The Sir Robert Garran Oration

Uniformity in the Law — Trends and Techniques

Delivered by the Rt Hon Sir John R. Kerr KCMG LSTJ PC AK GCMG GCVO — President of the Law Council of Australia — at the 1964 National Conference of the Australian Regional Groups, Royal Institute of Public Administration held in Canberra on 11 November 1964.

Sir Robert Garran was a Federationist. In 1895 he wrote a paper — or rather a pamphlet — called "The Urgency of Federation".[1] This was an attack on the postponers of Federation. It expressed the urgency and the passion of those seeking a national solution for national problems. In this pamphlet Sir Robert stressed the smallness of the difficulties in the way Federation in Australia by comparison with those which had faced America, Switzerland and Canada. and in doing so said: "We are one people in origin, in sentiment, in institutions — in everything but fact". He argued that every step not in union was a step further apart and Federation would grow less easy every year that it was delayed. Union was out destiny and we were abundantly ripe for it — riper in point of population, development, self-governing capacity and sense of national unity than the American States in 1787 of the Canadian colonies in 1867. He pleaded that we should do away with the see-saw of provincial tariffs and the walls of provincial isolation.

The struggle for Federation was the first great struggle for the attainment of legal uniformity in some sections of our life. The struggle was for federation and not unification and hence big areas of life and affairs were to be left for regulation by the processes of legal variety and difference. The Federal balance between the areas of permissible legal uniformity based upon Commonwealth law and the areas of probably legal variety and difference regulated by State law was fixed as a result of compromises and has remained a basic and controlling factor ever since. It is a reason why much of our legal uniformity today has been purchased at the price of some legal technicality and complexity.

The drives to legal uniformity throughout Australia which helped to produce the Federal solution did not cease to operate after Federation but, after Federation, the permissible modes and forms by which they might express themselves were conditioned and controlled by the Federal solution. The forces which before Federation opposed that solution or sought to delay it have since Federation also continued to exist and to play their part in the continuous national battle, under the constitution, about the extent, form and nature of uniform national legal regulation.

Since Federation, therefore, there have been two persistent themes in our constitutional debates and struggles. They reflect the antagonistic pre-federation attitudes but their form and quality since 1901 have been affected by the fact that we have had well over half a century of federal union. The two themes have been, on the one hand, the theme of growing uniformity in the laws, of growing desire for one set of uniform national laws and for a constitution which permits the development and growth of national legal uniformity and on the other the persistent theme of State rights, the theme of legal difference based on the rights of the States to handle their own affairs, under the constitution, in their own way and thus produce legal variety.

Each theme has been developed not only in debate and struggle, but in constitutional and legal achievement, so that our institutions, emerging and growing under the constitution, are in part the outcome of these two themes each operating with a life of its own and making its own impact upon national affairs.

It is the purpose of this paper to examine the development of legal regulation as affected and controlled by the power and impact of these two themes. In essence we shall be concerned to consider the way in which the urge and drive for legal uniformity is affected by the continuing political and social strength of the "States' rights" theme, and by the need of the Commonwealth, in relation to some important matters, to reach agreement with the States or, failing that, to endeavour to press Commonwealth power to perhaps unexpected limits. In other words, we shall enquire just what happens when, under the constitution, attempts are made to produce one set

[1] Reprinted as Appendix II, p. 426, in "Prosper the Commonwealth" by Sir Robert Garran.

of legal rules on a particular subject matter. We shall examine the trends and techniques which the drive to legal uniformity may be expected to produce. Amongst other things it has, especially in recent years, produced a considerable amount of legal uniformity through Commonwealth-State co-operation. The States are also, by agreement among themselves achieving more and more uniformity in State laws.

I have several times used the phrase "under the constitution". It is not my purpose here to make a plea for fundamental constitutional reform. This is not an exercise in constitutional criticism aimed at undermining federalism and arguing for a unitary constitution. On the contrary, it is precisely because we have a federal constitution and intend, or are obliged, to keep it that the problem exists in the form in which it does.

It is, however, not unimportant to make in passing a point or two about the problems of constitutional reform.

First, there is the well known fact that it has proved to be almost impossible to amend the Constitution by referendum. This illustrates the underlying strength of the point of view which, based partly on the desire to protect State rights, refuses to contemplate constitutional enlargement of Commonwealth powers. The difficulty of amending the Constitution by referendum indicates that trends and drives towards legal uniformity cannot normally express themselves through constitutional reform. Commonwealth powers cannot easily be enlarged by amendment of the Constitution as a basis for growing uniform legal regulation.

It follows that if these trends and drives are strong, as indeed they are, they must express themselves under the constitution. This leads to Commonwealth-State co-operation and agreement and also to unilateral Commonwealth action resulting in some of the complexity and technicality in our laws and institutions. This is the price we pay for federation and for our inability and unwillingness to abandon federation, and we must recognise this fact, accept it and live with it. Even under a unitary constitution legal technicality and complexity is a feature of the modern world. This reflects the growing complexity of society.

However, our federal constitution adds to the technicality and complexity.

The second matter connected with constitutional reform to which I should like to refer is the fact that despite the near impossibility of getting the people to grant greater power to the Commonwealth, reformers never cease trying to get the constitution changed. There are regular campaigns of one kind or another, Royal Commissions or Parliamentary Committees on constitutional reform, and attempts from time to time by various Commonwealth Governments to get more power. Almost always nothing comes of these moves, but their existence and continued recurrence show that there are always forces at work seeking to enlarge Commonwealth powers and hence the possibility of getting an additional national set of uniform legal rules on one subject or another.

Demand for and resistance to constitutional reform are therefore not irrelevant to our study. The forces at work, in the absence of constitutional amendment, sometimes produce bargaining and agreement between Commonwealth and States and sometimes frustrate one another at the constitutional level because of disagreement and lack of direct Commonwealth power. They are then, in a sense, driven underground. Unable to express themselves through increased constitutional powers or through Commonwealth-State agreement, the forces seeking increased national legal uniformity are driven to find other ways under the constitution to impose a national pattern. This whole process of bargaining, agreement, disagreement and constitutional experiment is of the essence of Federation.

There are some trends and techniques for achieving uniformity in some areas of policy which produce a lessening of legal complexity. These, as has been indicated, are based upon Commonwealth-State co-operation.

An interesting development in recent years as been the use made of the Standing Committee of Attorneys General. The Attorneys General of the Commonwealth and the States and their officials meet regularly and consider ways and means of producing, by agreement and co-operation, legal uniformity in various fields of the law. The Standing Committee grew out of discussions which began in 1959 in connection with proposals for uniform company legislation. Generally speaking, the important problems covered do not raise questions of Commonwealth-State constitutional power. What is generally sought is a uniform solution on some legal matter, the constitutional power to deal with which belongs to the States and not to the Commonwealth. The Commonwealth comes into the matter because it has similar powers and problems in Commonwealth Territories, especially the internal territories, and is thus interested in any attempt to achieve over-all national uniformity.

In relation to such matters there is no built-in legal conflict because legal action by the Commonwealth cannot cut down State power and cannot result in inconsistency between State and Commonwealth legislation with Commonwealth legislation prevailing.

This being so, the States, through their law officers of the Crown, work with the Commonwealth and its law officers to produce, in some field of the law, a set of legal rules which will be the same, or similar, throughout Australia and, if possible, its Territories. The bargaining compromise and agreement is in this area mainly over technical legal matters. Over and over again, however, we shall discover that in a Federal system, legal uniformity is dependent upon agreement and this, in its turn, means that whilst our Federal system continues we must cultivate the arts of political bargaining and compromise if we are to enjoy the growth of uniform legal rules on a national scale.

No one, of course, argues that uniformity for its own sake is desirable, but there are many areas of the law in which, as part of the general law reform movement, similar legal rules throughout Australia are desirable. The States, and the Commonwealth for its Territories, have discovered that if the process of modernising and bringing up to date the legal rules on some subject is to be undertaken with maximum advantage they can produce the best result by pooling their law reform activities and resources.

The Conference of the Attorneys General has therefore to be thought about first as a law reform agency especially suitable for law reform activities in fields which are constitutionally noncontroversial. In those fields there is generally great advantage in having the same or similar legal rules operating throughout Australia and its Territories.

Understood in this way the Conference is a most important new piece of constitutional machinery. It will not produce real results where the issues are controversial in a political, social or economic sense, but in matters of pure law reform it can be a most significant institution.

A few points must, however, be made about this new machinery. First, its law reform processes should not be secret. All really useful law reform comes after full and free discussion, both within the legal profession and outside it. In the early days of the Conference the tendency appears to have been for it to operate secretly. The technique was for the Attorneys General and their advisers and draftsmen to seek to reach agreement in private and without outside discussion. Once this was achieved and the resulting agreed draft Bill finalised it was difficult for anyone to change or alter the agreed solution, and there was an understandable reluctance to publish the agreed solution to outsiders before the Bill was brought down in the Parliaments. Further, the opportunities for effective Parliamentary debate and alteration of the scheme involved difficulties because to permit much parliamentary change would destroy the sought after uniformity.

The Law Council of Australia and its constituent bodies, the various State Bar Associations and Law Societies, took the view that it was undesirable for the solution to a law reform problem to be crystallised in this way before any views had been obtained from the legal profession. In more recent times, as a result of representations by legal bodies and of changed ideas by the various Attorneys General, there has been a growing tendency to consult the legal profession in the early stages whilst the Attorneys are considering the problem and before agreed solutions have emerged. In this way the resources of the legal profession can be and are mobilised and its experience can be and is made available to those seeking to evolve a uniform set of rules.

This means that on matters of law reform on which national uniformity is desirable the machinery for achieving uniformity has available to it not only departmental views and opinions, but professional views and opinions.

In the modern world the machinery for achieving law reform is receiving a lot of attention and various proposals have been made for establishing permanent machinery within a country to engage in full time study of the various fields of law in which modernisation and reform is necessary. This machinery is, of course, expensive, but it is very necessary if the law is to be sensible and up to date. An example of the current trend is the law reform machinery recently set up in the United Kingdom by the new Lord Chancellor, Lord Gardiner.

At the present time, apart from seeking assistance from the various Australian legal bodies and, apparently, some other professional bodies, the Attorneys rely mainly upon their various departmental officers taking it in turn to do the basic work on particular problems and to produce the first draft and so on.

It would seem that this technique, though a permissible and useful one, should not be the exclusive technique. Probably it would be too expensive for each State to have a separate and properly staffed Law Reform Commission, but all the States and the Commonwealth together could provide a very sound organisation to investigate problems of law reform on a full time basis. In other words, the Standing Committee of Attorneys General could be the top level policy committee with help from their departmental officers and the legal and other professions, but with a permanent organisation working under them to evolve recommendations and to carry out decisions and draft proposals and legislation. The future development of the Standing Committee along these lines, with a staff of its own, would ensure it a permanent role of the most important and constructive kind in legal evolution in Australia. And, in the outcome, we would get much more real law reform done. The Attorneys, committed by their agreements with one another, would feel impelled to find time in the legislative programme for law reform measures. One of the very real problems about law reform in Australia has been to get Parliaments and Governments to interest themselves sufficiently to introduce recommended measures. The Standing Committee has been a great help on this point.

This field of activity can be seen to be useful, straightforward and, politically speaking, noncontentious. Trends and techniques along these lines are constructive and cause no problems as long as they move and operate in a reasonably public way. Of course, they cannot be expected to produce precise uniformity throughout Australia. Each authority involved may decide to go along with the proposal with some variation to suit local political, social or economic circumstances, but the substantial uniformity achieved is well worth having. Lawyers in such a situation will never assume without examination that the law is precisely the same in each State. Yet, to the extent of the existence of substantial uniformity in a particular field of the law, the Courts are able to develop the law by application and interpretation, along the same lines. With a common final court of appeal principles will be substantially identical everywhere.

Law reform movements of this kind are not special to Australia. In the United States the American Bar Association seeks to get the various States to adopt a recommended piece of legislation in a particular field and achieves some success in the process. Similarly, at the international level, attempts are being made to achieve uniformity in the law by recommendations of a common pattern. At the coming Third British Commonwealth and Empire Law Conference machinery of law reform will be examined with a view to harmonising the law on particular matters throughout the British Commonwealth.

The Standing Committee of the Attorneys General does not confine its activities to ordinary law reform and to matters in which the States have the basic constitutional power. Commonwealth-State co-operation in the Standing Committee also extends to —

1) cases in which the Commonwealth, in addition to legislating for its Territories, draws upon a head of constitutional power which the Commonwealth Parliament has under sec. 51 of the Constitution. This pattern applies, for example, to shipping legislation, where the Commonwealth legislates in relation to interstate, overseas and territorial shipping and the States legislate in relation to intra-state shipping;

2) cases in which there is no agreement between the States as to the extent or exis-tence of the respective heads of Commonwealth and State power, but there is agree-ment to put constitutional issues aside and to seek a solution through joint legislative arrangements. For example, on 17th April 1964, it was announced that, without prejudice to the respective constitutional claims, there should be agreement between the States and the Commonwealth on joint arrangements over the whole off-shore sea bed in relation to oil prospecting and exploitation.

All the work of the Standing Committee is, however, predicated upon the notion of co-operation, bargaining and agreement. No single authority can, of its own will, achieve the desired result.

Legislative co-operation between the Commonwealth and States did not, of course, commence with the establishment of the Standing Committee of the Attorneys General. Earlier examples of legislative co-operation occurred in relation to River Murray waters, the coal industry, wheat industry stabilisation and other commodity mar-keting schemes and the Snowy Mountains Hydro-Electric Authority. The establishment of the Standing Committee has, however, given greater impetus to this type of co-operation and has been responsible in its own right for substantial achievements. Having regard to constitutional difficulties and to the eternal conflict between the "States Rights" theme and the drive to uniformity, there is much room for agreements which admit the

fundamental division and provide piecemeal solutions. But, outside the area of agreed law reform, the attempt to combine constitutional powers in order to reach an agreed policy solution often produces legal complexity.

Another area of potential State-Commonwealth co-operation arises under sec. 51 (xxxvii) of the Constitution. Under this provision the Parliament of the Commonwealth may make laws with respect to matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law. This has not been a frequently used provision. The reason for this has been partly because of natural reluctance of the States to give anything away to the Commonwealth, and partly because there was some doubt whether the States could refer a matter for a specific limited period or for a period terminable by some event, e.g. a proclamation. There has also been doubt about whether the State could repeal a reference once enacted. The recent Tasmanian Airlines Case (37 A. L. J. R. 503) has cleared the air on some matters and there can now be a reference limited by its terms as to its period of operation. Upon this assumption, in the future there could conceivably be more occasions when uniformity could be achieved in a particular field as a result of Commonwealth-State agreement and co-operation expressing itself through the reference power. Now that the States are assured that they can make a limited reference they may be a little more wil-ling to resort to this technique. This method has been used to some extent in the past to enable uni-form laws to be made with regard to Civil Aviation.

This field of Civil Aviation is an example of another type of Commonwealth-State co-operation. Where Commonwealth powers are limited, e.g. to interstate trade and commerce, the States may, if so minded, extend the Commonwealth law to intra-state matters in the same field by enacting a State Act making it so operative as State law. This adoption of Commonwealth law as State law for intra-state purposes has been the technique by which unified safety regulation of air navigation in Australia has so far been achieved.[2]

All these techniques illustrate the ways in which the drive to uniformity can express itself in those cases where the States co-operate and agree. There is obvious room, over the years, for the growth of some useful non-controversial uniform legal rules by such means.

However, the real problems arise when uniform rules are sought in the absence of Commonwealth-State co-operation. In point of fact this generally arises when the Commonwealth seeks to achieve, directly or indirectly, some pattern of uniformity relying solely upon its own powers under the Constitution.

There is, of course, a tendency for the Commonwealth gradually over the years to exercise the constitutional powers given to it by the Constitution. In some cases when this is done there is political and social controversy about whether the Commonwealth should enter and occupy a field which it has not previously regulated despite its power to do so. There are some Commonwealth powers which the Commonwealth may exercise to produce a uniform Australian code completely displacing the varied pattern of State legislation.

A well known recent illustration of this is the enactment of the Commonwealth Matrimonial Causes Act. There was considerable controversy about this Act, but it was not legal controversy. It was strongly argued by some that State differences in divorce legislation were a good thing and each State community should be entitled to adopt its own varying divorce laws. It was said to be a good thing that some divorce laws might be more stringent than others, that divorce should be harder or easier to get according to the local wishes of each State. However, this battle was a political and social battle. Legally speaking, the Commonwealth legislation reduced rather than increased over-all legal complexity and technicality. This will always be the case where the original federal bargain gives the whole of a particular field to the Commonwealth to control. Once political and social problems are settled Commonwealth legislation in such a field replaces varying State laws with a uniform Commonwealth code. Further, the struggle about these matters was really fought out at the time of Federation. It was then agreed that uniform Commonwealth laws should be permissible in some fields and it was left to the Commonwealth to decide when and how to achieve it.

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[2] After this oration was delivered and prior to its publication the recent Airlines Case (unreported) made it clear that the Commonwealth is not dependent upon State legislative under-pinning to enable a Commonwealth-wide safety system to operate. It can now ensure this under both the external affairs power and the commerce power (see later).

A much more difficult problem arises in those fields where, at Federation, there was a compromise, or a division of a subject matter so as to give part of it to the States and part to the Commonwealth.

A classic example of this type of political compromise built in to the Federal compact and dividing up one subject matter between the Commonwealth and the States is the Commonwealth arbitration power. Another example is the Commonwealth power relating to interstate trade and commerce. Yet another example may be found in the Commonwealth power to make laws with regard to external affairs. It is not, of course, possible in a paper such as this to deal in detail with these powers of the Commonwealth Parliament, but, for the purposes of the general exercise upon which we are engaged, something may be said about each example.

Taking the Commonwealth arbitration power first, it is notorious that this has produced a mass of complex and technical industrial law as the Commonwealth Parliament and the Courts have gradually expanded the area within which Commonwealth power has been permitted to operate. As originally conceived the Commonwealth power was designed to permit the settlement by arbitration of individual interstate disputes. It was not intended that uniform common rules should emerge applicable throughout Australia and imposing the dominant pattern in relation to industrial matters upon the nation as a whole. However, step by step, over the years the pressure for national uniformity has produced a situation in which the Commonwealth arbitral machinery does, in the main, dominate what happens in industrial relations, so far as arbitration is concerned.

This has been because of the gradual expansion of the concept of federal power mainly by decisions of the Courts upholding imaginative expansive techniques of the parties. The validity of the "paper" dispute based upon the service of logs of claims, the extension of federal arbitral regulation to non-unionists, the evolution of the "test case" approach, the isolation of the basic wage for special regular hearings, all of these and other developments gradually produced a situation in which federal award coverage became so important that it now effectively imposes its standards on the industrial scene, and what happens federally substantially determines what will happen throughout industry in general.

However, despite the vast extension of effective federal coverage, achieved at the price of considerable legal technicality and complexity, there is by no means real and full uniformity in the legal regulation of industrial matters. Apart from differences produced by State arbitral authorities, the State Parliaments themselves regularly legislate on industrial matters and, in this way, often force the Commonwealth arbitral authorities to adjust their solution to a State norm imposed by legislation. The developments in relation to long service leave illustrate this type of occurrence.

The long service leave situation posed a special problem in legal uniformity. In substance there had been no federal long service leave provisions and when the States legislated to provide for long service leave each adopted a scheme different in various respects from the schemes of the other States. As federal awards did not deal with this matter of long service leave, the State legislation was applied to those under federal awards as well as to those under State awards. The result was therefore legal uniformity within a State, but a variety of provisions in the different States. When it came to be decided whether federal long service leave should be made the problem was, inter alia, whether there should be a national long ser-vice leave code for those under federal awards, obtained at the cost of destroying the then existing internal uniformity of each State's provisions. It was decided to adopt a federal code.

This is but an illustration of the difficulties of achieving legal uniformity in industrial matters. Every uniform federal award introduces some lack of uniformity in each State. This is so, first, because it does not apply to all workers in the State within the classifications covered by the award and, secondly, because of the State awards that exist side by side with the federal awards. The industrial power is divided in an artificial way between Commonwealth and State.

The drive to legal uniformity in this field nowadays proceeds not so much because the Commonwealth Parliament has any remaining manoeuvrability under the arbitration power, but because more and more employees, and indeed employers, over the years seek a nation-wide regulation of their industrial relations. Professional workers, for example, seem now to be pressing into the federal sphere. It is to be expected that as the years go by more and more workers will create interstate disputes and get covered by federal awards and less and less will be left for regulation by the States. This will not be because of constitutional change or expanding concepts of the federal arbitration power, but simply because of the "grass-roots" pressure for federal regulation.

There are, however, possible ways by which the federal power over industrial matters is perhaps capable of further extension. One such way is under the interstate trade and commerce power. This is already used to provide additional constitutional basis for federal legislation in the maritime and stevedoring industries. The vast majority of those employed in these industries are employed in interstate trade. Since the virtual disappearance of intra-state passenger and cargo ships there is little, if anything, left in these industries beyond the power of Commonwealth industrial regulation under the trade and commerce power.

The Commonwealth Parliament has, therefore, moved, under the trade and commerce power, to add to its capacity to produce uniform industrial solutions in two industries where there is little or no intra-state activity. An interesting question for the future is whether any further moves under the interstate trade and commerce power may take place for industrial purposes.

Assuming that the Commonwealth Parliament can regulate the industrial relations of all of those employed in interstate trade and com-merce is it possible or likely in the years to come that it will endeavour to do so? It would be possible to dispense with the need for an interstate dispute in the case of those employed in interstate trade and commerce. Indeed, it would be possible for Parliament to legislate directly as to the salaries and conditions of those employed in inter-state trade and commerce. To do so would undoubtedly add to the legal complexity of our system of industrial relations, but one can conceive the possibility of a federal parliament of the future wishing to play a more direct part in the evolution of industrial norms than is the case at the moment.

It is true that federal legislation of this kind could not directly affect those engaged exclu-sively in intra-state trade, whether they were covered by state or federal awards. However, just as State legislation on industrial matters is significant today in affecting the provisions in a final federal award, so direct federal legislation for those engaged in interstate trade would doubtless have a serious effect upon the Commonwealth Industrial Commission when it makes federal awards.

Of course legislation of this kind would have to run the gauntlet of section 92, but this is not an area of discussion to be entered here. It is also obvious that important questions would arise as to whether the workers in question really were engaged in interstate trade. The expansive notions in the American authorities would not be a guide on this point. However, it cannot be the case that only maritime and stevedoring workers are engaged in interstate trade and commerce.

I do not venture to predict whether the future will produce legislation by the Commonwealth Parliament directly regulating the industrial relations of those engaged in interstate trade in general, nor will I express a view about the likelihood of the Commonwealth Parliament extending its arbitration system to such persons without the need for an industrial dispute. I would simply say that if pressure for national industrial regulation grows and constitutional amendment remains impossible there are perhaps legal and constitutional techniques available to extend the effective power of the Commonwealth in industrial matters. This complex field would, however, in the process become even more legally complex and technical.

Another way in which the power of the Commonwealth to legislate directly upon labour matters could possibly arise is under the external affairs power. This is mentioned later.

I have touched upon the interstate trade and commerce power for the purpose of making some observations about industrial relations. This power is, of course, more extensive in its possible application than in relation to industrial matters. The power to make laws with respect to trade and commerce with other countries and among the States is a very broad one. The fact that it has been little used so far, by comparison with the use made of the similar power under the American constitution, is due not only to the presence of section 92 in the Constitution but also to the relative immaturity of our economy and the considerable extent to which our trade and commerce has been geographically isolated in the States. However, things are changing in this respect and it is not at all beyond the bounds of possibility that the Commonwealth will be forced more and more to regulate interstate trade and commerce.

To the extent that this is done it will not only create complex and difficult problems in relation to the distinction between interstate and intra-state trade and commerce, but there will be more and more pressure to regulate intra-state trade and commerce to the extent that it is inseparably connected with interstate trade and commerce. The argument will be put, dressed up perhaps in different ways, that it is impossible to regulate interstate trade of

a particular kind without regulating intra-state trade. This is a difficult area of constitutional theory about which to make predictions. The American cases are not a direct guide. It is sufficient to say that growing complexity and unity in our national trade and commerce, and growing desire for national legal rules to regulate national trade and commerce will probably produce more and more attempts to regulate federally not only interstate trade and commerce but also, to some extent, intra-state trade and commerce in cases where it is impossible to regulate the former without regulating the latter. Sir Robert Garran discussed the extent to which intra-state trade maybe regulated as part of the process of regulating interstate trade in an article in 10 A. L. J. at pp. 297–8. He said: "There is much to be said for the proposition that the Commonwealth may, purely in the exercise of its power over interstate commerce, insist on the observance of uniform rules of the road by all craft using the highway. Such legislation, though affecting instruments of intra-state commerce, would appear to be valid legislation in respect to interstate commerce.

When and as often as attempts are made along these lines "State rights" will be called upon to resist growing Commonwealth regulation. The distinction between interstate and intra-state trade is inevitably artificial and will lead, as the years go by, to much disputation as to where the boundary is to be drawn.

It is extremely difficult to discuss this subject at this moment because the High Court of Australia is currently engaged in resolving a constitutional dispute between the State of New South Wales and the Commonwealth about the extent to which the Commonwealth, under the trade and commerce power, can regulate and control intra-state air navigation.[3]

That case also concerns the other example of Commonwealth power to which I intended to refer, namely the power in relation to external affairs.

The external affairs power appears to give the Commonwealth authority to deal with any matter affecting the Commonwealth as a whole in its relations with other countries. it is a power capable of expansion according to exigencies and circumstances. There are two views about the ambit of this power. One would extend the power to the implementation of international treaties or agreements on any subject at all, because the international agreement about the subject brings it within the field of international relations. On the latter view legislation to implement conventions and perhaps even recommendations of the Inter-national Labour Organisation would be permissible.

It is the possibility that the Commonwealth may have power to implement I. L. 0. conventions to which I was referring earlier when I said that the external affairs power might warrant direct Commonwealth legislation on industrial matters. This is, however, highly controversial. As Wynes says, both views, the wide and narrow, have been attacked as enabling the Commonwealth to increase its powers "by the mere expedient of making an international agreement upon a certain subject matter which is not otherwise within its powers" (Legislative, Executive and Judicial Powers in Australia — 3rd Ed. , p. 397). This criticism is no longer open. It is simply a question of how wide is the range of subject matters, covered by treaties, which can be brought within federal power for the purpose of implementing the treaty.

This could doubtless be a fruitful area within which Commonwealth power could expand. It is no use saying that the Commonwealth in this field can increase its powers by its own act. Wynes points out that the same applies to the defence power and the power to make grants to the States (ibid p. 397). To the extent that the Commonwealth can act under the external affairs power it can intrude into intra-state affairs. It is useful to remind ourselves of Sir Robert Garran's views on the external affairs power (10 A. L. J. pp. 298–9):

> "But when we try to apply generally the suggested test, whether the subject-matter of a Convention is <u>in se</u> proper for international agreement, where are we? Can we make a list of subjects that are, and of subjects that are not, proper for international agreement? What criterion of that can be laid down? In these days, with modern means of travel, and the progressive interlocking of the interests of all nations in social and industrial matters, what bounds can be set to the proper scope of international arrangements? It is difficult to find an answer to the observation of Justices Evatt and Mc Tiernan, that

[3] See note, at conclusion of this paper, on the decision in this case. This decision was announced after the delivery of the Oration.

> the mere fact of an international agreement having been made on a subject brings that subject within the field of international relations, so far as that subject is dealt with by the agreement."

After quoting extracts from the judgements of Latham, C.J., Starke J. and Dixon J. (as he then was), Sir Robert went on —

> "Justices Evatt and McTiernan, in their joint judgment, are more definite and more sweeping. They say generally that, in consequence of the close connection between the nations of the world, and their recognition of a common interest, and of the necessity of co-operation in matters affecting social welfare, 'it is no longer possible to assert that there is any subject-matter which must necessarily be excluded from the list of possible subjects of international negotiation, international dispute, or international agreement'. They cite the declaration, in the Charter of the International Labour Organization in the Treaty of Versailles, that universal peace can only be established on the basis of social justice, and that labour unrest due to unsatisfactory conditions imperils the peace of the world; and they say specifically that the Commonwealth power extends to international agreements as to such matters as suppression of traffic in drugs, control of armaments, and regulation of labour conditions. If — and it is hard to controvert — there is no constitutional objection to the Commonwealth entering into such agreements and making laws to give effect to them, it follows that the Commonwealth is not (in the words of Article 405 of the Treaty of Versailles) 'a federal State, the power of which to enter into conventions on labour matters is subject to limitations', and the field opened up for possible Commonwealth control is almost unlimited. And even the more cautious utterances of the rest of the Court indicate that the field is very wide, and its limits hard to define. It is not long since Herbert Spencer undertook to define the proper limits of government interference with individual liberty, in terms that have been described as 'anarchy plus the policeman'. Those limits now are quite obliterated; and attempts to define the proper limits of inter-national agreements are not likely to have much greater success."

The current case in the High Court in re-lation to civil aviation directly relates to this problem as well as to the ambit of the power as to interstate trade and commerce. I had hoped to discuss the trade and commerce power, and the external affairs power, in relation to questions of legal uniformity in a little more detail, but the present High Court hearing makes this difficult.[4]

One of the central points made at the outset was that, to the extent that State-Commonwealth agreement and co-operation is not possible, legal regulation of a national kind may involve pressing these powers in relation to industrial relations, trade and commerce and external affairs further and further. But as the powers in question are, on any view, by no means unlimited the legal complexity and technicality involved in resorting to them is and will be considerable.

Another power to which the Commonwealth may resort in seeking to impose a national pattern in fields where it has no direct power is the power to make grants to the States. The power arises under section 96, and it can be used to get the States to do something which the Commonwealth wants done but has no power itself to do. The Commonwealth can use the grant only to induce the State to act. It cannot compel action. The Uniform Tax Case· (65 C. L. R. 413) shows that this is so even though the very need for the grant is created by action by the Commonwealth Government. Here again is a foundation for producing uniform legal regulation by the States in order to qualify for federal financial assistance.

Much of the pressure for constitutional reform derives from the argument that wider powers are necessary to permit greater national legal regulation. Those seeking constitutional reform generally do not argue for abandonment of federation, but simply for direct grant of wider Commonwealth powers. However, the difficulty in inducing the people to grant those wider powers is gradually driving the Commonwealth to resort to its existing powers in a way not previously adopted to any significant extent.

Whatever may be the outcome of the current Airlines Case in the High Court this tendency will increase and ways will probably be found to achieve more and more national legal regulation by complicated methods. There will

[4] See note on recent Airlines decision at conclusion of this paper.

doubtless be a swinging backwards and forwards between reliance on Commonwealth-State agreement and unilateral resort to existing Commonwealth power. Although it is becoming and will become increasingly obvious that the resulting institutions and legal regulation are complex, technical and even socially distorted, the probability is that there will be little constitutional amendment.

As we push further into the second half of the 20th century, as our population grows, and our trade and commerce, our industry and economy become more developed and interlocked, as distance in our continent is annihilated, so will the demand for uniform legal regulation grow. The drives and pressures to produce more and more of this uniform national legal regulation will do so, by Commonwealth-State agreement or otherwise, irrespective of the achievement of constitutional reform.

When we settled for a federal solution, as Sir Robert Garran said, we were already ''one people in origin, in sentiment, in institutions". To become, as well, one people in fact we made political and constitutional compromises which continue to control us as we become one people economically.

The price we paid for federation — in political and legal complexity — is a price we must go on paying indefinitely as we achieve more and more national legal uniformity. Sir Robert would have had no doubt that it was, and will remain, proper to pay it. We must accept and be reconciled to this fact of life in the Australian Federation.

Note on the Airlines Judgement (1965)

The author had some difficulty in discussing the external affairs and the trade and commerce powers during the argument in the Airlines Case. The judgments were delivered in that case before publication of the Oration and a note on the judgments may now be useful. It is not, of course, possible or desirable to analyse such an important set of judgments in a note of this kind. All that can be done is to make one or two points of significance in relation to the main themes dealt with.

Until the amendments to the Air Navigation Regulations which were dealt with in the Airlines Case, the Commonwealth had elected not to rely on any constitutional powers of its own to ensure the safety, regularity and efficiency of intra-state air navigation. It relied upon Commonwealth-State agreement and upon State Acts giving the force of State law to the Commonwealth safety scheme in its application to intra-state air navigation. The recent case has now resulted in a decision that the Commonwealth Parliament can regulate intra-state air navigation to ensure the safety, regularity and efficiency of air navigation as a whole, and that it may do this under both the interstate trade and commerce power (thus moving in the direction predicted by Sir Robert Garran as quoted in the text), and under the external affairs power, having regard so far as the latter power is concerned to the terms of the Chicago Convention on International Civil Navigation.

However, the Commonwealth, in establishing what the court has held to be a valid licensing system for this purpose, had attempted to assert power to enable an aircraft and operator to operate a licensed regular public air transport service irrespective of State wishes. The Court has, however, held that this cannot be done if the State does not wish it. In order, therefore, to get an actual intra-state service into operation two licences are necessary: a Commonwealth licence founded upon considerations of safety, regularity and efficiency, and a State licence founded upon considerations of State policy as to public needs of air transport services, and other matters. The boundary of Commonwealth constitutional power has therefore been considerably widened by the decision, but the need for Commonwealth-State agreement has been underlined. Having regard to the main theme of the paper this Case will repay most careful study.