Adrift on ‘the Sea of Faith’ \(^1\)
Constitutional Interpretation and the School Chaplains Case

By
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At the many public meetings that were held by the Federal League in Tasmania in the 1890’s to garner support for federation one of the League’s regular speakers, whose identity is now unknown, was accustomed to end his speeches by declaring;

“Gentlemen, if you vote for the Bill you will found a great and glorious nation under the bright Southern Cross, and meat will be cheaper…”\(^3\)

That rather quaint juxtaposition of high principle and grass-root (or is it, grain-fed) politics is not merely amusing, it also serves as a reminder that the Australian Constitution is as much a political document as it is a legal document.

That it is as much the product of political negotiation and compromise as it is an enactment of the Imperial Parliament.

It should, therefore, come as no surprise that one of the principal strands of reasoning running through the majority judgments in *Williams v Commonwealth* relies so much upon the nature and form of the political compact that the Constitution is intended to document.

That we – or at least many of us – are surprised that the High Court should place such explicit reliance upon the principles of “responsible government” and so-called “federal considerations” in seeking to construe an admittedly abstruse provision of the Constitution like s 61, is probably due to a long – although it has to be said, not exclusive nor altogether consistent – history of the Court’s not taking that approach.

After all, certainly outside the realm of Constitutional litigation, the now well-settled principles of statutory construction expounded by the

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\(^1\) See “Dover Beach” by Matthew Arnold (1822-1888)
\(^2\) Solicitor-General of Tasmania
High Court itself require that both “text” and “context” are paramount considerations.4

Moreover, “context” is to be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise.5

But within the realm of Constitutional litigation, the rules of construction are – or at least appear to be – a little more complex.

Writing extra-judicially and adapting an analytical framework expounded by Philip Bobbitt6 in relation to the interpretation of the Constitution of the United States of America, Justice Susan Kenny7 has identified five ‘modes’ of interpretation used by the High Court in constitutional cases. They are:

Textual mode: Which involves the interpretation of the natural and ordinary meaning of the words in question. That is, the ‘text’ in “text and context”.

Structural mode: Which involves the drawing of inferences from the structure of the particular text, from surrounding provisions, from the structure of the Constitution as a whole and from the governmental structure that the Constitution describes. This is surely an aspect of ‘context’.

Historical mode: Which involves the use of historical material to illuminate the drafters’ understanding of, or purpose in using, particular text. This too would appear to be an aspect of ‘context’.

Doctrinal mode: Kenny calls this the “common law constitutional method.” This mode involves the application and

5 CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ
6 Constitutional Fate: Theory of the Constitution, Philip Bobbitt, OUP, 1982
7 See “The High Court of Australia and Modes of Constitutional Interpretation” in Statutory Interpretation: Principles and pragmatism for a new age, Judicial Commission of New South Wales, 2007
adaptation, in accordance with common law methods, of constitutionally relevant principles, rules or ideas that are derived from previous decisions of the court, and

**Prudential-Ethical mode:** Which involves a consideration of the economic, social, political or ethical issues to which a particular case is thought to give rise.

It probably goes without saying, but it is important to keep in mind, that the High Court and individual justices rarely, if ever, use one of these interpretive modes to the exclusion of the others. More usually all or most of them will be given greater or lesser weight in the pursuit of the constitutional equilibrium.

Writing in 2003, the late Brad Selway described the High Court as “fundamentally textualists”, with “a preference for ‘purposive’ interpretation” and “a strong disposition to following previous authority”.

Had he used the “Kenny Matrix” that I have just summarised, Selway might have said that the High Court has historically shown a marked preference for the Textual and Doctrinal modes. I suspect that most commentators would be in general agreement – although they may differ about which of those modes has been the more preferred.

Those preferences were very clearly in evidence in the majority judgment in the *Work Choices Case*.9

In that case the majority (Gleeson CJ, Gummow, Hayne, Heydon & Crennan JJ) interpreted the “corporations power”10 in the Textual and Doctrinal modes while making little use of the Structural or Historical modes.

The dissentients (Kirby and Callinan JJ) on the other hand, argued predominantly in the Structural and Prudential-Ethical modes by reference to concepts such as “federal balance”, “the framers’ intent” and in the Structural mode by reference to the negative implication for the corporations power said to be derived from the limited scope of the

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9 New South Wales v Commonwealth [2006]HCA 52
10 Constitution, s 51 (xx)
Commonwealth Parliament’s legislative power over industrial disputes – the requirement that they must extend beyond the limits of any one State.

By contrast, in the School Chaplains Case the judgment of the Chief Justice, the joint judgment of Gummow and Bell JJ and the judgment of Crennan J were all argued, to a greater or lesser degree, predominantly in the Structural and Historical modes.

The judgments of Hayne and Keifel JJ were similarly argued – but because both decided the case by reference to whether the Commonwealth Parliament might have made a valid law with respect to either “corporations” or “benefits to students”, they also necessarily argued in the Textual mode.

Heydon J, in dissent, argued in the Doctrinal and Textual modes but also made extensive use of the Historical mode to argue against the conclusions reached in the majority judgments - which may have contributed to His Honour’s memorable admonition against determining “points of fundamental significance” based upon the utterings of “ignorant armies” assembled “on a darkling plain”.

There is very little doubt that the use of the Structural and Historical modes of interpretation that were employed in the majority judgments in Williams involves a very different approach from the approach employed in the majority judgment in the Work Choices Case. But, should it be inferred that the School Chaplains Case signals a radical and permanent shift in the High Court’s approach to constitutional interpretation?

For the moment, at least, I am not convinced that it should.

Whilst it is true, in a general sense, that the Court and counsel alike have increasingly made reference to historical material since Cole v Whitfield was decided in 1988, there were a number of features of Williams v Commonwealth which, not unlike Cole v Whitfield itself,

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11 Constitution, s 51 (xxxv)
12 Williams v Commonwealth [2012] HCA 23
13 Ibid., par. [404]
14 Ibid., par. [343]. The reference is to “Dover Beach” by Matthew Arnold – see footnote 1.
15 Cole v Whitfield (1988) 165 CLR 360, esp. at 385
predisposed the case to an Historical rather than a Textual or Doctrinal analysis.

First among these is the rather arcane\textsuperscript{16} nature of the text of s 61 of the Constitution which provides:

“\textit{The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.}”

While s 61 tells us \textit{in} whom the executive power of the Commonwealth is vested and \textit{by} whom it is exercisable, it tells us nothing about what the executive power is or what it may consist of.

That that is so may well be due to the fact that those who drafted and ratified the final text of s 61 were themselves either unable or unwilling to articulate precisely what they meant.

On the one hand there was a general concern that any attempt to define the executive power might result in an inadvertent curtailment of the prerogative powers of the Crown in right of the Commonwealth.\textsuperscript{17}

On the other hand there was also genuine disagreement about the true scope of the executive power of the Commonwealth.

Broadly speaking there were those who believed that the executive power ought to be, or was, coextensive with the legislative power whether or not that legislative power had actually been exercised. That is, similar to the executive powers of the government of the United Kingdom or even of the Colonies, but trimmed to conform to the Commonwealth’s more circumscribed legislative powers.

According to Alfred Deakin the executive power of the Commonwealth existed both antecedently to, and independently of, legislation and was in scope at least equal to that of the Commonwealth’s legislative power exercised or unexercised.\textsuperscript{18}

\textsuperscript{16} The dictionary definition of “arcan” is “known or understood by very few” so that the use of even that word in this context may be something of an overstatement.

\textsuperscript{17} See \textit{Williams v Commonwealth} (supra) at par. [121] per Gummow & Bell JJ referring to Crommelin quoted in \textit{Re Patterson; Ex parte Taylor} (2001) 207 CLR 391 at 462-463.

\textsuperscript{18} \textit{Ibid.}, per French CJ at [50]
At the other end of the continuum stood those, like Andrew Inglis Clark who thought that, putting aside the prerogative powers of the Crown, the distribution of executive power between the Commonwealth and the States was conditioned by the exercise of Commonwealth legislative power. According to Clark:

“It is evident that the legislative power of the Commonwealth must be exercised by the Parliament of the Commonwealth before the executive or the judicial power of the Commonwealth can be exercised by the Crown or the Federal Judiciary respectively, because the executive and the judicial powers cannot operate until a law is in existence for enforcement or exposition.”

The second factor that predisposed the interpretation of s 61 to analysis in the Historical mode was the comparative dearth of authority dealing directly with the section.

There are a number of cases like the Wool Tops Case, New South Wales v Bardolph (which was really a case about State executive power) and the AAP Case (which was actually concerned with s 80 of the Constitution, not s 61) which comment upon aspects of the scope of the executive power but, according to French CJ there was no previous decision of the High Court that had required a “global account” of the executive power of the Commonwealth. This obviously tended to limit analysis in the Doctrinal mode.

The third, and perhaps most obvious factor is the expression “executive power” itself.

Any analysis in the Textual mode attempted in isolation from the historical and political structures on which the Constitution is explicitly and implicitly founded, was always unlikely to yield any, or any satisfactory, meaning.

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19 Inglis Clark, Studies in Australian Constitutional Law (1901) at 38. See French CJ in Williams v Commonwealth (supra) at par. [50]
20 (1922) 31 CLR 421
21 (1934) 52 CLR 455
22 Victoria v Commonwealth & Hayden (1975) 134 CLR 338
23 Williams v Commonwealth (supra) at par [22]
The Majority Judgments

So far as the judgments of the Chief Justice, the joint judgment of Gummow and Bell JJ and the judgment of Crennan J (which I shall call the majority judgments) are concerned, argument in the Structural mode was primarily focussed on two distinct features of the structure of the Constitution.

In saying this, I do not overlook that some attention was also given to the diverse character subject-matters of the heads of Commonwealth legislative power and the perception that some were, in the absence of legislation, “inapt for exercise by the Executive”. 24

1. The Role of the Senate

The first such feature was what French CJ referred to as now being the “vestigial” function of the Senate as “…a chamber designed to protect the interests of the States…” 25 combined with the fact that the legislative power of the Commonwealth Parliament is, with only a few exceptions, exercisable not exclusively but concurrently with the legislative power of the States.

For anyone who was interested enough to notice, the Chief Justice had signalled his views about the scope of the Commonwealth executive power as long ago as 2001 as a member of the Full Federal Court in Ruddock v Vadarlis 26 (“the MV Tampa Case”).

That case concerned whether, in the absence of legislation, the executive power of the Commonwealth extended to preventing aliens from entering Australia and, if it did, whether the Migration Act 1958 had nevertheless regulated the exercise of that power.

In the course of holding that the executive power did extend to the exclusion of aliens, His Honour said, en passant;

“It is not necessary for present purposes to consider the full content of executive power and the extent to which it may operate upon the subject matter of the heads of Commonwealth legislative power. Given that the legislative powers conferred by s 51 are concurrent with those of the

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24 Ibid., at par. [36] per French CJ and par. [135] per Gummow & Bell JJ
25 Ibid., par.[61]
26 (2001) 110 FCR 491 at [192]
States, subject to the paramountcy of Commonwealth statutes, (covering cl 5 and s 109) it could not be said that, absent statutory authority, executive power may be exercised in relation to all those matters.”

It appears that underpinning this conclusion are the following general propositions.

First, unless and until the Commonwealth Parliament exercises a head of concurrent legislative power, the States remain entirely free to exercise their legislative power in respect of that same subject-matter and must, of necessity, have and exercise the associated executive power.27

Secondly, the Commonwealth Parliament may only exercise its legislative power with the agreement of the Senate – a chamber which was expressly designed to protect the interests of the States (and, one might now add, the Territories).

Put another way, this means that the Commonwealth Parliament may never exercise any legislative power without the concurrence of, at least, a majority of Senators - although, it has to be said, not necessarily a majority of States. Indeed, the control now exerted by political parties over Senators has meant that Senators now rarely vote along State lines.

How then (so the argument would go) can it be thought that the Commonwealth can exercise executive power in respect of matters which are regulated only by State laws and a fortiori, in respect of matters in relation to which the Senate has actually declined to permit the Commonwealth to make a law?

If the Commonwealth could do, in the exercise of the executive power, things which the Parliament had refused or even forbidden it the power to do by legislation, where does that leave the Parliament? And more especially, the Senate and, by extension, the States?

This argument necessarily focuses on the Senate, it being inherently unlikely under a system of “responsible government” that the House of Representatives would refuse to pass a law proposed by the Executive Government because, by convention, the government must command a majority of votes in that chamber.

27 This, of itself, might be thought to be sufficient to militate against the existence of a concurrent Commonwealth executive power.
Thirdly, if and when the Senate permits the Commonwealth to exercise a head of concurrent legislative power it is, in effect, conceding to the Commonwealth the power, formerly reposed exclusively in the States, to both make and administer the law in respect of that matter. Thus, the legislative and executive power of the States is accordingly diminished to that extent.

These propositions are, I think, encapsulated in two quite short sentences in the judgment of the Chief Justice:28

“A Commonwealth Executive with a general power to deal with matters of Commonwealth legislative competence is in tension with the federal conception which informed the function of the Senate as a necessary organ of Commonwealth legislative power. It would undermine parliamentary control of the executive branch and weaken the role of the Senate.”

2. Section 96 of the Constitution

The second structural feature of the Constitution which influenced the majority was the purpose and effect of s 96 - the power of the Commonwealth Parliament to grant financial assistance to the States.

It is perhaps worth reiterating that s 96 of the Constitution confers authority on the Parliament to grant financial assistance to the States. It does not confer that authority on the Executive Government.

Section 96 was referred to on numerous occasions by Gummow and Bell JJ and also by Crennan J but, without much in the way of what Gummow J might call “explication”.29

It is probable that their Honours saw the significance of s 96 – involving as it does, the approval of the Parliament and thus, of the Senate - as being largely self-evident.

Nevertheless, the joint judgment does quotes a passage from the reasons for decision of Barwick CJ in the AAP Case30 which is described as being relevant to “…the significance of s 96 in the federal structure…”31

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28 Williams v Commonwealth (supra) at par.[60]
29 Ibid., at par. [121]
30 Victoria v Commonwealth and Hayden (supra) at par. [148]
That passage reads, in part;

“[A] grant under s 96 with its attached conditions cannot be forced upon a State: the State must accept it with conditions. Thus, although in point of economic fact, a State may on occasions have little option, these intrusions by the Commonwealth into areas of State power which action under s 96 enables, wear consensual aspect. Commonwealth expenditure of the Consolidated Revenue Fund to service a purpose which it is not constitutionally lawful for the Commonwealth to pursue, is quite a different matter. If allowed, it not only alters what may be called the financial federalism of the Constitution but it permits the Commonwealth effectively to interfere, without the consent of the State, in matters covered by the residue of governmental power assigned by the Constitution to the State.”

In essence, what their Honours appear to be affirming is that the existence of s 96 - permitting as it does the Commonwealth to provide financial assistance to the States but subject to Commonwealth Parliamentary approval and the agreement of the State or States concerned - gives rise to a negative implication which is inconsistent with the existence of a general executive power to grant money.

That is, there would be no work for s 96 to do if it were open to the executive government, without resort to the Parliament\(^{32}\), to grant financial assistance to the States – or to anyone else it chose.

Both of the structural features of the Constitution principally relied upon in the majority judgments reflect the fundamental principle of so-called “responsible government”: That the executive government is accountable to the Parliament and through the Parliament to the electorate – which, in the case of the Senate is described as being “…the people of the State…”\(^{33}\). (By contrast, the Constitution provides that members of the House of Representatives are to be “…chosen by the people of the Commonwealth…”\(^{34}\)).

The underlying proposition may therefore be that the Commonwealth government is not only responsible to the people through the House of Representatives but is also (at least in a structural, if not a practical sense) responsible to the States, through the Senate.

\(^{31}\) Williams v Commonwealth (supra) at par. [148]
\(^{32}\) Other than having a valid appropriation – see Pape v Commissioner of Taxation (supra)
\(^{33}\) Constitution, s 7
\(^{34}\) Ibid., s 24
The majority judgments in *Williams* offer a fresh – although perhaps not an entirely new – perspective on the nature of the Australian federation and more particularly the distribution of executive power within the federation.

Whether this new perspective is embraced and becomes the orthodox view remains to be seen. The High Court will be differently constituted the next time s 61 comes up for consideration – with who knows what result?

It is remarkable now, well over a century since federation, that we may not have yet finally resolved a constitutional question as fundamental as the scope of the executive power of the Commonwealth.

But these things rarely follow a predictable path.

While that anonymous Tasmanian orator to whom I made reference in opening may have accurately predicted the founding of a “great and glorious nation under the bright Southern Cross”, all of the available evidence suggests that meat did not get any cheaper!