

Advancing the Federal Principle through the Intergovernmental Immunity Doctrine

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Introduction

When Geoffrey Sawyer reviewed developments in Australian federalism in 1950 he emphasised the importance of changes that resulted from judicial interpretation as compared to the paucity of the changes that resulted from formal constitutional amendment.¹ He referred to the ‘official theory’ as being

that judicial interpretation is a mechanical process of explaining the meaning of words which ought to need no such exposition if the official theory had any validity. In actual fact, language is such that the courts have to create meanings which previously did not exist.²

Even though ‘[j]udicial interpretation ... necessarily lacked the bold and radical character which legislative amendment can achieve, [the effect of judicial interpretation] altering what was previously thought the law or establishing law for new problems [had] been to bring about changes in the constitutional structure at least as profound’ as those achieved by the few amendments that had been made to the Commonwealth Constitution.³

These remarks are particularly relevant to this chapter and the overarching theme of this book which focuses on the legitimacy of changes made to the Commonwealth Constitution through judicial interpretation rather

1 G Sawyer, ‘Developments in the Last Twenty-Five Years’ in G Sawyer *et al*, *Federalism in Australia* (Melbourne: FW Cheshire Pty Ltd, 1949), Ch 1. Most of the chapters in that book consisted of papers delivered at the 15th summer school of the Australian Institute of Political Science held at Albury, New South Wales. I wish to acknowledge and thank Ms Hannah Doyle, Associate to Justice Mansfield, Federal Court of Australia, for the helpful proof reading and other editorial assistance she provided me in the preparation of this chapter. However, the responsibility for any shortcomings in the chapter rest with me.

2 Ibid, p 15.

3 Ibid, p 16. This is a position which has hardly improved since Sawyer made those remarks with only eight out of 44 proposed constitutional alterations being adopted.

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