EDITORIAL – General Editors: Cheryl Saunders AO and Janet McLean

One Hundred Years Since Engineers ................................................................. 3

KEYNOTE LECTURE

Engineers: The Drama of Its Day in the Climate of Its Era – Stephen Gageler AC ........ 4

COMMENTS – Editor: Dan Meagher

Has Engineers Passed Its Use-by Date? – Jeffrey Goldsworthy .............................. 13

Engineers’ Problematic Comparative Legacy – William Partlett .......................... 22

Engineers and Persistent Constitutional Dissent – Andrew Lynch ......................... 28

ARTICLES


This article examines the reasoning in Spence v Queensland (Spence), in which a majority of the High Court held that s 302CA of the Commonwealth Electoral Act 1918 (Cth) was beyond the Commonwealth’s legislative power to make laws with respect to federal elections. It is argued that while the reasoning invokes orthodox approaches to the interpretation of the Constitution established since Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers’ Case), it also affirms propositions that have previously been regarded as heretical invocations of reserved powers reasoning. In particular, the majority affirmed that there is a “heartland of State legislative power” and that it is relevant, when considering whether a federal law is incidental to the subject matter of Commonwealth power, that the effect of the law is to “invade State power”. In previous decisions, members of the Court have criticised such propositions as endorsing ideas rejected in the Engineers’ Case. Is the Spence an indication of a subtle but significant shift in the Court’s approach to adjudicating the boundaries of Commonwealth legislative power? ................................................................................................................................. 33

The Engineers’ Case and Intergovernmental Immunities: A Century On – Stephen Donaghue QC and Christine Ernst

Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers’ Case) enjoys a seminal status in Australian constitutional law. It famously swept away the doctrines of reserved powers and implied intergovernmental immunities. Following the Engineers’ Case, it was clear that a power to legislate with respect to a given subject enabled the Commonwealth Parliament to make laws which, upon that subject, affected the operations
of the States and their agencies. However, in the century since the Engineers’ Case was
decided, the High Court has progressively breathed new life into the intergovernmental
immunities that were so emphatically rejected in that case. That revival continued in
Spence v Queensland, where the Court affirmed that the principle derived from Melbourne
Corporation v Commonwealth operates symmetrically, protecting the Commonwealth as
well as the States. This most recent development in the evolution of intergovernmental
immunities provides occasion to consider precisely where this leaves the principles
articulated a century ago in the Engineers’ Case. ................................................................. 46

Impairment and Limited State Immunity – David Tan

The modern doctrine of limited State immunity allows the Commonwealth to make laws
that affect a State’s functioning unless those laws impair the States. This article draws
attention to a distinction that French CJ made in Clarke v Federal Commissioner of Taxation
between the practical effects of a law as opposed to non-practical ones. His Honour asserted
that non-practical effects must also be taken into account when considering impairment.
It is argued that a prohibition against non-practical impairment cannot be derived using
the High Court’s methodology for constitutional implications (including principles from
Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers’ Case)). This
has an important consequence for constitutional doctrine – the test of discrimination is not
relevant to practical impairment. ......................................................................................... 58

Engineers and Constitution-building – Cheryl Saunders AO and Michael Crommelin AO

Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (The Engineers’ Case) was
decided relatively early in the life of the Constitution of the Commonwealth of Australia.
In contemporary parlance it contributed to “Constitution-building” in recently federated
Australia. This article examines Engineers through the lens of Constitution-building. It
explores its continuing relevance for 21st century Australia, after the Constitution is well
and truly built, the context in which it operates has dramatically changed, and the challenges
that Australian federal democracy faces are quite different. It also asks what insights might
be drawn from Australian experience with constitutional interpretation in the first few
decades of federation for countries elsewhere facing the challenges of implementing new
arrangements for multi-level government. ........................................................................... 75

BOOK REVIEW – Editor: Edward Willis

A Tribute to Australia’s Killer of “Living Constitutionalism” and “Common
Law Constitutionalism”, by Lisa Burton Crawford, Patrick Emerton and
Dale Smith (eds) – Reviewed by James Allan ........................................................................ 86

DEVELOPMENTS ............................................................................................................. 95