Chapter Three

Rights in the Constitution

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Like Sherlock Holmes' famous dog that didn't bark in the night, the best thing about our Constitution is what it does not contain – a Bill of Rights. Unfortunately it does contain some express rights and the High Court has found some implied general principles, and the Constitution has been weakened by both.

It is important to bear in mind the opening remarks by Gleeson CJ in *Roach v. Electoral* Commissioner,[1] where he said:

> "The Australian Constitution was not the product of a legal and political culture, or of historical circumstances, that created expectations of extensive limitations upon legislative power for the purpose of protecting the rights of individuals. It was not the outcome of a revolution, or a struggle against oppression. It was designed to give effect to an agreement for a federal union, under the Crown, of the peoples of formerly self-governing British colonies. Although it was drafted mainly in Australia, and in large measure (with a notable exception concerning the Judicature – section 74) approved by a referendum process in the Australian colonies, and by the colonial Parliaments, it took legal effect as an Act of the Imperial Parliament. Most of the framers regarded themselves as British. They admired and respected British institutions, including parliamentary sovereignty. The new Federation was part of the British Empire; a matter important to its security. Although the framers were concerned primarily with the distribution of legislative, executive and judicial power between the central authority and the States, there remained, in their view of governmental authority affecting the lives of Australians, another important centre of power in London".

One of the few direct attempts to create direct civil rights in the Constitution is s. 117, which prohibits a State from discriminating against residents of another State. Initially this was given a very limited interpretation. In *Henry v. Boehm*[2] the High Court (Stephen J dissenting) considered Australian legislation which provided that, in order to be admitted as a lawyer in that State, one needed to reside in South Australia for the three months prior to application. It was held that this did not discriminate against residents of other States, because the requirement to reside in South Australia for three months applied equally to South Australian residents and residents of other States. That decision was effectively overruled by the High Court in *Street v. Queensland Bar Association*.[3]

The real problem with s. 117 is that it may unduly restrict certain types of State activities. Thus, for example, if a State were to impose a State tax (which obviously would fall primarily on local residents) in order to provide single bed accommodation for local residents in its hospitals, such legislation might well be struck down under s. 117. In *Street's Case* itself, there had been for some time a view held among some of the legal profession in Queensland that the admission of southern barristers would inhibit the development of a strong Bar in Queensland, because the major commercial cases would all be argued by barristers from Sydney and Melbourne. The wisdom of this view is debatable, and I do not wish to debate it. My point is that the case was necessarily decided without reference

to the desirability or otherwise of the particular discrimination. That issue was simply irrelevant. Bills of Rights which contain wide generalisations similarly do not give any opportunity for the consideration of the merits of particular applications in particular cases.

Section 80 requires that trials on indictment for offences against laws of the Commonwealth be heard by juries. This provision has proved to be both too wide and too narrow. It is too narrow, in that it can be avoided by the simple expedient of the Commonwealth providing that a particular offence shall be prosecuted summarily rather than on indictment. The result of the line of cases reaching this conclusion is that it is a simple matter for the Commonwealth to preclude trial by jury for specific offences if it chooses to do so.

The provision is too wide in a different respect. In *Brown v. R*[4] the High Court held that a State provision which permitted an accused person to elect for trial by judge was invalid in its application to Commonwealth offences. It is one thing to say that a person has a right to a trial by jury, it is quite another to say that a system under which a person can elect for trial by judge is not permitted, especially where, for example, the defendant has been excoriated in the media.

Section 75(v) provides that the High Court has original jurisdiction in all matters in which a writ of prohibition or *mandamus* is sought against an officer of the Commonwealth. As a matter of English these words are very straightforward. They do no more than confer jurisdiction on the High Court where certain remedies are sought. The High Court has held, however, notably in *Plaintiff S157/2002 v. The Commonwealth*,[5] that the effect of the provision is to confer a right to obtain an order of prohibition or *mandamus* where a Commonwealth officer commits a jurisdictional error (which includes a denial of procedural fairness). In *Bodruddaza v. Minister for Immigration and Multicultural Affairs*,[6] this was taken so far as to enable the Court to strike down a statutory limitation period for prerogative relief in migration matters of 28 days, which period could be extended by up to 56 days, to 84 days, at any time before the expiry of 84 days. This comparatively generous limitation period was held to conflict with s. 75(v) of the Constitution because it was capable of inhibiting the ability of the High Court to grant prerogative relief notwithstanding jurisdictional error.

Sections 7 and 24 of the Constitution provide that the Senate and the House of Representatives respectively shall be chosen directly by the people. Section 30 allows the Parliament to determine the qualification of electors. Clearly there has to be a reconciliation, so that Parliament cannot fix the franchise in such a way that the Senate and House of Representatives are not "chosen directly by the people". The issue arose in *Roach v. Electoral Commission*,[7] where the High Court held that a provision precluding any person serving a sentence of imprisonment on the date of an election from voting was invalid, but that a provision limited to the exclusion of persons serving sentences in excess of five years was valid. This decision was reached notwithstanding that, at the time of the Constitution, all six of the Australian colonies had provisions restricting the right to vote of persons serving sentences for imprisonment (although the provisions differed from colony to colony). One could be forgiven for thinking that this was one of the matters the Constitution had deliberately left to the Parliament, but the High Court chose to draw a wider implication from the general words requiring the two bodies to be "chosen directly by the people".

I will not deal in this paper with the implied freedom of political communication which the High Court has managed to find in the Constitution, nor with the complex issues arising out of s. 51(xxxi).

The major implication found in the Constitution has arisen from the division between Chapters I, II and III, which deal respectively with the legislature, the executive and the judiciary. In *R v. Kirby, ex parte Boilermakers' Society of Australia* ("the *Boilermakers' Case)*,[8] the High Court held that this division meant that Parliament could not confer judicial power on a non-judicial body, nor could it confer non-judicial power on a Chapter III court. This may well be a sensible general approach, but it causes difficulties when one has a matter to be decided which falls close to the line between judicial and non-judicial.

In such a case, the effect for years has been that the Parliament selects at its peril what it believes the decision to be. If it is wrong, and something which is just on the judicial side of the line is given to a non-judicial tribunal, or something which is just on the non-judicial side of the line is given to a Chapter III court, the legislation is invalid. This extreme doctrine is the result of treating an implication in the Constitution as creating an absolute rule. Fortunately, in recent times the doctrine has been modified by the Chameleon doctrine, which enables the court to say that in borderline cases a conferral of power may take its colour from the body on which it is conferred, so that it is non-judicial if conferred on a non-judicial tribunal and judicial if conferred on a Chapter III court. In very recent cases some members of the High Court have criticised this doctrine on the basis that it might undermine the *Boilermakers'* principle. This is another illustration of the danger of treating principles as having absolute effect.

There are real questions as to how far the High Court in the future will find implications in Chapter III of the Constitution, dealing with the judiciary. Litigants in person regularly seek to argue cases based on an argument that Chapter III guarantees some sort of due process, or more generalised justice, which the litigant claims not to have received. As special leave to appeal is normally refused in such cases, the High Court has not yet considered the general issue, although it touched upon it in *APLA Limited v. Legal Services Commissioner (NSW)*.[9]

My general conclusion is that the framers of the Constitution were wise in not including a general Bill of Rights. Where they did try and include civil or political rights, they created provisions which have led to much difficulty and some undesirable consequences. It is to be hoped that the High Court will not be anxious to find more rights of this kind concealed between the lines of the Constitution.

Endnotes:

1. *Roach v. Electoral Commissioner* [2007] HCA 43.
2. *Henry v. Boehm* (1973) 128 CLR 482.
3. *Street v. Queensland Bar Association* (1989) 168 CLR 461.
4. *Brown v. R* (1986) 160 CLR 171.
5. *Plaintiff S 157/2002 v. The Commonwealth* (2003) 211 CLR 476.
6. *Bodruddaza v. Minister for Immigration and Multicultural Affairs* (2007) 81 ALJR 905.
7. *Supra*.
8. *R. v. Kirby, ex parte Boilermakers Society of Australia* (1956) 94 CLR 254.
9. *APLA Limited v. Legal Services Commissioner (NSW)* (2005) 224 CLR 32.