonwealth obligation shall be passed before the obligation is undertaken. But it can now be seen that acceptance of the States' views would have detracted seriously from the status not merely of the Commonwealth Government in relation to the States, but of the Commonwealth itself. A system whereby the obligations which might be undertaken towards external communities were determined by authorities, State and British, from which the Commonwealth Government was excluded, would have been inconsistent with the position which the Commonwealth, in common with the other Dominions, has now assumed.

In the class of case just considered, the British Government having itself the responsibility of action, was compelled to define its attitude in relation to the federal system: the case fell within the political rather than the juridical sphere, and was hardly susceptible to the sanctions enforced by Courts. But, in 1902, a suggestion was made in the Supreme Court of Victoria which would have cast upon the British Government the function of arbiter in a class of difference which, as experience of federal systems has shown, is at once most common and most acute. The question being of the application to Australia of the American decisions, of which McCulloch *vs.* the State of Maryland is the first and chief, which imply certain legal restrictions upon federal and State Legislatures from the very nature of the federal system, the Chief Justice of Victoria found, in the observations of the Privy Council in a Canadian case, an essential ground of distinction between federalism in an independent state such as the United States, and federal systems existing in communities where both governments, federal and State, were subject to a single common authority. In the British Empire, this common authority was the Crown, which, acting on the advice of the Imperial Government, could disallow the legislation of either Commonwealth or State calculated to subvert the constitutional powers or conflict with the interest of the other. This discretionary political authority was “a safety-valve” which adequately provided against those

evils of conflict in the exercise of power that had evoked in America the doctrine of restrictions implied by the judiciary upon the power itself.[1] But, in a succession of cases[2] , the High Court of Australia rejected the notion that the constitution intended to establish a system, at once so destructive of that self-government to which Australians were accustomed, and so novel and impracticable as to carry to the Imperial Government complaints by each Government against the other, founded not on any excess of legal power but on the policy involved in the exercise of the powers of either. The matter was thus lifted from the political to the forensic tribunal. The doctrine of implied restraint upon power, based on the inherent nature of federalism, is now discredited by later judicial decision, but nothing that has been said or done by the High Court encourages the notion that a solution of the federal problem is to be found in a resort to the authority of the British Government.

In a federal constitution, it is inevitable that the two governmental authorities should touch each other at many points. There is consequently some friction, which may be lessened, though it can never be entirely removed, by the accurate definition of their spheres. The great achievement of the federal form of government is that it has been able to reconcile the conflicts of the two governments by an appeal to law which both parties recognise as binding, and that it has provided means for the authoritative determination and enforcement of that law. But the law to which the appeal is made has qualities of its own arising from the nature of the matters dealt with: as was pointed out by Chief Justice Marshall in McCulloch *vs.* Maryland, it cannot have the precision of a legal code. Still less can it have the detail which commonly marks the statutes of British Legislatures. It can be little more than a frame of government—a certain generality and breadth of description belong to its very nature, because, whatever its mode of enactment, its vigour lies peculiarly in its acceptance by the people. A constitution, brief and allusive, with its background of history, practice and principles of government, presents to the judiciary a task which, while it is in form the interpretation of a statute, is in substance comparable with the development of the common law, wherein the courts are avowed *conditores juris*. A federal constitution, too, has a character of its own as a pact. As in any other statute, the courts are bound by the letter; but the spirit which is to give life to the text calls on the judge—to cite Marshall again—"to mingle with the lawyer's rigour the statesman's breadth of view", and that in cases where great political issues hang on the judicial decision, and where the whole political interest of the community is ranged on the one side or the other. Actually, the differences of opinion which have marked the judicial delimitation of powers of the Commonwealth and

States are referable less to a conflict between “broad” and “literal” interpretations, than to differences as to the dominant principles, wher of law or practice, which aid and control interpretation.

The first important constitutional question as to the relations of Commonwealth and State authorities raised in the Courts was in the group of cases already referred to. The State Income Tax Acts required all persons to make a return of income earned in the State, and the taxation authorities in Victoria accordingly demanded such returns from Commonwealth officers in the State. The Commonwealth claimed that these officers were exempt, not by any specific provision in the constitution, but from the very nature of a federal system. In Wollaston's case, the Supreme Court of Victoria rejected the Commonwealth contention. But, in 1904, the High Court of Australia, which had been constituted in 1903, held, in a Tasmanian case[1] , that the American principle of implied restriction, rejected in Wollaston's case, was applicable in Australia, and, later in the same year, in two cases[2] in which Commonwealth ministers were parties, specifically over-ruled Wollaston's case. The rule was thus laid down that “when a State attempts to give to its legislative or executive authority an operation which, if valid, would fetter control or interfere with the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorised by the constitution, is to that extent invalid and inoperative”. In 1906, the High Court held that this principle was reciprocal: the freedom of the States from Commonwealth control within their own exclusive sphere was as essential a part of the federal system as the freedom of the Commonwealth: consequently, there being nothing in the constitution which expressly applied to State operations the legislative power of the Commonwealth with respect to conciliation and arbitration in industrial matters, the provisions of the Commonwealth Arbitration Act did not apply to the relations between the State authorities and their employees on the State railways.[1]

In 1908, the provisions of the Excise Tariff Act 1906 furnished the occasion for the invocation of the federal principle of the constitution in another class of case. The Commonwealth Parliament, having enacted a customs tariff of a protective kind, sought to secure to the employees in protected industries the advantageous conditions which protection made possible. It had no general power to regulate industry; and its power over industrial conditions was contained only in the circumscribed matter of “conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State”. But the Commonwealth had a general power with respect to “taxation”, and the

end was sought by the enactment of an excise, balancing the protective customs duty, remissible on proof of compliance with prescribed labour conditions. Thus was set up the "new protection", as it was called. Challenged in the High Court, a majority of the Court held that it was *ultra vires*: in substance, the Act was not one of taxation at all, it was a regulation of industry; and if the power of taxation sanctioned what had been done here, the same device would enable the Commonwealth Parliament to regulate anything whatsoever, and so make the federal scheme illusory.[2] The federal principle, i.e. the constitutional division of powers of government between Commonwealth and States, involved that the specific powers of the Commonwealth must be interpreted consistently with the maintenance of this division, and therefore if a particular matter granted to the Commonwealth would according to one construction extend in substance to nullify that division and give to the Commonwealth a general paramount authority, it must be rejected in favour of a more restricted application, consistent with the general scheme.

These two principles, or adaptations of the same principle, had important results. The States railways were the most extensive industrial enterprise in the Commonwealth, and were only one among the many activities in which the States Governments were employers. To exempt the States railways from the Commonwealth power was to exempt operations peculiarly liable to industrial disturbance; to exempt other State operations was to sanction inequalities among people performing similar work, and thus stimulate industrial unrest. On the other hand, for a Commonwealth authority to cast unknown burdens upon the State as an employer was not merely to control the State in an extensive part of its activities, but, from the magnitude of these operations, to control its political discretion in matters of finance.

The political situation in the Commonwealth Parliament, where the Labour Party held the balance of power, the constitution of the Senate, which promised during the earlier years of the Commonwealth an open road to legislation which in the States was barred by the Legislative Councils, the unrest due to the increasing cost of living, the relatively small interest of the community in the main purposes of the Commonwealth (once the tariff and the "White Australia" policy were settled), as compared with social questions, and the prevalence of economic thought which emphasised the distribution rather than the production of wealth—these circumstances led the Commonwealth Parliament to make a number of experiments in legislation which from the first were recognised as of doubtful validity, and which were certain to be challenged in the Courts as belonging exclusively to the States. With power to make laws with respect to trademarks, the Parliament included in the Trade-Marks Act 1905

protection for the “union label”, in the Act described as “Workers' Trade-Marks”. Seeking to control monopolies and combines in restraint of trade, it not merely prohibited them in foreign and inter-State trade—which was within its express powers—but, in virtue of a power to make laws with respect to corporations, sought to extend the prohibition to the operations of internal and domestic commerce within the limits of a single State, when carried on by corporations. The attempts failed; and in pronouncing its decisions the Court extended the “federal principle” in laying it down as a fundamental rule of construction that, where the intention to reserve any matter (in this instance, commerce) to the States to the exclusion of the Commonwealth clearly appeared, no exception from the reservation could be admitted which was not expressed in clear and unequivocal terms: otherwise the Constitution would be made to contradict itself.[1] The practical difficulties arising from the bisection of commerce made by the constitution were intensified by a rule of construction which seemed to suggest that the extent of the matters specifically committed to the Commonwealth was determined by reference to the residuary powers of the States, and gave colour to the political view that in the opinion of the Court, every specific power of the Commonwealth Parliament was arrested when it reached the domestic commerce or industries of a State. The principle of construction enunciated in these cases was dissented from by the two Justices who had been added to the High Court in 1906, and their dissent was the beginning of judicial controversies which have disturbed the serenity of the Court, even since the death of the original members of the tribunal.

In 1910 two further legislative enactments of the Commonwealth in relation to industrial matters were held to be void. One of these was the provision in the Arbitration Act which enabled the Commonwealth industrial tribunal to make its awards not merely binding on the parties, but by a “common rule” binding upon the whole industry: this was neither “arbitration” nor incidental to arbitration, but the assumption of a substantive power not within the grant.[1] The other was the Seamen's Compensation Act which had included persons engaged in intra-State commerce as well as those engaged in inter-State commerce.[2]

Constitutional alteration to rid the Commonwealth Parliament of these fetters had become not merely a part of the programme of the Labour Party, but an immediate end to be attained without delay. Accordingly, when a Labour Government assumed office in 1910, it introduced a set of alterations extending the Commonwealth power to all trade and commerce, combinations and monopolies in relation to the production, manufacture or supply of goods or services, the control and regulation of corporations, and

labour and employment, including wages and conditions of labour and the settlement of industrial disputes generally, and including disputes in relation to employment on the State railways. The relation of these to the decisions of the High Court is obvious. There was a further addition proposed separately—the nationalisation of monopolies. The proposals were passed without difficulty through both Houses of Parliament, but on the referendum held in accordance with the constitution, they were rejected by the voters by an overwhelming majority, Western Australia alone showing a majority for them. In 1913, similar amendments were again submitted, this time at the same time as a general election. But though the issues of an election ensured a larger vote, the amendments still failed to secure a majority either of total votes polled or of States, though there was a majority in three States—Queensland, South Australia and Western Australia. Again, in 1919, proposals for additional Commonwealth powers, this time limited to industrial disputes and the nationalisation of monopolies, were submitted and again rejected.

It must not be inferred from what has been described that the general course of High Court decisions was unfavorable to the Commonwealth. It was a part of the Labour Party's policy to break up large estates; but land holding and land settlement were exclusively within the sphere of the States. The Commonwealth Parliament in 1910 passed an Act establishing a progressive land tax, the notorious and avowed policy being to put pressure on large owners to dispose of their estates. The Act was attacked on the ground that it was not in substance an exercise of the taxing powers of the Commonwealth but an attempt to regulate the holding of land. But the Court had no difficulty in distinguishing the Act from that held invalid in Barger's case. In the earlier case, the intrusion upon the field of industrial regulation was in the very terms of the Act; in the case of the land tax, the Act itself did no more than establish *discrimina* which might be designed to effect, and which might in their consequences effect, certain social and economic ends. But this was a feature of all taxation, in greater or less degree, and was an essential part of the political discretion: it was not for such reasons that the Court could hold that the Act was not in substance an Act imposing taxation.[1]

The carefully limited power of the Commonwealth in industrial matters—"conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State"—remained the chief battleground of constitutional conflicts. The interpretation by the High Court was marked by a gradual extension of the jurisdiction of the Commonwealth Arbitration Court. It sanctioned compulsory arbitration and the prohibition of strikes and lock-outs. The

power was not limited to wages and hours, it covered the ever-increasing matters of dispute which threaten a paralysis of industry. On the other hand, there were matters of "management" which lay beyond it, and "sympathetic strikes", though extending beyond a single State, did not give jurisdiction over an original dispute limited to one State. The limits of "industrial" were not precisely determined, but appeared hardly to fall short of all cases in which the relation of employer and employed existed. A "dispute" came to be constituted when demands were made on the one side and refused on the other; and it became clear that persons desiring to invoke the jurisdiction could by simultaneous demands in different States create the conditions which gave the jurisdiction. Gradually the High Court appeared to move away from the analogy of "arbitration" in private disputes, and to view the subject as *sui generis*, with the industry as a unit, not without some judicial dissidence, which saw inconsistency between later decisions and the earlier decision (not over-ruled or disagreed with) that arbitration awards were binding merely *inter partes* and could not be made a common rule for the industry.[2] The relations of Commonwealth and State awards were caught in an intricate discussion as to the nature of judicial and legislative power; and the ruling in 1910, that "inconsistency" did not exist where it was possible to obey both awards, involved an overlapping of Commonwealth and State jurisdictions which in practice came to be the most serious evil of the dual system, regarded from the standpoint of the conduct or management of business. For there was deemed to be no inconsistency where one authority having prescribed a certain minimum wage, the other authority prescribed a higher: the employer was bound to pay the higher minimum. The practice of going from the one authority to the other was well established, and unions "picked the eyes" of both awards, treating the courts, as the President of the Commonwealth Arbitration Court once observed, as "competing shops". It was not until 1926 that the test of "inconsistency" which had led to this result was abandoned, and it was held that where there was a Commonwealth award, a State could not confer rights or impose obligations in matters covered by the award.[1]

In the result, a power suggested to the framers of the constitution by emergencies or crises of national magnitude, came to confer an authority over industrial relations in every part of the Commonwealth hardly less than that which would have arisen if the device adopted in the "new protection" case had succeeded or if the common rule had been sustained. But it was not complete, and the Court had to give effect to the fact that the constitution did impose some limits on the jurisdiction of the Arbitration Court. Distinctions became very fine, and the discontents of those who

found barriers impeding their access to the Arbitration Court were joined with feelings of grievance and irritation at what was deemed to be the artificial treatment of great issues. Divisions of opinion generally marked the decisions of the High Court, and as earlier decisions were over-ruled, an uncertainty reigned, which, from the magnitude of the matters and of the interests involved, impaired the respect for law itself.

Nowhere were the difficulties, both legal and political, more serious than in the relation of the Commonwealth awards to State activities. As already seen, the High Court had held that Commonwealth arbitration awards did not apply to State railway servants, as a particular instance of the application of the broad principle established in the United States. How far did this principle extend? The High Court held in 1908 that it did not exempt from the Commonwealth Customs Tariff material imported by the States for the construction of railways.[2] Did it apply to the State's relation to employees engaged in "governmental" functions, or was it limited to the case of enterprises of the State in lieu of or in competition with the private undertaker? Did it apply at all to the subordinate authorities of the State empowered not as agents or mandatories, but merely by the legislative power of the State, e.g. municipalities engaged in the lighting of roads or in the supply of electricity for light or power? These questions occupy a large space in many volumes of the *Law Reports*. At last, in a case which came before the Court in 1920, their Honours directed that the question of the application of the American principle to the Commonwealth—assumed as axiomatic since 1907, though the dissent from it of some members of the Court was notorious—should be re-argued. The result was that the principle was declared inapplicable to the Commonwealth, and the several cases hitherto treated as the leading cases on constitutional interpretation—D'Emden *vs.* Pedder, Deakin *vs.* Webb, Baxter *vs.* Commissioner of Taxation, and the States Railway Servants Case—were, as far as they depended on it, over-ruled.[1]

The political importance of this decision is obvious in its bearing upon the States and their finances. But the principle is much wider, for the doctrine of the immunity of instrumentalities was not limited to the industrial power. Its significance goes to the whole method of the interpretation of the Commonwealth constitution. Specific provisions in a constitution as in other statutes must be construed in the light of the whole, and the whole has a background which forms part of the material for interpretation. Thus, as already seen, the High Court held early in its course that the inference to be drawn from the existence of the Crown's power to disallow Commonwealth or State statutes was limited by the notorious conventional limitations on the exercise of that power. As far back as 1907

the restraint on State Parliaments, implied by the High Court in D'Emden *vs.* Pedder from the nature of the federal relation, had been disapproved by the Privy Council in Webb *vs.* Outtrim,[2] without either coercing the Australian Court by its authority or convincing it by its reasoning. But the fact that the constitution, both by specific description and by its structure, was federal in nature, was invoked by the Privy Council as a principle for ascertaining powers of the Commonwealth Parliament in A.-G. for Australia *vs.* Colonial Sugar Refining Company.[3]

In a constitution it is even less possible than in more detailed legislation to avoid some implications or inferences in determining the extent of the subject-matter over which power is granted or reserved. But neither the American nor the Australian constitution can be explained in the light of federalism alone. In the United States, the essentials of federalism were developed in conditions which precluded any exaggerated respect for the acts of Legislatures as such. Succeeding the colonial Legislatures, which were themselves subject to various restraints based on their dependent condition or on an individualistic political philosophy, legislative bodies were conceived of even legally as holding their powers not as inherent but as derived from the people and upon a trust. These considerations reinforced the express limitations upon Federal and State Legislatures alike, with which the constitutions abound. In Australia, these conditions were absent, and her Legislatures had grown up in an atmosphere of parliamentary sovereignty, with the traditional attributes of British parliamentary institutions, so far as these were possible in a non-sovereign community. So the Privy Council had decided before federation was accomplished. Part of this system also was responsible government, the responsibility of the executive to the Legislature, a principle which, in the words of Lord Haldane in the House of Commons in 1900, permeated the constitution.[1] The earlier decisions of the High Court considered that federalism was the dominant principle, and found a guide chiefly in the decisions in the United States, while recognising that in many matters there were differences which prevented the analogy from being perfect.

But from 1906, when two additional Justices were appointed to the Court, a different note began to make itself heard, sometimes in judgments which cautiously avoided reliance on the American principles, sometimes in dissenting judgments which rejected them, in either case emphasising the differences between the American and Australian constitutions, and finding the relevant authorities in principles laid down by the Privy Council, even if such decisions were given in reference to purely unitary constitutions, or to a constitution so different in its federalism from Australia's as that of the Dominion of Canada. A good illustration may be

found as early as 1912, where the majority of the High Court held invalid a New South Wales Act[2] excluding undesirable persons, on the ground that the continuance of such a power to its full extent after federation was inconsistent with the elementary notion of a Commonwealth, following therein the "police power" decisions of the Supreme Court of the United States of America. Isaacs and Higgins, JJ., while concurring in the decision, based their opinion exclusively on the express prohibition of interference with freedom of intercourse among the States by Section 92. Finally, the minority became the majority, and in 1920 the whole Court with one dissentient rejected the doctrine of "implied prohibitions" as formed on a vague, individual, conception of the spirit of the compact, not the result of interpreting any specific language, and not referable to any recognised principle of the common law of the constitution.[3]

In the long drawn out controversy in the High Court, it is probably true that over-statement on one side led to some over-emphasis on the other. The principle of federalism led in the earlier decisions of the High Court to the enunciation of some rules of construction which found little support in professional opinion.[1] But if the parliamentary nature of the constitution and the responsible government which "permeates" it are informing matters which may guide its interpretation, not less must that be true of its federal nature and scheme, which is at least as explicitly stated in the text. All three in fact appear to be relevant: the weight that may attach to each is not capable of statement in general form; and there remains the question—in case of conflict, which prevails? The state of the authorities points to the predominance of the British parliamentary principle as against federalism as interpreted in the United States. A practical illustration is found in the substantial disuse of American authorities in argument to-day, while in the earlier years of the Court, the *Reports* of the Supreme Court of the United States formed part of the library of every man in leading practice at the bar.

Judicial controversy has extended to another field: the distribution of the judicial power itself. It has involved the relations of the High Court of Australia and the Privy Council in questions as to the constitutional powers *inter se* of Commonwealth and States;[2] the power of the Commonwealth Parliament, in committing federal jurisdiction to State Courts, to affect the appeal to the Privy Council from decisions in their jurisdiction[3] ; the nature of federal jurisdiction, and whether it can exist in a State Court when that Court already has ample jurisdiction over the matter by State law. In these matters, the divergence of opinion between the State Court and the Privy Council on the one hand and the High Court of Australia on the other opened, at the very beginning of the High Court's history, a contest which would certainly have assumed a political importance, if the Privy Council

had not declined further battle by using its discretionary power over the reception of appeals, and refusing leave to appeal. The subject-matter of the controversy has been revived in the sharp differences disclosed, by the cases just cited, between the High Court of Australia and the Supreme Court of Victoria.[4] But the minor political importance of the subject, the intricacy of the questions, and the even greater intricacy of the discussions, which, in addition to differences on the authority of decisions, turn on differences as to what those decisions actually decided, and involve not merely the interpretation of the constitution but the interpretation of specific Acts of Parliament—these things make the whole matter one to which justice can only be done in a professedly legal work[1] . So far as concerns the class of constitutional questions provided for by Section 74 of the constitution, in which no appeal is permitted to the Privy Council from any decision of the High Court except upon a certificate of the High Court itself that the question is one which ought to be determined by the King in Council, the High Court has scrupulously guarded what it conceives to be the trust imposed on it. Accordingly, it has not considered that the question is one which ought to be decided by the King in Council when, a divergence between the opinion of the Privy Council and the High Court having appeared, State Courts were doubtful whether they should follow the one or the other; or when there were differences of opinion in the High Court itself; or when the High Court had over-ruled earlier decisions. A certificate of appeal was refused in the Engineers' case referred to above,[2] possibly on the ground that the Court was now affirming the principle of a Privy Council decision conflicting with the cases over-ruled. It granted a certificate in a case where the Court was equally divided.[3]

From the standpoint of the working of the constitution, probably the most important event in the judicial history was the decision in 1905 that an appeal lay direct to the High Court from the Supreme Court of a State exercising original jurisdiction through a single judge, without the need for an intermediate appeal to the Full Court of the State.[4] The immediate result was that the High Court, instead of being, as was contemplated, the substitute for the Privy Council after the State tribunals were exhausted, tended to become the substitute for the Full Courts of the State. The Justices of the Court, to whom popular opinion had assigned the enjoyment of a position of dignified leisure, found their cause lists congested, and additional appointments had to be made to the Bench.

It has been charged against our constitutional studies, concerned as they are with the political side of government and with a development which comes through struggle, that they give an inadequate and misleading view of government as a whole, through their disregard of the humbler and more

harmonious activities of administration. In a rigid constitution and particularly a federal constitution, an account of the working of the constitution must be largely an account of legal issues. In the case of Australia, it leaves in the background the fact that, in general, government and administration, whether under Commonwealth or State auspices, proceeded tranquilly in their respective spheres, and not without a certain amount of co-operation of the authorities. Thus, the police activities involved in the enforcement of Commonwealth legislation and in the protection of Commonwealth authority have been left to the States without complaint of apathy or hostility of the State authorities. It is always possible, however, that differences in sympathies may interrupt co-operation, as was shown in Queensland at one time during the war and by the New South Wales Government in 1925; an instance on the other side is perhaps the refusal of the Commonwealth Government in 1912 to recognise the "domestic violence" arising from the Brisbane Tramways strike as a fit occasion for coming to the aid of the State Government when requested to do so under Section 119 of the constitution. More formal co-operation of Commonwealth and States in many matters has been established by specific agreement, notably in regard to the waters of the River Murray and railway construction; and recently in the assessment and collection of income tax and the compilation of electoral rolls. In later years this co-operation has been encouraged by the contrast between the financial affluence of the Commonwealth Government and the straitened circumstances of State exchequers. The States, in consideration of financial assistance for such purposes as main roads and for developmental work for the promotion of settlement, have in effect agreed in important matters to accept, if not Commonwealth control, at any rate Commonwealth co-operation, in matters which constitutionally belong exclusively to the States. This has not been without protest on their part, or without attempts to secure from the Commonwealth a larger return of "surplus revenue" to the State Treasuries or to induce the Commonwealth to withdraw from the field of direct taxation, in which it operates concurrently with the States. The matter of finance has in fact become the fundamental question in Commonwealth relations, involving, as it does, ultimate responsibility for the stability and credit of the country and for its development, and the whole balance of power in the federal system. After many conferences and some recriminations, Commonwealth and State ministers arrived at an agreement in 1927. The principal features of this arrangement were that the Commonwealth provided out of its revenues over 71/2 millions annually for fifty-eight years towards meeting the interest on State debts existing at that date, and assumed as between itself and the States the whole liability

for these debts; that an Australian Loan Council controlled future borrowings; and that a Sinking Fund should be established and maintained by contributions from Commonwealth and States.

The agreement was approved by the several Legislatures in 1928, and was provisionally brought into operation for the years 1927–9 on the part of the Commonwealth by the Financial Agreement Act 1928. But to carry out a scheme of such an elaborate nature as was contained in the agreement, the somewhat meagre provision in the existing constitution was inadequate; it was necessary also that constitutional authority should be obtained for making the agreement legally operative as such, instead of leaving it dependent simply on several legislative acts without force to bind even the authority which enacted them.

Accordingly, the Commonwealth Government prepared, and Parliament by the required majorities approved, an alteration of the constitution whereby the Commonwealth Parliament might make financial agreements with the States (such agreements to be variable only with the consent of all parties) and might pass the legislation required from time to time for carrying out such agreements. This constitution alteration was submitted by *referendum* at the general election of November 1928, and adopted: it now therefore forms a part of the constitution.

The Commonwealth constitution has failed to furnish authority for a great deal that has been attempted by the Commonwealth Government and Parliament under it. But, for that, the framers of the constitution are not to be blamed, either in respect of their general scheme or of the manner in which they carried it out. Federalism is legalism, and the United States and Canada have provided as great occasions for litigation. Having before them fairly definite objects for attainment, the Federal Convention granted power in terms usually ample for the attainment of those ends. The Commonwealth Parliament—for reasons which need neither be examined nor censured here—sought to found on these powers legislation for the attainment of other public ends, or they carried their legislation to the very margin of the subject-matter, and thus inevitably and to a great extent consciously raised questions as to the limits of the subject-matter. Nor is the action of the Commonwealth Parliament to be imputed to the new needs which will arise in course of time: the most striking cases were in the early years of the Commonwealth. In the devices employed, too, ingenuity was rather over-conspicuous. Save through the imported doctrine of the "immunity of instrumentalities", the judicial power, and the exotic matter of industrial disputes, the constitution has provided remarkably few difficulties. In the great testing time of the war, the best authority on the subject—the Solicitor-General for the Commonwealth—has declared that

"it can be confidently affirmed that they [the Commonwealth Government] were never hampered in the conduct of the war by any defect of constitutional power"; and when it was decided in 1916 that in time of war the power with respect to naval and military defence included authority to fix the retail price of bread,[1] the Commonwealth Parliament could establish control as completely as was done in Great Britain under the Defence of the Realm Act. Where the Commonwealth has sustained the most notable rebuffs in the Courts, the electorate, by its repeated refusals to "fill the gap" by an enlargement of powers, not merely has acquiesced in, but in a sense has approved, the result: the most recent instance is the rejection of a proposed constitutional alteration extending the industrial powers of the Commonwealth, submitted to referendum in 1926, this time at the instance of the Nationalist Government; for the leaders of both political parties had become convinced of the need for an extension of Commonwealth power in the industrial field.

There is, in fact, a very general agreement in Australia that the constitution calls for some revision. It would be surprising if twenty-five years' experience had not suggested some things that should be different; the more so when it is remembered that we are dealing with the rapidly changing conditions of what is still a new country and that the period has been one of startling scientific invention and political cataclysms. Every one condemns the law which makes possible the intricacy of present industrial conditions; no one is satisfied with an allotment of the commerce power which puts shipping under different laws according as it is between ports of the same State or between ports of different States. As "commerce", aviation is divided between Commonwealth and State; but its character as a single subject for regulation was recognised in 1920 by an agreement of the State Governments to make over to the Commonwealth Parliament at any rate the power to give effect to the International Convention on the subject. Where does "broadcasting" stand? Whether the Commonwealth, though vested with power with respect to corporations, can establish a uniform company law has been doubted. The relations established by the constitution between the British Government and the States are not really consistent with the status of the Commonwealth as defined at the Imperial Conference of 1926.

Hitherto these matters have been considered—so far as they have been discussed—merely from the standpoint of an extension of Commonwealth power; and it has seemed that if commerce and industry were granted without qualification to the Commonwealth, production and social conditions generally must attend them. If so, the whole federal structure would have to be revised. Following the defeat of their proposals for an

extension of the industrial powers of the Commonwealth in 1926, the Government announced their intention of inviting Parliament to make a systematic study of the constitution and its working, with a view to the submission of a comprehensive scheme to the people. But realising too that such a study by the Commonwealth Parliament, if the ground were not prepared, would take the form merely of proposals for enlargement of its own powers, and anxious not to throw the matter into the party arena by itself putting forward proposals in the first instance, the Commonwealth Government appointed a representative Royal Commission to report upon the working of the constitution, and to present recommendations for its revision.

The Commission reported in September 1929. In the two years of its existence it held 198 sittings in widely distant parts of the Commonwealth and examined 339 witnesses. In the result, the evidence is itself a library of information regarding the working of government in Australia, and of Australian political opinion.[1]

The Report of the Commission expounds the constitution, its interpretation, and its working, and includes the relation of the Commonwealth Government with the States Governments on the one hand and the British Government and the League of Nations on the other. In the Report will be found a consideration of the constitution in its legal aspects and conclusions on the practical operation of the federal system and the effects on the welfare of the country of the actual exercise of powers. But the diversities of legal opinion which are embodied in the interpretation of the constitution in the courts extend in the Report to the actual operation and effect of the federal system—there are few matters, and those not of the greatest importance, upon which the Commission was unanimous, and even within the two groups of four and three, into which the seven members of the Commission fall, there are divergences which compel individual members to make their own statements, indicating that an agreement has been reached for distinct reasons and by different roads. Thus, in the majority group, the member of the Commission who came from Western Australia has the distinctive standpoint of those who consider that the “small States” have paid for the development which federalism has made possible to New South Wales and Victoria. That the minority of three consists of two prominent members of the Labour Party and of the President of the Victorian Employers' Federation shows that the grouping was not wholly on party lines. But the “representative” views of the former and the highly individual views of the latter could not be satisfied in a single statement. In fact, it requires some art and technique to ascertain the extent of concurrence of members of the Commission in the

specific matters reported on.

The majority considers that the federal system of government is "the system best suited to the views of the Australian people at the present time". The main conditions leading to this conclusion are the area of Australia, its varieties of soil and climate, the uneven distribution of population—large areas thinly populated and great concentration in the capital cities—the diversity of outlook and interest between town and country, between the capital cities themselves, and between States. Self-governing units are necessary; they are at any rate of first rate importance to States distant from the capital and with small representation in the Commonwealth Parliament. As to the fundamental objection that federalism means a divided loyalty, the majority thinks that "the loyalty of a citizen finds its fullest scope, in a country of the size of Australia, when certain important functions are assigned to local authorities, and those which are truly national to the central Government". Many existing inconveniences can be got over by better co-operation between Commonwealth and State Governments.

The Minority Report solves the major problem of "where the sovereign power of the people of Australia should reside" by a recommendation that full powers "such as those embodied in the constitution of Great Britain, New Zealand and South Africa be vested in the Commonwealth Parliament". The statement is somewhat ambiguous, since, though the countries are alike in not having a federal government, each differs from the other in the legal position of its constitution. The Report of the Minority contemplates the maintenance of the notion of a paramount constitution, for it distinguishes between a power in the Parliament of the Commonwealth to amend the constitution and an "immediate grant of full legislative power to that Parliament by a sudden and complete amendment of the constitution". The latter would involve an interruption of the services now performed by the States, and the Minority accordingly recommends the method of committing to the Commonwealth Parliament the power to amend the constitution. "Gradually, without upsetting the smooth working of the Parliamentary machine, the national Parliament would be invested with full control over the matters that the people desired", the desire of the people being formulated, however, not as now by their own vote, but by the will of the Commonwealth Parliament. The principle of a unitary constitution being affirmed as essential, the question what matters should be dealt with by the Commonwealth Parliament is no more a part of the subject of constitutional revision than the questions how and when they should be dealt with. It is enough that "broad national questions could be dealt with by the Commonwealth Parliament and purely

local affairs by local bodies". But some beliefs are expressed as to matters that would be devolved, and as to the probable character of the devolution —"existing States would be sub-divided into smaller units of local government, not so small however as to be without important functions".

The main reasons for the conclusions in the Minority Report are that the national interest in the principal matters now under State control is so uniform or interdependent as to demand a single national control, whether regard is had to practical convenience or to the cultivation of a national outlook—"the great need is a constitution which will tend to still further develop national ideals". Industry and trade and commerce are outstanding among such matters. The existence of the States as at present constituted belongs to social and economic conditions which have passed away. The dual system is costly in administration, it leads to over-government, it lessens responsibility, it encourages promises by political parties, non-fulfilment of which can be excused by lack of power.

Both the Majority and the Minority Reports are disappointing in that the "reasons" for their conclusions are to so great an extent mere general statements of opinion.

The dissidence within the Minority group has been mentioned, and attention may be directed to the vigorous and thoughtful "Supplement and Recommendation by Mr T. R. Ashworth". Agreeing that the amendments proposed by the Minority would effect an improvement throughout the whole area of government, Mr Ashworth believes that "pending certain further and drastic changes some of the worst political and economic evils from which the people of Australia are now suffering will remain". He believes that the Cabinet system and federalism are incompatible: that federalism demands the "American" relation of executive and Legislature; and that if the Cabinet system is adopted, the unitary model must extend to the legislative power as well as to the relation of executive and Legislature. The Cabinet system combines in the highest degree the principles of authority and liberty. But that system is perverted by sectionalism, which is fostered by the constitution, and can be mitigated or cured by an alteration of the electoral system and a complete change in the character of the Senate. The two parties essential to the smooth working of Cabinet Governments are to be assured by an adaptation of the "list system" to the House of Representatives. The Senate is to be filled by representation of occupations and interests on the model of the Federal Economic Council in the German constitution. The writer believes that a seat of government remote from the centres of population cuts off administrators and legislators from the life and interests of the people, and that this evil will become increasingly detrimental to government. He considers therefore

that the Commonwealth should "cut the loss" involved in Canberra at the earliest possible moment.

The fundamental issue being disposed of, the Majority proceeds to consider the re-adjustment of legislative powers between Commonwealth and States. A number of new matters of Commonwealth power is suggested, not however of outstanding importance—drug and food standards, certain professional qualifications, the adoption and legitimation of children, wireless transmission and cinematograph films, double taxation, and extension of letters of probate and administration are instances. On the major matters of controversy, the inseparable relation of industrial disputes and industrial matters leads to a recommendation that the Commonwealth should leave industrial disputes wholly to the States; while, in trade and commerce, the only extension of Commonwealth power should be the inclusion of air navigation and aircraft, and of navigation and shipping, irrespective of whether it is inter-State or intra-State.

The Minority, as an alternative to its general recommendations, supports the recommendations of the Majority so far as they would confer new matters of legislative power on the Commonwealth, and adds a number of matters. But the "specific recommendations" of Majority and Minority, and the dissidence and qualifications thereon, can only be studied in the Report itself.

An addendum to the Minority Report over the names of the two Labour members contains a draft alteration of the constitution designed in its main provision to carry out the scheme of the Minority Report. It proposes to change the mode of altering the constitution by eliminating in general the requirement of submission to and approval by the electorate. The result would be that alterations of the constitution would differ from ordinary laws enacted by the Parliament merely in requiring that they should be passed by an absolute majority instead of a majority of those present and voting. But the requirement of a *referendum* is to be retained for certain classes of constitution alteration, viz. regarding adult suffrage, the extension of the three years' term of the House of Representatives, trial by jury, and religious tests for Commonwealth office. It also proposes a new constitutional provision, and provides that that too should be unalterable without the approval of the electors—that no person shall be conscripted for naval, military or industrial service.

1 McCawley *vs.* The King (1920), *A.C.* 691.

2 Amalgamated Society of Engineers *vs.* Adelaide SS. Coy. (1920), 28 *C.L.R.* at p. 147; and see the judgments of Isaacs, J. in Commonwealth *vs.* Colonial Combing etc. Coy. (1922), 31 *C.L.R.* 421, and Commonwealth *vs.* Bardsley (1926), 37 *C.L.R.*

393, 411.

3 Colonial Sugar Refining Coy. *vs.* A.-G. for Commonwealth (1914), *A.C.* 237.

1 Northern Australia Act, 1926.

1 See *C.H.B.E.* vol. VI, chaps. XVIII and XXIX.

1 Commonwealth of Australia Constitution Act 1900, Section V.

1 *Law of the Constitution*, p. 142 (1927 ed.).

1 McArthur *vs.* State of Queensland (1920), 28 *C.L.R.* 530, 556.

1 Colonial Sugar Refining Coy. *vs.* A.-G. for Commonwealth (1914), *A.C.* 237.

1 See chap. xix, section II.

1 See chap. xix, section II.

1 *Vide infra*, p. 567.

2 *Vide infra*, chap. xviii.

1 *Commonwealth Parl. Papers*, 1903, No. 18.

1 Wollaston's Case (1902), 28 *V.L.R.* 357.

2 D'Emden *vs.* Pedder, (1904), I *C.L.R.* 91; Deakin *vs.* Webb (1904), I *C.L.R.* 585; N.S.W. Taxation Court *vs.* Baxter (1907), 4 *C.L.R.* 1087.

1 D'Emden *vs.* Pedder (1904), I *C.L.R.* 91.

2 Deakin *vs.* Webb, Lyne *vs.* Webb, I *C.L.R.* 585.

1 4 *C.L.R.* 488.

2 The Commonwealth *vs.* Barger, 6 *C.L.R.* 41.

1 A.-G. for N.S.W. *vs.* Brewery Employees Union (1908), 6 *C.L.R.* 469; Huddart Parker *vs.* Moorhead (1908), 8 *C.L.R.* 330.

1 Australian Boot Employees Federation *vs.* Whybrow, 11 *C.L.R.* 311.

2 SS. Kalibia *vs.* Wilson, 11 *C.L.R.* 689.

1 Osborn *vs.* The Commonwealth (1911), 12 *C.L.R.* 321.

2 Cf. Whybrow's Case (1910), 11 *C.L.R.* 311 and Hudson *vs.* Australian Timber Workers' Union (1922), 32 *C.L.R.* 413.

1 “The Forty-four Hours Case,” 37 *C.L.R.* 466.

2 The King *vs.* Sutton, 5 *C.L.R.* 789; A.-G. for N.S.W. *vs.* Collector of Customs, 5 *C.L.R.* 818.

1 Amalgamated Society of Engineers *vs.* Adelaide SS. Coy., 28 *C.L.R.* 129.

2 (1907) *A.C.* 81.

3 (1914) *A.C.* 237.

1 Cited *per curiam*, Amalgamated Society of Engineers *vs.* Adelaide SS. Coy., 28 *C.L.R.* at p. 147.

2 R. *vs.* Smithers, 16 *C.L.R.* 99.

3 Amalgamated Society of Engineers *vs.* Adelaide SS. Coy., 28 *C.L.R.* at p. 145.

1 E.g. that cited above from A.-G. for N.S.W. *vs.* Brewery Employees' Union and Huddart Parker *vs.* Moorhead.

2 Cf. Webb *vs.* Outtrim (1907), *A.C.* 81 and Baxter *vs.* Commissioners of Taxation (1907), 4 *C.L.R.* 1178.

3 See, in addition to the above cases, Lorenzo *vs.* Carey (1921), 29 *C.L.R.* 243; Commonwealth *vs.* Limerick SS. Coy. (1924), 35 *C.L.R.* 69; Commonwealth *vs.* Bardsley (1926), 37 *C.L.R.* 393.

4 See also Pirrie *vs.* McFarlane (1925), 36 *C.L.R.* 170.

1 See the learned and acute examination of the subject in the Minutes of Evidence before the Royal Commission on the Constitution, pp. 781 seqq.

2 Cf. 29 *C.L.R.* 406.

3 A.-G. for Australia *vs.* Colonial Sugar Refining Coy. (1914), *A.C.* 237.

4 Parkin *vs.* James, 2 *C.L.R.* 315.

1 Farey *vs.* Burvett, 21 *C.L.R.* 433.

1 *Commonwealth Parl. Papers*, 1929.