Introduction: The Vision in Hindsight Explained

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It is possible to argue, Aristotle says, that in the making of law the collective wisdom of a people is superior to that of even the wisest lawgiver.¹

Introduction

In Australia the collective wisdom described by Aristotle is in its national dimension vested in the representatives elected to a federal parliament. In an age of increasing and unrelenting cynicism about the workings of representative democracy, it is instructive to recall that over a century ago the framers of the Australian Constitution devised what was thought at that time to be a most democratic document. Indeed, one supporter of Federation went so far as to argue that ‘he could not conceive anything more democratic unless they gave the vote to dogs and horses’.² In addition, the procedures used to adopt the Constitution were highly democratic both in the election of most of the delegates who attended the Second National Australasian Convention and also the referendums held to approve that instrument.

It is, of course, true that the kind of representative democracy provided at the turn of the 20th century would understandably only reflect what might be more accurately described as a partial instalment of democracy given the absence of a universal franchise. The franchise did not extend the right to vote to women and Aborigines in most of the Australian Colonies at the time of Federation. But even so, both Houses of the Parliament were composed of members who would be directly

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elected by those who had the right to vote and the kinds of restrictive franchises known for some of the Australian colonial parliaments were certainly not reflected in the Australian Constitution. Moreover, the machinery created by the Constitution was more than adequate to enable the Federal Parliament to deliver the remaining instalments of democracy required to accord with our more contemporary understanding of democracy. This was seen as part of the ‘continuous process of democratisation’ which was to lead ultimately to the adoption of a universal franchise in Australia and many other countries.

The design adopted for the national parliament may not have been original. As Quick and Garran were to point out after indicating that ‘[i]t has its deep roots in the past’:

Its framers did not venture to indulge in any new fangled experiments; they resisted every temptation to leave the beaten tract of precedent and experience, or to hanker after revolutionary ideals. In constructing a legislative machine for the new community they believed that they would most successfully perform their work by utilizing and adapting the materials to be found in the British, American, and Canadian Constitutions, with such developments and improvements as might be justified by reason and expediency.

The design adopted by the framers and approved by the voters at the referendums held at the end of the 19th century combined ‘the British system of parliamentary government containing an executive responsible to the legislature with American federalism’.

**Parliament and the Australian Constitution**

According to Professor Harrison Moore:

The distribution of powers by the Constitution is not inconsistent with the preponderance of the Parliament in the Government of the Commonwealth; the tradition of the identity of self-government with Parliamentary government remains, and the dominant fact in the Constitution is a transfer of powers previously exercised in the several Colonies by the respective Parliaments to a Parliament which represents the whole. In addition to that kind of control over other functions which the power of making laws necessarily carries, the Parliament is expressly

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5. *R v Kirby; Ex parte Boilermakers Society of Australia* (1956) 94 CLR 254 at 275 per Dixon CJ, McTiernan, Fullagar and Kitto JJ. The combination was described as ‘probably the most striking achievement’ of the framers.
given considerable powers of control over the executive and the judiciary.6

The preponderance referred to here included, apart from the powers of legislation conferred on the Parliament under ss. 51 and 52 of the Constitution:

- the organisation and regulation of the Executive given the power of the Parliament to fix the number of Ministers (s. 65) and the control over the appointment and removal of all officers in the public service (s. 67);
- the partial legal recognition of the conventions of responsible or cabinet government by requiring Ministers to become members of the Parliament (s. 64);
- the need for parliamentary appropriation of public funds (s. 83).

He also pointed out that ‘[e]ven in the judicial department the establishment and jurisdiction of Courts other than the High Court of Australia are completely controlled by Parliament’. He referred in that regard to the provisions of s. 72 which protected the tenure of federal judges against their arbitrary removal and without the approval of both Houses of the Parliament.7 No doubt he also had in mind the provisions in s. 77 which enable the Parliament to confer and define the federal jurisdiction exercised by Federal and State courts. Finally, but by no means the least significant example, was ‘the important matter of the amendment of the Constitution’ (s. 128).

The list of matters which fall within the jurisdiction is not limited to those mentioned by Harrison Moore. There are, of course, the powers to pass laws relating to elections and the qualifications of both electors and candidates for elections for both Houses (ss. 8–10, 29–31 and 51(xxxvi)); the role of both Houses in dealing with disputes over the membership of both Houses of the Parliament (s. 47); the powers, privileges and immunities enjoyed by both Houses (s. 49); the respective powers of both Houses over the enactment of legislation (ss. 53–57); grants of financial assistance to the States (s. 96); the creation of new States (ss. 121, 123–124); and the government of the Territories including their representation in the Parliament (s. 122).

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7. Ibid., p. 103.
Parliament and the Development of the Constitution

The Exercise by the Parliament of its Legislative Powers

As the chapters in this collection demonstrate, the powers vested in the national Parliament have proved more than adequate in helping to secure the basic objectives of Federation. This included the enactment of national and uniform legislation in the areas of external and internal tariffs putting into place the basic protections from external competition that were to last until well into the 20th century. There was, of course, legislation to deal with defence and external affairs, although the latter only assumed its full potential once Australia attained its independence. In addition legislation was enacted to give effect to a uniform policy on immigration even if today that policy can now be seen as tainted by racial prejudice. Legislation was also enacted to address the legal and technical problems associated with the existence of different jurisdictions (State and Territories) in areas such as bankruptcy, service and execution of process throughout Australia, intellectual property and much later, uniform laws on marriage and divorce.

Legislation was also passed early in the history of the Commonwealth to provide for what H. B. Higgins referred to as ‘a new province for law and order’, namely the establishment of conciliation and arbitration for the settlement of industrial disputes which extended beyond the limits of any one State. In addition, legislation was passed to provide for old aged pensions.

The deliberate decision of the framers to adopt a federal and not a unitary constitution is reflected in the resolution passed at the first National Australasian Convention:

That the powers and privileges and territorial rights of the several existing colonies shall remain intact, except in respect to such surrenders as may be agreed upon as necessary and incidental to the power and authority of the National Federal Government.

However, and as befits provisions of a constitutional nature, the provisions which conferred on the Parliament legislative powers have enabled the Parliament to pass laws which went far beyond what might
have been contemplated at the time of Federation. While this could not have occurred without a generous interpretation of federal legislative power adopted by the High Court, it is too easily forgotten that the Court cannot adjudicate on the validity of legislation which has not been enacted. This is so especially given the unwillingness of the Court to render advisory opinions on the legal and constitutional validity of legislative or indeed any other governmental action. Even if the Court were minded otherwise, it still requires a government and parliament that is politically motivated to take legislative and other governmental action in order to occasion a test of the validity of such action. This calls attention to the important and leading role that the Parliament has played in the development of national authority and, as will be seen, to the rationale for this collection.

In modern times it seems to have been accepted that the Parliament possesses and is expected to exercise ample powers to make laws for the control of the national economy, the exploitation of the nation’s resources and the environment. With the help of a generous interpretation accorded by the High Court to the legislative powers possessed by the Australian Parliament, the same Parliament has met the perceived demands of the welfare state in the 20th century. This has seen an accompanying increase in the centralisation of power in Australia as elsewhere. It remains to be seen how the Parliament will respond to the more recent contraction of the role of governments in the social and economic affairs of our nation.

The Constitution as originally framed did not create an independent Australian nation. Rather, it contained the means by which that independence might one day come to be achieved and recognised. As the Constitutional Commission pointed out, it ‘contained provisions which while they could not be given their full application because of Australia’s status as part of the Empire, were seen by later judges to contain the potentiality of full nationhood’.10 The Commission quoted with approval the following observations of a former Australian Chief Justice:

Whilst the new Commonwealth was upon its creation the Australian colony within the Empire, the grant of the power with respect to external affairs was a clear recognition, not merely that by uniting, the people of Australia were moving towards nationhood, but that it was the Commonwealth which would in due course become the nation state, internationally recognised as such and independent. The progression from colony to independent nation was an inevitable progression, clearly

adumbrated by the grant of such powers as the power with respect to
defence and external affairs.¹¹

The process by which Australia attained its full constitutional and
legal independence was reluctant, fragmented and above all evolutionary.
But the Australian Parliament played a significant role in that process
with the enactment of the Statute of Westminster Adoption Act 1942 (Cwlth)
and the enactment of the Australia Act(s) 1986 (Cwlth) and (UK).

Any contraction in the role of the state in the present century is
unlikely to lessen the need for the national Parliament to act as a
facilitator in the phenomenon of internationalisation and globalisation.
Its role as a facilitator takes the form of passing laws to give effect to
Australia's international obligations in what previously might have been
thought to fall within the area of State exclusive legislative authority, for
example human rights, wages and conditions of local employment. While
this has proved controversial in upsetting the balance of power between
the Commonwealth and the States, there seems little doubt that this
phenomenon will continue unabated for some time to come.

The Parliament’s role in the exercise and development of all of its
legislative powers, as distinct from that played by the High Court, has
not received the attention it deserves. It is hoped that this collection will
make a significant contribution to filling this gap.

Parliament and the Interpretation of the Constitution

There is, however, a narrower sense in which the Parliament can become
involved in the development of its legislative powers. That sense
concerns the extent to which the Parliament exercises an independent
role in interpreting the scope of its own powers under the Constitution.
It is true that the growth of the Australian parliamentary committee
system and the development of a (then) Legislative Research Service in
the Department of the Parliamentary Library, both of which date from
the last quarter of the 20th century, have begun to exert a significant
influence in this direction. Even so, however, we still seem to lack the
kind of tradition which exists in the United States under which other
agencies of government apart from the courts perform meaningful
interpretative roles in relation to constitutional matters.

In the United States it has been asserted that:

¹¹. New South Wales v Commonwealth (Seas and Submerged Lands case) (1975) 135 CLR 337 at
373 per Barwick CJ who referred to the legislative powers in s. 51(vi) (defence) and
(xxix) (external affairs) and the executive power of the Commonwealth in s. 61—the
section being described as underlining 'the prospect of independent nationhood which
the enactment of the Constitution provided': ibid.
Broadly conceived, then, the meaning of the Constitution is shaped not merely by judges but by legislators, executives, state officials, and private citizens.¹²

For the same writer, ‘constitutional law is not a monopoly of the judiciary’¹³ and ‘[the US] Constitution undergoes constant interpretation and reinterpretation by legislators and executive officials’.¹⁴ Perhaps the most striking assertion of a co-ordinate authority to interpret the Constitution was advanced by a President who is reported to have said:

It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision.¹⁵

It has been argued that merely because the United States Supreme Court is the ‘ultimate interpreter’, having as it does the final word on questions of constitutional validity, does not mean that that it is the ‘exclusive interpreter’.¹⁶ This has been referred to as the theory of ‘coordinate construction’.¹⁷

This contrasts with the view asserted in Australia by a former Commonwealth Attorney-General and distinguished lawyer, the Hon. Robert Ellicott QC. When in Opposition in 1974, he said during the course of a debate on the enactment of legislation in the House of Representatives:

Uncertainty as to the extent of constitutional power should never of itself be a reason for opposing an otherwise worthwhile legislative exercise of power; nor should it prevent a government, properly advised, treading where angels of constitutional probity have formerly feared to tread. The High Court, as we know, will readily give us the answer.¹⁸

Even more in point is the Law Officer’s Opinion given early in the history of the Commonwealth regarding the role of the Governor-General in deciding whether to assent to federal industrial legislation of doubtful validity. Apparently the Attorney-General of the day had

¹⁴. ibid., p. 5.
¹⁵. ibid., p. 240. The President was Andrew Jackson.
¹⁶. ibid., p. 243 (emphasis added).
¹⁷. ibid., chapter 7.
conceded in parliamentary debates that certain provisions contained in the legislation subsequently presented for assent were likely to be held invalid. It was strongly asserted that the Governor-General was not justified in withholding assent because the Constitution provided the method by which such matters are resolved, however strongly the Governor-General might believe that the legislation was invalid. Thus, it was said:

For the Attorney-General or the Ministry to seek to give effect to their view in opposition to that of Parliament as expressed in the enactment, by tendering advice to His Excellency to withhold assent or to suggest the excision of the provision by amendment, would be to usurp the functions of the High Court. Every Bill has to be read as though it contained the words ‘subject to the Constitution’, and the duty of saying whether it conforms thereto or not rests with the High Court.19

The view expressed illustrates a fundamental tenet of the principles of British responsible government; namely, that as a general rule a Governor-General should act in accordance with the wishes of his or her Ministers. Perhaps this provides us with part of the explanation for the difference between our respective traditions as regards the coordinate authority to interpret the Constitution. The adoption of responsible government makes it impossible to maintain a strict separation of powers between the Legislature and the Executive and so narrows the potential for conflict between at least the House of Representatives and the Executive branch of government. Perhaps the point may be carried further, but in a slightly different way, regarding the absence of scope for argument about the interpretation of a judicially enforceable bill of rights given the failure of the Australian Constitution to incorporate, with few exceptions, such a document. But the explanation is only partial because the assertion made in the Law Officer’s Opinion highlighted the role of the High Court as if it were to be treated as both the final and the exclusive interpreter of the Constitution. Furthermore, the potential for conflict has always existed between the Senate and the Executive branch of government, and was certainly increased as a result of the introduction of proportional representation in 1949.

In making these observations I put to one side those exceptional areas where the High Court has decided that certain constitutional provisions are not justiciable ostensibly because the relevant constitutional

19. Opinion given to the Governor-General by Sir Josiah Symon, P. Brazil, ed., Opinions of Attorneys-General of the Commonwealth of Australia: with opinions of Solicitors-General and the Attorney-General’s Department, vol. 1, AGPS, Canberra, 1981, vol. 1, 1901–14, Opinion No. 203, p. 238, p. 239, para. (5). The legislation in question dealt with conciliation and arbitration and the offending provisions sought to extend the application of its provisions to State railway employees. It was subsequently found invalid by the High Court.
provisions deal only with ‘proposed laws’ and not laws actually enacted by the Parliament. Disputes between both Houses over their respective powers of legislation in ss. 53–54 of the Constitution have necessitated the determination of significant issues of interpretation by them and without the assistance of the judiciary. These have included what constitutes the ‘ordinary annual services of the Government’ as regards financial legislation that may not be amended by the Senate; and also whether the Senate has the right to press its requests for amendment of such legislation.20

Another exceptional area where the High Court has decided that certain constitutional provisions are not justiciable relates to the power of the Governor-General to dissolve both Houses of the Commonwealth Parliament simultaneously under s. 57 of the Constitution.21 This may account for the authority asserted by Governors-General to satisfy themselves that the conditions of a double dissolution have been satisfied before agreeing to dissolve both Houses on the advice of Prime Ministers who command the confidence of the House of Representatives.22

In addition, care should be taken not to carry the difference mentioned above too far given the increasingly valuable role played by both the Senate and the House of Representatives constitutional and legal affairs committees and by information and research resources made available to members of Parliament independently of the services provided by the Executive branch of government.

A number of useful reports have been prepared by the committees on constitutional matters which may help to steer our own Parliament in a similar direction as that followed in the United States. They have covered an array of constitutional issues ranging from the role which the Commonwealth could play in the enactment of a national companies scheme, the Commonwealth’s power to make and implement treaties, the privileges and immunities enjoyed by the Australian Government in


21. This means that the High Court will not determine the validity of the elections which result from a dissolution of both Houses although it will determine whether the conditions of s. 57 have been satisfied in order to determine the validity of a law which was enacted at a joint sitting; Victoria v Commonwealth and Connor (1975) 134 CLR 81, at 120, 155–7, 178, 183; cf. the position left open by Gibbs J in relation to whether the Court could intervene to prevent an invalid double dissolution proclamation being given effect to before the issue of writs for the election of both Houses at 157.

22. Leaving aside its correctness, that authority seems to have been recognised in the practices and conventions codified by the Australian Constitutional Convention: Proceedings of the Australian Constitutional Convention vol 1 Brisbane 29 July–1 August 1985, Government Printer, Brisbane, 1985, p. 416, para. K.
legal proceedings, the feasibility of a treaty between the Commonwealth and the Aboriginal people, the ability of the Commonwealth Parliament to pass laws to override the freedom of speech enjoyed by State members of parliament in respect of what they say in those parliaments, the powers of both Houses of the Commonwealth Parliament over the enactment of Money Bills, Commonwealth parliamentary privilege and various aspects of the qualifications and disqualifications of Commonwealth members of Parliament. The 1981 report on the last of these matters proved useful in the case decided by the High Court on the disqualifications contained in s. 44(i) and (iv) of the Constitution.

The potential exists in Australia to follow the reliance placed by the United States Supreme Court on congressional findings in establishing the requisite connection needed to uphold the validity of legislation. That reliance is still permissible even if in more recent times the Supreme Court has had occasion to emphasise that such findings were not, and can never be, conclusive. It is possible to see a similar use being made of findings contained in Australian parliamentary reports by the Australian High Court although this has yet to reach the scale encountered in the United States.


Reports from the House of Representatives Standing Committee on Legal and Constitutional Affairs include: ‘The Third Paragraph of Section 53 of the Constitution’, November 1995; and ‘Aspects of Section 44 of the Australian Constitution: Subsections 44(i) and (iv)’, July 1997 and from the Joint Select Committee on Parliamentary Privilege ‘An exposure report for the consideration of Senators and Members (on parliamentary privilege)’, June 1984.


25. The reliance has been very evident in the way in which federal laws have been sustained as a valid exercise of the power of Congress to make laws with respect to commerce: see L. Zines, The High Court and the Constitution, 4th ed., Butterworths, Sydney, 1997, pp. 58–9, 60. But see now as regards the non-conclusive nature of Congressional findings emphasised in the more recent decisions of the US Supreme Court: United States v Morrison, No 99–5 15 May 2000 per Rehnquist CJ delivering the opinion of the Court <http://supct.law.cornell.edu/supct/html/99-5.ZS.html>, p. 6, para. 3, following United States v Lopez 514 US 549 at 557; 131 L Ed 2d 626 at 636 (1995), n. 2.

26. An interesting example is provided in the judgment of Brennan J in Australian Capital Television Pty Ltd v Commonwealth (No. 2) (1992) 177 CLR 106 who referred to a Report of the Joint Standing Committee on Electoral Matters (‘Who pays the piper calls the tune’: Report no. 4 June 1989) in upholding the power of the Commonwealth Parliament to restrict political advertising as a permissible regulation of the implied freedom of political communication: at 148, 160–1. He was, however, in dissent, although account was taken of that report by some of the judges in the majority: Mason CJ at 130, 131; Deane and Toohey JJ at 173.
INTRODUCTION—THE VISION IN HINDSIGHT EXPLAINED

The Idea for the Project

The centenary of Federation provides an apt occasion to explore the way in which the Parliament has developed and influenced the operation of the Australian Constitution. As its primary vehicle to mark the celebration of the Centenary, the Department of the Parliamentary Library believed that it was time to focus more directly on this theme by looking at the vision which the framers had in mind in designing the Parliament and its powers, the way that the Parliament has exercised those powers and how that the original design now looks with the benefit of hindsight. What has the past century taught us about the powers and roles the Parliament should exercise and play in the future?

A number of very distinguished authors drawn from the various disciplines were approached to prepare papers on topics approved by a Steering Committee. I think it is fair to say that most authors found their task to be challenging. There is, of course, no shortage of commentary on the judicial interpretation of the Constitution and the highly significant role played by the High Court in the development of Australia’s Constitution. The challenge of this project was to analyse developments from the parliamentary perspective.

An Overview of the Chapters

Professor Brian Galligan’s chapter provides an overarching look at the way the Parliament has exercised its legislative powers and the impact this has had on federalism. As he has observed, there is an important difference between the role of the Commonwealth Parliament and that of the High Court in the development of federalism. The former is a major institutional player on the Commonwealth side and the latter acts as an umpire in adjudicating disputes between the Commonwealth and the States. His chapter begins by outlining the institutional design which underpins the federal distribution of power in Australia and then attempts to dispel what he described as the ‘myths of federalism’. This was seen as important because they can affect the way the role of the Parliament is perceived in giving effect to the same concept.

He goes on to address his theme in at least three ways. First, the Parliament’s own development as a federal institution and the dynamic interaction between its bicameral parts, the House of Representatives, the Senate and the Executive. Secondly, the change in the relative balance of power in Commonwealth and State relations. Thirdly, the role of the Parliament (and government) in meeting and mediating the challenges of internationalisation. His contribution touches at certain points and from a different perspective a number of matters that are
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dealt with in more detail by the other authors. Professor Galligan forecasts for the future the possible decrease of the predominance of the Commonwealth Parliament (and Government) and an accompanying winding back of the ‘ever increasing centralisation of Australian federalism’. It will be interesting to see if this development is accompanied by a corresponding winding back of the judicial interpretation of national legislative power, although I have argued elsewhere that this does not necessarily have to be the case.27

The role of the Commonwealth Parliament in relation to internationalisation is the subject of the chapter written by Anne Twomey. That subject recalls the famous words of Alfred Deakin when he said at the Imperial Conference in 1907:

[O]ne of the principal reasons that induced Australians to federate was that as regards all places outside this continent they should speak with one voice, that as the interests of Australians in relation to external affairs were common to all it was desirable to have one spokesman with one set of views instead of as formerly six spokesmen with six possible divergent sets of views.28

Ms Twomey traverses the development of the Australian Government’s authority to enter into international treaties and the power of the Australian Parliament to decide whether to implement them as law. This necessarily involves an examination of the Parliament’s involvement in the gradual, if not reluctant, transformation of Australia as a member of the British Empire into an independent nation in its own right with full responsibility for conduct of its own defence and foreign relations. She describes the role which the national Parliament played in debating and being kept informed on the ratification of important international instruments such as the Treaty of Versailles and Covenant of the League of Nations; and the debates on reports tabled in Parliament relating to the Imperial Conferences and the International Labour Organization. Inevitably, her analysis covers the scope of the Commonwealth Parliament’s power to legislate with respect to the domestic implementation of treaties entered into by the Australian Government; and the corresponding decrease in the extent of the States’ exclusive legislative powers to make laws which were previously thought to come only within their authority. The chapter also deals with the modern developments that have resulted in the greater role now accorded to the Parliament and its committees in scrutinising the treaties entered into

28. Cmd. 1907, No. 3340 quoted with approval by Evatt and McTiernan JJ in R v Burgess; Ex parte Henry (1936) 55 CLR 608 at 685.

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and ratified by the Australian Government. It remains to be seen whether future Parliaments may be minded to go further and require some or all international agreements to be ratified by the Parliament in order to bind Australia at international law.

As indicated previously one of the earliest pieces of legislation passed by the Australian Parliament was the Conciliation and Arbitration Act 1904 (Cwlth) enacted under the power contained in s. 51(xxxv) of the Constitution. It represented a peculiarly Australasian attempt to resolve industrial disputes by *judicialising* their resolution and went a long way towards laying the foundations for the Australian 'fair go' tradition. Almost a century later, the attempt to secure wage justice over market forces seems a remarkably bold and novel piece of State intervention in the labour context. It is interesting to reflect on the extent to which, if at all, this innovation was due more to the relative scarcity of labour than to any innate Australian attachment to justice or fairness.

The chapter written by Dr Andrew Frazer addresses the origin and development of the conciliation and arbitration power by the Commonwealth Parliament. As he correctly points out, it is an unusual power because it does not give the Parliament direct power to legislate outcomes, but rather requires the use of a particular method (conciliation and arbitration) to resolve particular kinds of industrial disputes (those extending beyond the limits of any one State). This bestows upon the Commonwealth arbitral tribunal created by the Parliament a unique authority to decide outcomes in the industrial arena. In other words the tribunal becomes, as is made clear in his chapter, the institution responsible for exercising the constitutional power so as to also become an important participant in political controversies associated with industrial disputes at the national level.

Dr Frazer provides a comprehensive account of the framers’ vision. He also details the largely unsuccessful attempts made to expand the industrial power by the holding of referendums and seeking references of legislative power from the States. The chapter contains an exhaustive examination of the Commonwealth parliamentary record principally generated by the many amendments made to federal industrial legislation. As Dr Frazer shows, much of this legislation was the subject of challenge in numerous High Court cases. These cases highlight the technical and complex nature of the legislative power in question which, as he also points out, remains one of the most contentious and litigated aspects of the Commonwealth Constitution. The chapter also deals with the extent to which Parliament has continued to rely on s. 51(xxxv) as the source of its legislative power in industrial relations, or has resorted to other constitutional heads of power in order to avoid the limitations inherent in
that power. Those powers have, of course, included the power to legislate with respect to industrial relations under the corporations and external affairs powers (s. 51(xx) and (xxix)). This may coincide with the decline in the political popularity of using conciliation and arbitration as a means of resolving industrial disputes. Despite that, the author predicts that the industrial power is likely to retain its primary significance. Whatever the prognosis for the future, and whatever judgment is reached about the merits of the bold new experiment in securing wage justice, the use made of the experiment by the Commonwealth Parliament will undoubtedly be seen as having played an essential part in the political and economic history of the Australian nation.

The decision of the framers to deny the Commonwealth Parliament the power to make laws with respect to Australia’s indigenous peoples under s. 51(xxvi) did not deny the same Parliament the power to make such laws under its other legislative powers, including its very considerable authority to make laws for the government of its Territories including the Northern Territory (s. 122). The chapter written by John Summers essays the way in which the Parliament exercised that authority until 1967 and the successful referendum which gave the Parliament its more general and comprehensive legislative power with respect to persons of the Aboriginal race. Much has been written about the Parliament’s involvement since 1967 and the use that it was ultimately forced to make of its newly acquired power. The aim here, however, is to address the gap in writing which exists as regards the period between 1901 and 1967. He does this by examining, first, the Commonwealth legislation which discriminated against and denied persons of the Aboriginal race the right to vote in federal elections and other Commonwealth rights and entitlements. Secondly, the use made of the Commonwealth’s undivided legislative power over Aborigines in the Northern Territory. Thirdly, the failure of the Parliament to play any meaningful role in protecting the interests of Aboriginals in the 1950s and 1960s in the establishment of the Woomera Rocket Range and the British nuclear tests conducted in the north-west of South Australia.

The depressing conclusion that is reached after this survey is that, contrary to what might have been expected, the Parliament failed to exercise the role that it could have played to act in the best interests of the Aboriginal people. Indeed, it may have been surprising, as Mr Summers points out, why there was such a strong move to expand the Commonwealth Parliament which ultimately led to the successful 1967 referendum. Fortunately, the record is not all one way as his examination shows in relation to the gradual removal of discriminatory provisions and the successful initiation of the proposed constitutional alteration to give the national Parliament the power it now possesses over persons of
the Aboriginal race. Whatever might be said of the wisdom of using the special races power in s. 51(xxvi) of the Constitution as a vehicle for expanding national legislative power over Aboriginals, the adoption of this alteration will, and to some extent already has, enabled Australia to come to terms with its past.

The main problem foreseen by the framers with respect to federal financial relations was the vast amount of ‘surplus revenue’ that the Commonwealth would obtain from having exclusive access to the levying of duties of customs and excise. After all it was thought that the annual cost of federation would be ‘less than the cost of a dog licence per head of population of Australia’ while the States would be deprived of their most important source of revenue. The ultimate reply given by the defenders of the arrangements finally adopted was that the people should ‘trust the Federal Parliament’. Has the Parliament misused that trust? The chapter contributed by Denis James addresses that question. He describes the transitional financial arrangements between the Commonwealth and the States and points out that the Constitution did not provide for any long-term resolution of Commonwealth–State financial relations. He identifies a number of important milestones which marked the various stages of the inexorable progress of Commonwealth financial domination of the States. That domination has had the result that the Commonwealth raises more money than it needs to meet federal expenditure and the States raise too little of the money they require to meet their expenditure (vertical fiscal imbalance). It is also a domination which, in his opinion, Parliament has found itself constrained in its ability to modify the will of the Commonwealth Government. In his view the Parliament has made no serious attempt to reverse this trend and reference is made to the factors that may explain that failure. That said, he acknowledges that some efforts have been made to address the fiscal imbalance such as the introduction of the revenue-sharing arrangements that will take effect following the introduction of the Goods and Services Tax even if this will still leave the States with little financial autonomy. In addition, the Parliament has played an ongoing role in scrutinising programs funded through special purpose grants made to the States under s. 96. According to the received learning, the power of the Parliament to grant financial assistance under that provision has assumed a critical importance to the current financial dominance of the Commonwealth. Nevertheless, more attention might be paid in the future to the question whether the ends of s. 96 could and would have been served even without its existence, as is illustrated by

the experience in the United States which lacks a corresponding provision in its federal Constitution.30

Trusting the Federal Parliament underlies yet another contribution to this project, namely, the chapter written by Dr John Uhr on the design of the Australian federal electoral system and the rules for representation devised by and for the Federal Parliament. If the Australian Constitution embodies representative democracy, it does not entrench the electoral system used to give effect to that form of government. Dr Uhr’s chapter reviews the development of the rules for representation devised by the Parliament which regulate the requirements for representation for the Senate and House of Representatives and the electoral process generally. As he points out, one of the few constants in this story is the frequency of change and the fascinating compromise which has emerged as a result of those changes between democratic ideals and partisan deals. Although his view is that the electoral systems chosen have worked, he also points to the need for the Parliament to review the existing electoral mechanisms in order to ensure they can continue to give effect to representative democracy and retain their relevance for the future.

One issue that calls into question the successful combination of British responsible government and American federalism has been how the powers in s. 57 of the Constitution have been used to resolve deadlocks between both Houses of the Federal Parliament. The framers spent much time in devising solutions for reconciling the conflict between responsible government (a government retaining the confidence of the House of Representatives) and federalism (a Senate in which the original States are equally represented and having almost equal powers as the House of Representatives). The truth is, however, that s. 57 has largely been used as a means of obtaining early elections for reasons that have little to do with federalism. Emeritus Professor Jack Richardson essays the design of s. 57, the use made of it and the changes that might be made to it for the future.

The wisdom of the desire by some of the framers to permit compliance with the system of responsible government, without perpetuating its existence under the Australian Constitution, is well illustrated by the declining force of individual ministerial responsibility. The vacuum created by the decreasing role of Australian parliaments in holding individual Ministers to account for the wrongdoings or inefficiencies of the departments administered by them makes it easy to understand why the Federal Parliament has seen fit to adopt a package of administrative law reforms. The chapter written by Professor John

McMillan examines the Parliament’s role in the development of federal administrative law. He traces a number of themes that have emerged in the past century:

- the development of administrative law in Australia, including the question whether the courts have played a leadership role in recent decades, or have instead responded to initiatives that can be traced to Parliament;
- the tension and conflict that arises between Parliament and the courts in the development of administrative law;
- the different ways in which the development of administrative law has impinged on the functioning of Parliament and its members; and
- the sharing between Parliament, administrative tribunals and the courts the function of publicly testing Executive conduct.

Professor McMillan points to the dangers posed by legal accountability (as enforced through the courts) in undermining or diminishing the role that parliamentary accountability can and should play in the incremental development of public policy in individual cases.

If Australia has experimented with novel policies designed to produce wage justice, the relative scarceness of private capital and the tyranny of distance have also forced it to allow the state to take on the role of a major supplier of energy and transportation and other commercial services. This role has been exercised by statutory authorities outside the traditional framework of public service departments under responsible government. This serves to provide another illustration of how the workings of government have involved a need to go beyond that framework. It has required alternative ways of securing public accountability than is available through the traditional model of responsible government, which assumes a Minister responsible for the workings of a public service department. The chapter written by Professor Stephen Bottomley deals with the way in which the Australian Parliament has had to develop those alternative mechanisms for the delivery of certain government services. He traces the development of Government Business Enterprises (GBEs) and reviews the Parliament’s role in trying to ensure that those bodies remain accountable for their actions. The hybrid nature of such bodies, possessing as they do features of both the private and public sector organisations, is seen as posing special problems in defining and achieving public accountability. There is also thought to be a tension between such bodies having as their principal function the engagement in commercial activities in the private sector and the fact that they are controlled by government. This chapter addresses these matters and discusses the various accountability mechanisms created by Parliament.
As Professor Harrison Moore indicated, the role of the Parliament is not confined to its role as a general lawmaker, much less its various housekeeping responsibilities related to the internal workings of the Parliament. Rather, it extends to providing for the organisation and appointment of public servants and it also has an important role to play in securing the independence of the federal judiciary. These responsibilities are quite considerable even though they do not match the more active role played by the United States Congress in approving senior executive and judicial appointments. The chapter written by Dr Max Spry addresses the record of Australian parliamentary involvement in such matters. Reference is made to the method of appointing executive officers: Ministers and officers in the public service. But the primary focus of the rest of the chapter is on the role of Parliament in debating the selection and appointment of federal judges especially those of the High Court and the method of dealing with such matters. The chapter highlights the growing dissatisfaction with the way judges are chosen. Dr Spry identifies the pressures for moving towards the American system which gives the United States Senate such a key and public role in that process. I suspect that these pressures will probably force us to determine whether it is possible to devise a halfway house. That house needs to be located somewhere between the present system, which accords exclusive and non-transparent authority in the government of the day, and that of the United States, which may involve the payment of an unacceptable price for accepting appointment to federal judicial office in that country. The unfortunate circumstances which surrounded the attempts to remove Justice Murphy from the High Court signal a warning about the need to consider how best the Houses of Parliament can be assisted in performing their role in the removal of a federal judge for proved misbehaviour or incapacity.31

After pointing out that the ‘Constitution requires for its amendment, an Act passed by the Parliament in a certain way’ and confirmed by the electors, Sir Robert Garran once had occasion to observe that ‘if we can devise a method of framing and introducing into Parliament a constitutional amendment on a non-party basis, the electors would have more confidence in the result’.32 The story of constitutional amendment is in part a search for such a method. Regardless of the success of that

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32. Sir R. Garran, *Prosper the Commonwealth*, Angus and Robertson, Sydney, 1958, p. 209. Sir Robert served as the Secretary to the Drafting Committee at the Second National Australasian Convention which drafted the Australian Constitution. He later became the first Commonwealth Solicitor-General and Secretary of the Federal Attorney-General’s Department.
enterprise, Garran’s observation draws attention to the key role that Parliament is required to play in the process of constitutional amendment. The chapter written by Professor Cheryl Saunders essays the role the Parliament has played as a partner in the referendum process adopted to alter the Australian Constitution, as well as the reasons that lay behind the adoption of that process. She deals with the initiation of proposals for constitutional alteration and also the provision of the regulatory framework for holding constitutional referendums. Her conclusion is that the record of 100 years reveals substantial activity on the part of the Parliament, which has, however, been relatively unproductive in achieving significant constitutional change. Professor Saunders discusses the reasons for that outcome and the steps that might be taken to improve the success rates of future referendums, including steps that the Parliament might itself take for the same purpose. I would add a further suggestion, namely, that both Houses of Parliament could usefully set aside more regular time in the future for the debate and discussion of matters that concern the operation and alteration of the Australian Constitution.

**Broader Project—Other Papers**

The Steering Committee for the *Vision in Hindsight* project commissioned more papers than it knew the volume could carry. The final selection for inclusion, while a difficult one, was made by reference to a number of editorial considerations, which included the size of the volume and the coverage of the topics it contained. Needless to say, this does not detract in any way from the helpful and informative nature of the papers which were not included. All the papers formed part of the whole project and were commissioned to fill gaps in the literature and also assist the Department of the Parliamentary Library in responding to requests of members and committees of both Houses of the Parliament. As with the chapters that are included in this collection, the other papers were published in the form of Information and Research Services (IRS) Research Papers and can be found on the Internet (<http://www.aph.gov.au/library/>).

One such paper by Associate Professor Elaine Thompson examines the record of the Parliament in providing stable and democratic government in giving effect to the systems of representative and responsible governments provided by the Constitution. She addresses the relationship between the Parliament and the Executive and the extent to which the dominance by the Executive can be said in more recent times to have been challenged by the rise of minor parties holding
the balance of power in the Senate and the expansion of the parliamentary committee system. The same theme of the dominance of the Parliament by the Executive is addressed in more detail in the joint paper by Professor Glyn Davis and Jim Chalmers. The unpromising conclusion reached by those authors is that the framers of the Constitution did not benefit from the certainty granted by hindsight. In particular, their failure to spell out the requirements for responsible government and ministerial accountability set a pattern of Executive dominance that continues today and will in their view almost certainly characterise the operations of the Commonwealth Parliament in the second century of its existence.

The remaining papers, which were not included in this collection, deal with what might be termed housekeeping matters. The paper by Emeritus Professor Enid Campbell highlights the effect of the Parliamentary Privileges Act 1987 (Cwlth) in addressing a number of difficulties and uncertainties with the law on parliamentary privileges as well as removing certain privileges and clarifying the operation of Article 9 of the English Bill of Rights in relation to the use that can be made of parliamentary proceedings and debates outside the Parliament. She also points to some residual problems that remain including those connected with the investigatory powers of parliamentary committees.

The paper by Bob Bennett provides a comprehensive discussion of the role played by the Houses of Parliament in relation to the qualifications and disqualifications of members of Parliament. This is an area that is not well understood by lawyers because of the traditional and historical exclusion of the courts from dealing with such matters. Fortunately, the mechanism exists to confer the courts with jurisdiction to deal with them. This is complemented by the joint paper written by Professor George Williams and Jennifer Norberry, which deals with the parliamentary development and evolution of the federal franchise. As indicated earlier in this introductory chapter, the Constitution allowed

36. R. Bennett, ‘Candidates, Members and the Australian Constitution’, Research Paper forthcoming, Department of the Parliamentary Library, Canberra, 2001. The mechanism is to be found in s. 47 of the Constitution which along with s. 51(36) enables the Parliament to make other provision which, as the paper demonstrates, has in fact occurred, to some extent, with the enactment of the Commonwealth Electoral Act 1918 Part XXII, ss. 352–381.
for the extension of the franchise by the Commonwealth Parliament in favour of women and the Indigenous population of this country. It also deals with the modernisation effected by the Parliament of the laws that deal with the apportionment of electoral divisions for the House of Representatives.  

**Scope for Future Work**

It was mentioned earlier that the purpose of the project was to explore the way in which the Parliament has developed the operation of the Australian Constitution. The distinguished authors who have contributed to this volume will I am sure readily agree with me when I indicate that much more work needs to be done on this theme. Future explorations of this subject may wish to touch on the following topics:

- the role of Parliament in debating legislation which was later the subject of judicial challenges in famous cases decided by the High Court on such matters as the immunity of the States from federal legislation, the banning of the Australian Communist Party, the blocking of the Franklin Dam and the legislation which banned electoral advertising;
- a biographical sketch of famous federal politicians who later became High Court justices;
- significant parliamentary contributions made by famous Australian politicians on constitutional matters such as federalism, the Statute of Westminster and s. 96 of the Constitution;
- parliamentary discussion of the rationale which underlies the present federal distribution of power;
- the extent to which the exercise of federal legislative power has borne out the assertion that that the Australian Constitution provided a design for the defence of conservative interests; and
- the key role played by the Parliament in dealing with public financial law.

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38. *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers' case)* (1920) 28 CLR 129.
41. *Australian Capital Television Pty Ltd v Commonwealth (No. 2)* (1992) 177 CLR 106.
That said, the members of the Steering Committee who assisted my co-editor and me to design and develop this volume confidently believe that the authors in this volume have made an important contribution to the central theme of the project and that their contribution will encourage others to develop that theme further in the future.

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Professor Geoffrey Lindell
Chair
Steering Committee
Centenary Federation Project
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