AUSTRALIAN LAW NEWS

70TH ANNIVERSARY OF ENGINEERS' CASE REMEMBERED

SEPTEMBER 1990

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On 1 September 1920 the Argus newspaper in Melbourne announced that "a judgment of momentous importance was delivered by the High Court yesterday". As described by the Argus, "the principal point to be decided was whether the Commonwealth Arbitration Court has power under the constitution to fix wages and conditions of labour of certain employees of the State government of Western Australia". The High Court held, in effect, that it did, upholding the power of the Federal Parliament to make laws binding on the States with respect to conciliation and arbitration.

Until the decision in the Engineers' Case, the majority of the Australian High Court had inferred from the language and Federal nature of the Australian Constitution a prohibition against the exercise of Federal legislative power in such a way as to affect State governmental bodies. Following D'Emden v Pedder (1904) 1 CLR 91, the Court had affirmed that State instrumentalities were immune from Federal interference. As the Argus announced to its readers on the Wednesday morning after the decision, the doctrine of immunity of State instrumentalities "is now overthrown ... the condemnation passed on the decisions in question is complete and unsparing".

Few decisions in the history of the Australian Commonwealth have been so influential and far-reaching as that in the Engineers' Case. See The Amalgamated Society of Engineers v The Adelaide Steamship Company Limited & Ors (1920) 28 CLR 129. Its "great lasting importance" has been the subject of analysis in every book on Australian constitutional law since 1920. In Strickland v Rocla Concrete Pipes Limited (1971) 124 CLR 468, 485, Chief Justice Barwick wrote:

> *"[T]he so-called reserved powers doctrine ... was exploded and unambiguously rejected by this Court in the year 1920 in the decision [in the Engineers' Case]."*

Adherence to the approach to the interpretation of the Australian Constitution laid down in the Engineers' Case was a consistent theme through Sir Garfield Barwick's judgments on constitutional matters. For him, the constitutional power of the Federal Parliament was to be found in the words of the Constitution, properly applied. The States had no boundary of reserved powers. They merely inherited whatever residue was left over, after the Federal power was properly defined. That definition was to be found, not by exploration of the historical meaning of the words of the Constitution as understood at the time it was written, but by giving the words their full meaning as they were to be applied in the modern context.

The recent decision of the High Court of Australia in New South Wales v The Commonwealth (1990) 64 ALJR 157

illustrates the divergence of view upon the meaning to be given to the language of the 1901 Constitution. The majority of the Court (Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ) held that s 51(xx) of the Constitution conferred no power on the Federal Parliament to provide for the incorporation of companies. The Court held, accordingly, that sections of the Corporation Act 1989 (Cth) which purported to confer such power were ultra vires the Federal Parliament and invalid. The Court followed its decision in Huddart, Parker & Co Pty Limited v Moorehead (1909) 8 CLR 330. However, the minority decision by Deane J rejected the "narrow construction" of s 51(xx) of the Constitution. He declared that Huddart Parker had been disapproved and/or authoritatively discarded by the High Court in Strickland v Rocla Concrete Pipes Limited. It was in that case that Sir Garfield Barwick had declared that the judgments of the Court in Huddart Parker "were all permeated by the doctrine of the reserve powers of the States which was 'exploded and unambiguously rejected' in the Engineers' Case".

This latest reminder of the influence of the Engineers' Case, and its contemporary relevance to the Australian constitutional scene, provided the background for a large gathering held at Macquarie University on 31 August 1990, the seventieth anniversary of the Engineers' decision. A dinner was organised by the Macquarie University Law Society in conjunction with the University's School of Law. Sir Garfield Barwick proposed a toast to the decision. Justice

Mary Gaudron of the High Court responded. The speakers were introduced by Justice Michael Kirby, President of the Court of Appeal of New South Wales and Chancellor of Macquarie University. A large audience of Federal and State judges, law lecturers and students from the four law schools in Sydney heard interesting observations on the significance of the Engineers' decision.

Introducing the principal speakers, Justice Kirby said that the Engineers' Case was to be seen in the context of the development of Australian nationhood. That development provided the background against which the decisions of the High Court were written and the words of the constitution construed. Justice Kirby quoted from the observations of Sir Victor Windeyer in the Payroll Tax Case (1971) 122 CLR 353, 396 speaking of the Engineers' Case:

> *"[I]n 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. ... As I see it the Engineers' Case looked at as an event in legal and constitutional history, was a consequence of developments that had occurred outside the law courts as well as a cause of further developments there."*

Justice Kirby pointed out that, to some extent, the Engineers' decision had relieved Australian courts,interpreting the constitution, from having to decide the respective boundary lines of Federal and State claims to power. Such decisions would invoke very high levels of

political subjectivism as Stephen J pointed out in Actors' and Announcers' Equity Association v Fontana Films Pty Limited (1982) 150 CLR 169, 190. See also L Zines, The High Court and the Constitution (2nd ed) 14.

Justice Kirby also reminded the audience of Sir Garfield Barwick's remarks on the occasion of his retirement as Chief Justice of the High Court. On that occasion, Sir Garfield had warned against what he then detected as "occasional ... little echoes of the old doctrine, as if the reserve powers doctrine that was exploded so long ago still had legs". See (1981) 148 CLR ix. He had then warned in emphatic terms of the "need to be very wary that the triumph of the Engineers' Case is never tarnished and that we maintain stoutly that notion that the function of the Court is to give to the words their full and fair meaning and leave the Constitution, which places the residue with the States, to work itself out".

Sir Garfield Barwick, proposing the toast to the Engineers' decision, suggested that it had not been the force of nationalism or extracurial developments which had led to the Engineers' doctrine. The decision was purely an exercise in proper construction of the Constitution. Any lawyer who had read the document ought never to have entertained the reserved powers doctrine. Sir Garfield repeated his view, expressed so often in the cases, that the words of the Constitution, granting power, do not change meaning over time (as Justice Windeyer's observations might suggest). The

words, he said, had a "fixed" meaning which remained the same. But as society grew more complex the denotation of the words, operating in the modern context, took on a wider reference. Sir Garfield said specifically that it was not a question of what the Founders thought the words of the Constitution meant but what they cover, when construed today. He said that although the Engineers' decision had been very important in the development of the Australian Federation, equally important had been the decisions about the power of the Commonwealth under s 96, to make grants to the States on conditions. It was in this way that the Commowealth had entered fields (he instanced transport, education, housing) which, in 1901 were regarded as purely State concerns. The shift to central power had also been reinforced by the Uniform Tax Cases. Indeed, such had been a shift towards the centre, that there was now a "new tendency" to hand some of the powers back to the "perimeters" of the Commonwealth.

Sir Garfield Barwick said that operating a Federation required great statesmanship. He urged that it was important to study not merely the law of the Constitution but how it operated in practice. He said that it was possible that insufficient attention had been paid, in construing the Australian Constitution, to the fact that the grant of power in s 51 is expressed to be "subject to this Constitution". It was upon that basis that the Melbourne Corporation case might be explained. The Federal Parliament could not destroy

the States which are an essential feature of Australia's Federal system of government. But how this basal idea could be reconciled with the approach to construction adopted in the Engineers' Case would remain a task for constitutional lawyers of the future.

Introducing Justice Gaudron, Justice Kirby, pointed out that she and Sir Garfield had both served on the Council of Macquarie University (Sir Garfield as Chancellor between 1967 to 1978). Both were medallists of the Sydney Law School. Both had been admitted to the Honorary Degree of Doctor of Laws at Macquarie University.

Justice Gaudron in her response to the toast drew attention to the skill of the young barrister who had appeared for the Amalgamated Society of Engineers in the Engineers' Case. He was Robert Menzies. When, in response to early submissions, Menzies, then 25, had provoked Justice Hayden Starke to declare that his argument was "a lot of nonsense", Menzies had said "Sir, I quite agree. But I am compelled to advance the argument by earlier decisions of this Court".

Justice Gaudron acknowledged that the Engineers' Case was an historic turning-point in constitutional law in Australia. She said that it had not always been strictly followed in decisions of the High Court. Sir Owen Dixon had written, in correspondence, that it should be used "sparingly". It had not been followed in the Melbourne Corporation Case (1947) 74 CLR 31; nor, she suspected, in

The Commonwealth v Cigamatic Pty Limited (In Liq) (1962) 108 CLR 372.

The toast to the Engineers' decision and the response were followed by a musical rendition of "The Engineers' Song" by Professor A R Blackshield of the Macquarie Law School. This musical rendition of the effect and importance of the Engineers' Case was well received, with a mixture of amusement and astonishment. Unfortunately, the text is too long to reproduce here and a small sample will have to suffice:

> *"The implied immunity of instrumentalities*
> *Gives no opportunity for social realities*
> *The doctrine is risible; the Crown's indivisible;*
> *The States are subordinate; they can't be coordinate;*
> *When power is plenary, that gives the machinery*
> *To fill up the scenery with Federal greenery.*
>
> *The problem's constructional; the answer's deductional;*
> *The text is instructional; the States are effluxional.*

The Head of the School of Law (Dr Iain Stewart) then concluded the evening with a humorous speech of thanks.

Although, as it will be seen, the celebration of the seventieth birthday of the Engineers' decision was a partly festive occasion, it had a serious point. After nearly a century of Federal government in Australia, more attention is now being paid to leading constitutional decisions and their effect upon the law and politics in the Australian Federation. A good illustration of the new tendency to consider the background to leading cases is the recently published essay on the Boilermakers' Case by Justice J T

Ludeke. See "Arbitrator and Lawmaker" (1990) 64 ALJ 459. Many other like decisions await similar analysis. Such analysis gives life to the law and portrays the interstitial development inherent in a common law system. The occasion was also novel in the participation of lecturers and students from all of the Sydney law schools. The participation of judges, particularly of Sir Garfield Barwick, added a long historical perspective. The recent decision of the High Court in the Corporations Act Case gave the discussion of the Engineers' doctrine a high topical relevance.