Nothing has frustrated our politicians more, nor protected our people so well, over the last 87 years as our constitution. Australians need to understand its strategic role in restraining government power, and in protecting our democratic freedoms. We need to understand its past contribution and the future.

For anyone interested in the rich heritage of Australia, the court system, the constitution and the law are alive with unexpected treasures.

King Alfred (848-899), known as Alfred the Great, was not called great because he burnt the cakes, or even for his military exploits. He was 'great' because he introduced a standard legal system for the whole of England. The system was not new, but had not previously been firmly enforced for the whole country.

The Ten Commandments (Exodus Ch.20) were the basis of the law and were to be applied by all Judges. For understanding and applying the Ten Commandments the judges were to use the whole of the Bible. The responsibility of the king were to ensure that the law was properly administered for the welfare of the people and that the people could dwell in safety, protected from one another and from external aggressors. For these purposes the king had a council of advisers on whose advice he would normally act.(Thus an Act! of Parliament is a decision of the monarch taken on the advice of his properly appointed advisers.)

The task of the Judges was to declare law, or to put it, in other words, to declare the application of the Bible to the case before them. As the judges were simply re stating, for a particular case, rules that already existed, it can be easily understood that each judgement created a precedent that would have to be followed in other cases with the same or similar facts.

This raises the problem of what to do when a judge misunderstood, mis-stated or mis-applied the Bible, thereby creating a "Wrong" precedent. This is where the king's council of advisers came in. The wrong decision made by the judge would stand, but the Kings advisers should not allow such a judgment to become a precedent to be followed in subsequent cases. Thus, they had a responsibility to advise the king to 'enact' a law that correctly interpreted the Bible for future application In the courts, In the place of the mistaken interpretation of the judge.

The king, his advisers and the judges were all subject to the law. The judges were bound to apply the law created by precedent and by Acts but could not otherwise be directed by the king or his advisers. The king had no right to place himself above the law but could not be brought before the courts. The advisers had a responsibility to advise the king in accordance with the law and could not be directed either by the king himself, or by the judged what advice to give. It is easy to understand why this has subsequently been referred to as a system of checks and balances.

Magna Carta

The weakness in the system established by Alfred appears from the question: "Who controls the king if he does place himself above the law, or if he improperly rejects the advice of his council?" This question does not seem to have needed an answer until after the Norman Conquest of 1066.

Although the answer probably was perfectly clear before 1215, history shows the dramatic events of the signing of the Magna Carta. Despite what has been written in some history books and what might have been taught in schools in recent years, research demonstrates that there

was nothing new in Magna Carta. King John was forced to recognise some aspects of his existIng responsibility under the law. Certainly Magna Carta largely related to issues raised by powerful interest groups and covered only a small part of the kings existing responsibility. Nevertheless, It was a significant landmark in reminding the monarch of his preexisting duties.

It would not be true to say that all went well after Magna Carta – the judges did not always faithfully declare the law, the kings advisors did not always firmly advise as they should have, and the king did not always remember that he was subject to the law himself. Indeed, particularly in the Seventeenth Century the political doctrine of the 'divine right of kings' was popular. This doctrine held that the king ruled as God's regent and, this being so, the kings word was law. It was In this setting that Samuel Rutherford wrote his famous book "Les Rex" (1644).

In this work Rutherford reminded the nation that the "law is king' and if a ruler (whether king or anyone in authority) disobeys the law or portrays the trust of his position he should be removed from office. He made it clear a ruler should not be deposed merely because of a single breach, but when the governing structure of the country is being destroyed the offending ruler should be relieved of his power and authority.

This is exactly what happened in the case of James II in 1688. The king claimed 'a divine right', rejected the advice of his counsellors and set about changing the governing structure of the country. He was removed from office (as he should have been in accordance with the law) and was replaced by William III and Mary.

Bill Of Rights

William and Mary were required to sign the Bill of Rights in 1689. Again, interestingly, the Bill of Rights contained nothing new but was a restatement of some of the areas of peoples rights James had improperly sought to remove. Like Magna Carta, the Bill of Rights included a reflection of the complaints of powerful sectional interests, but was intended only as a reminder of certain inalienable rights of the people and certain responsibilities of the monarch.

William Blackstone, first Vinerian Professor of the Law of England at Oxford University, wrote the first total overview of English law in 1765 (known as Blackstone's Commentaries on the Law of England). He demonstrates that, although the law had developed since the days of Alfred the Great, the same basis of law, function of the judges, purpose of the kings advisors (House of Commons and House of Lords), and responsibility of the king still existed. It can be clearly seen therefore that the law of England, the purpose of the courts and the functions of the constitution had their derivation in the Bible, and not, as Is often suggested, from Roman law or any other source.

It was the law, constitution and court system in the form explained by Blackstone that came to Australia with the first English settlers in 1788.

English Law.

It was a principle of English law that settlers brought to a colony so much of the law of England as was applicable to their own situation and the conditions of the infant colony. Any aspects of the law that were not immediately applicable lay dormant until circumstances changed. A change of circumstances automatically revived the relevant dormant laws. Judgments of the courts of England made before settlement continued as binding precedents for the courts of the colonies, and Acts made before settlement also applied. No decision of an English court made after the date of settlement constituted a binding precedent for the colony, and Acts made after that date did not apply to the colony except by express application or necessary implication.

Thus, it can be said that In English law the date of settlement of a colony is a "cut off" date for the reception of laws. Thereafter the colony makes its own. This principle was varied for the Eastern part of Australia (New South Wales, Van Diemen's Land, Queensland and Victoria) by the Australian Courts Act which declared 25 July 1828 as the "cut off" date.

A governor was appointed to represent the monarch in each of the Australian colonies. Also, each of these colonies was granted a Constitution establishing a parliament to advise the governor, and courts for the administration of Justice. These constitutions in no way replace, but merely reflected, the existing constitutional structures Imported into Australia by the operation of the law the settlers brought with them.

Federation

After more than ten years open public discussion, the Australian colonies agreed to federate for the certain limited purposes and, thus, the Commonwealth of Australia Constitution, and the Commonwealth itself, came into existence on I January, 1901. Again, this Constitution reflected the existing constitutional structures – dependence on God was recognised; the independence of the
judiciary was maintained: the elected council (House of Representatives and Senate) advised the Governor-General; and the Governor–General normally enacted (or assented to) the advice of the Houses of Parliament. The Commonwealth of Australia Constitution, however, contains two additional and Interesting features.

The first of these features is that, although the advice of the two Houses of Parliament becomes law when it is consented to by the Governor–General, the King (or Queen) may disallow or annul any law within twelve months after the Governor-General has given his assent.

The second feature is that the provision of the Constitution (i.e. the 1901 agreed terms of federation) can only be altered if the proposed alteration is agreed to by an overall majority of voters in Australia and by a majority of voters in a majority of States. A referendum is required before any change can take place.

The "Australia Act"

It is basically the system Introduced by Alfred the Great that is still maintained in Australian's institutional heritage of courts, law and constitution in the federal sphere. However, the Australia Act 1986 brought great change to the structure in the States. In the debates leading up to the passing of that Act (an Act supported by every member of parliament In Australia) the Hon. John Spender, Shadow Attorney-General, said in the House of Representatives on 25 November 1985:

"The Australia Act will require a State Governor not to withhold assent to a Bill passed according to the requirements of the Parliament of a State; and the power of the Queen to disallow State laws, and any requirement of State laws to be suspended pending the signification of the Queen's pleasure are to be put to an end."

This is a fundamental change to the historic constitutional structures. Now in the States of Australia, the Houses of Parliament are no longer advisers to the Governor and monarch, but are the ultimate deciders of the law. The Governor and Queen have been relegated to ceremonial roles.

The current Federal Government sought to change the Constitution of the Commonwealth of Australia in 1988. In the providence of God, there was no proposal for the imminent removal from the Constitution of the powers and responsibilities of the Governor-General and the Queen in the Federal sphere. If these powers and responsibitities are removed, the whole historic governing structure of the nation will be changed. The effect would be to make Australia a republic in fact if not in name; the only remaining control over the absolute power of the government on the day would be the Constitution Itself.
As Australia celebrates two hundred years of settlement, its people can also celebrate the tri-centenary of the English Revolution of the peaceful and bloodless removal of a ruler, who sought to destroy the fundamental structure of the nation, from which our heritage of Justice and constitution is drawn.

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