If they could see us now – what would the founders say?

JCPML Anniversary Lecture presented by the Hon Robert French AC on 7 July 2013.

In the last decade of the nineteenth century Australia consisted of six self-governing colonies each of which had a constitution authorised by an Act of the Parliament of the United Kingdom. For some decades before the 1890s there had been discussion of the possibility that the colonies would agree to form a federation. As Professor JA La Nauze put it in his book The Making of the Australian Constitution before and after the mid 1850s when the colonies began to govern themselves under systems of parliamentary responsible government:

The prospect of the 'night of provincialism' that was likely to descend upon them alarmed some of the more thoughtful colonial politicians, administrators and journalists.

Other factors stimulating discussion of federation included rumours of colonising activity in the region by France and Germany. Indeed, fearing German designs on New Guinea, the Premier of Queensland in the 1880s tried to take possession of it in the name of the Queen. Although approved in the colonies his action was repudiated by the Imperial Government. The French were said to have designs upon the New Hebrides and arranging their own transportation of criminals to New Caledonia. Quick and Garran wrote in 1901 in their Annotated Constitution of the Australian Commonwealth:

In this emergency the colonies found that disunion hampered them in making proper representations to the Imperial Government, and weakened the effect of what representations they made. Here was a practical and convincing argument for Federation...

A Federal Council of Australasia was formed in 1883 supported and given limited legislative powers by an Imperial Act of 1885. While it was an omen of things to come, it was something of a dead letter for most of its existence and was overtaken by the convening of the National Australasian Conventions in the 1890s to draft and put to the people of the colonies a proposed constitution for a federated Australia.

The process of federation began in earnest with the convening, at the instigation of Henry Parkes, the Premier of New South Wales, of a conference in Melbourne on 6 February 1890 at which the six Australian colonies and New Zealand were represented by delegates of their respective governments. They were Henry Parkes, the Premier of New South Wales and William McMillan, the Colonial Treasurer of that colony; Duncan Gillies, the Premier of Victoria and Alfred Deakin, the Chief Secretary; Sir Samuel Griffith the Leader of the Opposition in Queensland and John Macrossan, the Colonial Secretary; John Cockburn, the Premier of South Australia and Thomas Playford, the Leader of the Opposition; Andrew Inglis Clark, the Attorney-General of Tasmania and Bolton Bird the Treasurer; and Sir James Lee Steere, the Speaker of the West Australian Parliament. New Zealand also sent two representatives: Captain Russell, the Colonial Secretary and Sir John Hall, out of what La Nauze called 'politeness'.

Two famous phrases were uttered at a banquet which encapsulated themes of the decade-long process of making a constitution that was to follow. One concerned the tariff question, which was described as 'the lion in the path' which federalists must either slay or be slain by. The other was Sir Henry Parkes' utterance reflecting an underlying theme of racial identity when he said: The crimson thread of kinship runs through us all.

The Conference adopted a resolution proposed by Sir Henry Parkes:

That, in the opinion of this Conference, the best interests and the present and future prosperity of the Australian colonies will be promoted by an early union under the Crown, and while fully recognizing the valuable services of the Convention of 1883 in founding the Federal Council, it declares its opinion that the seven years which have since elapsed have developed the national life of Australia in population, in wealth, in

the discovery of resources, and in self-governing capacity to an extent which justifies the higher act, at all times contemplated, of the union of the colonies, under one legislative and executive government, on principles just to the several colonies.

As a result of that conference, a National Australian Convention met in 1891 to consider a draft constitution in sessions which were held in 1891. The draft which emerged from that process was an important achievement and, as Quick and Garran observed, 'marked a notable advance in the movement.' For a variety of reasons to do with local politics it did not find acceptance in the parliaments of the colonies. Nevertheless it defined the most important elements of the Constitution that was ultimately adopted.

The process of drafting a constitution acceptable to the colonies then fell into abeyance until it was revived in 1897 and 1898 in Conventions held in Adelaide, Sydney and Melbourne, which ultimately produced the Constitution Bill that was accepted by all the colonies including, belatedly, Western Australia, and led to the enactment of the Commonwealth of Australia Constitution Act 1901(UK) and the creation, on 1 January 1901,of the Commonwealth of Australia.

This lecture seeks to illustrate some of the ways in which the Australian Federation has developed over the one hundred and twelve years since it came into existence. John Curtin, Australia's great wartime Prime Minister, whose memory we honour today, played a significant part in that development. The part he played highlights an important proposition. Despite the preoccupations of some commentators with the effects of High Court decisions on relations between the Commonwealth and the States, itis the elected representatives of the people in Commonwealth and State Parliaments, whose actions as legislators and as members of the executive government are the drivers of change in the way the federation works. The High Court is the final judicial interpreter of the Constitution, but it only carries out that function when disputes involving questions arising under the Constitution are brought before it for determination. The role of the Court in the functioning of the Federation is important, but not that of a prime mover. Decisions of the Court may affect, but are not uniquely determinative, of the shape of the Federation and in particular the working relationships between Commonwealth and State

governments. There are legislative and executive actions and co-operative arrangements between governments that may be very significant but which never see the light of day in the High Court because nobody has an interest in challenging them.

John Curtin became Prime Minister of Australia in October 1941. Robert Menzies had won government at the election in September 1940 with the support of two Independent Members of the House of Representatives. However, Menzies resigned under pressure from Conservative Members of Parliament on 28 August 1941. Arthur Fadden took over from him and governed until 3October 1941 when the two Independents withdrew their support. Curtin was then able to form a government. His legislative program had been foreshadowed in an election speech in 1940 when he promised to take 'monetary measures ... so that industrial and economic preparedness, which are the essence of national defence and security, shall be assured'. Those measures included national control of banking and credit, interest rates and investment. He promised a greatly enlarged role for the Commonwealth in the management of the nation's affairs. His vision went beyond the exigencies of wartime as reflected in the concluding lines of his election speech:

We have to plan with the entire resources of this nation to win the war and we also have to plan with the entire resources of this nation to win the peace.

In February 1942, Curtin announced a National Economic Plan with strong regulatory powers in relation to prices and profits, interest rates and wages. One measure, in particular, which he introduced in 1942 has been credited with changing the nature of the federation. That was the Uniform Tax Scheme which, in a political sense, placed effective control of income tax in the hands of the Commonwealth. The Scheme was not the first entry of the Commonwealth into the field of income taxation. Only 15 years elapsed from federation to the enactment of the first Commonwealth Income Tax Assessment Act 1915. That legislation was initially proposed for the purpose of funding the war effort in the First World War. The Labor Attorney-General, Billy Hughes, said in his Second Reading Speech:

That additional revenue is necessary to meet the great and growing liabilities of the war is amply apparent.

But foreshadowing things to come he went on:

I have always regarded this form of direct taxation as peculiarly appropriate to the circumstances of a moderate community. ... Not only an effective means for raising money for the conduct of government but serving as an instrument of social reform.

As one commentary has observed, his speech did 'provide a hint of potentially deeper motives'.

The 1915 Act did not have the effect of creating any Commonwealth monopoly with respect to the raising of revenue through income taxation. Concurrent State laws continued to impose their ownseparate and distinct income taxes. Following the Great Depression and the onset of World War II there were discussions between the Commonwealth and the States about the possibility of a political arrangement under which the States would vacate the field of income taxation in favour of the Commonwealth subject to receiving compensation for lost revenue. An attempt to reach an agreement to that effect at the 1942 Premiers' Conference was not successful. There was no support from any State for Commonwealth proposals to take over income tax. The Commonwealth Government under John Curtin then moved unilaterally.

On 7 June 1942, the Commonwealth Parliament enacted legislation constituting Australia's first Uniform Tax Scheme. It had four components. The first was the Income Tax Act 1942 (Cth) which imposed income tax at a level which would raise the same amount of revenue as was being raised by Commonwealth and State Governments collectively. The second component, the States Grants (Income Tax Reimbursement) Act 1942 (Cth) provided for grants to be made to each State in any year in which the Treasurer was satisfied that the State had not itself imposed a tax on incomes. That Act relied upon the power conferred upon the Parliament by s96 of the Constitution to 'grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.' The third component was a provision

introduced into the Income Tax Assessment Act1936 (Cth) by the Income Tax Assessment Act 1942 (Cth) which made it an offence for a taxpayer to pay a State income tax until Commonwealth tax was paid. This was a priority provision. The fourth component, the Income Tax (Wartime-Arrangements) Act 1942 (Cth) provided for the transfer to the Commonwealth of State staff involved in the collection of income tax and of office accommodation, furniture and equipment.

The validity of the scheme was challenged by South Australia, Victoria, Queensland and Western Australia. The case was heard by five Justices of the Court. Sir Owen Dixon did not sit. He was serving in the United States as Australia's Ambassador. There was concern in some political circles that the High Court might strike the scheme down. Some not very veiled threats were made. The Minister for Trade and Customs, Senator Keane, said:

if the day came in this country when the High Court interfered with the considered decisions of the elected representatives of the people its position might have to be examined.

The High Court dismissed the States' challenge in what became known as the First Uniform Tax case. The fact that it had become politically impossible for the States to impose their own income taxes did not affect the validity of the Commonwealth laws. The Chief Justice, Sir John Latham, drew an important distinction between the legal questions which had to be decided by the Court and the wider political questions which were outside its authority. He said:

the controversy before the Court is a legal controversy, not a political controversy. It is not for this or any court to prescribe policy or to seek to give effect to any views or opinions upon policy. We have nothing to do with the wisdom or expediency of legislation. Such questions are for Parliaments and the people.

The majority in the Court held that, notwithstanding its political consequences, the Scheme did not legally bar the States from levying their own income taxes. It provided a financial inducement which they could accept or reject. The judgments of the Court relied in part upon the power conferred on the Commonwealth by s 51(ii) of

the Constitution to make laws with respect to taxation. The laws thus rested upon a constitutional foundation which did not depend upon the defence power. That meant the Scheme could continue after the war.14Robert Menzies commented after the decision that it marked 'the end of the Federal era in this country.' Another leading scholar, KC Wheare, also observed in the early 1950s that in Australia 'tendencies [were]at work which may make it necessary soon to describe its Constitution and its Government as quasi federal'. However as Professor Saunders observed:

Neither proved correct. The 1942 case is a fairly extreme example of laissez-faire on the part of the Court, driven by both the circumstances of the time and the prevailing mode of interpretation. The Australian High Court in fact has been far more ready to enforce the constitutional boundaries of federalism than has the Supreme Court of the United States.

The absence of Sir Owen Dixon in the First Uniform Tax case was no doubt a matter of some significance and, as will be seen, his presence led to a different result in one important respect when the case was revisited in 1957. His absence gave rise to an entertaining little anecdote reflective of personalities on the Court in the 1940s. In the course of argument in the State Banking case in 1947 when counsel referred to the absence of Sir Owen in the First Uniform Tax case, Starke J is said to have commented 'no, worse luck'. Professor Saunders recounts that when Geoffrey Sawer, on the teaching staff at Melbourne Law School, set a question in his constitutional law examination inviting students to comment on the implications of Starke's remark, it drew a letter of complaint from Sir John Latham to the Chancellor of the University and ultimately to a promise from the Dean of Law, Professor Paton, that 'further papers will be carefully scrutinized from every angle'.

Following the election of the Menzies government in 1949, consideration was given to the return of income taxation to the States. An intergovernmental working party examined issues that arose out of different polities in the federation imposing income tax, but the examination did not lead anywhere. The State of Victoria commenced proceedings in 1955 to again challenge the constitutional validity of the Scheme. New South Wales issued its own proceedings in 1956. Seven Justices of the Court, including Sir Owen Dixon who had become Chief Justice, sat to hear the case in

April 1957. In what became known as the Second Uniform Tax case the High Court reaffirmed the validity of the grants legislation supported by s 96 of the Constitution but held that the priority provision, which made it an offence for a taxpayer to pay State income tax until Commonwealth income tax was paid, was invalid. It was an intrusion upon the Constitutions of the States.

Notwithstanding the invalidity of the priority provision, the Second Uniform Tax case confirmed the fiscal dominance of the Commonwealth. That dominance was underpinned by the coupling of the taxation power with the power of the Commonwealth to make conditional grants to the States under s 96 of the Constitution. To that could be added the exclusive nature of the power of the Commonwealth to make laws imposing excise duties. Despite her rejection of the proposition that the decisions marked the end of federalism, Professor Saunders accepted that they symbolized a 'turning point in Australian constitutionalism'. When it comes to fiscal dominance, the Commonwealth has never really looked back although, as appears later, its powers in this field have been held to be subject to certain implied limitations protecting the governmental capacities of the States.

It is interesting in the light of the Uniform Tax Scheme decisions to go back in time to the National Australasian Convention held in 1891 when delegates from the Australian colonies first met to frame a proposed draft Constitution and debated the powers to be given to the Commonwealth with respect to taxation. The focus of their discussions was on the power to impose duties of customs and excise. There was opposition from some delegates to allowing the Commonwealth wide-ranging powers. They argued that the Commonwealth would raise sufficient money for its purposes by the exercise of an exclusive power to impose customs and excise duties. That argument might be thought to have reflected a rather minimalist view of the future requirements of the Commonwealth Government. A South Australian delegate, Sir John Bray said:

Personally, I feel that we ought not to give the federal parliament this power unless we know to a greater extent than we do at the present time, the purposes to which the revenue is to be applied.

Arguments in favour of a broad taxation power included the proposition that it was necessary for the defence of the Commonwealth that it have such a power. Alfred Deakin said:

It is impossible to cast the duty of defence on the government of the commonwealth without giving them unlimited taxing power.

Alfred Deakin and Samuel Griffith both assured the 1891 Convention that the taxation power would be exercised concurrently with and would not 'take away' from existing colonial powers. Griffith went further and expressed his belief that the Commonwealth Parliament 'would never impose direct taxation excepting in a case of great national urgency'. Mr McMillan added that the Commonwealth Parliament 'will never go beyond Customs; nobody dreams of such a thing'. In fact it only took the Commonwealth 15 years after federation to introduce its own laws with respect to income taxation.

The drafters of the Constitution were leading political figures in the Australian colonies which were to become the States of Australia. They were drafting a document for government into an unknown future. They were guided by some of the finest legal minds of their day, including Samuel Griffith who became the first Chief Justice of the High Court, Edmund Barton first Prime Minister and, in 1903, a founding member of the High Court, Richard O'Connor also one of the three founding members of the High Court, and Alfred Deakin first Attorney-General of the Commonwealth. Isaac Isaacs, who was appointed to the High Court in 1906 and became Chief Justice in 1930 and thereafter first Australian-born Governor-General, was also among the delegates, as was Henry Bournes Higgins who was appointed to the High Court in 1906. Prominent in the early drafting of the Constitution and in the decision to model it in part upon the Constitution of the United States was Andrew Inglis Clark, the Attorney-General of Tasmania, and Charles Kingston, a lawyer who was Premier of South Australia. Another Premier of South Australia during the period of the Conventions was John Downer, a barrister and Queens Counsel.

The first working draft of the Constitution prepared by Andrew Inglis Clark informed much of the shape of the document that was eventually adopted. It drew heavily

upon the Constitution of the United States, although its model of responsible government was taken from the United Kingdom. Sir Owen Dixon, addressing the American Bar Association in his capacity as Australian Ambassador in 1942, summarised the approach taken by the framers of the Constitution:

The men who drew up the Australian Constitution had the American document before them; they studied it with care; they even read the standard books of the day which undertook to expound it. They all lived, however, under a system of responsible government. That is to say, they knew and believed in the British system by which the Ministers are responsible to the Parliament and must go out of office whenever they lose the confidence of the legislature. They felt therefore impelled to make one great change in adapting the American Constitution. Deeply as they respected your institutions, they found themselves unable to accept the principle by which the executive government is made independent of the legislature. Responsible government, that is, the system by which the executive is responsible to the legislature, was therefore introduced with all its necessary consequences.

Sir Samuel Griffith made substantial additions to Inglis Clark's draft, before sending the 'First proof of a Constitution Bill' to the government printer late on the night of 24 March 1891. Over the next six days, Griffith, Inglis Clark and Kingston continued to revise the text (although Inglis Clark's involvement was somewhat hampered by a bout of influenza). Three of those six days coincided with the Easter break, and Griffith decided that he and his colleagues would do well to continue their work during the break aboard his yacht, the Lucinda. On Tuesday, 31 March 1891, Griffith introduced to the Convention the first official draft of a Constitution for an Australian Federation.

The men who drafted the Australian Constitution lived in a world very different from our own. The polities which they represented were self-governing colonies of the United Kingdom. They were not creating a revolution against Imperial rule. There was no concern about the definition of human rights and freedoms of the kind to be found in the United States Constitution. They were constructing a constitution which would have to be accepted not only by the people of the Australian colonies but also by the United Kingdom Government and Parliament. They were constructing a constitution

for a nation which at its beginnings would be in many respects a large self-governing colony whose governmental powers would be dependent for their legal authority upon a statute of the United Kingdom Parliament. They were drafting their constitution in a world in which it would have been difficult, if not impossible, to imagine or envisage the world of the late 20th and early 21st century, in which Empire had vanished, in which international law and multilateral and bilateral conventions covered almost every topic with which government might be concerned, and in which technology had transformed the means by which trade, commerce, communication, travel and warfare would be conducted. They would have found it difficult, if not impossible, to imagine a world in which humanity seemed to be capable of destroying itself as a species an in which, for all its tensions and conflicts, there is an enhanced sense of the interdependence of nations and peoples in a global community. That they produced a working constitution which has supported a successful representative democracy through a century of change, which they could not have imagined, is a testament to their acuity and to their statesmanship. They knew that they were writing a document for the future. Sir John Downer QC, speaking at the 1898 Session of the Australasian Federal Convention held in Melbourne, looked to the judiciary of the future and said:

With them rests the obligation of finding out principles which are in the minds of this Convention in framing this Bill and applying them to cases which have never occurred before, and which are very little thought of by any of us.

Andrew Inglis Clark, writing in 1901 about the interpretation of the Constitution through future generations, said:

it must be read and construed, not as containing a declaration of the will and intentions of men long since dead, and who cannot have anticipated the problems that would arise for solution by future generations, but as declaring the will and intentions of the present inheritors and possessors of sovereign power, who maintain the Constitution and have the power to alter it, and who are in the immediate presence of the problems to be solved. It is they who enforce the provisions of the Constitution and make a living force of that which would otherwise be a silent and

lifeless document. Every community of men is governed by present possessors of sovereignty and not by the commands of men who have ceased to exist.

In those words we hear the voice of a great Australian statesman speaking across the 112 years in which the Australian federation has existed. His 'living force' metaphor, which has perhaps too vitalist a flavour for contemporary tastes, other than those of Star Wars aficionados, did not exceed the constraints that the constitutional text imposes. Its language was to be interpreted 'consistently with a proper use of it asan intelligible vehicle of the conceptions and intentions of the human mind, and consistently with the historical associations from which particular words and phrases derive the whole of their meaning in juxtaposition with their context.

It was implicit in what Inglis Clark said that a change in the way the Constitution was interpreted did not necessarily mean that the earlier interpretation was wrong. In the early years of federation, the High Court, whose members had all been closely involved in drafting the Constitution, developed doctrines of implied governmental immunities and State reserve powers which were applied until the Court changed direction, at the instigation of junior counsel, Robert Menzies, in its decision in the Engineers' case in 1920. The first doctrine was an implication from the federal nature of the Constitution that the Commonwealth and the States could exercise their respective legislative powers immune from the operation of the legislation of the other. The doctrine of reserved State powers stated that the Commonwealth could not exercise its legislative power in such a way as to interfere with powers of the States falling outside the list of enumerated powers. The Court in Engineers' held that the parliaments of the Commonwealth and the States each have the power to enact laws within their legislative competency binding on the Commonwealth, the States and the people. As Sir Owen Dixon later explained it, the principle emerging from the Engineers' case required a broad interpretation of Commonwealth legislative power and an acceptance of the capacity of the Commonwealth to enact legislation affecting States and their agencies. Two of the members of the Court in the Engineers' case, like those judges who formulated the doctrine overturned in that

case, had also been delegates involved in the drafting of the Constitution. They were Isaac Isaacs and Henry Higgins.

Sir Victor Windeyer, writing in the Payroll Tax case in 1971,reflected on the changes which, in his opinion, explained this important change in the interpretation of the Constitution. He pointed out that the colonies which in 1901 had become the States were not before that time sovereign bodies in any strict legal sense and the Constitution did not make them so. He said:

They became components of a federation, the Commonwealth of Australia. It became a nation. Its nationhood was in the course of time to be consolidated in war, by economic and commercial integration, by the unifying influence of federal law, by the decline of dependence upon British naval and military power and by a recognition and acceptance of external interests and obligations. With these developments the position of the Commonwealth, the federal government, has waxed; and that of the States has waned.

Sir Victor did not regard the Engineers' case as overturning error nor as evidencing a judicial alteration of the Constitution. Rather, as he put it:

in 1920 the Constitution was read in a new light, a light reflected from events that had, over twenty years, led to a growing realization that Australians were now one people and Australia one country and that national laws might meet national needs. For lawyers the abandonment of old interpretations of the limits of constitutional powers was readily acceptable.

The Engineers' case resulted from developments that occurred outside the law courts. In an important statement about constitutional interpretation Sir Victor said:

In any country where the spirit of the common law holds sway the enunciation by courts of constitutional principles based on the interpretation of a written constitution may vary and develop in response to changing circumstances. This does not mean that courts have transgressed lawful boundaries: or that they may do so.

In so doing, he reflected the approach to interpretation of the Constitution explained by Andrew Inglis Clark writing in 1901 and foreshadowed by Sir John Downer in his comments upon its interpretation in the Convention Debates in 1898.

That approach is not inconsistent with the application to the interpretation of the Constitution of techniques applicable to the interpretation of legal texts generally. Those techniques enable the Court to respond to a variety of interpretive questions. They require close attention to be paid to the nature and content of the constitutional text, its drafting history as evidenced by the successive drafts at the Conventions, as well as the informed commentaries of those who were involved in, or close to, the drafting process. Historical facts of the time may be relevant to an understanding of the purpose of words that, taken out of context, might mislead. The common law is also a necessary part of that understanding, not least because the interpretive mechanisms are, for the most part, derived from the common law.

Before considering further the growth of and limits upon Commonwealth powers with respect to the States, it is helpful to refer to two important aspects of Australian constitutional development. The first was the understanding of the source of constitutional authority. The second was the evolution of Australia as an independent nation.

It was readily accepted at Federation and long thereafter that the formal legal authority of the Constitution on 1 January 1901 derived from the legislative power of the Imperial Parliament. Andrew Inglis Clark described it as contained in a 'written document which is an Act of the Imperial Parliament of the United Kingdom of Great Britain and Ireland.' It was seen by a leading constitutional lawyer at the time, Professor Harrison Moore, as 'first and foremost a law declared by the Imperial Parliament to be "binding on the Courts, Judges and people of every State and of every part of the Commonwealth".' Sir Owen Dixon said of it:

It is not a supreme law purporting to obtain its force from the direct expression of a people's inherent authority to constitute a government. It is a statute of the British Parliament enacted in the exercise of its legal sovereignty over the law everywhere in the King's Dominions.48

Sir Owen attached to this characterisation of the Constitution a consequence for interpretation. The organs of government are simply institutions established by law. This contrasted with the position in the United States where they are agents for the people who are the source of the power.

The acceptance in 1901, and for a considerable time thereafter, of the Imperial Parliament as the source of legal authority for the Constitution is hardly surprising. It was in accord with the way in which the constitutions of the Australian colonies had evolved. Their legal legitimacy derived from pre-existing Imperial Acts of general application or from specific Acts giving legal force to a constitution which had been submitted to the Imperial Parliament by the colonists.

The notion that the Constitution might be based on popular sovereignty was first advanced by Justice Lionel Murphy in 1976. He thought that the United Kingdom Parliament ceased to be an Imperial Parliament in relation to Australia at the inauguration of the Commonwealth and that the existing authority of the Constitution was 'its continuing acceptance by the Australian people.'For some years he was a lone judicial voice for that proposition. However, in 1992 the concept of the Constitution as a framework for the exercise of sovereign power on behalf of the Australian people was propounded by Chief Justice Mason in Australian Capital Television Pty Ltd v Commonwealth. Chief Justice Mason said that the Australia Acts of 1986 marked the end of the legal sovereignty of the Imperial Parliament and recognised that ultimate sovereignty resided in the Australian people. On the other hand, the late Professor George Winterton cautioned against breaking the chain of legal authority from the British Parliament. He expressed concern about moving into what he called an 'extra legal realm' which he described as:

A world of legal fictions in which there are no boundaries except practically political power and theoretically the limits of imagination.

The question of popular sovereignty is one which is still open. The way in which its development could affect the interpretation of the Constitution in future is a matter which awaits cases in which questions of interpretation which might be affected by the source of authority of the Constitution arise for consideration.

It does not seem that the drafters of the Constitution would have regarded their efforts as giving rise to an independent nation in the full sense of that term upon the creation of the Commonwealth. Consistently with their vision, Australia came into existence and entered the 20th century in some respects as a self-governing colony of the United Kingdom. The United Kingdom Parliament had continued power to legislate for Australia. Australia remained subject to paramount British legislation.

Australia lacked executive independence in the conduct of its foreign relations at the time of federation. Such relations were carried on through the British government. Eventually that executive independence was recognised for all Dominions at an Imperial conference held in 1926. The resolutions passed at that conference were sufficient 'to secure the independence of Dominion executives, in the conduct of both domestic and foreign affairs'.

Legislative independence from Great Britain did not come to pass until the adoption by the Australian Parliament in 1942, retrospective to 1939, of the Statute of Westminster 1931(UK). That was a British statute which gave effect to the wishes of Dominions to lift fetters on their legislative powers imposed by an Imperial Act known as the Colonial Laws Validity Act 1865 (UK).The Statute of Westminster also affirmed the powers of Dominion parliaments to make laws having extraterritorial effect. It repealed the Colonial Laws Validity Act 1865 in relation to Dominion laws. That Act continued to apply to the States of Australia until 1986.

Even after the Statute of Westminster it remained theoretically possible for the United Kingdom Parliament to make laws affecting Australia. Independence granted to the Dominions at the national level by the Statute of Westminster, did not apply to the Australian States.

The final severance of the legislative and executive umbilical cord between Australia and the United Kingdom did not occur until 1986 with the passage of the Australia Act 1986(UK) by the United Kingdom Parliament and the corresponding Australia Acts of the Commonwealth and the State Parliaments. It was then also that the last vestige of judicial dependence disappeared. For until 1986 a litigant in a State Supreme Court could seek leave of that Court to appeal to the Privy Council in

England against decisions of the Supreme Court. Although such appeals were not permitted where they involved matters arising under the Constitution or involving its interpretation, there were, for many years, effectively two final appellate courts for Australia, the High Court and the Privy Council.

Australia's acquisition of executive independence in connection with foreign relations was to have a marked effect in subsequent decades upon the scope of Commonwealth power with respect to the States. As a full member of the Community of Nations, Australia has, over the years, entered into many treaties, both bilateral and multilateral, and acceded to numerous conventions on a variety of topics. Those treaties and conventions have been entered into by the Commonwealth Government in the exercise of its executive power. The accession to those treaties has enlivened the power of the Commonwealth Parliament to make laws giving domestic effect to those treaties and conventions. Those laws are made pursuant to the power conferred upon the Parliament by the Constitution to make laws with respect to external affairs. Laws giving effect to treaties and conventions in Australia now cover a large variety of topics from human rights protection in the fields of race, sex, age and disability discrimination, environmental law, criminal law, commercial law, transnational insolvency, intellectual property, maritime law including maritime pollution, and a large variety of other topics. The range of subjects of international law could not have been imagined by those who drafted the Constitution, nor their impact upon the scope of Commonwealth legislative power.

So far the focus of this presentation has been on Commonwealth power. However, every constitutional power has its limits. They may be expressed or implied in the Constitution. The Engineers' case did not presage the conversion of Australia into a unitary state. The joint judgment foreshadowed implied limitations on Commonwealth legislative powers. While such powers were to be broadly interpreted, they could not be used to 'impair or affect the Constitution of a State'. That was later more broadly stated as preventing the Commonwealth from passing laws which destroy or weaken the capacity or functions of the State. It was that kind of reasoning that underpinned the Court's decision in the Second Uniform Tax case to uphold the challenge to the Commonwealth law which made it an offence to pay

State income tax before Commonwealth income tax. Chief Justice Dixon, writing in the Second Uniform Tax case, said the provision attempted to 'advance or extend the substantive power actually granted to the Commonwealth until it reaches into the exercise of the constitutional powers of the States. 'State parliamentarians, ministers and judges have to pay Commonwealth income tax like anyone else. But laws singling out States or their officers or authorities are another matter. The High Court in recent times has held that laws imposing superannuation surcharges specifically on the pensions of State judges or the retirement benefits of State parliamentarians are invalid.

An important mechanism of the exercise of Commonwealth financial power and its entry into fields outside heads of power conferred upon the Commonwealth is s 96 of the Constitution, which provides:

During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

That section, as its language indicates, was evidently contemplated as a temporary provision to enable the Commonwealth, by assistance to the States, to overcome the rigidities imposed by other provisions of the Constitution providing for payments to the States after the imposition of uniform tariffs. Nevertheless, Quick and Garran concluded pragmatically:

as the Parliament is not likely to pass a self-denying ordinance to diminish its own powers, this section may be considered, for all practical purposes, as a permanent part of the Constitution.

Not only did s 96become a permanent part of the Constitution, it became a vehicle through which the Commonwealth was able to use its financial power to enter into a variety of fields for which it had no specific legislative power. As Sir Owen Dixon said in the Second Uniform Tax case:

it is apparent that the power to grant financial assistance to any State upon such terms and conditions as the Parliament thinks fit is susceptible of a very wide construction in which few if any restrictions can be implied.

Recently in ICM Agriculture Pty Ltd v Commonwealth, Gummow and Crennan JJ and I observed that the legislative power of the Commonwealth conferred by s96 did not extend to the grant of financial assistance to a State on terms and conditions requiring the State to acquire property on other than just terms. That was relevant to interlocking Commonwealth and State legislation relating to the substitution of aquifer access licences with reduced entitlements as part of the national water initiative.

The conditional grants power under s 96 may be compared with another aspect of Commonwealth financial activity and that is the use by the Commonwealth of its executive power to directly fund programs without going through the conditional grant mechanism for which s 96 provides and which a State may either accept or refuse. That aspect of Commonwealth power concerns s 61 of the Constitution which provides:

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

It is notable that the executive power of the Commonwealth is expressed in broad terms, the content, scope and limitations of which are not spelt out in the same way as legislative powers of the Commonwealth.

The executive power of the Commonwealth has been considered recently in two important decisions of the Court in Pape v Federal Commissioner of Taxation and in Williams v Commonwealth. In the first case, the High Court held that the executive power would authorise stimulus payments to individual taxpayers made by the Commonwealth as part of a national response to the Global Financial Crisis. In the second case, the Court held that the Commonwealth could not directly fund an activity within a State, namely the provision of chaplaincy services in State schools,

without authorising legislation under a head of Commonwealth legislative power. That conclusion did not say anything about the power of the Commonwealth to make grants of funds for such purposes to the States under s 96. Given the recency of those decisions and the possibility that there may be further litigation on the scope of the executive power in this respect, it would be unwise to make any further observation. As to what the founders would say, a review of the drafting history and commentaries of the time does not indicate any clear conception held by them collectively of the extent and limits of the executive power of the Commonwealth.

The drafters of the Constitution and the colonists whom they represented saw themselves as essentially British. It has been argued persuasively that a consciousness of white nationalism was central to federation and the invocation of that consciousness has been described as related to a 'cultural strategy in the processes of nation-building'. It informed the inclusion in the Constitution of a power for the Commonwealth Parliament to make laws with respect to '[t]he people of any race for whom it is deemed necessary to make special laws.' The purpose of that provision, according to the constitutional commentators Quick and Garran, writing in 1901, was to authorise the Commonwealth Parliament to localise the 'people of any alien race' within defined areas, 'to confine them to certain occupations', and to restrict their immigration. It also extended to giving such people special protection and securing their return to their country of origin.

The principal proponent of the power was Sir Samuel Griffith. The main debate was not whether there should be such a power, but whether it should be exclusive to the Commonwealth or shared with the States.

There was virtually no reference to the Aboriginal people of Australia during the Convention Debates on the race power. Indeed, they were expressly excluded from the coverage of that power so that the States could retain legislative power with respect to them. It was not until 1967 that the Constitution was amended to remove that exclusion so that the Commonwealth Parliament would have the power to make laws for Aboriginal people, as well as the people of any other race. The oddity is that a beneficial amendment was grafted onto a provision originally conceived as supporting adversely discriminatory laws.

Having regard to the history of the federation movement, it is not surprising that the Constitution has little to say about the relationship between government and governed. Australian legal academic, Professor George Williams, has suggested that many of the drafters of the Constitution were influenced by the commentators, Bryce and Dicey. Neither of those writers saw a need to expressly guarantee rights in written constitutions. Professor Helen Irving has referred to colonial liberals and conservatives among the drafters of the Constitution. The conservatives, for the most part, were primarily concerned with States' rights. The liberals, however, represented liberal utilitarianism associated with the ideas of John Stuart Mill. Professor Irving observed:

In the area of human rights, the majority, including most conservatives, took the Millsian approach, seeking the restriction of belief and action only in so far as their free expression harmed others. The tendency, as she described it, was to respect rights and freedoms negatively from interference but not to declare them positively.

Sir Owen Dixon, in comparing the United States and Australian Constitutions, attributed the omission of a Bill of Rights to a readiness on the part of the framers of the Constitution to leave the protection of rights to the legislature and the processes of responsible government. He stated:

The framers of the Australian Constitution were not prepared to place fetters upon legislative action, except and in so far as it might be necessary for the purpose of distributing between the States and the central government the full content of legislative power. The history of their country had not taught them the need of provisions directed to the control of the legislature itself.

In holding that there was no basis in the Constitution for implying general guarantees of fundamental rights and freedoms, another Chief Justice of Australia, Sir Anthony Mason, said in 1992:

To make such an implication would run counter to the prevailing sentiment of the framers that there was no need to incorporate a comprehensive Bill of Rights in order

to protect the rights and freedoms of citizens. That sentiment was one of the unexpressed assumptions on which the Constitution was drafted.

It is sufficient to say that there was probably a variety of reasons behind the absence in Australia's Constitution of a Bill of Rights, some related to the desire to maintain the capacity to discriminate against particular racial groups and others reflecting a loftier vision of nascent Australian constitutionalism. Hypotheses more than 100 years after the event, however plausible, are unlikely to yield a single reliable explanation.

In his preliminary draft of the Australian Constitution in 1891, Andrew Inglis Clark included four rights inspired by the United States Constitution. They were:

1. The right to trial by jury.
2. The right to the privileges and immunities of State citizenship.
3. The right to equal protection under the law.
4. The right to freedom and non-establishment of religion.

He also proposed that a State not be able to 'deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of its laws'.

Inglis Clark's rights provisions were debated at the 1898 Convention in Melbourne. There was opposition to the proposed guarantees, particularly those relating to equal protection and due process. One concern was that they would affect the legislative powers of the States. In the event, limited rights provisions were adopted. They comprised the right to trial by jury in cases of offences against the Commonwealth tried by indictment, a prohibition on the Commonwealth establishing any religion or preventing the free exercise of any religion and the protection of the residents of one State from discrimination by another State on the basis of residence. The anti-discrimination guarantee was the relic of Inglis Clark's equal protection proposal. It is important, however, to acknowledge that these are not the only sources of protection of rights and freedoms in the Australian Constitution. The Constitution, while authorising the Commonwealth Parliament to make provisions for medical and

dental services, limits the power by expressly providing that it does not authorise any form of civil conscription. The Constitution also limits the power of the Commonwealth to acquire property from any State or person by requiring that any such acquisition be on just terms. Section 92 of the Constitution, which guarantees that trade, commerce and intercourse among the States shall be absolutely free, contains two elements: one is the freedom of trade and commerce and the other is freedom of intercourse. The latter freedom was relied upon to strike down national security regulations in 1945 which were found to prohibit interstate movement. Then there are important implications drawn from Chapter III of the Constitution.

Chapter III of the Constitution, which provides for the federal judicial power to be exercised by the High Court, by Federal courts created by the Parliament, and also by State courts has become an important source of limitations upon Commonwealth and State legislation which would compromise the essential and defining characteristics of Federal and State courts. By its decision in the Boilermakers' Case, the High Court asserted a strong principle of separation between the judicial power of the Commonwealth and its legislative and executive powers for which Chapters I and II respectively provide. Chapter III has also become an important source of implied limitations upon Commonwealth and State legislation which would compromise the essential and defining characteristics of State and Territory courts. The limits upon the power of State legislatures to make laws affecting State courts and their decisions are embodied in the following propositions:

- State legislatures cannot abolish State Supreme Courts, nor impose upon them functions incompatible with their essential characteristics as courts, nor subject them in their judicial decision making to direction by the executive;
- State legislatures cannot authorise the executive to enlist a court of the State to implement decisions of the executive in a manner incompatible with the Court's institutional integrity;
- State legislatures cannot enact a law conferring upon a judge of a State court a non-judicial function which is substantially incompatible with the functions of the court of which the judge is a member;

- State legislatures cannot immunise statutory decision makers from judicial review by the Supreme Court of the State for jurisdictional error.

The Court has also recognised an implied freedom of communication on political matters in Australia. The implied freedom has been considered in a number of cases. It does not confer an individual right of freedom of speech but rather limits the power of both Commonwealth and State parliaments to interfere with freedom of communication on matters relevant to Commonwealth government.

In addition to the constitutional guarantees and limitations, the implied freedom and implications derived from Chapter III of the Constitution, the common law has developed in such a way as to require that statutes passed by the Parliament be construed in such a way as to minimise their interference with common law rights and freedoms, although the Parliament retains the power by clear words to abrogate such freedoms. The principle, which is an aspect of what is known as the 'principle of legality', is something that we share with the United Kingdom. It is not something that would be a surprise to the founders of the Constitution. In fact, it is reflected in an observation by Justice O'Connor, one of the original members of the High Court and a delegate to the Conventions, in a 1908 decision Potter v Minahan when, quoting Maxwell on Statutes, he said:

It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.

What would the founders say today? They would perhaps be more struck by the social and political changes which have occurred nationally and internationally, by the emergence of the phenomenon known as globalisation and by the advances in technology and by attitudes to race and to the Aboriginal and Torres Strait Islander peoples than they would be about the shape of the Federation, which is in part a response to matters external to the Constitution. Like John Curtin, they were men of

vision, allowing for the possibilities of an unimagined future. That is how we should remember them. That is why we should be grateful to them.

Lecture reflection by Professor David Black, JCPML Historical Consultant

It is beyond dispute that Western Australia's place in the Australian federation has always been a major source of contention and at times confusion. Barely ten years after the colony, with the assent of the British Government, had finally secured self government and its own bicameral Parliament and constitution the inhabitants of the colony were asked to vote to join the Commonwealth of Australia and in the process surrender a significant range of powers to the newly formed national government.

Over the ensuing hundred years and more as the effective powers of the newly formed Commonwealth government expanded far beyond what was envisaged in 1901 West Australians have been in the forefront of those opposing the accretion of power and authority at the national level. Indeed on one occasion (in 1933) the electors of the state voted by a two to one majority to leave the Commonwealth a consequence which proved to be both legally and politically impossible.

Much of the political rhetoric in 2013 now focuses, not as was originally the case on how Western Australia was suffering as an economic underdog crippled by the national system of protectionist tariffs, but rather on the situation today where Western Australia as the lifeblood of the Australia economy is portrayed as being sucked dry by many of its relatively impoverished neighbours east of the 120 parallel.

In this atmosphere Professor Geoffrey Bolton on 9 July (the anniversary of the date in 1900 when the Australian Constitution received the Royal Assent in the UK)delivered the inaugural John Forrest lecture at the Constitutional Centre focussing on how the relationship between Western Australia and the Commonwealth of Australia had developed over the years.

Nine days later Robert French, the Chief Justice of the High Court of Australia and himself a West Australian delivered the annual John Curtin Prime Ministerial Anniversary Lecture commemorating Australia's war time Prime Minister (and the only Australian Prime Minister to represent a West Australian seat in the House of Representatives) and who had died while still in office on 5 July 1945.

Topically the subject of the address was 'If they could see us now—what would the founders say?' and in this context Chief Justice French provided his audience with an extraordinarily comprehensive and thoughtful over view of a 112 years of constitutional development preceded by the twenty years of negotiation and contention which preceded the 1901 decision.

Chief Justice French highlighted from the outset that perhaps more than any other factor the driving force behind the federation movement was the desire by the politicians, and administrators and others to avoid the 'night of provincialism that was likely to descend upon them' (a quotation which itself comes from the work of a noted Western Australian born historian John La Nauze). Of particular concern was that the activities of the French and Germans in the area, for example, clearly required a response from some greater form of united government with the capacity to make an effective response.

More broadly, in dealing with the ways in which the constitution has developed in practice an underlying theme of Chief Justice French's lecture was that

"Despite the preoccupations of some commentators with the effect of High Court decisions on relations between the Commonwealth and the States, it is the elected representatives of the people in Commonwealth and State Parliaments, whose actions as legislators and as members of the executive government are the drivers of change in the way the federation works".

In this context "John Curtin, Australia's great wartime Prime Minister, whose memory we honour today, played a significant part in that development"

The evolution of the Commonwealth effective monopoly of income tax collection was the classic case in point and in particular the Uniform Tax Scheme in 1942

" which, in a political sense, placed effective control of income tax in the hands of the Commonwealth".

It was clearly the exigencies of war which led to this decision (the first ever Commonwealth income tax had previously been introduced in 1915 during the First World War) and it was related to the growing national responsibility of the Commonwealth Government as Australia moved by a series of steps from being a dependent colony linked to the United Kingdom to a fully fledged member of the international community.

Crucial to the Uniform Tax decision was Section 96 of the Constitution which gave the Commonwealth power to 'grant financial assistance to any State on such terms and conditions as the Parliament thinks fit' and it was this the High Court ruled that enabled the Commonwealth to impose its own income tax to the exclusion of the States and then provide financial assistance grants to the states provided they themselves did not impose income tax. At the time the Commonwealth did go further and try to provide that it would be an offence for a taxpayer to pay state income tax until Commonwealth tax had been paid but this provision was subsequently ruled unconstitutional.

The exigencies of war had led to a direct contradiction of the views of some of the founders. Thus Samuel Griffith, for example, in 1891 had contended that the Commonwealth would 'never impose direct taxation excepting in case of a great national emergency', and another of the convention delegates had the view that the Commonwealth Parliament would 'never go beyond Customs; nobody dreams of such a thing'.

In providing an overview of the intentions of the founders Chief Justice French indicated that the men who drafted the constitution 'were not creating a revolution against Imperial rule' and unlike their American counterparts were not concerned with defining human rights and freedoms. Rather, in general terms they were constructing a constitution for a self governing colony. By comparison by the early 21stcentury

"the Empire had vanished … international law and bilateral conventions covered almost every topic with which government might be concerned, and in which technology had transformed the means by which trade, commerce, communication, travel and warfare would be conducted".

Essentially the founding fathers built a constitution which had to be applied to cases 'which have never occurred before, and are very little thought of by any of us' [aviation would be an obvious example). It was in their opinion the responsibility of those who would come after them to

"maintain the Constitution and have the power to alter it, and who are in the immediate presence of the problems to be solved… . Every community of men is governed by present possessors of sovereignty and not by the commands of men who have ceased to exist".

Chief Justice French also devoted attention to a number of other issues including the extent to which the Constitution continues to be derived from the legislative power of the Imperial Parliament by contrast with the view that by the latter part of the twentieth century the constitution was increasingly seen as derived from popular sovereignty. Certainly the West Australian secessionists were told in no uncertain terms that Western Australia's continued place or lack thereof in the federation was an issue to be resolved within the framework of the Constitution itself. At the same time in his view the "final severance of the legislative and executive umbilical cord between Australia and the United Kingdom did not occur until 1986 with the passage of the Australia Act 1986 by the United Kingdom Parliament and the corresponding Australia Acts of the State and Commonwealth Parliaments".

In this context the scope of Commonwealth power with respect to the States was also transformed to a major extent by Australia's acquisition of executive independence in connection with foreign relations as the nation entered into treaties and numerous conventions on a variety of topics.

In the latter part of the lecture Chief Justice French focussed on some of the limits on the powers of the Commonwealth. Even in the Engineers Case in the early 1920s

which cleared the way for some of the more important extensions of Commonwealth powers the judges stressed that they were to be granted but only so as not to 'impair or affect the Constitution of a State 'or as later expressed, to destroy or weaken 'the capacity or functions of the State'.

Similarly the High Court has refused to allow the Commonwealth to single out States or their offices or authorities as, for example, when attempting to impose surcharges on the pensions of State judges. Similarly Section 96 has been limited in its impact to the extent that the Court will not allow the Commonwealth to directly fund activities within a State (as contrasted with making grants to a State) unless the Commonwealth has a specific constitutional power in the area affected.

What then would the founders say today? Chief Justice French's conclusion is that they would be

"more struck by the social and political changes which have occurred nationally and internationally, by the emergence of the phenomenon known as globalisation and by the advances in technology and by attitudes to race and to the Aboriginal and Torres Strait Islander peoples than they would be about the shape of the Federation Like John Curtin they were men of vision, allowing for the possibilities of an unimagined future".