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# Getting the Political Architecture Right

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# Getting the Political Architecture Right

## **Abstract**

As Australia approaches the twenty-first century, it finds itself, like a number of other Anglo-centred countries in the western world, including Canada, in the grip of continuing economic trauma. There has been a marked relative (and absolute) slip in general economic performance. This paper focuses on the linkages between this phenomenon and Australia's basic political architecture. It argues that, although renovation of Australian federalism is no panacea for these problems, there are linkages between Australia's aged, formal, political structure and its recent economic performance. Lack of attention to the task of serious, systematic renovation is allowing the present outdated political structure to aggravate economic and social problems. The article concludes that a much more adventurous, long-term approach to the renovation of Australia's political architecture is needed.

## **Keywords**

Federal government; Economics; Australia

# GETTING THE POLITICAL ARCHITECTURE RIGHT<sup>©</sup>

BY RICHARD CULLEN\* AND PETER HANKS\*\*

As Australia approaches the twenty-first century, it finds itself, like a number of other Anglo-centred countries in the western world, including Canada, in the grip of continuing economic trauma. There has been a marked relative (and absolute) slip in general economic performance. This paper focuses on the linkages between this phenomenon and Australia's basic political architecture. It argues that, although renovation of Australian federalism is no panacea for these problems, there are linkages between Australia's aged, formal, political structure and its recent economic performance. Lack of attention to the task of serious, systematic renovation is allowing the present outdated political structure to aggravate economic and social problems. The article concludes that a much more adventurous, long-term approach to the renovation of Australia's political architecture is needed.

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## I. INTRODUCTION

### A. *The Approach of This Paper*

Some fundamental questions overshadow the discussion in this paper. What is Australia's national vision for the twenty-first century? What sort of values do we, as a community, want Australia to embody in 2050? We, in Australia, have never been very good at articulating responses to questions such as these. The relative comfort of our existence and the comparative absence of national traumas must, in part, explain this.

In this paper, we are not drafting a national vision. That is a long task in which many must participate. But we do argue that our existing political architecture<sup>1</sup> has exceeded its "use-by" date. Our contention is based on the accumulated Australian political experience, which suggests that fundamental structural changes are needed in Australia. We are concerned with the process of achieving structural change. Frankly, that process is not working happily.

In a more perfect world we might fashion our national vision over considerable time and then tackle structural change fully informed by that carefully developed understanding. But we live in a highly dynamic world, which is changing more swiftly than at any time in the last forty years. For Australia this is a disturbing and at times, traumatic period in its history. As a nation, Australia has to respond with greater energy than ever before to its latest challenges. And this means tackling issues on many fronts at the same time. In particular, we argue that this means beginning the long task of creatively renovating our political

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<sup>1</sup> First, let us make clear what we mean by the term political architecture. This we define as the full spectrum of the formal political structure straddling virtually all economic, social, and political activity in Australia. Its principal component is the Australian Constitution. The *Commonwealth of Australia Constitution Act 1900* 63 & 64 Victoria, c. 12 (U.K.)—the covering Act—was the Act of the Parliament at Westminster, which took effect from 1901 and established Australia as a federal nation-state. The *Australian Constitution*, all 128 sections of it, comprises section 9 of the covering Act just referred to. All future references to the *Australian Constitution* refer to the document that forms section 9 of the covering Act. Political architecture also includes: the state constitutions, all the conventions of use and practice associated with constitutions at both levels, the substrata of local government, and all the quasi-governmental offshoots at all three levels of government.

architecture.

Although we argue that fundamental structural changes are needed in Australia, we recognize both the potential for change *within* the existing architecture and the reality that it is here that most change will occur in the short term. Although the achievements of *ad hoc* adjustment within the existing structure cannot be dismissed, they are essentially reactive adjustments, which largely serve to legitimate the current order. They do not take place within an overall philosophy for changing Australia's political architecture. They are responses, which are very often disembodied from other structural adjustments and most often effected as a response to one or more of the endless crises in the Australian political economy. The new Australian system of uniform companies and securities regulation<sup>2</sup> is a product of this familiar modification process.

In looking at the need for creative, fundamental change and the growth in *ad hoc* reactive structural change, we stress that we are not suggesting that some sort of magic remedy lies here for the lurching Australian economy of the last decade. What we are saying is that, in the search for remedies, Australia is currently paying scant attention to the linkages between the nation's flawed political architecture and its socio-economic performance.

We have taken a two-tiered approach to our topic. The first tier adopts a pragmatic analysis, in keeping with the current, confined tradition of political structure review in Australia. This is an analysis, which largely confines itself to discussing what is possible within the Australian political experience. The second tier of analysis places the Australian political reality in a wider global context. It suggests that recent attempts to engender wider debate about political structure reform, although useful and welcome, are fairly modest when one considers the political structure revolution, both theoretical and practical, occurring beyond Australia and, particularly, in Europe. This tier of analysis says that this "new constitutionalism" should be the direction for the longer term in Australia.

This paper focuses on the federal constitutional component of Australia's political architecture. There is discussion of the wider political system but this is largely confined to aspects that contextualize the constitutional issues. Limits of time and space preclude any deep discussion, for example, of the beginnings of major changes in the party political system in Australia.

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<sup>2</sup> See section III.A.1, below at page 18.

## B. *A Brief Exploration of Australia's Political Architecture*

Australia, the nation, the federal entity, was the product, constitutionally, of a series of conventions conducted over the last two decades of the nineteenth century by the then semi-independent (of Britain) colonies, which now comprise the Australian states. New Zealand also participated in parts of the process but declined to join the resulting federation.

Australia became a federal nation on 1 January 1901. The document that set down this arrangement, the *Australian Constitution*, was a product of those conventions. It was also a product of nineteenth-century minds, many of them able, doing their best within time and resource constraints, to mould an effective political structure for the new, though still colonial, nation. There is little doubt that, for many of the framers of the Constitution, the new structure was to be state driven. That is, the former colonies, now states, saw themselves as the masters in the new order and saw the new Commonwealth government as their, albeit lusty, servant.

This intention is captured in the *formal* structure of the Constitution, which, as we shall see, has changed very little since 1901. That document gives the Commonwealth very few exclusive powers. The principal powers conferred on it by section 51 of the Constitution are to be shared with the states. The states, meanwhile, have their own constitutions, with plenary powers to legislate for "all matters [related to the state] whatsoever,"<sup>3</sup> explicitly preserved in sections 106 and 107 of the *Australian Constitution*. Section 109, however, does make it clear that, in the event of overlapping state and federal laws, federal laws are to prevail.

The political reality today is quite the reverse of this formal intention. The Commonwealth now has an effective stranglehold on tax revenues. It manages Australia's tertiary education system. It has the principal role in trying to manage Australia's chaotic interstate road transport system and has now taken over substantive control of corporate and securities regulation throughout the country. In comparison, the Canadian provinces today enjoy far greater fiscal and political independence than the Australian states. The provinces retain much greater control over their educational systems, while regulation of

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<sup>3</sup> See, for example, *Constitution Act 1902* (N.S.W.), s. 5; *Constitution Act 1975* (Vic.), s. 16.

the corporate sector and of road transport is also largely provincial.<sup>4</sup>

A second comparison arises from the manner in which governments within the two countries share control of offshore petroleum resources. In both countries, the highest courts initially said that the central governments enjoyed virtually complete control of these resources. In Australia, the Commonwealth, after returning the economically insignificant territorial seas to the states, retained all ultimate management rights and has taken over 95 per cent of all direct government revenue from offshore oil. In Canada, the federal government recently struck a series of accords with coastal provinces which leaves ultimate management of the offshore at the provincial level and gives those provinces access to 100 per cent of all direct offshore revenues. Other examples could be cited but space is limited. Those given illustrate that the Australian states are relatively hollow political entities.<sup>5</sup>

It is clear from the above brief overview that there has been a major shift in the alignment of power between the Commonwealth and the states since 1901. It is equally clear, however, that the document that set out the original power alignment, the Constitution, has barely altered in form since 1901. There are three key components to the explanation of this remarkable detachment of constitutional substance from form: the High Court of Australia, intergovernmental cooperation, and the Commonwealth's spending power.

During the first twenty years of federation, the High Court showed a marked, though by no means complete, deference to the interests of the states. This changed in 1920, in *Amalgamated Society of Engineers v. Adelaide Steamship Co.*<sup>6</sup> In this case, the Court deliberately overturned the state-deference doctrines of earlier years. It adopted a constitutional-interpretive model, which clearly favoured the growth of central power. Generally, from that time, the Court has proceeded with its project of interpreting the Constitution in a manner highly favourable to the Commonwealth. There have been some retreats from this approach. These have been most noticeable when the Court has been adjudicating on the usually controversial, constitutional adventures of

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<sup>4</sup> Here "regulation" refers to deciding what the rules will be, rather than simply acting as an administrative arm of the central government.

<sup>5</sup> That is, relative to their former selves or to regional governments in most comparable classical federal jurisdictions.

<sup>6</sup> (1920), 28 C.L.R. 129 [hereinafter *Engineers*].

federal Labor governments.<sup>7</sup> But they have been the exception rather than the rule. Over the years the Court has, for example, significantly enhanced the Commonwealth taxation powers, its corporations power, to a lesser extent, its trade and commerce power, and, probably most notoriously, its external affairs power.<sup>8</sup> Currently, the Court appears to be working some similar alchemy with the federal industrial relations power. The only surprising aspect of this last development is that it has taken the Court so long to do so.

A collateral aspect of the High Court's reshaping of the Constitution has been its approach to the interpretation of section 109, the federal supremacy provision in the Constitution. The cases are far from consistent but the pattern of a very wide reading of the section's ambit so as to give federal laws the maximum possible coverage is well established.<sup>9</sup> Additionally, the court has crafted a doctrine that routinely exposes many state activities to Commonwealth regulation, but confers almost total immunity on the Commonwealth from state regulation.<sup>10</sup>

Intergovernmental cooperation also has been important. Comprehensive commodity-marketing schemes have been put together by cooperating governments where neither level could, constitutionally, have enacted such a scheme alone. Australia's current uniform corporate and securities regulatory regime is a product of intergovernmental cooperation. Other less spectacular instances abound.

Finally, there is the Commonwealth spending power. The remarkable scope of this power flows from the Commonwealth's extraordinary dominance of government revenue raising, which is based on two crucial factors. First, since the last war, the states have lacked the

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<sup>7</sup> For example, attempts by the 1940s federal Labor governments to control or nationalize the state-owned and private banks were thwarted by the High Court in *Melbourne Corporation v. Commonwealth* (1947), 74 C.L.R. 31 [hereinafter *State Banking*] and *Bank of New South Wales v. Commonwealth* (1948), 76 C.L.R. 1 [hereinafter *Bank Nationalization*].

<sup>8</sup> The latter expansion, in particular, has allowed the Commonwealth to regulate environmentally-sensitive resource developments *within* the states. For remarkable examples of the High Court's expansion of this power see, *inter alia*: *Commonwealth v. Tasmania* (1983), 158 C.L.R. 1 [hereinafter *Tasmanian Dam*] and *Richardson v. Forestry Commission* (1988), 164 C.L.R. 261 [hereinafter *Richardson*]. Also see section III.A.2. below at page 19.

<sup>9</sup> P. Hanks, *Constitutional Law in Australia* (Sydney: Butterworths, 1991) at 210-31. This is in marked contrast to Canada where the Supreme Court has read down the implicit federal supremacy rule so as to maximize the coverage and effectiveness of provincial law. See P.W. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at 417-18.

<sup>10</sup> See further, Hanks, *supra* note 9 at 186-210; C. Howard, *Australian Federal Constitutional Law*, 3d ed. (Sydney: Law Book Company, 1985) at 143-229.



political (though not the constitutional) capacity to raise income tax, thus leaving this revenue-raising zone entirely to the Commonwealth.<sup>11</sup> Second, in a series of cases, the High Court has prohibited the states from levying *any* sales taxes.<sup>12</sup> All of this has resulted in overflowing Commonwealth coffers. The states get a large block of their federal funds without strings attached but the Commonwealth has, over the years, made a regular practice of “giving” some funds with many strings attached. The High Court has repeatedly sanctioned this practice.<sup>13</sup> The Commonwealth has come to dominate tertiary education throughout the country principally through the use of its spending power. The power has also been used in many other areas of public policy normally outside of the Commonwealth’s legislative domain, such as urban planning, housing, health care, and so on.

The current structure is working, after a fashion, because it has been bent almost double. This is the political reality of Australian federalism in 1991. The processes described show no signs of abating. Indeed, they appear to be accelerating. The exigencies of global economic life in the 1980s found the majority of Australian states in varying degrees of serious financial trouble. Victoria, Western Australia, and South Australia have been consumed by probably their worst economic crises this century. All of this has produced an increase in the scope and pace of intergovernmental cooperation, further eroding the remaining disparateness of Australian federalism.

### C. Some Comments of the Contemporary Australian Economy

Various measures of Australia’s declining economic performance may be consulted. They vary somewhat in detail but they all conclude that, especially over the last two decades, economic decline has been rapid and dramatic. Within the “first” world, Australia has

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<sup>11</sup> The Commonwealth achieved this result by passing a package of acts, which applied irresistible economic pressures on the states to hand over their income-taxing powers towards the beginning of the Second World War. The High Court endorsed the constitutional legitimacy of this legislative scheme in *South Australia v. Commonwealth* (1942), 65 C.L.R. 373 [hereinafter *First Uniform Tax*]. See further, R. Cullen, *Federalism in Action: The Australian and Canadian Offshore Disputes* (Sydney: Federation Press, 1990) at 37; Hanks, *supra* note 9 at 265-70.

<sup>12</sup> Cullen, *Ibid.* at 38; Hanks, *supra* note 9 at 241-62. There are some curious exceptions to this rule.

<sup>13</sup> See, for example, *Deputy Commissioner of Taxation v. W. V. Moran Pty. Ltd.*, (1940) 63 C.L.R. 338 [hereinafter *Moran*] and *First Uniform Tax*, *supra* note 11 for possibly the two most notorious incidents.

slipped from first, in terms of standard of living, in 1900 to sixteenth or eighteenth today.<sup>14</sup>

The battery of measures of socio-economic performance in *The Economist's The World in 1991*<sup>15</sup> all reinforce this impression of the Australian economy. The current account deficit is one of the worst in the Organization of Economic Co-operation and Development (OECD); unemployment figures are soaring and growth prospects deriving from internal forces are bleak. A linchpin of the domestic economy, the building industry, was recently described by the Royal Commissioner enquiring into the industry in the State of New South Wales as "massively worse" than construction sectors overseas and as "hopelessly inefficient."<sup>16</sup>

The Director of the federal government's influential Economic Planning and Advisory Committee (EPAC) recently warned that Australia may be condemned to a recurring cycle of trade crises and declining living standards.<sup>17</sup> Another suggestion made recently is that perhaps the only way for Australia to achieve a current account surplus is to obtain a major reduction in imports. It is bleakly suggested that this might be achieved by putting the nation into permanent semi-recession.<sup>18</sup>

In the early 1980s, the Washington-based Brookings Institution completed a comprehensive review of many aspects of the Australian economy. The results of that research were published in 1984.<sup>19</sup> In their

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<sup>14</sup> S. Moeller, "Ignorance Not Bliss in Asian Trade Relations" *The Australian* (23 February 1991) 51. In this article, Professor Helen Hughes of the School of Pacific Studies of the Australian National University is quoted as saying that Australia's relative rankings were first in 1900, third in 1935, and fifteenth or sixteenth today. See also T. Colebatch, "Australian Wages Lower Than Most, Say OECD Figures" *Melbourne Age* (10 May 1991) 5. Australia is now paying real wages in the OECD, higher only than those in Greece, Portugal, and New Zealand. This places it eighteenth out of twenty-one OECD-reporting nations. Australian wages are less on average than \$20,000 (U.S.) *per annum*. In the United Kingdom, the average wage is \$25,000 (U.S.), while in Switzerland it is \$46,000 (U.S.) *per annum*. Ireland, Spain, and Italy also pay higher average wages than Australia.

<sup>15</sup> (London: The Economist Publications, 1990).

<sup>16</sup> T. Chappell & M. Whittaker, "Commissioner Attacks Building Industry" *The Australian* (16 March 1991) 3. The Commissioner went on to point out that the lost time through bad weather and industrial disputation was 30 per cent. The comparable figure from countries with radically less favourable climates was 10 per cent.

<sup>17</sup> R. Spiers, "EPAC: 'Business Way Out of Touch'" *Australian Financial Review* (4 February 1991) 1.

<sup>18</sup> T. Colebatch, "Following Trends Brings Growth" *Melbourne Age* (22 March 1991) 6. There is some resonance with this prospect and the manner in which the United Kingdom economy stagnated for most of the twenty-year period between world wars.

<sup>19</sup> R.E. Caves & L.B. Krause, eds., *The Australian Economy: A View from the North* (Washington: The Brookings Institution, 1984).

introduction, the editors concluded that Australia was clearly in for more pain. There was no way to prepare for this in the short term but much could be done to prepare for the future. In particular, the exposure of Australian business to world competition and the preparation of its young people by large investments in human capital were recommended. The editors concluded that Australia was doing neither.<sup>20</sup> Since 1984 some headway has been made but the recommendations, particularly the latter, are far from being met.<sup>21</sup>

It is not fanciful to suggest that the Australia of the twenty-first century will become a major Asian farm, quarry, holiday spot, sometime property investment zone, and possible refuse disposal point.<sup>22</sup>

## II. AN ALTERNATIVE PERSPECTIVE

A central thesis of this paper is that, as Australia confronts the twenty-first century, the deficiencies in its troublesome political structure advertise themselves ever more blatantly. The accelerating growth in *ad hoc* intergovernmental adjustment is welcome but seriously incomplete as a response. It is welcome because some progress has been made in areas such as companies and securities regulation, industrial relations, and even environmental protection.<sup>23</sup> It is also welcome because these responses are more carefully crafted, less acrimonious, and more swift than adjustments achieved through High Court litigation.<sup>24</sup> Moreover, it

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<sup>20</sup> *Ibid.* at 23.

<sup>21</sup> The revolution in tertiary education underway in Australia over the last four to five years has largely concentrated on squeezing a far higher number of graduates through the existing system with minimized allocation of new resources. Another characteristic has been the forced creation of massive, amalgamated tertiary institutions. The system, more than ever, harbours serious discontent and is under great strain. Education is still grudgingly regarded as necessary by widespread sections of the community and within the corridors of power. But government attitude towards funding remains parsimonious.

<sup>22</sup> This forecast implies that Asian nations will, ultimately, be able to determine Australia's role by a process of gradually taking control of production and management mechanisms throughout the economy. This is not meant as anti-Asian rhetoric. Indeed, if Australia's socio-economic slide continues into the next century without significant abatement, it likely will be better for greater competence to be introduced in this way.

<sup>23</sup> See section III.A, below at 17.

<sup>24</sup> This is still an important mode of structural adjustment in Australia (see section I.B, above at page 8). But intergovernmental agreements on change is the area of growing importance. There appears to be a growing recognition, especially within the various state governments, of the seriousness of Australia's economic prognosis. A concomitant improved understanding of the costs of the frequent failure to make decisive, united responses to national problems is also developing.

places the structural decision-making process in the hands of democratically elected persons rather than non-elected judges.<sup>25</sup>

Intergovernmental adjustments are incomplete because: (1) they are reactive; (2) they are unrelated to similar developments; (3) they do not occur within any developed framework for structural change; and (4) they are often mistaken for or touted as major structural reforms. Moreover, intergovernmental adjustments fail to establish any serious interdisciplinary programme for a creative overhaul of the nation's political architecture. Such change must evolve as an ongoing process. That is, we should not attempt to get the political architecture right once and for all, or even for the next fifty to one hundred years. We need to establish a practice of continuous review of our fundamental structure with a view to enhancing its real responsiveness.

The challenge in addressing the above shortcomings is to develop a climate receptive to serious discussion of fundamental restructuring. It is over one hundred years since we last enjoyed such a national mood in Australia. It achieved a great deal—the implementation of Australia's current classical federal system.<sup>26</sup>

How does one engender a repeat of that sea change in political discussion? There is no simple way. Any such process will begin and operate slowly. A century ago, political discussion was driven principally by compelling economic and defence considerations. Today's economic considerations are, if anything, even more compelling. Although long-term planning is necessary, we would argue that the more immediate process of substantial *ad hoc* adjustment of the political architecture must continue. This is providing some effective abatement. But we need a framework so that the relationship between such adjustments can be recognized and studied. And we need to tackle the larger task of rejuvenating the fundamental structure itself. So far there appears to have been no serious attempt to develop a framework for screening and delivering *ad hoc* adjustments. And, attempts at fundamental rethinking

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<sup>25</sup> Intergovernmental arrangements are often also criticized for failing to meet a basic requirement of liberal-democratic theory: the need for accountability. The argument is that when the two sovereign levels of government in a federation merge their powers to provide a combined response to a problem, it is no longer possible—for the voting public, especially—to pinpoint responsibility. This is a valid criticism. In relative terms, however, the point made in the text still holds. Intrinsically the High Court's remodelling of the Constitution is almost totally removed from any democratic accountability.

<sup>26</sup> By classical federalism we mean a political structure in which two sovereign levels of government (central and regional) are designated as separate powers; neither level can unilaterally extinguish the other; both levels answer directly to the people; the regional governments occupy separate geographic areas and coexist with a third level of micro-government; and the whole package is embodied in a rigid, formally all-encompassing written constitution.

rarely move beyond the intense diagnosis of some symptoms of disorder in the current system.

It is a truism that processes of constitutional change are slow. Too often that recognition is both introduction and conclusion in Australia. We do not try to probe beyond it to understand this process of slow change. Moreover, the very slowness tends to lend a kind of sanctified, unique status to constitutional study. All of this tends to quarantine constitutional study within certain limits.

An alternative approach views constitutional change as one of a range of slowly altering processes in society; it is an example within a genre and not unique. Some social scientists with a particular interest in regional development expressly categorize constitutional change in much this way.

For some time regional scientists<sup>27</sup> have attempted to bring a multi-disciplinary approach to understanding spatial structures. This involves an analysis of the working of an economy in a spatial context. Regional science attempts to account for uneven concentrations of population and industry, focusing on successful and emerging areas as well as depressed peripheral economies. This approach provides scope to broaden an essentially introspective, legalistic approach to the development of constitutional structures.

Regional science developed from the application of conventional neoclassical economics to help locational development problems.<sup>28</sup> Later it was developed to explain the changing economic fortunes of regions. Recent work has shown that patterns of regional development (especially, urban regional development) reflect the interaction of a set of "change processes," some of which are slow, like developing political structures, and some fast, like varying rates of interest and other economic variables. Scanning European urban history, Andersson argues that there have been four broad shifts in the logistics of production and exchange—the "four logistical revolutions"—associated with the expansion and decline of regions.<sup>29</sup> These logistical revolutions

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<sup>27</sup> The discipline of regional science is a relatively new and not uncontroversial one. It originated in the United States in the mid-1950s. It blends skills from a number of areas including geography, economics, and urban and regional planning.

<sup>28</sup> W. Isard, *Location and Space Economy* (Cambridge, Mass.: M.I.T. Press, 1956).

<sup>29</sup> A.E. Andersson, "Presidential Address: The Four Logistical Revolutions" (1986) 59 *Papers of the Regional Science Association* 1. Andersson argues that the four logistical revolutions occurred over the period 1000 AD to 2000 AD. In sequence, they are as follows:

1. The first logistical revolution emerged in Italy in the eleventh century and ended in northern Europe in the sixteenth century. This was the period when the Crusades created demands for expeditionary resources. This undermined the previous tribal-feudal order in Europe. The

are not limited to technological change. They also refer to changes in organization and production and in the political and social infrastructure of a region.<sup>30</sup>

Andersson and Batten argue that we are now in the midst of the fourth logistical revolution where “knowledge-intensive production” is rapidly displacing the third logistical revolution (better known as the “industrial revolution”<sup>31</sup>) in certain western nations.<sup>32</sup> They argue further that a consequence of this is “the emergence of a new political structure based on the importance of knowledge handling occupations.” Moreover, “[t]his will precipitate a declining importance for those political and social movements currently associated with the third logistical revolution.”<sup>33</sup> Batten has further shaped this idea by arguing that changes to a nation’s political fabric are needed to facilitate the evolution of successful regions during the fourth logistical revolution. In other words, we need to rethink our social and political structures while recognizing that we are in the midst of an era of rapid change.<sup>34</sup>

In Batten’s work a distinction is drawn between so-called “slowly changing arenas of infrastructure” and faster processes of change.<sup>35</sup> But both are recognized as processes of change. In the latter, faster category, we regularly attempt to influence the process by instruments of monetary, fiscal, and trade policies, and so on. Australia’s much

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destruction of that order opened up Europe to trade. The previously never-ending fights among the miniature countries of central Europe abated with the reduction of fighting resources.

2. The second logistical revolution emerged in Italy in the sixteenth century and ended in northern Europe in the nineteenth century. This era was characterized by the development of revolutionary trade transaction (credit) facilities. The private Italian bankers began this process, which fundamentally altered trading relations. The city of Amsterdam then made the spectacular innovation of establishing an officially guaranteed central bank.

3. The third logistical revolution emerged in England in the eighteenth century and, it is predicted, will conclude within the developed nations in the twenty-first century. This era is better known as the industrial revolution.

4. The fourth logistical revolution is currently emerging in Japan, the U.S.A., Switzerland, Western Germany, and Sweden. This era is characterized by a major shift to information and knowledge-based production.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.* at 7.

<sup>32</sup> As noted above, these countries are Japan, the U.S.A., Sweden, Switzerland, and West Germany. See A.E. Andersson & D.F. Batten, “Creative Nodes, Logistical Networks, and the Future of the Metropolis” (1988) 14 *Transportation* 281.

<sup>33</sup> *Ibid.* at 293.

<sup>34</sup> D.F. Batten, “Shaping the Future Arenas of Melbourne” (The Kemsley Oration Address to the Victoria Division of the Royal Australian Planning Institute, Melbourne, Australia, November 1990).

<sup>35</sup> *Ibid.* at 3.

discussed attempts at microeconomic reform largely fall into this category. Redeveloping a nation's education system involves much longer lead times for the implementation of change and would fall into the former category. The quintessential slowly changing arena, however, is constitutional or fundamental political structure alteration. The argument is made that slowly changing arenas have a profound controlling, indeed, at times, enslaving, influence on all faster processes of change.<sup>36</sup>

This perception brings constitutional change into the foreground of social and economic development. Australia's Constitution was forged in the midst of the industrial revolution (the third logistical revolution) and was a material product of that economic era. The Andersson/Batten analysis strongly suggests that, in adjusting to the new, knowledge-based production era, nations need to develop their political architecture to accommodate and take advantage of these fundamental changes. We currently show precious few signs of doing so in Australia.

### III. THE CURRENT CONSTITUTIONAL POSITION

#### A. *The Australian Experience*

Ninety years of experience suggest that Australia's federal structure impedes effective policy development in areas central to Australia's future role in the global economic order. Policy development in areas such as corporate and financial regulation, resource and environmental management, or industrial relations and communications, will enhance or retard Australia's participation in the world economy. To enhance that participation, policy development should be uniform, planned yet responsive to evolving environments, and driven by a coherent strategy. Diffuse, reactive, and self-contradictory policy development is likely to handicap Australia as a competitor in the world economy.

When a nation acts within the international community, lack of strong central leadership presents a considerable disadvantage. But centralization of policy development does not guarantee effectiveness. Indeed, in a society with diverse economic conditions and divergent political cultures, functional policies should be built on the participation of a wide range of interests in order to bind interested parties to the

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<sup>36</sup> Batten, *ibid.*, concludes by suggesting the need for a new, permanent ministry for constitutional amendments.

developed policy and thereby pre-empt frustrating opposition to policy implementation.

## 1. Corporations Law

In the Australian context, this point emerges with stark clarity from our recent experience in the area of corporate regulation. For ten years prior to the 1989 passage of the Commonwealth *Corporations Act*,<sup>37</sup> corporate activities central to capital formation and investment were regulated under a “co-operative scheme.” The scheme featured complementary state and federal legislation, whose terms represented the lowest common denominator upon which the participating governments could agree. Amending the various statutes required the agreement of all participants: the six states, the Northern Territory, and the Commonwealth, acting through a Ministerial Council. Consequently, as the capital market heated up during the 1980s and corporate entrepreneurs exploited ambiguities and inadequacies in the regulatory regime, adjustments to that regime were slow in coming. Local and international criticism of the inadequacies of the regime grew, as did the risk of discouraging overseas investment in Australia.

Both the 1974 Rae Committee and the 1988 Constitutional Commission stressed the disadvantages inherent in the lack of a national regulatory regime for the securities and corporate sectors. The Commission said that “the arguments against a clear and express federal power ... are in patent disregard of the realities of business and finance in Australia today.”<sup>38</sup>

The federal government responded by drafting a package of legislation to place regulation of corporations on a national and uniform footing. The centre-piece of this package was the proposed *Corporations Act*. This *Act* would have introduced a single and comprehensive regime for regulating the formation, internal affairs, and winding up of trading and financial corporations. It was to be administered by a national regulatory body, the Australian Securities Commission.

The states’ reaction was particularly instructive. Several states immediately launched a constitutional challenge in the High Court arguing that the federal Parliament could not regulate the formation of trading and financial corporations. As the litigation progressed, it became clear that the states’ principal interest was in protecting the

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<sup>37</sup> *Corporations Act 1989* (Cth) [hereinafter *Corporations Act*].

<sup>38</sup> Constitutional Commission, *Final Report*, para 11.109.



revenue base represented by the regulation of corporations. The states had no plausible objections to the central regulation of corporations and the securities market beyond their fiscal self-interest. Consequently, when the states' technical legal argument was accepted by the High Court and key provisions in the *Corporations Act* were found to be beyond the legislative power conferred by section 51(xx) of the Constitution,<sup>39</sup> the states began negotiating. Rather than seeking a regime that would best balance the interests of the community with those of the corporate and financial sectors, they sought the best financial deal for themselves, in exchange for their recently confirmed constitutional monopoly. Following two months of hard bargaining, the Alice Springs Agreement was settled between the Commonwealth and the states and the territories. Under this agreement, the states undertook to adopt the Commonwealth's *Corporations law*, effectively supplying the power found to be lacking in *Incorporation*.<sup>40</sup> Meanwhile, the Commonwealth undertook to give the states and territories a share of the revenues generated by corporate regulation and a modest role in the administration of the new national scheme for corporate regulation. The national scheme came into operation on 1 January 1991.

Eventually, it might be said, the federal government achieved a functional result with the adoption by the states of its new *Corporations Act* and its associated legislation: although the campaign was long and hard fought, the eventual achievement vindicated our federal system by illustrating that it is still capable of achieving a positive result. But the struggle to achieve that result and the position adopted during the campaign by most of the states demonstrated a basic feature and essential weakness, of our political architecture. The division of political responsibility between the centre and the regions made at the end of the nineteenth century requires substantial adaptation to meet the needs of the twenty-first century. This division of power enables interest groups—the state governments—to block legislative reform in order to serve their own interests.

## 2. Resource and Environmental Policy

This essential weakness is further illustrated in the field of resource management and environmental policies. The issues in these fields are driven by several factors: the pressure to achieve short-term

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<sup>39</sup> *New South Wales v. Commonwealth* (1990), 169 C.L.R. 482 [hereinafter *Incorporation*].

<sup>40</sup> *Ibid.*

economic advantage through the exploitation and sale of resources (timber, minerals, and agricultural produce); the intense regional competition for control of short-term economic advantage; the countervailing recognition that long-term economic advantage demands prudent management of productive resources, including the limited supplies of land and water; and the international pressure for resource management policies, which will retard rather than promote environmental degradation.

In this multifaceted and essentially contradictory context, Australia, in common with other resource-rich countries, must develop functional policies to balance short-term economic gain against more prudent investment and the need to slow the destruction of the earth's resources. The states' approach to resource development policy demonstrates their inability to balance these factors. The competition among regional governments for immediate gain from development (more accurately, exploitation) projects and their lack of accountability to the international community skew the process of policy formulation.

The federal government, too, can be distracted from a sensible consideration of long-term resource goals by the prospect of immediate financial advantage and by the drive to achieve a short-term competitive edge in international markets. But its focus is necessarily broader than that of the states. And it has the need and capacity to integrate national policy development with the international agenda, which is essential to the long-term interests of Australia and the maintenance of life on Earth.

However, the formal Australian constitutional documents give scant recognition to the need for national policy making in resource management and environmental protection. This oversight is not surprising. After all, the *Australian Constitution* reflects the concerns and sensitivities of the closing decade of the nineteenth century. None of the Constitution's drafters could have foreseen the extraordinary growth in resource exploitation, industrial capacity, and domestic consumption, which evolved in the following century. Accordingly, they could not have anticipated the risk of resource depletion and exhaustion, which that exploitation has posed. Nor, despite the English experience in the nineteenth century, could they have grasped the danger to the critical resources of air, water, and soil now posed by industrial and consumer growth. And, while land degradation was not entirely alien to their experience, the drafters would no doubt have regarded as alarmist any realistic prediction of the salination damage, which development of agriculture has imposed on Australia.

In its federal distribution of powers, the *Australian Constitution*

makes no mention of resource management and environmental protection. According to the conventional (and still dominant) view of Australian federalism, the Constitution's silence indicated that these topics were reserved for the states.<sup>41</sup> Consequently, the states had initial responsibility to develop resource management standards and environmental protection policies. When pressure accumulated for national policies and standards, the Commonwealth was obliged to resort to a series of indirect approaches.

In an economy which, for most of its modern economic history, has functioned as a granary and quarry for the developed world, the most obvious process for achieving national resource and environmental goals has been the Commonwealth's control over the export trade. If the market for Australian resources is largely outside Australia, then prohibiting export of a commodity will almost certainly stop the local production of that commodity. In this way, the current national Labor government has been able to impose strict limits on uranium mining, wood-chip production, and the construction of paper pulp mills.

The potential represented by the Commonwealth's power over exports was demonstrated in *Murphyores v. Commonwealth*.<sup>42</sup> The High Court held that the Commonwealth could use its power of trade and commerce with other countries<sup>43</sup> to prohibit the export from Australia of minerals (zircon and rutile concentrates) whose extraction had been approved by the State of Queensland but was assessed by the Commonwealth as likely to damage the environment. The prohibition on export effectively prevented the extraction of the minerals because, without an export market, the return on capital was not adequate to justify extracting them. In answer to the mining company's objection that the Commonwealth was intruding into an area of state responsibility, the High Court emphasized that the validity of the Commonwealth controls depended on what those controls legally prohibited—export—and not on the motives of the Commonwealth or the practical or economic effect of the prohibition.<sup>44</sup>

The approach adopted by the Commonwealth to the mining of

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<sup>41</sup> Each of the state parliaments is declared by its own Constitution Act to have the power to make laws for the state "in all cases whatsoever." Section 107 of the *Australian Constitution* declares that the state parliaments continue to have the legislative powers of their colonial predecessors, except to the extent that the new Constitution "exclusively vested" a power in the Commonwealth or removed that power from the states.

<sup>42</sup> (1976), 136 C.L.R. 1 [hereinafter *Murphyores*].

<sup>43</sup> *Australian Constitution*, s. 51(i).

<sup>44</sup> *Murphyores*, *supra* note 42 at 19-20.

zircon and rutile on Fraser Island was based on the idea that specific and narrow heads of constitutional power could be exercised to achieve a wide range of broad policy objectives. In this way, the Commonwealth's powers over international and interstate trade and commerce,<sup>45</sup> taxation,<sup>46</sup> and corporations<sup>47</sup> have been used as levers to implement national resource and environmental policies. This use of relatively narrow legislative powers to achieve objectives outside the Commonwealth's direct control has, since the landmark decision in *Engineers*,<sup>48</sup> been consistently endorsed by the High Court.<sup>49</sup>

The most dramatic expansion of the Commonwealth's environmental control policies has been achieved through exploitation of the external affairs power under section 51(xxix) of the Constitution. This expansion has been aided by the increasing prominence of environmental issues on the international agenda over the past two decades and by the High Court's expansive reading of section 51(xxix). In *Tasmanian Dam*,<sup>50</sup> the Court held that the Commonwealth Parliament could legislate to prevent the construction of a hydroelectric dam by the State of Tasmania where Australia had entered into an international agreement,<sup>51</sup> which required Australia to protect the site of the dam. The external affairs power, the majority of the Court said, empowered the Commonwealth Parliament to legislate for Australia the implementation of any international obligation that Australia had assumed under a *bona fide* international treaty. This proposition was not affected by the fact that the subject matter of the obligation might otherwise lie outside the specific powers of the Commonwealth Parliament.

This proposition has now been confirmed by all members of the Court and extended to the implementation of the non-obligatory aspects of international agreements.<sup>52</sup> Thus, the Commonwealth Parliament can legislate to "freeze" development pending an inquiry to determine whether the development poses a threat to internationally-endorsed

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<sup>45</sup> *Australian Constitution*, s. 51(i).

<sup>46</sup> *Ibid.* at s. 51(ii).

<sup>47</sup> *Ibid.* at s. 51(xx).

<sup>48</sup> *Supra* note 6.

<sup>49</sup> See, for example, *Fairfax v. Federal Commissioner of Taxation* (1965) 114 C.L.R. 1; *Murphyores*, *supra* note 42.

<sup>50</sup> *Supra* note 8.

<sup>51</sup> *Convention for the Protection of the World Cultural and Natural Heritage*, (1972) UNESCO.

<sup>52</sup> *Richardson*, *supra* note 8.

environmental values. And, in *Queensland v. Commonwealth*,<sup>53</sup> the Court decided that it was for the international community to determine whether a particular matter fell within Australia's obligations under a multilateral treaty. The Court could not undertake to decide whether the land in question was part of the world's natural heritage so as to determine the extent of Australia's international obligation.

Relying on this expansive interpretation of the external affairs power, the Commonwealth has acted to protect a wilderness area against the construction of a hydroelectric dam; to protect native forests against clear-felling; to impose an orderly regime on the timber industry in the northern rain forests; and to reduce the utilization of greenhouse gases in Australia.

This use of the external affairs power to implement national resource and environmental policies has attracted considerable attention over the past decade. But it may be that another of the Commonwealth's legislative powers, apparently unrelated to these concerns, holds the most significant potential for supporting those policies. It seems that the Constitution's section 51(xx), the corporations power, will support Commonwealth regulation of the "external" activities of foreign corporations and trading and financial corporations, that is, corporate activities affecting persons and things outside the shell of the corporate actor. This point, with its wide potential to expand Commonwealth regulatory power in an economy dominated by corporations, was made in *Tasmanian Dam*.<sup>54</sup> Commonwealth legislation prohibiting a foreign or trading corporation from interfering with land designated by the Commonwealth as having environmental significance was held to be legislation with respect to foreign corporations and trading corporations. Accordingly, it was supported by section 51(xx).

In summary, the Commonwealth has been given the power to administer national standards in several areas, which have a direct impact on resource and environmental policies. Is this an illustration of the flexibility of our political architecture, of its capacity to adapt to new problems? Some observers will, no doubt, regard this concession of national power as an endorsement of the organic character of Australia's constitutional processes.

However, there is a further aspect to this apparent concession of broader national responsibility for resource and environmental policy: it

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<sup>53</sup> (1989), 167 C.L.R. 232.

<sup>54</sup> *Supra* note 8.

has been incomplete. While the Commonwealth is seen to have the power to protect air quality by controlling the emission of chloro-fluorocarbons in order to meet its obligations under the Montreal Protocol,<sup>55</sup> it has not acted to protect the quality of inland water against the ravages of phosphates. The latter is seen as a state responsibility. No doubt, a courageous national government could find a means to achieve that control. For example, the corporations power would support the imposition of standards on the corporate manufacturers and distributors of detergents, and the taxation power would support selective taxes, effectively penalizing the production and distribution of offending products. The fundamental difficulty is that, in order to develop and apply national standards to a national problem, the Commonwealth must resort to a patchwork of legislative powers designed for another era and a radically different society. Again, while the Commonwealth has begun to express concern at the devastation of Australia's largest resource, land, there are very real doubts that it has the power to implement policies to reverse the destruction and degradation of the past two centuries.

### 3. Industrial Relations

In Australia's mixed economy, with its basic capitalist features, the relations between employers and workers, between capital and labour, are critical to economic policy and development, and occupy a central position in the political agenda. Questions of productivity, security of employment, industrial harmony, wage rates, and retirement incomes are seen as interacting with inflation and employment rates, the balance of Australia's current account, and the international value of Australian currency. The reputations and political fortunes of governments are closely linked to those variables.

The 1988 Constitutional Commission emphasized "the legitimate concerns of the Commonwealth" in employment conditions and industrial relations. These were seen to be of "enormous importance" to the development of industry and commerce, to the strength of export industries, and to the replacement of imports.<sup>56</sup>

The assumption of the Australian Constitution appears to be

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<sup>55</sup> *Montreal Protocol No. 4 to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as amended by the Protocol done at the Hague on 28 September 1955* (Montreal: International Civil Aviation Organization, 1975).

<sup>56</sup> Constitutional Commission, *supra* note 38 at para. 11.148.

that the national government has only an indirect, perhaps passing, responsibility for industrial relations. Although other subsections of section 51 might be exploited to support Commonwealth legislation dealing with aspects of this topic, the only one directly relevant is section 51(xxxv). It gives the Commonwealth legislative power over the prevention and settlement, through "conciliation and arbitration [,] ... of industrial disputes extending beyond the limits of any one State."

The powers of the Commonwealth Parliament are, therefore, explicitly limited in several ways. They are confined to the settlement or prevention of "disputes." Those disputes must be "industrial" and must "extend beyond ... one State." And the method of settlement or prevention must be "conciliation [or] arbitration." The extent of those limits and the consequential constraints on the capacity of the national government to integrate industrial relations policy with its broader economic management policy are crucial to the coherence of its economic policy.

Those limits have, at various stages over the past ninety years, been drawn quite narrowly. Recently, many of the narrower views of what constitutes an "industrial dispute" and of what processes are encompassed within "conciliation and arbitration" have been eroded by judicial exposition. However, the national government's powers in this area remain limited by the terms of section 51(xxxv).

The major limitation in this area has been the High Court's insistence that the terms of section 51(xxxv) confine the Commonwealth Parliament to legislating so as to delegate to an autonomous agency the junction of preventing or settling interstate industrial disputes through conciliation and arbitration. This subsection neither supports an industrial relations code nor permits the Commonwealth Parliament to direct the agency as to the settlement it must impose on any dispute. Acting within this limited conception of the power, the Parliament established a Court of Conciliation and Arbitration, known from 1957 as the Conciliation and Arbitration Commission. Later the *Industrial Relations Act 1988*<sup>57</sup> established an Australian Industrial Relations Commission. The Court and the commissions have been given autonomous power to apply conciliation and arbitration to the prevention and settlement of industrial disputes extending beyond the limits of any one state. This autonomy was expressed in the following terms by a High Court justice in 1967:

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<sup>57</sup> (Cth), ss. 8-49.

The Commission exercises a far-reaching authority over the national economy. But the Parliament has no power under the Constitution to direct that it go about its task of settling industrial disputes by fixing wages according to some particular principle or formula. It must be given a discretion as to means having regard to the end, the prevention and settlement of industrial disputes by conciliation and arbitration.<sup>58</sup>

Section 51(xxxv) has also been seen as limiting the matters over which the Commission has jurisdiction to disputes between employers and employees about industrial issues, as distinct from political and "management prerogative" issues, where those disputes extend beyond one state. In large part, members of the High Court have imposed these limits out of a poorly concealed concern to contain the expansionist ambitions of the Commonwealth Parliament and government—a concern which, as Murphy J. put it in 1976, "keeps the pre-*Engineers* ghosts walking."<sup>59</sup> It is only in the last few years that some members of the Court have conceded that such a concern is inappropriate in an industrial economy which is increasingly national. Deane J. recently acknowledged "the close interaction and interdependence of almost all industrial relations between employees and employers in modern Australia" as a reason for substantially liberalizing the Court's restrictive reading of section 51(xxxv).<sup>60</sup>

This is not the place for a discussion of the intricacies of the Commonwealth's legislative powers under section 51(xxxv) and the consequential limits on the powers of the Industrial Relations Commission. It is enough to repeat the Constitutional Commission's observation that, as a result of "scores of High Court cases ... employers and employees have been required to master, and use for their own purposes, a great deal of technical law that is otherwise irrelevant to the social aspects of industrial relations law."<sup>61</sup>

Prominent among the technicalities, which plague industrial relations in Australia, is the federal division of authority between the national Industrial Relations Commission and its state counterparts. That division is reflected in the organization of trade unions and employer groups, many of which have assumed a federal structure. Both employees and employers have sought to manipulate the parallel

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<sup>58</sup> *R. v. Commonwealth Conciliation and Arbitration Commission; Ex parte Amalgamated Engineering Union* (1967), 118 C.L.R. 219 at 269 (Windeyer J).

<sup>59</sup> *Attorney-General (Western Australia) ex rel. Ansett Transport Industries (Operations) Pty. Ltd. v. Australian National Airlines Commission* (1976), 138 C.L.R. 492 at 530.

<sup>60</sup> *Re Federated Storemen and Packers Union of Australia; ex parte Wooldumpers (Victoria) Ltd.* (1989), 166 C.L.R. 311 at 328.

<sup>61</sup> *Supra* note 38 at para. 11.122.



industrial relations systems to achieve what they perceive as the best short-term result. And industrial relations policies have fallen into conflict and confusion, as the Commonwealth and state governments have pursued sharply diverging ideological and economic goals.

In many industries and at many industrial sites, conditions of employment are regulated by several distinct "awards,"<sup>62</sup> made by both Commonwealth and state agencies. Although there has been substantial progress over the past few years toward achieving a degree of cooperation between Commonwealth and state agencies (largely through cross-appointing members of the various agencies), the structural weakness of the division of power remains. That weakness is, quite simply, that an essential element in a national economy is afflicted by contradictory policies and divided regulation. The significance of industrial relations to the health of that economy demands coherent policies, whether those policies reflect the intensive centralization and regulation, which has characterized Australian industrial relations over the past ninety years, or whether the policies reflect a more liberal, enterprise-based, contractual system.

These considerations moved the 1988 Constitutional Commission to describe the current federal distribution of industrial relations powers as "deeply flawed, whether viewed from the aspect of Parliamentary Government, national economic management, a rational federal system or efficiency."<sup>63</sup> The Commission proceeded to recommend that the Commonwealth be given legislative power over "industrial relations."

### *B. A Comparative Amplification*

Australia's political structure is not the only one suffering from incontestable stress. We believe there are some significant lessons for Australia in the developments occurring in Europe. In particular, the recent European constitutional experience speaks strongly of the need for Australia to question more openly, honestly, and thoroughly the nature of Australia's current political structure.

There have been cataclysmic constitutional changes throughout eastern Europe over the last two to three years. These, principally, have been triggered by the collapse of state communism in the former

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<sup>62</sup> This is the term used to describe the formal decisions of industrial arbitration agencies in Australia.

<sup>63</sup> *Supra* note 38 at para. 11.155.

U.S.S.R., its eastern European satellites, and in Yugoslavia and Albania. In western continental Europe, however, there have been major constitutional changes driven by forces other than the collapse of any ideology. These changes have been introduced, generally, within a stable, existing political order. However, not all countries in western Europe have participated in this process.

We are more concerned with changes occurring at the national level rather than the remarkable movement towards a transnational, federal structure for the European Community. That development is clearly of great importance, but at the national level the adaptation of existing, relatively stable political structures suggests that our reverence in Australia for the relative immutability of our constitutional structure is an attitude from a passing era. Let us consider some examples.

Austria is not yet a member of the European Community but is moving fairly rapidly to join. The process of constitutional change there in some ways resembles that in Australia. That is, there has been significant incremental change particularly since the mid-1950s when Austria ceased to be an occupied country after the last war. The process has not, however, relied largely on the courts. The Austrian federal constitution, originally crafted after the collapse of the Hapsburg Empire in 1918, allows for relatively easy formal constitutional change.

It is also clear that, in Austria, major changes in patterns of behaviour of the principal political parties have been crucial. Between the wars these parties were eventually drawn into civil war. The experience of the *Anschluss* and the Second World War created a modified political mentality, which stressed cooperation. The Austrian experience has been heavily criticized for its non-parliamentary, corporate thrust. But a great deal has been achieved. Austria is now a thriving, prosperous country. Less than fifty years ago it was a devastated, occupied nation. The relative adaptiveness of the country's basic political structure has contributed to this achievement.

Recently one Austrian scholar suggested that what we need in a modern constitutional system is a "permanent learning capacity based on a self-referential procedure"<sup>64</sup> His argument begins with the observation that constitutional legitimation in medieval Europe had a religious base. The erosion of this form of legitimation led to a search for a new anchor or certainty. During the process of secularization the notion of the rule of law evolved. The law was not just an instrument of social management. Basic law, relatively unchanging and monolithic,

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<sup>64</sup> R. Potz, "Legal Problems of Muslim Minorities in West European Countries" (1992) 7 L. and Anth. (forthcoming).

lent secular rather than religious certainty to society. Fundamental to maintaining the legitimacy of this constitutional mooring of society appeared to be a need for constitutional constancy and inflexibility.

The new angle is that, even if that view was compelling one hundred or even only fifty years ago, the rapidity of technological and social change is now so great that evolving constitutional systems will have to demonstrate much greater responsiveness, or a "permanent learning capacity" to use Potz's words. Basic human rights have to be protected in a fixed way but, apart from that, constitutional legitimacy in the twenty-first century will derive from the discriminating flexibility of each constitutional system. This is very nearly the opposite of the current Australian system of conferring constitutional legitimacy.

Another interesting case is Spain, which, in the post-Franco era, has also seen major constitutional change. A federal structure is now in place, although it is not described as federal for historical reasons.<sup>65</sup>

The interesting thing about the Spanish constitutional experiment of the last two decades is that, although there was strong support for the dismantling of the highly centralized, Falangist state and the movement towards a federal system, in some regions it appears this has not produced the anticipated benefits. Citizens still have a "before-and-after picture" so the new structure is far from having the given status, in some parts of Spain, that the classical federal structure has in Australia, where it spans four generations. Thus, when regional governments falter in Spain, people more readily consider whether the new structure is worth the trouble.<sup>66</sup> If financial collapses of the sort littering the landscapes in Victoria, South Australia, and Western Australia had occurred within some of the new autonomous regions in Spain, it is quite likely that their continuation as political entities would be questioned. In Australia, these collapses have not threatened the existence of these states. We seem to be accustomed, politically, to the immutability of our existing structure.

Other European examples are also available. The Belgians, especially over the last decade, have moved to a federal structure of

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<sup>65</sup> The reluctance of Spaniards to use this word derives from the tragedy of the First Federal Republic of 1873. This Federal Republic was established following the overthrow, in 1868 of the Bourbon Queen, Isabel II, by an alliance of reform-minded generals and admirals. The naive political adventure of the 1873 First Federal Republic ended in disarray and in the restoration of the Bourbon monarchy by 1874. This history has tainted the expression "federal" in Spain ever since.

<sup>66</sup> J. Hooper, *The Spaniards* (London: Penguin, 1987) at 266.

extraordinary complexity.<sup>67</sup> Again, what is interesting is the way in which the nation's constitutional structure has (by Australian standards) been so readily adapted to meet the exigencies of the current era. Specifically, the Belgians have moved in this direction as part of the ongoing process of dealing with their two thousand-year-old Flemish/French divide.

In Germany, the political structure in the western half of the country has coped with the absorption of the eastern part of Germany, which until October 1990 was a separate nation with a population the size of Australia's. Contemplating the rapid achievement of a change of such magnitude staggers the Australian constitutional imagination.<sup>68</sup> Economically, this is a task roughly parallel to the United States of America absorbing Mexico.<sup>69</sup>

Ultimately, these experiences point to a major change in continental European constitutionalism. The role of European constitutional structures in affecting and, indeed, determining many aspects of day-to-day socio-economic life is widely recognized and studied. The perception is now well developed that these fundamental structures must be monitored for their effectiveness. They need to be responsive. They need to be crafted to meet the needs of the twenty-first century. These fundamental structures are shedding their status as unchangeable instruments for maintaining social order. Indeed, the authoritative inflexibility, which was historic constitutionalism's *raison d'être*, increasingly conflicts with the new demands for constitutional responsiveness.

What might account for this apparent, relative constitutional dynamism in Europe *vis-à-vis* Australia? Clearly there are major cultural, economic, and political differences. More critical, however,

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<sup>67</sup> For an overview of this novel, if Byzantine, experiment in federalism, see R. Cullen, "Adaptive Federalism in Belgium" (1990) 13 U.N.S.W.L.J. 346.

<sup>68</sup> This transition has brought with it serious difficulties in adjustment. In particular, as the economic consequences of incorporation have been unfolding in the former East Germany, social and political stability have been threatened, and the German "economic miracle" no longer looks inviolable. Nevertheless, given the extraordinarily daunting nature of the task, the achievements so far remain remarkable. We are not underestimating the difficulties of carrying through with reunification. Currently the Germans are experiencing significant social disruption in the old East Germany, as former state-run industries close down across the region. The better view would seem to be that this, although forbidding, is almost certainly transitory and, indeed, was expected. To a significant degree, the disruption appears to be a product of unrealistic expectations of the East Germans (about the speed of their material transformation into West Germans) and of the West Germans (about the state of the East German socio-economy).

<sup>69</sup> Of course, in the German example, historical language and cultural factors are also major differences.

seems to be a widespread European recognition that they are in the midst of a major period of change. There has been a recognition of and response to the economic and political-historical forces driving this period of transformation. The Australian experience appears to be very similar. Major forces are changing the world about and within Australia. We recognize this to varying degrees and with considerable reluctance. We are not yet making the linkages between this appreciation and the development of our political architecture.

#### IV. THE CASE FOR FUNDAMENTAL CHANGE

It must be stressed again that we do not see fundamental constitutional change as an antidote to Australia's economic woes. We also recognize the advances made and being made by the now accelerating process of *ad hoc* constitutional adjustment.

It remains the case, however, that there is something basically wrong with today's Australian constitutional reality. The Constitution has been left formally intact but through High Court judgments and, increasingly, through intergovernmental cooperation, it has been bent almost double to make it work. In itself, this juxtaposition of form and actuality speaks potently of the need for fundamental change. It is a little like having a Model T Ford, which has been updated over the years with somewhat improved brakes, steering, suspension, fuel control, valves, *etcetera*. The claim that it is "just as good as ever" might convince the irredeemably nostalgic. It should, today, convince few others who know anything about motor cars, or constitutions.

Of course there are some who argue that it is the compromising of the Constitution by the High Court and governments that is the cause of our structural problems. These critics say, more or less, that we need to revert, in substance, to something closer to the form of the Constitution. We believe this view to be intrinsically misconceived. To return to a structure and to practices, which were discarded because they did not meet the challenges of years gone by, cannot be a sensible strategy.

Other factors cogently challenging our neglect of ongoing fundamental review have been discussed in this paper. First, there are the pressures being applied by the globalization of so many economic factors in the world. The critical point is that this mercantile revolution is applying changing economic pressures so quickly and so powerfully that swift and precise national responses are often required. Few nations are able to provide these responses. But some are worse in this

regard than others. Australia's responsiveness is improving but it remains very poor by world standards. Second, there are the accessible insights from other disciplines such as regional science and from comparative studies.

Regional science stresses two facets of real interest. First, it focuses on the controlling effects of our basic constitutional structure on most operational aspects of the Australian political economy. For many lawyers, these linkages are often not noticed or are regarded as being too tenuous to warrant serious attention, especially during extended periods of economic crisis such as we are experiencing now. Regional science suggests that this is a misguided judgment. Second, it demonstrates that our fundamental political structure is not a unique artifact. It is simply another, very important, slow-to-change component in Australia's total infrastructure. Understood in this way, its almost mystical, formal inflexibility begins to look like a curiosity rather than a compelling essence.

From the comparative discussion, it appears that these theoretical insights are manifesting themselves to some degree in what is now the world's pre-eminent political laboratory, continental western Europe. Political and societal attitudes to constitutional change and to the purpose of fundamental political structures are altering within many western European nations. These changes are occurring both at the national level and at the level of Euro-federalism. The momentum is considerable and seems to be growing.

The lessons for Australia are clear. We need to activate a process of ongoing fundamental review—a process that goes well beyond all our past experiences of window dressing and *ad hoc* bursts of reform. We have not been able to do this throughout this century. The chances of any rapid initiation of such a process are bleak. However, the circumstances compelling this journey are going to grow more acute. In the longer term there will be no avoiding this task. The opportunity and the challenge is to embrace it, to manage it creatively, and to breach the cycle of decades of rancorous reactive change.

Let us now return to the present political world and consider the task of working for structural fundamental change within that reality.

## V. TACKLING STRUCTURAL CHANGE IN AUSTRALIA

The past twenty years have seen a stirring of interest in constitutional reform in Australia. The Constitutional Convention, which first met in 1974, struggled through four sessions until it was eased

from the toils of this world in 1986. The Convention was monopolized by serving parliamentarians. It could boast only three minor alterations to the façade of the political architecture, which were approved by a referendum in 1977.<sup>70</sup> For much of its extended life, the Convention was distracted by the issues raised by the 1975 constitutional crisis. But the members of the Convention, most of them participants in that crisis, found objectivity and compromise impossible. The Convention's agenda was dominated by partisan posturing.

In 1986, the Commonwealth government established the Constitutional Commission, which had a compact membership<sup>71</sup> and was assisted by a series of expert committees. Two years of intensive work, including discussion papers, public hearings and submissions, and committee reports, produced the Commission's *Final Report* in late 1988. But, before that Report was published, the Labor government cobbled together several proposals for constitutional alteration and put these to a referendum in September 1988. As with the proposals that had emerged from the Constitutional Convention in 1977, these dealt with a few friction points in the processes of government and added a few sweeteners.<sup>72</sup> But they did not address any of the fundamental structural weaknesses in Australia's federal system. The opposition, adopting the traditional tactics of confusion and obfuscation, campaigned against the proposals<sup>73</sup> and the electorate rewarded this energetic campaign by inflicting on the reform proposals the highest "no" vote seen in eighty-odd years of referenda.<sup>74</sup>

This sorry episode, with its combination of overly hasty action by

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<sup>70</sup> These were, first, a system for filling casual vacancies in the Senate, which recognized the significance of party political affiliation; second, a retiring age (seventy years) for federal judges; and, third, a referendum franchise for Territory residents.

<sup>71</sup> Chaired by former Commonwealth Solicitor-General Byers, the Commission included former Prime Minister Whitlam, former Victorian Premier Hamer, a Federal Court judge, and two academic constitutional lawyers. The Federal Court judge, John Toohey, left the Commission when he was appointed to the High Court in 1987.

<sup>72</sup> The friction points hinged on the relationship between the two federal houses of Parliament, the House of Representatives and the Senate, and the distorted electoral systems used for some state parliaments. The sweeteners were embodied in a modest catalogue of guarantees of individual rights: jury trial, freedom of religion, and property rights.

<sup>73</sup> Observers with some faith in the democratic process must have been intrigued by the opposition's claims that guaranteeing trial by jury for criminal offences, full compensation for any government acquisition of private property, or the free exercise of religion threatened the fabric of Australian society.

<sup>74</sup> See E. Campbell, "Changing the Constitution—Past and Future" (1989) 17 Melbourne U. L. Rev. 1; H.P. Lee, "Reforming the Australian Constitution: The Frozen Continent Refuses to Thaw" [1988] Pub. L. 535.

the government, cynical opportunism by the Opposition, and confused reaction on the part of the voters, had the effect of destroying the Constitutional Commission's proposals before they were published. When the proposals were released a few weeks after the September 1988 referendum, they were seen as a series of substantial but modest suggestions for adapting the structure and function of Australia's political architecture to the twenty-first century. Although the Commission urged the retention of Australia's federal system and the division of governmental powers between Commonwealth and states, it recommended two dramatic enlargements of the Commonwealth's legislative powers. First, it suggested that the Commonwealth be given power over "trade and commerce," without any words of qualification;<sup>75</sup> and, second, that it be given power over "industrial relations."<sup>76</sup> These changes, in combination with the taxation, corporations, and external affairs powers (which the Commission recommended be left unchanged), would undoubtedly have rewritten the division of economic regulatory powers within the Australian federation, and given a sharp stimulus to the process of rationalization of regulatory standards. But after the September 1988 referendum, the Labor government had clearly lost its appetite for constitutional reform; the Commission's *Final Report* and recommendations were confined to library reference shelves.

However, during 1990, the Labor government restarted the process of constitutional change. First, it began to negotiate an exchange of legislative and fiscal powers with the states; second, it started building the foundations for a rewriting of the Constitution, which would coincide with the centenary of the drafting and adoption of the current Constitution during the 1890s.

The first of these strategies was initiated at the Special Premiers' Conference held on 30 and 31 October 1990. Chaired by the Prime Minister and attended by the Premiers of the six states and two territories, premiers' conferences are a regular feature of the Australian political calendar. Their agenda has always been set and controlled by the Commonwealth government and largely confined to the delivery, by the Commonwealth government, of its decisions on such matters as borrowing by all levels of government and the distribution of Commonwealth revenues to the mendicant states and territories. But

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<sup>75</sup> That is, the power would not be limited, as it has been since 1901, to interstate and international trade and commerce. See *supra* note 38 at para. 11.1.

<sup>76</sup> This is so that the Commonwealth would no longer be obliged to administer its industrial relations policy indirectly through an independent conciliation and arbitration agency, nor would it be confined to the narrow field of interstate industrial disputes. *Supra* note 38 at para. 11.119.



the aim of the Special Premiers' Conference of October 1990 was described as the "reforming of intergovernmental relations."<sup>77</sup>

The agenda of the Special Premiers' Conference was consciously driven by economic, rather than political, considerations. Recognizing that changes were needed to make the Australian economy more competitive and flexible, the Conference declared that a more effective public sector was essential to microeconomic reform.<sup>78</sup> The commitments to change adopted at the Conference included a fundamental review of Commonwealth/state financial arrangements to redress "vertical fiscal imbalance;"<sup>79</sup> a rationalization of regulatory activities in such areas as packaging and labelling, food standards, planning and building approvals, and occupational licensing;<sup>80</sup> integration of rail transport and regulation of road transport;<sup>81</sup> "the development of a more co-operative intergovernmental environment [sic] policy;"<sup>82</sup> and "enhanced co-operative efforts in industrial relations."<sup>83</sup>

The strategy endorsed by the governments in October 1990 was essentially consensual. It stressed consultation, cooperation, and exchange of responsibilities. And the goal was purely reformist: "improving the workings of the Australian Federation." Political events have since largely overtaken this initiative. Some improvements may emerge but the broad reformist momentum has gone.<sup>84</sup>

The second strategy was launched in April 1991 when the Constitutional Centenary Conference was held in Sydney.<sup>85</sup> This Conference nominally celebrated the first of the Constitutional Conventions, held in Sydney in 1891, which led nine years later to the

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<sup>77</sup> Special Premiers' Conference, "Communique" (31 October 1990) at 1.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.* at 4-5.

<sup>81</sup> *Ibid.* at 5-6.

<sup>82</sup> *Ibid.* at 11.

<sup>83</sup> *Ibid.* at 12.

<sup>84</sup> The principal reason for the loss of momentum was the deposing of Robert Hawke as Prime Minister of Australia in late 1991 by Paul Keating, the current Prime Minister. Keating has stressed a strong centralist approach to intergovernmental negotiations.

<sup>85</sup> The responsibility for this initiative lies partly with the Hawke Labor Government. Chastened by its ignominious failure in 1988, it now sees the value of moving deliberately and with broad political support. Partly it has ties also with a small and enterprising group of academic lawyers, including Cheryl Saunders of Melbourne University and James Crawford, formerly of Sydney University.

*Commonwealth of Australia Constitution Act 1900* (U.K.). More substantially, it provided the occasion, as the first Convention had in 1891, for a selected group of politicians, lawyers, academics, and journalists to debate and adopt an agenda for constitutional reform to pursue through this decade.

Among the key issues highlighted by this Conference were the potentially divisive questions of Australia's head of state, guarantees of basic rights, and the place of Australia's indigenous people in the nation's political framework. These questions are entirely independent of the federal system and its divisions of governmental responsibility. The Conference endorsed the continuation of a federal system of government as "highly desirable for Australia in the twenty-first century," but it diluted that endorsement with a dash of realism. The "internationalisation of economic activity," the Conference said, "requires an effective Australian economic union."<sup>86</sup> And the Conference noted, "considerable support ... for an examination of the distribution of powers between the Commonwealth and the States," particularly in the areas of "natural resources and environmental effects ... and industrial relations."<sup>87</sup>

The assumptions, which underpin these two strategies, are that significant structural change is unlikely and that any alterations to our political architecture must be incremental and symmetrical. If the national government is to be given authority to set national economic and environmental policies, then the states must be offered a corresponding transfer of national powers. The metaphor of design appears particularly inappropriate for this process, which is redolent more of the marketplace. Perhaps this is the way forward in the 1990s. Certainly it is a consideration, which recognizes the huge political difficulties that have confronted constitutional reform programmes in the past, which acknowledges that no change is likely to be achieved without broad, bipartisan support, and which concedes that this support must be bought. The price to be paid in a society whose political culture is essentially materialistic and shallow, is calculated in two currencies: revenue and power. So it is reported, for example, that the Commonwealth government is about to exchange its innovative

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<sup>86</sup> Constitutional Centenary Conference, *Concluding Statement: A Constitutional Review Process* at para. 8.

<sup>87</sup> *Ibid.* at para. 10.

residential welfare programmes for the states' industrial relations powers.<sup>88</sup>

## VI. CONCLUSION

Australia is facing substantial and serious economic problems. The Constitution has contributed both directly and indirectly to a significant degree to creating this mess. The reality for the foreseeable future is that we will have to live with the current classical federal structure. We do seem, however, to be moving towards a gradual recognition of the reality that we have an outdated Constitution within which flourishes a shallow and abrasive political culture. We have long pretended that we have sophisticated political institutions and something approaching a model political structure. That pretence still provides comfort to some, but for many, it no longer compels support.

The realities of entrenched political institutions must affect the development of any strategy for change in Australia's political architecture. The goals of that strategy need, however, to be informed by more than merely an assessment of what is "achievable."

We need to approach the task of constitutional renovation with a much more open mind less confined by the "political realities." We see the process of major renovation to the *Australian Constitution* spanning up to two decades. That process should not try to establish a blueprint for the next fifty or one hundred years. The nature of the world today is that it is an exciting, challenging, and still dangerous place. A thoughtful and considered adaptability is the key to coping with the challenges and the dangers. The days of the overarching, rigid constitution set in stone seem to be passing. Some fundamental aspects of our lives need to be protected against regular change, such as basic human rights. But this type of fundamental protection is not needed in a wide range of other areas where we remain extremely rigid, for example, in the regulation of the economy and the management of our welfare state.

In a process of major renovation it is crucial that we canvass as widely as possible throughout the world for useful comparative material. The comparative exercise should not constrain our imaginations and creativity. It is not a matter of copying another political system. Rather, we should learn from the experience of others. This means going beyond constitutional experience in the Anglo-centred world. We need to abandon parochialism about the development of our political

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<sup>88</sup> *The Age* (13 April 1991).

structure. It is unthinkable that we would change our tax laws without intense comparative study or build a motor car today based simply on Australian experience. We look for guidance and help throughout the world in such enterprises. We should be doing the same in the process of constitutional renovation.

Another crucial factor will be the input of a much wider cross-section of groups than participated in the development of our current political structure one hundred years ago. In particular, one thinks of women, native peoples, and various minorities. This is going to produce difficulties, but it is crucial that any renovated structure have commitment from across the national spectrum.

So what might a renovated Australian political structure look like?<sup>89</sup> We do not know the precise answers to this question. What we do know is that Australians ought to search for the answer more systematically and more thoroughly than they have so far. In doing so Australians will have to address concerns such as introducing different types of checks and balances on government to those which operate under our current structure. The checks and balances of the current classical federal system are not very effective and are linked to major dislocations and the poor performance of the Australian socio-economy.

It may be that we will continue with a federal structure but one less complex and more truly decentralized in a number of areas than the existing structure. That is, possibly one with only two levels of government.

We will certainly need to address which matters could be more decentralized than they are now and which should be more nationally controlled. One can think of significant benefits, which may arise from decentralizing the management of our educational system, our police forces, and aspects of our telecommunications system. On the other hand, the realities of the global economy and our experience suggest that effective, standardized, if not centralized, regulation of the economy, including the welfare system, may be crucial for success in the twenty-first century.

Finally, this project must recognize the huge difficulty of moving from argued proposals to the implementation of changes, which will have widespread effects on all Australians. First, the process must elicit commitment from those affected. This is a very long-term process. In Australia, it requires the gradual engendering of a positive recognition, a

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<sup>89</sup> Clearly the problem of setting national goals, referred to in the Introduction arises once more.

trust, that we can manage such change. Second, we may want to test proposed changes by using pilot projects.<sup>90</sup>

In summary, we see the process of major renovation as: (1) tackling the task with a clean slate; (2) encompassing the full spectrum of groups in the nation; (3) applying a rigorous comparative perspective; (4) not aiming for any sort of new, rigid blueprint but recognizing the principle of contingency that is going to apply to many aspects of constitutionalism in the future; (5) canvassing all practical options for managing change effectively; and (6) commencing while we continue with the current process of constitutional adjustment. It must be stressed again that fundamental constitutional change is not an antidote to Australia's economic woes. The advances made and being made by the now accelerating process of *ad hoc* constitutional adjustment also must not be undervalued.

The hidden agenda here is not to overthrow federalism in Australia. Our argument is, simply, that we must rescind our preoccupation with reactive, inward-looking change and open ourselves to more adventurous restructuring opportunities. This process may lead to the retention of a federal structure, but one developed for the twenty-first century. The programme of research and development will take time to bear fruit. We have to be patient. We must also commence this programme. The components in the process of major constitutional research should include wide participation; realistic goals, which recognize the contingent nature of any proposed changes; regular comparative analysis; sensitive implementation mechanisms; and an open mind on what is possible. The task is not simply to mend the faults. It is also positive. It is to design for a worthy future.

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<sup>90</sup> We have, incidentally, already done so. The Brisbane City Council, with its powerful single authority status, is generally reckoned to have demonstrated its operating superiority as a local government entity (*vis-à-vis* the multi-council systems, which prevail in Melbourne and Sydney, for example).

