

## Chapter 13

# The Constitutional Decisions of the Founding Fathers\*

### Introduction

During the 14th century, Chief Justice Hengham interrupted an argument about the meaning of certain legislation, saying: “Do not gloss the Statute; we understand it better than you do, for we made it”.<sup>1</sup> This robust judicial attitude to statutory interpretation, from a time that knew little of the separation of powers, is now unfashionable. Indeed, it fell out of favour a long time ago. In 1902, the Lord Chancellor, Lord Halsbury, said that the worst person to construe a statute was the person who was responsible for its drafting: “He is very much disposed to confuse what he intended to do with the effect of the language which in fact has been employed.”<sup>2</sup> Whatever the nature of the document, be it contract, conveyance, will or Constitution, when there is doubt about its meaning the duty of the court is to construe the text, and it is the meaning of the text that controls the outcome. Drafting history, properly used, may be an aid to discovery of that meaning. Knowledge of facts and circumstances within the contemplation of those who drafted the text may throw light on its purpose and meaning. Law, custom or practice at the time of drafting might indicate the sense in which a word or phrase has been used. Context is vital to the discovery of textual meaning, and that concept itself should be understood in a broad sense.

In *Singh v Commonwealth*,<sup>3</sup> I explained my views on meaning, intention and purpose as related to constitutional interpretation. I do not intend to repeat what I said there. Rather, I want to develop a particular topic discussed in that judgment. When a doubt is raised about the meaning of some part of the Australian Constitution we may be curious to know what, if any, opinion on the point was held by people who were influential in framing the Constitution. If some such people held a certain opinion, the legal significance of that fact is a matter to be treated with some care. For reasons explained in *Singh*,<sup>4</sup> although a knowledge of what was said, in the Convention Debates or on other occasions, by people who participated in drafting the Constitution, may throw light on a particular problem of meaning, to find the collective intention of everyone who contributed to its final form would usually be impossible, and

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1 Horwood AJ (ed), *Year Books of the Reign of Edward the First: Years XXXIII to XXXV (1305-1307)*, (London: Longman, 1879) p 82.

2 *Hilder v Dexter* [1902] AC 474 at 477.

3 [2004] HCA 43; 222 CLR 322 at 331-338.

4 *Ibid*, at 331-337.

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