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Q150 Constitutional Conference 2009

150th Anniversary of establishment of the Colony of
Queensland

Queensland Constitution at 150: Origins and Evolution

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Queensland's Constitutional Inheritance
from New South Wales

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ABSTRACT

The paper will examine the Constitutional development of the Colony of New South Wales, with particular emphasis on the movement from autocratic power to civil colonial government in 1823, to the first representative government in 1842 and, through the social and political forces of the 1840s and 1850s, to responsible government in 1855. The paper will examine how these developments also led to the political movement for separation of northern New South Wales and the creation of responsible government for not only New South Wales, but the other colonies on the continent, including Queensland in 1859.

I am honoured to be asked by the organising committee to speak at this important conference and to contribute to this important occasion celebrating the 150th anniversary of the formation of Queensland and of its receipt, at formation, of responsible government. I am doubly honoured to share the first session with the Hon Dr Bruce McPherson. When Dr Michael White told me of this, I felt (after 37 years) the same concern as having an essay or tutorial paper submitted to

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Professor John Ward at Sydney University. I was privileged to be taught history by Professor Ward; I am privileged to share this session and participation in this conference with Dr McPherson.

I have been asked to address the New South Wales Constitution of 1855. This is a necessary task for anyone seeking to understand the Constitutional structure of Queensland, because the New South Wales Constitution of 1855 was the foundation of Queensland's constitutional arrangements at the time of its creation on 10 December 1859.

To understand the constitutional structures given to New South Wales in 1855 and to Queensland in 1859 two tasks are necessary, in addition to gaining an appreciation of the text of the relevant instruments of 1855. First, one needs to appreciate the governmental and constitutional steps leading up to 1855. Secondly, and very much bound up with that first task, one needs to appreciate the historical forces and pressures (local, Imperial, European and international) that brought the politicians, businessmen, pastoralists, artisans, labourers and bureaucrats, in Australia and in England, to the position they found themselves in 1855. To a significant extent, the task is historical as well as legal. The historical aspect of the task is not merely an exercise in giving proper context to the written text of the statutes in question, it is also part of understanding the legal and constitutional step that occurred by the coming into force of the statutes embodying the Constitution. This is so because so much was not written into the relevant texts, but left to convention and contemporary understanding, and thus, now, historical understanding.

The necessary confines of the paper have required me to focus upon the development of the structures of government in New South Wales in respect of executive and legislative power. I have not sought to survey the development of an independent judiciary, though, of course, such development is fundamental to the developing civil societies of all the colonies. My review of the historical forces is not original and owes much to the true scholars in the field.¹ What I have

¹ E Sweetman *Australian Constitutional Development* (Melbourne University Press 1925); A C V Melbourne and R B Joyce *Early Constitutional Development in Australia* (UQP 1963); E Jenks *A*

sought to do is to give content to so much that was unstated, yet present, in the 1855 New South Wales Constitution, when responsible government was wrested from London. It is not possible to appreciate the contemporary constitutional reality of what was effected in 1855 without appreciating the struggle, conflicts and tensions between colonials and London over self-government. People at the time understood that struggle, which was about power – Imperial and colonial, and how, if they could, the two types of power could co-exist within the Empire.

I should also say at the outset that this is a white man's story. It should not be forgotten that the history of New South Wales, Queensland and Australian Aboriginal history of the 19th century remains to be told fully. The absence of the indigenous inhabitants from what I am about to say, otherwise that as an aspect of background (though, at times, mentioned in instructions and despatches from London seeking their protection) speaks volumes as to their exclusion from the constitutional and political developments of the day. Reading of the heated political debates over "waste lands" and unalienated "empty" Crown land one conjures up a silent scream. This is not said by way of historical judgement on others of another age, or by way of contemporary political comment. Rather, the absence of indigenous participation in the political and constitutional development of the 19th century is itself a constitutional fact and a feature of our respective States' and our nation's constitutional, political and social history, which we inherit, and with which we must deal.

History of the Australasian Colonies (Cambridge 1896); K R Cramp *The State and Federal Constitutions of Australia* (Sydney 1914); C M H Clark *History of Australia* (Melbourne University Press) Vols 3 and 4; P Cochrane *Colonial Ambition: Foundations of Australian Democracy* (Melbourne University Press 2006); J Quick and R Garran *The Annotated Constitution of the Australian Commonwealth* (Sydney 1901); A Castles *An Australian Legal History* (LBC 1982); J M Ward *Earl Grey and the Australian Colonies 1846-1857* (Melbourne University Press 1958) ("Ward Earl Grey"); J M Ward *Colonial Self-Government: The British Experience 1759-1856* (CUP 1976) ("Ward Colonial Self-Government"); W G McMinn *A Constitutional History of Australia* (OUP 1979); G Carney *The Constitutional Systems of the Australian States and Territories* (Cambridge 2006)

Early autocratic rule

The early governmental structure from 1788 to 1823 was essentially autocratic rule of the Governor. This conformed with the penal aims and purposes of the first occupation; though as time passed, the political pressures of a growing civil society brought change.²

In 1770, Cook took possession of the eastern coast on behalf of the Crown.³ The loss of the American colonies sparked an idea that colonisation of New South Wales might give an asylum to British loyalists from the lost colonies.⁴ When Lord Sydney took over the Home Office in a new government in 1786, New South Wales was decided upon for transportation.⁵ By Imperial Act of 1784⁶, the King in Council had been given power to declare places to which convicts might be transported. New South Wales was so declared in 1786.⁷

Captain Phillip's first commission (a military one) by letters patent dated 12 October 1786 appointed him Governor of the territory of New South Wales from latitudes 10° 37' S to 43° 39' S and west as far as longitude 135° E, including all adjacent islands.⁸

² See generally, McMinn *op cit* ch 1

³ This was an act of state not open to municipal judicial challenge: *Coe v Commonwealth* [1979] HCA 68; 53 ALJR 403 and *Mabo v State of Queensland (No 2)* [1992] HCA 23; 175 CLR 1 at 31, 32, 69, 78, 81, 95 and 121.

⁴ Suggestion of James Matra to the Fox-North government in 1783: Evatt "The Legal Foundations of New South Wales" (1939) 11 ALJ 409.

⁵ Evatt *op cit* p 409

⁶ 24 Geo III c 56

⁷ McMinn *op cit* p 1

⁸ Historical Records of Australia, Series 1 Vol 1 p 1; The phrase "adjacent islands" was one of considerable breadth in the 19th century including Norfolk Island, New Zealand, Tasmania and other: *Wacando v Commonwealth* [1981] HCA 60; 148 CLR 1 at 8 (Gibbs CJ), though compare Cramp *op cit* note 2 above p 4; Carney *op cit* p 37.