

## **Chief Justice French presents the 2013 Anniversary Lecture**

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.

Typically 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 overview 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 21<sup>st</sup> century

“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”.