

15th National Schools Constitutional Convention Dinner

Welcome to High Court

Chief Justice Robert French

24 March 2010, Canberra

Ladies and gentlemen, it is my pleasure to welcome you all to the High Court of Australia.

The Constitution of Australia contains eight chapters. I want to say something about the first three. Chapter I is entitled 'The Parliament'. It concerns the law making power of the Commonwealth, the Parliament which exercises that power and the subjects on which that power may be exercised. Chapter II concerns the executive power of the Commonwealth, which includes carrying out the laws passed by the Parliament. It is not until you get to the third chapter, which concerns the judicial power of the Commonwealth, that you will find reference to the High Court. That reference is found in s 71:

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. ...

Although it was provided for in the Constitution, the passing of laws to bring the High Court into existence was not a foregone conclusion. Indeed, the first Commonwealth Attorney-General, Alfred Deakin, had quite a battle to secure the passage of the *Judiciary Act 1903* (Cth) which established the Court¹. There were those who thought that the High Court would not have enough work to do, that it was an unnecessary luxury and that the Supreme Courts of the States and the Privy Council combined were sufficient to meet the judicial needs of the country. In a famous speech in support of the Bill which became the *Judiciary Act*, Deakin said²:

The Constitution is to be the supreme law, but it is the High Court which is to determine how far and between what boundaries it is supreme. The federation is constituted by distribution of powers, and it is this Court which decides the orbit and boundary of every power. Consequently, when we say that there are three fundamental conditions involved in federation [the existence of a supreme constitution; the distribution of powers under it; and the authority reposed in a judiciary to interpret it] we really mean that there is one which is more essential than the others – the competent tribunal which is able to protect the Constitution, and to oversee its agencies. That body is the High Court. It is properly termed the "keystone of the federal arch".

¹ See Bennett JM, *Keystone of the Federal Arch*, (Australian Government Publishing Service, 1980) pp 12-20.

² Australia, House of Representatives, *Parliamentary Debates* (Hansard), 18 March 1902, p 10967.

The focus of your Convention is on Federalism under the title 'Federalism: Unite or Divide?' That is a timely and highly relevant focus. There are important public debates going on at the moment about whether or not the Commonwealth Government should take over responsibility for the health system from the States. Because of the federal distribution of powers, it may require the agreement of the States to be able to do that. Indeed, the Prime Minister has suggested that if that agreement is not forthcoming he might seek a referendum to amend the Constitution to give the Commonwealth the necessary power. There are also debates, about which you have heard, concerning the regulation of diminishing water resources. These too raise issues about the boundaries of Commonwealth and State powers.

Important questions about the limits of Commonwealth and State law-making powers have come before the High Court many times since it was established and we had a number of such cases last year.

One of the cases which we decided last year was about the power of the Commonwealth to spend the money it raises through taxes. Can it spend such money on anything the Parliament thinks is appropriate, or are there limits? That question was raised in the *Tax Bonus Case*³ when the Commonwealth Parliament passed an Act to make payments of between \$250 and \$900 to most Australian taxpayers. The idea was to provide a fiscal stimulus to the economy to help protect us all from the global financial crisis. Everybody would go out and buy plasma televisions or computers or play stations. However, a law lecturer from New South Wales didn't want the money

³ *Pape v Commissioner of Taxation* (2009) 238 CLR 1.

and thought it was beyond the power of the Commonwealth to spend in this way. He brought a challenge to the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) in the High Court. He lost the challenge, but in the decision the High Court indicated that there were limits on the spending power of the Commonwealth. Another case concerned the power of the Commonwealth to impose special taxes on the pension or superannuation benefits of retired State politicians⁴. Behind that question was the fundamental issue of the extent to which the Commonwealth can pass laws which affect the capacity of the States to carry on their governmental functions.

We also had a case concerning the limits of State legislative powers. We held invalid a provision of a New South Wales law which would have required the Supreme Court of the State to hear certain applications without giving notice to the affected party. The particular provision concerned the seizure of suspected proceeds of crime⁵. Because the courts of the States can be authorised under our Constitution to deal not only with State laws but also with Federal laws, there is a doctrine that says they cannot be required by State law to carry out functions which are incompatible with their status as courts fit to exercise federal jurisdiction⁶.

The agenda for your Convention is both exciting and relevant, and no doubt has challenged each of you. That is good for you. It is also good for Australia. It is essential to our future as a representative democracy that not only future leaders but as

⁴ *Clarke v Federal Commissioner of Taxation* (2009) 258 ALR 623.

⁵ *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 261 ALR 220.

⁶ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

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many Australians as possible should have some understanding of the way in which their democracy works and the proper functions under it of the Parliament, the Executive and the Courts. Ignorance and misunderstanding do the work of demagogues.

I welcome you to the Court for this dinner. I congratulate the organisers on the program⁷ and I wish you all well for the balance of the Convention and for your futures as significant contributors to our community.

⁷ The Department of Education, Employment and Workplace Relations; The Australian Curriculum Studies Association Inc and National Curriculum Services Pty Ltd.