Chapter 26

One Small Point About Originalism*

The impact of Cole v Whitfield

For a long time, although in construing the Constitution the High Court had indirect recourse to what was said during the Convention Debates via the writings of Quick and Garran and others, it only rarely relied on direct access to them. Then in 1988, in *Cole v Whitfield*,[1] in defiance of 85 years of contrary practice and abruptly, without any attempted explanation or justification, the High Court adopted a new course. It favoured a type of "originalism" which was partly restrictive and partly permissive. It was restrictive in that it forbad recourse to the Debates for the purpose of substituting for the meaning of the words used the scope and effect which the founding fathers subjectively intended. That is, it seemed to frown on that form of originalism known as "intentionalism". But it was permissive in that recourse was held allowable to the Debates and other historical materials for the purpose of identifying three things. One was the contemporary meaning of the language used. The second was the subject to which the language was directed. The third was the nature and objectives of the federation movement. There are of course still great debates about whether that approach is correct, or whether some purer originalism, or some more organic approach, should be adopted. And there is also a debate about whether what was said in *Cole v Whitfield* is not self-contradictory: for critics ask what the point is of examining the objectives of the federation movement unless one also examines the objectives and thus the intentions of its members. It is not today's task to analyse these debates.

I would note only how great a revolution in the construction of s 92 was caused by the originalist technique adopted in *Cole v Whitfield*. *Cole v Whitfield* overruled about 140 High Court and Privy Council cases—in effect, though not by name. The extent of the revolution can also be illustrated by the changing approaches of Mason J. In 1975 he had said that the "freedom guaranteed by s 92 is not a concept of freedom to be ascertained by reference to the doctrines of political economy which prevailed in 1900; it is a concept of freedom which should be related to a developing society and to its needs as they evolve from time to time".[2] In 1979 he repeated that view.[3] Yet less than 10 years later, in 1988, as Chief Justice in the court which delivered the unanimous judgment in *Cole v Whitfield*, he construed s 92 by reference to a detailed analysis of the history of the federation movement and the language used in the Convention Debates. That history and

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1 (1988) 165 CLR 360 at 385.

2 *North Eastern Dairy Co Ltd v Diary Industry Authority of New South Wales* (1975) 134 CLR 559 at 615.

3 *Permewan Wright Consolidated Pty Ltd v Trewhitt* (1979) 145 CLR 1 at 35.