The Constitution Goes to War
[The Sixth Sir Harry Gibbs Memorial Oration]

The Honourable Justice R R S Tracey

The first Sir Harry Gibbs Memorial Oration was given by the then Justice Dyson Heydon in 2006. The next was given by tonight's Chairman, Justice Ian Callinan, in 2008. In such company it is more than an honour to be invited to give this year's Oration.

Each of my predecessors has remarked on the distinguished contribution which Sir Harry Gibbs has made to this country's jurisprudence. Their remarks are replete with superlatives. The last orator, the Attorney-General, Senator the Honourable George Brandis, QC, described Sir Harry as "the greatest judicial lawyer Queensland produced in the twentieth century". He compared him with Sir Samuel Griffith whom he described as Queensland greatest judicial lawyer in the nineteenth century. I, too, hold Sir Harry in the highest esteem as a practising barrister and a judge. Given the topic of my address, which owes its inspiration to the Centenary of the outbreak of the First World War, I would, however, wish to say something of a lesser known aspect of Sir Harry's distinguished career.

During the 1930s he studied at the University of Queensland under Professor Thomas Penberthy Fry who, during the early stages of the Second World War, was General Thomas Blamey's Principal Legal Officer in the Middle East. Sir Harry graduated shortly before the outbreak of the Second World War. On the day after Germany invaded Poland, and the day before Britain declared war on Germany, Sir Harry volunteered for the Australian Military Forces. He served in Queensland during the early stages of the war. On 1 January 1943 he transferred to the Australian Army Legal Department and was posted to the Headquarters, New Guinea Force, in Port Moresby. On 30 September 1943 Sir Harry became one of the inaugural members of the Australian Army Legal Corps.

In December 1944 he was posted to the Directorate of Research and Civil Affairs in Melbourne on promotion to Major. He was engaged in planning for post-war government in New Guinea. He there worked alongside Lieutenant Colonel John Kerr. During this period he also wrote a Master of Laws thesis on the Constitutional and Common Law Difficulties Involved in Australia's Government of the New Guinea Territory. The thesis was examined by Professor Fry who described it as "an outstanding contribution to systematic legal learning" on the matter of civil and military governance. Sir Harry continued to serve in the military until 1946 when he embarked on his highly successful civilian legal career.[1]

The scope of the defence power

We have recently witnessed a series of commemorative events to mark the centenary of the outbreak of the First World War. It is, therefore, perhaps not surprising that I have been asked to speak about the intersection of constitutional law and war.

A number of significant constitutional issues have arisen during war-time. Foremost amongst these has been the scope of the defence power. Another to which I propose to devote some attention is the interaction between the defence and judicial powers in the context of military

discipline. Since Federation the reach of the defence power has been considered in circumstances ranging from "profound peace" to international tension to preparation for war to declared war and thence to post-war reconstruction. Time will only permit me to concentrate on the periods of declared war.

The decision to confer a power to make laws with respect to national defence on the Commonwealth Parliament was relatively uncontentious. There was a general acceptance, in the course of the Convention debates, that national defence was a responsibility which should pass from the colonies to the Commonwealth. The power was granted in broad terms to deal with "the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth . . .". What was contemplated was legislation relating to the raising, equipping and control of national naval and land forces to supersede those previously serving in each of the colonies. After Federation the States were prevented, by section 114 of the Constitution, from raising or maintaining any naval or military force without the consent of the Commonwealth Parliament. The former colonial forces were transferred to Commonwealth control by operation of sections 52(ii) and 69.

In the course of the Convention Debates little attention was given to the deployment of these forces outside the territory of Australia. The numbers of trained sailors and soldiers was barely enough to perform garrison duties and to man the few small ships which were to be transferred from colonial to Commonwealth control.[2] None was given to their participation in the multi-national hostilities of the kind which was to engulf the world within a few short years.

This power was first exercised in 1903 with the passing of the *Defence Act* which provided for the establishment and control of naval and military forces. These were to include small permanent forces supported by voluntary militia.

The width of the defence power was not to be tested until the early years of the First World War. The Government readily raised and committed the first AIF and the Royal Australian Navy to the service of the mother country. The support of these troops and sailors required wholesale changes to the national economy. Factories which had produced consumer goods had to be retooled to produce munitions. Employment arrangements had to be adjusted to facilitate the replacement of service personnel with workers diverted from other occupations. The rationing of many commodities became essential. The Commonwealth Parliament sought to accommodate these and other demands by enacting wide-ranging legislation. In doing so it sought to rely on the defence power. There was no doubt that the Parliament had the power to legislate for the raising, equipping and controlling of the armed forces. What was far less clear, in the era of the doctrines of reserved powers and implied State immunities, was whether the defence power was broad enough to cover these essential but ancillary measures. When the inevitable challenges emerged, the High Court's response was marked by its willingness to validate very broad Commonwealth regulation of any activity which could reasonably be seen to be related to the war effort. The Court was also prepared to defer to the judgment of the Executive as to the necessity and desirability of particular regulatory activity to an extent which would be unlikely in the present day.

Such an approach could not have been predicted prior to the High Court's decision in *Farey v Burvett*.[3] Under the *War Precautions Act 1914 (*Cth) Commonwealth officials were empowered to fix the price of food and other commodities by regulation and order. This power had been used

to fix the price of bread. Mr Farey was convicted of selling bread for more than the prescribed price. He appealed to the High Court, challenging the validity of the empowering Act and the regulations and orders made under it. Five of the seven Justices held that all three instruments were valid under the defence power. In doing so they treated the phrase, "naval and military", as words of extension rather than limitation. Griffith CJ proposed a test of whether the legislation "conduce[d] to the efficiency of the forces of the Empire, or is the connection of cause and effect between the measure and the desired efficiency so remote that one cannot reasonably be regarded as affecting the other?"[4] Isaacs J was disposed to accord even wider power to the Commonwealth. Adopting language similar to that of the war-time political leaders, Isaacs J spoke of Australia being engaged in "a mighty and unexampled struggle" which required "co-ordinated effort in every department of our life . . . to ensure success and maintain our freedom." At such times, he said, "[i]f the measure questioned may conceivably . . . even incidentally aid the effectuation of the power of defence, the Court must hold its hand and leave the rest to the judgment and wisdom and discretion of the Parliament and the Executive it controls – for they alone have the information, the knowledge and the experience."[5] Using prose which would have provided Commonwealth ministers with enormous comfort, his Honour added:

> A war imperilling our very existence, involving not the internal development of progress, but the array of the whole community in mortal combat with the common enemy, is a fact of such transcendent and dominating character as to take precedence over every other fact of life. It is the *ultima ratio* of the nation. The defence power then has gone beyond the stage of preparation; and passing into action becomes the pivot of the Constitution, because it is the bulwark of the state. Its limits then are bounded only by the requirements of self-preservation.[6]

The Court also supported the conferral of wide discretionary powers on the Executive. In *Lloyd v Wallach*[7] a unanimous Court upheld the validity of regulations which gave the Minister for Defence a broad discretion to intern aliens and naturalised persons. In *Welsbach Light Co Ltd v Commonwealth*[8] the Court held valid a provision of the *Trading With The Enemy Act 1914* (Cth) which authorised the Governor-General to prohibit transactions which he deemed to constitute trading with the enemy. In the same case, a proclamation which, for practical purposes, delegated to the Attorney-General the power to declare a particular business enterprise to be controlled or carried on for the benefit of persons of enemy nationality or connections was also supported.

A more nuanced approach to the construction of section 51(vi) is evident during the Second World War. This approach was guided by a series of judgments, delivered by Sir Owen Dixon, in which he identified a peculiar characteristic of the power. In *Andrews v Howell*[9] and *Stenhouse v Coleman*,[10] he drew attention to a singular feature of section 51(vi) which set it apart from other legislative powers contained in section 51. This feature was that it was a "purpose" power. This meant that, when called upon to determine the validity of legislation purportedly made under section 51(vi), the Court was required to decide whether the measure was directed to national defence or was properly incidental thereto. This in turn required the Court to take into account

extant exigencies. Implicit in this approach was a recognition that the reach of the defence power would depend upon the circumstances which confronted the nation at any given time. The power would be at its most expansive when the country was at war with enemies who threatened its continued existence.

In *Stenhouse*, regulations made under the *National Security Act 1939* (Cth) empowered a minister, if it appeared to him to be necessary in the interests of defence of the Commonwealth or other related purposes, to prohibit the distribution of essential articles. A ministerial order, made under this power, prohibited the distribution of bread by persons who did not hold a license authorising them to do so. The Court upheld both the regulation and the order made under it as being within the defence power. The prohibition had "a real connection with the subject of defence."[11] The regulation of the production and distribution of bread was "clearly incidental to the conduct of the war." [12]

The application of similar reasoning led the Court to uphold price control,[13] uniform taxation,[14] manpower regulation,[15] advertising restrictions[16] and the prescription of restricted drinking hours in hotels.[17] There were, however, limits to the Court's benevolence. The Commonwealth was denied the right to regulate university admissions[18] or the right to prescribe the terms and conditions of employment of State public servants who were not involved in war-related work.[19] During the Second World War, the New South Wales Supreme Court also placed limits on the operation of the defence power. In *Ex parte Day; Re Courtney*,[20] for example, it held invalid an order, made under Commonwealth National Security Regulations, which sought to control the conduct of "disorderly houses."

Following the conclusion of the Second World War the Court took stock of the case law which had developed under section 51(vi) during the two World Wars. It accepted that the width of the defence power expands during time of war. The core elements of the power covered matters such as the enlistment and training of servicemen and women, the provision of military equipment, the manufacture of armourments and the erection of defence facilities. Legislation relating to these matters was supported by the defence power in both times of peace and times of war. A wider range of activities could, however, be regulated during war-time and the periods immediately preceding and post-dating the end of hostilities. Such regulation may apply, for example, to price fixing, rationing, ownership of land and employment. This "secondary" aspect of the defence power falls away at other times. It was not sufficient to justify the dissolution of the Communist Party of Australia in 1951, notwithstanding the fact that, at that time, Australian forces were actively engaged in fighting Chinese and Korean communist troops during the Korean War.[21]

Military discipline

Since the eighteenth century military discipline in the United Kingdom had been enforced by courts martial. This regime was codified during the nineteenth century. The legislation had application to the Australian colonies and continued to operate (subject to some modification) even after the enactment of the *Defence Act* in 1903. In general terms, the *Army Act 1881* (Imp) and the *Navy Discipline Act 1866* (Imp) applied in a modified form during peace-time but were given full effect in respect of Australian forces in war-time. Hundreds of courts martial were convened during the First World War to deal with offences committed by Australian

servicemen. The concept of trial by court martial was so entrenched in the forces that its legitimacy was not called into question. The question of whether ad hoc courts martial could exercise judicial power, consistently with the Constitution, was, however, raised, not by a litigant, but by the High Court itself, during the Second World War.

At the outbreak of that War, as had happened at the commencement of the First World War, the Australian Government transferred all the vessels in the Royal Australian Navy together with the officers and seamen who served on them to the King's Naval Forces. The transfer was to continue in force indefinitely and unconditionally.

One of the vessels thus transferred to the Royal Navy was HMAS *Australia*. In March 1942, on the eve of the battle of the Coral Sea, the ship was sailing in the South Pacific Ocean. A seaman was murdered by being thrown overboard. Two of his fellows were charged with his murder. The convening authority was a Rear-Admiral of the Royal Navy who was the Commander of the Australian Squadron. He directed the Captain of HMAS *Australia* to assemble a court martial in the ship to try the two seamen on the charge of murder. That Captain was H.B. Farncomb who, after the war, returned to civilian life and became a member of the New South Wales Bar. He appointed a Royal Navy Captain as President of the court martial and some of his junior officers as members of that court. He chose to act as prosecutor. The defending officer was a lowly paymaster, Lieutenant Trevor Rapke, who was later to become a judge of the Victorian County Court and the Naval Judge Advocate General. The court martial convened in a harbour at Noumea.[22] In the course of the trial Captain Farncomb told the court that he would not have undertaken the prosecution unless he had been firmly convinced of the guilt of both of the accused. The defending officer protested in vain. The accused were both convicted and sentenced to death, a penalty provided for in the UK legislation, but not under the *Defence Act*. They were transferred to Long Bay gaol in Sydney to await execution.

The two seamen applied to the High Court for writs of habeas corpus or, alternatively, prohibition. The members of the court martial, the Governor of the Long Bay gaol and the New South Wales Sheriff were named as respondents. The applicants argued that the power, under the *Defence Act*, which facilitated the transfer of naval assets to the Royal Navy had to give way to another provision of the Act which prescribed capital punishment for various offences but not for murder. They also challenged the procedural fairness of the court martial.

The applications faced a number of threshold problems. The first was doubt as to whether the High Court had original jurisdiction to issue a writ of habeas corpus. The second related to the alternative remedy of prohibition. The court martial was functus officio and, in any event, the gaol Governor and Sheriff were not officers of the Commonwealth against whom the writ would run. Not to be denied, Starke and Williams JJ (with McTiernan J agreeing) fixed on an alternative foundation for the Court entertaining the application. It had power, pursuant to section 76 of the Constitution and the *Judiciary Act*, to deal with matters arising under the Constitution or involving its interpretation. They held that the applications gave rise to a question (which had not been raised or argued by counsel) as to whether courts martial, when trying offences which had civilian counterparts, were impermissibly exercising the judicial power of the Commonwealth.

Having raised the question, they answered it in the negative, relying on United States Supreme Court authority. They held that legislation providing for the trial by court martial of members of the Defence Force was a valid exercise of the defence power, supported by the incidental power and the vesting, by section 68 of the Constitution, of command of the military forces in the Governor-General.[23] The judges clearly recognised the need for military commanders to be able to maintain and enforce discipline within the Defence Force. In doing so, Williams J referred to a possible distinction, which was to be influential in later decisions, between "ordinary criminal [offences] as opposed to offences against discipline and duty."[24]

Had the decision been otherwise, the maintenance of discipline in Australia's Defence Force would have been significantly undermined. Those forces were distributed around the world in various theatres of war, on land and on sea. Battles were raging. It would have been a practical impossibility for any court established under Chapter III of the Constitution to convene in such environments. The alternative of repatriating accused service personnel to Australia for trial (along with any witnesses) would have impinged on the fighting capacity of their units. Again, the Court can be seen to have adopted a pragmatic approach to ensure that essential discipline was preserved.

Three years later, in *R v Cox; Ex parte Smith*,[25] Latham CJ, Dixon and Williams JJ held that courts martial could be empowered to hear and determine charges against former soldiers, who had been discharged from the forces, without offence to Chapter III of the Constitution.

These decisions were to be treated as authoritative long after the war had ended. In a series of cases, decided under the *Defence Force Discipline Act 1982* (Cth), the High Court reaffirmed that the defence power supported trial by court martial and by military officers at least to the extent that such proceedings could reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline.[26]

From the earliest days of Federation the High Court was at pains to emphasise the generality of the language adopted by the framers of the Constitution and the purposes served by this device. In *Baxter v Commissioners of Taxation, New South Wales*,[27] Griffith CJ, Barton and O'Connor JJ quoted with approval a passage from the opinion of the United States Supreme Court in *Martin v Hunter's Lessee*,[28] in which Story J had said:

> The Constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution . . . It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to model the exercise of its powers, as its own wisdom, and the public interest should require.

These principles can be seen to have guided the approach of the Court to the unforeseen events which, only a decade later, were to threaten the very existence of the nation. Great

latitude was accorded the Parliament during both World Wars when it came to determining the nature and the extent of measures which were adopted to assist in the prosecution of the war effort.

Writing in 1919, Sir John Quick reflected on the manner in which section 51(vi) had been interpreted during the First World War. His assessment was apt, albeit somewhat floridly expressed. He said that "the mandate embodied in the simple but stirring word 'Defence' interpreted by wise statesmanship and administered under the inspiration of a noble patriotism" had been successful in preserving and enhancing Australia's national identity.[29]

Towards the end of the Second World War Sir Owen Dixon said that the Constitution was "an instrument of government meant to endure and conferring powers expressed in general propositions, wide enough to be capable of flexible application to changing circumstances."[30]

That flexibility was evident in both World Wars when the Court came to determine the reach of the defence power. It was made possible by the wisdom and foresight of the drafters of the Constitution including Australia's first Chief Justice whose memory is honoured by this Society.

Endnotes

1. Oswald and Waddell (eds), *Justice in Arms*, Big Sky Publishing, 2014, at 197-8.

2. In 1901 there was a total of 27,353 sailors and soldiers in the colonies who were transferred to Commonwealth control. See Quick, *The Legislative Powers of the Commonwealth and the States of Australia*, Law Book Company, 1919, at 372.

3. (1916) 21 CLR 433.

4. Ibid at 441.

5. Ibid at 455.

6. Ibid at 453. Isaacs J was not alone in his vocal support of the war effort. Throughout the First World War the Chief Justice of New South Wales, Sir William Cullen, made a series of public pronouncements strongly supporting Australia's participation in the war: see T. Cunneen, "Gaining Public Confidence in the Judiciary: Sir William Portus Cullen, Chief Justice of New South Wales, 1910-1925" (2014) 88 *ALJ* 477 at 495-8.

7. (1915) 20 CLR 299.

8. (1916) 20 CLR 268.

9. (1941) 65 CLR 255 at 278.

10. (1944) 69 CLR 457 at 471-2.

11. Ibid, at 464.

12. Ibid, at 472.

13. *Victorian Chamber of Manufactures v The Commonwealth* (1943) 67 CLR 335.

14. *South Australia v The Commonwealth* (1942) 65 CLR 373.

15. *Reid v Sinderberry* (1944) 68 CLR 504.

16. *Ferguson v The Commonwealth* (1943) 66 CLR 432.

17. *De Mestre v Chisholm* (1944) 69 CLR 51.

18. *R v The University of Sydney* (1943) 67 CLR 95.

19. *Victoria v The Commonwealth* (1942) 66 CLR 488.

20. (1942) 42 SR (NSW) 212.

21. See, generally, *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 and especially at 255-6 (per Fullagar J).

22. The port was not identified in the Commonwealth Law Report of the case. No doubt reasons of security dictated that no more be disclosed than that "[t]he court-martial assembled in the ship at a port in the South Pacific that was not a British port . . .": see (1942) 66 CLR 452 at 456.

23. *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452 at 467-8 (Starke J), 479 (McTiernan J), 481 (Williams J).

24. Ibid, at 481.

25. (1945) 71 CLR 1.

26. *Re Tracey; Ex Parte Ryan* (1989) 166 CLR 518; *Re Nolan; Ex Parte Young* (1991) 172 CLR 460; *Re Tyler; Ex Parte Foley* (1994) 181 CLR 18; *Re Aird; Ex Parte Alpert* (2004) 220 CLR 208. In *Lane v Morrison* (2009) 239 CLR 230 the High Court drew a line when the Parliament legislated to provide for the establishment of a Military Court of Record, whose members stood outside the chain of command, to conduct military trials.

27. (1907) 4 CLR 1087, at 1105.

28. (1819) 1 Wheat 304, at 326.

29. Quick, *op. cit.*, at 10.

30. *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29, at 81.