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Vanderstock: wider implications for constitutional interpretation

Greg Craven*

Introduction

There are 3 ways by which the decision of the High Court in *Vanderstock* may be approached.[1] The first is as a technical decision on the scope of the term 'excise' in section 90. This undeniably is the immediate significance of the decision, which is of basic importance, given that it critically affects the revenue-raising capacity of the states.

The second is as an exercise in judicial method, in the sense of the constitutional approach adopted by the Court in *Vanderstock*, as opposed to its specific decision concerning section 90. As an example of judicial method, *Vanderstock* is striking in an Australian context.

The third, and most important approach, is to seek to understand the future implications held by the decision for the wider interpretative directions of the Constitution by the Court. These will affect not only the interpretation of section 90, but of many – if not all – of the other provisions of the Constitution. Indeed, the *Vanderstock* decision contains important hints as to the future interpretation of the Constitution under a Gageler Court.

This presentation focuses upon these latter 2 wider analyses of the decision, rather than the specific interpretation of the Constitution's excise provision. Nevertheless, it is necessary to give some sufficient account of *Vanderstock* in its own immediate context as a decision concerning the definition of excises under the Constitution.

Vanderstock and excises under section 90

Section 90 always has been one of the fundamentally 'federal' provisions of the Constitution, in the sense that its interpretation will profoundly affect the federal balance through setting boundaries to the capacities of the states to impose taxation. A wide interpretation of the term 'excise' will narrow the already limited revenue options for the states, while a narrow interpretation will promote the maintenance of what typically is referred to as the 'federal balance'.[2]

Unsurprisingly, the High Court historically has been acutely aware of this reality. As a consequence, its decisions have been somewhat precariously balanced between 'purity' and 'practicality'. Purity in this sense means interpreting the term 'excise' entirely technically,

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* This paper was presented as part of the Senate Lecture Series on 3 May 2024.

1 *Vanderstock v Victoria* (2023) 297 CLR 333.

2 *Ha v New South Wales* (1997) 189 CLR 465 ('*Ha*').

without regard to its implications for vertical fiscal imbalance. This approach typically produces a broad concept of excise, and a consequent strengthening of Commonwealth financial power at the expense of the states.

Practicality has involved the Court recognising that an unrestricted concept of excise realistically would risk wrecking the capacity of the states' to levy indirect taxes, and potentially critically undermine their already precarious financial security. The practical approach therefore tends to produce a narrow notion of excise, either implicitly or explicitly by reference to the need to protect the federal nature of the Australian Commonwealth.

For most of its existence, the High Court has tended towards the practicality approach. While its decisions may not specifically have said as much, they most often confined the scope of excise in the interests of federal equity. This necessarily involved much obfuscation and increasingly technical distinctions between such legal concepts as 'taxes', 'licenses' and 'franchises' to name but 3. Decisions were contradictory and sometimes internally illogical, but they did preserve the increasingly meagre tax raising capacity of the states.[3]

However, at least by the decision in *Ha*, the Court had come to be attracted not only to pure interpretational logic as regards section 90, but far less moved by appeals to financial or theoretical federalism. In that decision, the Court decided that any indirect tax that ultimately entered into the price of goods constituted an excise, displacing a number of options for the states in evading the clutches of section 90. Critically, however, neither *Ha* nor subsequent decisions went so far as to ban a state consumption tax as contravening section 90. This was despite the fact that such an exaction would indeed be an excise under the general reasoning of *Ha* and its successor decisions.

In other words, consumption taxes were the last fortresses of the practicality approach to section 90.

The central effect of *Vanderstock* is the demolition of this refuge. The majority were prepared to admit consumption taxes and kindred exactions within the concept of excise, holding specifically that a tax on the use of electrical motor vehicles on specific highways constituted an excise. It is not easy to deduce an exact ratio from the majority judgement, but it is clear enough that the concept of excise is to be interpreted broadly, and according to its 'natural' meaning. It at least covers a tax which bears a close relationship to a class of goods, has an effect on the market for such goods, and in particular affects demand for those goods.

On this analysis, self-evidently, a tax on the use of electric cars on specific roads had the requisite relationship with goods (that is, electric vehicles) and according to the Court would affect the market for these goods by reducing demand for them. As regards broader consumption taxes, the logic of Vanderstock is that they would be caught as excises, in that they necessarily bear a close relationship to goods, impact the market for such goods and – apparently – automatically depress demand for those goods.

One of the striking complexities of the majority judgement is that it ultimately depends on an economic analysis of relevant state taxes by judges (and lawyers) who have no obvious training in that discipline. The majority were quite unafraid of this challenge. It insists that the

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[3] *Peterswald v Bartley* (1904) 1 CLR 497; *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177.

task of the Court merely is to assess the 'practical' economic effect of an impost, free of any distracting technicalities or limitations derived from federalism.

The central consideration for the Court here is what the majority perceives as the overwhelming imperative to protect the customs union of the Australian Commonwealth embedded in section 92 of the Constitution, vesting the capacity to levy customs duties in the Commonwealth. In the event that the central government were to determine that a particular class of goods were not to be subject to customs duties, this simply could be negatived by a state or states levying a duty of excise. The majority in *Vanderstock* elevates the customs union imperative to what amounted to a 'super principle' of the Constitution, easily outweighing any contrary requirement for the protection of federalism in general, and federal fiscal balance in particular.

The distinction is exemplified in the dissenting judgement of Gordon J. She castigates the majority for failing to read the Constitution in light of a fundamental principle, and specifically accused it of amending the document itself. Her view was that the majority had transformed the specific concept of duties of excise to the simplistic delineation of all state taxes on goods. There is much to be said for the technical logic of Gordon J, but for present purposes, the judgement is one of federal practicality in the face of unrestricted purism. The judgements of the remaining members of the minority may be similarly characterised.

The obvious technical question is as to what other forms of state taxation may be condemned as excises under the majority approach in *Vanderstock*. To take an obvious example, any taxes on petrol would seem to be vulnerable on the basis that they would have a direct relationship with petrol-driven cars, and presumably would affect demand for those vehicles. To take the decision one step further, would car license fees constitute excise on the basis that they are greater than fees attached to motor bikes and push bikes and therefore depress demand for cars? The answer potentially is in the affirmative, though one can only imagine the complex economics involved around determining substitutability of goods as affecting demand and so forth. Similar comments may be made around differential taxing of products by reference to environmental concern, for example, as applying to glass or plastic containers versus degradable containers.

Realistically, the majority approach in *Vanderstock* is an economic entity pregnant with numerous economically derived 'excises' only to be elaborated in future decisions of the Court.

Wider implications of *Vanderstock* for constitutional interpretation

The majority judgement in *Vanderstock* is best understood as a striking example of the 'grand scheme' school of Australian constitutional interpretation. Despite various protestations to the contrary, it privileges not only the constitutional text of the provision, nor its history, nor even the asserted 'natural' understanding of section 90 in an economic context. Instead, *Vanderstock* stands for the proposition that individual sections of the Constitution are primarily to be interpreted by reference to relevant grand themes or strands running through the document and the constitutional settlement it creates.

In *Vanderstock*, as already noted, the relevant grand scheme is the customs union of the Australian federation. The financial provisions of the Constitution, and notably section 90, are

to be interpreted within that fundamental context. Consequently, given that the customs union comprises a sort of 'super principle', the concept of excise is to be interpreted broadly so as to absolutely protect the Commonwealth's complete power over customs duties, which could be undermined by the imposition of contrary state excise.

This incidentally produced the strange result that, even though ordinary constitutional principle would demand that section 90 – as a restriction on power – should be read narrowly, it was given the broadest possible operation by the majority. Indeed, the closest analogy lies in the Court's interpretation of section 109 of the Constitution, its inconsistency provision, where the application of the 'covering the field test' has cut a swathe through state laws.[4] After *Vanderstock*, section 90 is a state-killer in the same sense as section 109.

The commitment of the majority to the grand scheme of customs union also explains the obsession of the majority with questions of economic operation. If one is utterly focused on avoiding the economic undermining of Commonwealth customs policy, one naturally is drawn to an in-depth examination of economic effect, in order to determine whether a duty comprises a forbidden excise.

The obvious difficulty is that High Court judges are not trained in economics, let alone the complex economics of markets affected by duties. This is a point powerfully made by Gordon J, but running through all the dissenting opinions. Put frankly, what would a person trained in law, and applying constitutional law, necessarily know about economics. The clear answer is very little.

Some of the High Court's previous expeditions into economic theory have been markedly unsuccessful. When the Court comprehensively overhauled the meaning of section 92 regarding freedom of interstate trade, it propounded a test of whether or not the duty in question imposed a discriminatory burden on interstate trade.[5] This test necessarily involved wading into the economic realities of a duty, with consequent complexity and results that were not compelling to lawyers and economic experts alike. Even the factual decision in *Cole v Whitfield* [6] that the Tasmanian duty in question did not discriminate against the South Australian crayfish market in favour of the Tasmanian market was the object of private amusement within the relevant sections of the Tasmanian public service, some of whom asserted that this was exactly the intention behind the duty.

Vanderstock thus invites the Court in determining constitutional cases into a shadowy world of factual impact – in this case economics, but potentially some other discipline – where the Court is not informed and potentially both confused and even gullible. There have been previous examples where the Court has wandered in fascination into foreign realms of knowledge. It was ruefully said by some lawyers involved in the Seas and Submerged Lands litigation that once the High Court had been supplied with multiple historic maps, there was no stopping it. Maritime geography, which was an utter mystery to it, apparently was far more interesting than constitutional method.

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4 *Clyde Engineering Co v Cowburn* (1926) 37 CLR 466.
5 *Hawkins v Clayton* (1988) 164 CLR 539.
6 *Cole v Whitfield* (1988) 165 CLR 360.

The use of constitutional history is of some interest in *Vanderstock*. The majority used the Convention Debates extensively. But this was not to elucidate the concept of 'excise', but to deny that it had any accepted meaning to the founders of the Constitution, and thus generally at the time of Federation. This probably is true, but it is something of a paradox to see history so extensively applied by the Court, but to so little impact. It is a warning to those who see the Debates as an easy key to constitutional meaning.[7]

That said, the dismissal of an historic meaning to the notion of excise was crucial to the Court's employment of the grand interpretative scheme of customs union. In the absence of any compelling textual or historic explanation of the concept of an excise, the Court was free to construe it within some much wider constitutional theme.

Perhaps the most intriguing element of *Vanderstock* is why the Court privileged in particular its grand explicatory theme of customs union, as opposed to some other theme or grand scheme of the Constitution. There are, after all, a number of fundamental streams running through the Australian Constitution. The most obvious of these is federalism. Not only does it dominate the Constitution textually, but the slightest historic analysis of the Convention Debates would show that it dominated the minds of the founders to the subjection of every other topic.

Why did the Court not seek to resolve the inherent ambiguity of the term 'excise' in section 90 in the context of the fundamental imperative of federalism, rather than the far less compelling one of customs union? It is clear that had it done so, a precisely opposite interpretation of section 90 and decision in the case at hand would have been the result. An application of federal theory would have preserved, so far as possible, the power of the states to obtain revenue, and therefore led to a limited concept of excise. This really is the principle underlying many of the earlier decisions which strained to limit the application of section 90 and narrow the concept of excise. It also enlivens the minority judgements in *Vanderstock*.

It is hard not to suspect that the theme of customs union was chosen precisely by the majority because it had the practical effect of enhancing the financial power of the Commonwealth over that of the states. This ultimately is a values judgement in favour of centralism like that represented in the famous *Amalgamated Society of Engineers v Adelaide Steamship Co Limited* ('*Engineers Case*')[8], not a judgement of constitutional law. It is in this sense that Gordon J was entirely correct in saying that the majority judgement involved an amendment of the Constitution. It was an amendment adjusting the federal balance of power in favour of the Commonwealth, like so many of the Court's most famous decisions in the past.

One final technical point may be made, which may seem merely niggly. The combined judgements in *Vanderstock* are extraordinarily long and complex. Indeed, taken together, they are longer than many minor academic theses in the discipline of law. In particular, the length and complexity of the majority judgement renders it difficult to enunciate a clear rationale for the decision. This may limit the future use of the decision as an effective and far-ranging precedent.

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[7] Another example of historical futility is the Corporations Case; *New South Wales v Commonwealth* (1990) 169 CLR 482.

[8] (1920) 28 CLR 129.

Vanderstock and future directions in constitutional interpretation

Predicting future directions of the High Court in interpreting the Constitution is a famously inexact science, on much the same scale as selecting the winner of the Melbourne Cup 3 months in advance of the race. Nevertheless, the decision in *Vanderstock* does enable an observer to make some modestly certain predictions.

In *Vanderstock*, the High Court has returned to its great historic work of undermining Australian federalism. This has been the overwhelming theme of the Courts decisions since its tone was set by the *Engineers Case* in 1928. The limitation of state taxation in *Vanderstock* sits easily with the ban in the *Engineers Case* against going beyond the literal words of the Constitution to the making of federal implications; the expansive interpretation of section 109 to allow the Commonwealth to sweep clear entire fields of Commonwealth legislation; and the progressive whittling down of any immunity of state governmental entities from Commonwealth action.

Consequently, the states must eye the decision in *Vanderstock* with considerable nervousness. Even more importantly than its severe potential effect on state finances, *Vanderstock* signals an entire psychological position of the Court against what are commonly called 'states' rights'. That psychology logically will extend to other areas of federal disputation, notably the determination of the scope of Commonwealth legislative powers contained in section 51. A court that can cheerfully displace large elements of state taxing power is unlikely to have much regard for the interests of the states in the pull and push of legislative competency.

Given the pervasively federal nature of the Australian Constitution, what ultimately lies behind the reasoning in *Vanderstock* is the same motivating force that drove the Court in the *Engineers Case*, the expansion of the Commonwealth's exclusionary legislative power under section 109, and the extremely broad interpretation of such Commonwealth powers over corporations section 51(xx) and external affairs section 51(xxix).[9] This is the practical conviction that the logical and desirable destination of the Australian federal state is towards pervasive central power and away from state competence. The potency of this theme in the historical reasoning of the Court is explicitly recognised in the minority judgements in *Vanderstock*.

There are 2 fundamental objections to this type of constitutional centralisation. The first is as to legitimacy. [10] There can be no doubt that the Australian Constitution was framed to produce a profoundly federal result, in the sense that it police a strict division between Commonwealth and states. Under that division, the legislative powers of the states would so far as possible be preserved. To put it simply, the Australian federation was to lean towards its components, rather than its centre.

Judges like those in the majority in Vanderstock who are deeply interested in history in general and the Convention Debates in particular know this. For every mention of the importance of a future customs union, there literally are dozens demanding the protection of the states and the strong federalism they required to prosper. The High Court itself was seen

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[9] *Commonwealth v Tasmania* (1983) 158 CLR 1.

[10] See generally Greg Craven, 'Heresy as Orthodoxy: Were the Founders Progressivists?' (2003) 31 *Federal Law Review* 87.

as the 'keystone' of the federal arch, charged with protecting the position of the states, a somewhat humorous position in light of subsequent history. The strict preservation of state powers was cemented by the restrictive amendment procedure contained in section 128, which required not only a majority in a national referendum but the carriage of that referendum in a majority of states.

Crucially, this was a democratic settlement. The Constitution had been drafted overwhelmingly by delegates democratically elected to the great conventions by the colonial populations. The draft bill they produced was popularly approved not once, but twice. That bill's constitutional successor likewise can only be amended by referendum. Even by contemporary standards, the democratic character of the Australian Constitution both in terms of formulation and amendment is remarkable, and notably exceeds those of other great federations, such as Canada and the United States. Surely, the interference by the High Court in the federal settlement achieved by the Constitution – for example, by consciously limiting the power of the states over indirect taxation – is entirely illegitimate?

There are various answers that have been made to this charge, of which 2 currently are most popular. The first is to deny the democratic pedigree of the Constitution. The argument goes that the founders were not truly representative of the Australian people; that women could not vote; that the ratification process was imperfect. The difficulty with this argument is that we are not really assessing the Constitution on the basis of absolute, but comparative democratic legitimacy. On this basis, imperfect as the Constitution's democratic chain of title may be, it certainly beats the unauthorised amendment of the Constitution by 7 unelected judges whose appointment ultimately is in the deeply political hands of the Commonwealth executive, and whose social background hardly itself is reflective of modern Australian society.

The other argument on legitimacy is the risible one that the founders intended that the High Court progressively amend the Constitution by interpreting it in light of changed national circumstances. Various heavily redacted and unrepresentative passages from ultimately marginal founder Andrew Inglis Clark typically are cited. There are 2 immediate problems here. First, when Clark's writings are analysed as a whole and in context, rather than picked over for encouraging sentences, it is absolutely clear that he was not a judicial progressive. Second, when the Convention Debates, as well as the connected debates around the Judiciary Act are closely examined, they reveal an absolute clarity that the founders were overwhelmingly opposed to judicial amendment of the Constitution. They were fully aware of the American experience in this regard and rejected it.

A second argument against historic constitutional validity boldly bypasses questions of legitimacy and appeals to practicality. The argument typically runs that in a complex modern world, Australia needs a system that promotes the cohesive and rapid deployment of policy. This can only be achieved by a powerful central government, not a gaggle of self-interested states. Echoes of this sentiment sound strongly through the majority judgement in *Vanderstock*, with its heroic defense of the customs union policed by Australia's central Commonwealth government.

The difficulty is that there is no evidence that centralised government is any more efficient and effective than its concentrated alternative. Many exemplars among modern nation states

are federal rather than unitary states, to name but 4, the United States, Canada, Germany, and Australia itself. At the most practical level there is no evidence in Australia that the policy record of our central government has been superior to that of our federal integers. After all, the Commonwealth currently wallows in policy doldrums in such areas as policy regarding refugees, immigration, healthcare and defence. It is hard to discern a thread of policy quality superior to that of the states. Perhaps most strikingly, when Australia faced an almost existential crisis in COVID-19, it was the states, not Canberra, which led the country out of danger. Consequently, for the High Court to justify the limitation of state taxing power on the basis that this embodies an advance in the Australian policy matrix is implausible.

What certainly is striking about *Vanderstock* in terms of future constitutional interpretation is what has been referred to as the 'grand scheme' approach. This is strikingly different to the 2 historically competing ideologies of interpretation. The first was the literalism of the *Engineers Case*, where the words of the Constitution simply were given their natural meaning, without regard to federal implications. The second was an intentionalism that in the United States would be referred to as originalism, and was derived from an historical search for the intention of the founders behind a particular constitutional provision. In many ways, most of the history of constitutional interpretation in Australia can be seen as a battle between these 2 basic approaches.

But the decision in *Vanderstock* is neither literalist nor originalist. It does not purport to derive any conclusive meaning from the word 'excise'. It does accord some importance to founder's intent, but more as something underlying the Constitution as a whole, or at least its financial settlement, than as a concept directed primarily to section 90 itself. Once again, it is clear that the Court looked to animating constitutional principle – the grand scheme of customs union – as the umbrella under which the delineation of excises would be achieved.

The obvious question is where this school of grand scheme interpretation might take the Court in the future? Significantly, this type of constitutional interpretation has been deployed before by the Court. Its most dramatic outing was when the Mason Court used what it regarded as the Constitution's central theme, 'representative democracy' to found a small number of implied rights, most notably the freedom of political communication, but also by immediate implication rights around assembly, electoral franchise and so forth.[11] This rights jurisprudence has survived in Australian constitutional law, but its development stalled after a brief flowering in the 1990s. Their implication was controversial both in terms of constitutional history and the plausibility of the vague concept of 'representative democracy' as the controlling principle of the Australian Constitution.

The attraction of the Court in *Vanderstock* to reasoning on the grand scale offers the tantalising vision of whether the Court might adopt the same sort of reasoning in other constitutional contexts. Most obviously, would a Gageler Court be prepared to enliven the concept of implied rights by reviving the great principle of representative democracy in the same way as it deployed the founding principle of a customs union. In recent times, the Court has shown limited enthusiasm for pursuing the sort of rights consciousness of Sir William

[11] *Australian Capital Television v Commonwealth* (1992) 177 CLR 106.

Deane, but the wide interpretative approach adopted in *Vanderstock* does offer possibilities.[12]

One thing that is absolutely clear from the majority judgement in *Vanderstock* is that this is not a Court frightened of the practical outcomes of its decisions. The fact that a broad interpretation of section 90 might undermine state finances clearly has dissuaded the High Court in the past. This Court was merciless in its application of principle to state revenue. Interestingly, this tough-mindedness is very similar to the approach of the Court in an entirely different context, the application of the doctrine of the judicial separation of powers to the detention of refugees. In *XYZ v Commonwealth* ('*XYZ*')[13], the Court again was profoundly indifferent to the practical plight of the Commonwealth in the wake of its decision, as policy collapsed and was confounded. Again, this is a Court that is content to have the dice land as they fall, which should be a warning to both Commonwealth and the states. An obvious point in light of both *XYZ* and *Vanderstock* is that the Court is likely to take a broad view in the application of underlying constitutional principle, and this necessarily will produce a strong adherence to separation of powers reasoning.

The interest of the Court in *Vanderstock* in economics raises some intriguing possibilities. Section 90 is not the only section of the Constitution open to economic reasoning. Section 92 is the obvious example and has been the object of experimentation in the past. But section 109 is another candidate. Thus far, the Court's reasoning on whether a state law 'entered a field' of Commonwealth legislation has been relatively crude, often involving little more than a semantic analysis of the terms of the competing pieces of legislation. The economic approach of *Vanderstock* might be dramatic here, with the Court more closely evaluating the actual policy effects of laws, rather than merely their terms. Of course, the limitations on the economic capacities of High Court judges remain problematic.

The final 'pointer' in *Vanderstock* is the Court's interest in history, and the Convention Debates in particular. Decisively gone are the days when use of the Debates was first prohibited, then discouraged. The Court is fully prepared to delve extensively into the Debates, and it probably is fair to say that judges are more qualified as legislative historians than they are economists. The result in *Vanderstock* probably will cause under-estimation of the future influence of history in constitutional interpretation, simply because the application of historical insight provided no determinative explanation of the concept of excise. But section 90 is a special case: constitutional historians have long known that the debates provided no settled explanation of that term. Importantly, other sections of the Constitution are underlain by much deeper historical insights, notably including a number of Commonwealth powers contained in section 51, such as the corporations power.

Conclusion

Vanderstock obviously is a decision of great importance in the specific context of excise. It has the capacity to significantly affect the taxing capacity of the states, but also to complicate it, as new forms of impost are devised and refined, very probably with the cooperation of the

[12] *Kable v DPP* (NSW) (1996) 189 CLR 51.
[13] (2006) 227 CLR 532.

Commonwealth. Its wider importance for constitutional interpretation lies in the Court's willingness to adopt an approach of 'grand scheme' reasoning. The implications of this stretch a long way beyond the interpretation of section 90 and could be applied with significant effect to the Constitution as a whole.

Federal fiscal relations after *Vanderstock*

Anthony Gray*

Introduction

In late 2023 the High Court rendered its first decision regarding excise in 25 years, and considered for only the third time in its history whether what I call a 'true' consumption tax is an excise within the terms of section 90 of the Australian Constitution. It found by a slim majority that such a tax was within the meaning of 'excise', and thus was invalid due to section 90, which prohibits states from levying customs and excise duties. This paper will explain the background to the decision, the decision itself and what it may suggest regarding the state of federal fiscal relations in Australia.[1]

One preliminary note by way of explanation is considered necessary. The relevant tax was a 'true' consumption tax. In other words, it was imposed on an act of consumption. Consumption has been defined in this context, in relation to items other than food, as meaning destruction by use.[2] Such taxes are extremely rare in Australia, reflected in the fact that in its 120-year history the High Court has only considered this issue on 3 occasions. Much more common are sales taxes on goods, such as the Australian GST (though obviously, it is imposed on services as well as goods), taxes on production, taxes on manufacture, taxes on distribution and licence/registration fees in order to legally run a business involving the sale of goods. It is necessary to be precise here because GST-type taxes are often called 'consumption taxes'. This is not the sense in which it is meant here. In this context, and in the context of the decision, a consumption tax is imposed upon an act of consumption.

Outline of Victorian legislation

The Victorian Parliament imposed a fee upon the use of zero and low emission vehicles (ZLEVs). The fee was payable by the registered owner of a vehicle, based on the extent to which that vehicle had been used on Victorian roads. The charge was either 2 or 2.5c per kilometre during a given financial year.[3] It was argued that users of ZLEVs needed to pay a

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1 I have published previously in this area: Anthony Gray 'The High Court's invalidation of Victoria's consumption tax on ZLEVs and its possible implications for other charges: Vanderstock v Victoria' (2024) 39(3), *Australian Tax Forum* 401; Anthony Gray, 'Consumption taxes and section 90 of the Australian Constitution' (2023) 38(2), *Australian Tax Forum* (2023) 305; Anthony Gray, '*Vanderstock v Victoria*: are "true" consumption taxes forbidden to the states by Section 90 of the Australian *Constitution*?' (2022) 44(4) *Sydney Law Review* 591. This article draws to some extent from the research that forms the basis of those articles.

2 *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177, 187 (Barwick CJ).

3 *Zero and Low-Emission Vehicle Distance-Based Charge Act 2021* (Vic), s 8.

contribution to the upkeep of the roads they used.[4] Those using petrol or diesel vehicles would pay a substantial 'excise' tax when they purchased fuel, given that this tax is a significant component of the bowser price. Users of ZLEVs were obviously not contributing to road maintenance through payment of such taxes; thus the Victorian Parliament developed this scheme so that such users would so contribute. The scheme was not expected to raise a significant amount of revenue for the Victorian Government, there being relatively few of such vehicles currently on the road, and given that the rate of the charge was relatively low. Two individual owners of ZLEVs commenced a constitutional challenge to the scheme, arguing that the fee they were being charged was an excise duty, and prohibited by section 90 of the Constitution.[5] That section renders constitutionally invalid a state tax that is of the character of a customs or excise duty. The intention was that the Commonwealth would levy such taxes.

The law prior to *Vanderstock*

Many cases prior to this one had considered the meaning of section 90, though they typically raised different issues. The Constitution does not define the word 'excise'. Some have resorted to the Convention Debates leading up to the development of the Constitution in order to try to determine its meaning. This also occurred in some of the judgments in *Vanderstock* itself, as I will show. While this is understandable, on one level, the High Court has increasingly turned against the use of these debates to determine the meaning of a constitutional provision. The orthodoxy is now reflected in a judgment of 5 members of the High Court in *New South Wales v Commonwealth* ('*WorkChoices Case*')[6] where Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ noted:

> *To pursue the identification of what is said to be the framers' intention, much more often than not, is to pursue a mirage. It is a mirage because the inquiry assumes that it is both possible and useful to attempt to work out a single collective view about what now is a disputed question of power, but then was not present to the minds of those who contributed to the debates. And even if a statement about the framers' intention can find some roots in what was said in the course of the Convention Debates, care must be taken lest, like the reserved powers doctrine, the assertion proves the answer to the very question being investigated (the constitutionality of a measure) … the answer to that question is not to be found in attempting to attribute some collective subjective intention to all or any of those who participated in the Convention Debates.*[7]

Even if it were accepted (though it is not) that the Convention Debates are potentially an important source in terms of constitutional interpretation more than 120 years after they occurred, in the specific context of section 90 it is very difficult to discern much from the Convention Debates regarding the intended meaning of the provision. This is noted by

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4 Victoria, *Parliamentary Debates*, Legislative Assembly, 18 March 2021, 1183 (Tim Pallas, Treasurer).

5 *Vanderstock v Victoria* (2023) 279 CLR 333 ('*Vanderstock*').

6 (2006) 229 CLR 1.

7 Ibid 97.

5 justices in *Vanderstock*, including the joint reasons,[8] and Gordon and Jagot JJ.[9] This is similar to the comments of Mason CJ and Deane J in *Philip Morris Ltd v Commissioner of Business Franchises* (Vic) that:

> *We do not regard reference to the history of successive drafts of s 90 or to the Convention Debates as being at all helpful to the problem of eliciting what may be the constitutional purpose of the section. This view is due not to a refusal to acknowledge the relevance of the historical context in which the provision was drafted and enacted, but to the sheer lack of evidence of a convincing or consistent nature from the available materials.*[10]

In its first section 90 decision in *Peterswald v Bartley* ('*Peterswald*')[11], the High Court confined excise duties to taxes imposed on goods at the production or manufacture stage. This gave the section relatively little scope, leaving states free to impose taxes on goods at other stages of the movement of goods to consumers, including distribution, sales and consumption taxes. It must be noted that, for the first 20 years of Federation, the High Court applied the doctrine of reserved powers to constitutional interpretation. This meant that powers granted to the new Commonwealth Parliament would be read narrowly having regard to the position of the states. Logically, it would also suggest that limitations on state power, including section 90, would be read narrowly. This means any High Court decisions on constitutional law during this period must be treated with great care; they may not be as impactful as High Court decisions typically would be. This is because, in 1920, the High Court overturned the reserved powers doctrine, and this remains the law today.[12]

In *Commonwealth and Another v State of South Australia; Commonwealth Oil Refineries Limited v State of South Australia* ('*Commonwealth Oil Refineries*')[13], the High Court extended the meaning of excise in section 90 to include taxes on distribution and sale[14], a finding that was obviously inconsistent with the decision reached in *Peterswald*. Two members of the Court in this case suggested that a tax on consumption could be within the meaning of an excise duty, and prohibited to the states by section 90.[15]

In *Matthews v Chicory Marketing Board* ('*Matthews*')[16], one of the most revered High Court justices, Sir Owen Dixon, stated that a tax on the consumption stage could be an excise for the purposes of section 90.[17] He was influenced by the work of Sir William Blackstone who had noted that in English historical practice, the meaning of excise was broad and that it included consumption taxes.[18] Latham CJ agreed.[19] However, a few years later the

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[8] Ibid 222 (Kiefel CJ, Gageler and Gleeson JJ).

[9] Ibid 260 (Gordon J).

[10] (1989) 167 CLR 399, 425.

[11] (1904) 1 CLR 497.

[12] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

[13] (1926) 38 CLR 408.

[14] Ibid 420 (Knox CJ), 431 (Isaacs J), 435 (Higgins J), 436 (Powers J), 437 (Rich J) and 439 (Starke J).

[15] 'It matters not (regarding a breach of section 90) whether the duty is imposed at the moment or actual sale or not, or sale and delivery, or consumption': 435 (Higgins J); Rich J said section 90 extended to taxes on the 'use, consumption or sale' of goods: 437.

[16] (1938) 60 CLR 263.

[17] Ibid 300.

[18] Sir William Blackstone, 'Commentaries on the Laws of England' (1765).

[19] *Matthews v Chicory Marketing Board* (1938) 60 CLR 263, 277.

Privy Council decided a case involving a section of the Canadian Constitution which related to the meaning of excise duties.[20] It is very important to observe that there were and are material differences between the Canadian provision and the Australian. Specifically, the Canadian Constitution was written at a time when the distinction between direct and indirect taxation loomed large in the literature, and the Canadian Constitution expressly embraced the distinction. By the time the Australian Constitution was being drafted, that distinction had been discredited, and it was not utilised (expressly) here.[21]

However, comments by the Privy Council in the Canadian context were construed (misconstrued) as suggesting that a consumption tax could not be an excise. This led Dixon J to change his position in *Parton v Milk Board* (Vic) ('*Parton*')[22] a decade after *Matthews*, now stating that a tax on consumption was not an excise. He clearly did this because of what he thought was required by the Privy Council decision. This is understandable at a time when the High Court considered itself legally bound to follow Privy Council decisions, a shackle that was later overthrown by the High Court itself.[23] Thus, it can safely be said that Dixon J believed that a consumption tax could be an excise, as his judgment in *Matthews* reflects. However, a definition of excise was later adopted by the High Court that excluded consumption from it, given the response of the Court to the Privy Council decision.[24] The other important development in *Parton* was the classic statement of the purpose of section 90 by Sir Owen Dixon, that the section was designed to give the Commonwealth 'real control over the taxation of commodities'.[25]

The question whether a consumption tax was an excise was squarely addressed in *Dickenson's Arcade Pty Ltd v Tasmania* ('*Dickenson's Arcade*').[26] On its face, the challenged tax was a 'true' consumption tax – apparently payable not when a person purchased some tobacco from a retail outlet, but once they had actually consumed it at a later date. This was clearly an attempt by the Tasmanian Parliament to take advantage of the loophole created when consumption taxes were excluded from the definition of excise. Knowing that a tax imposed at the retail level would be considered an excise and invalidated, the parliament cannily imposed the tax, at least on its face, on a later act of consumption. Of course, when loopholes in the law are created (by case law or statute), they will be exploited. Barwick CJ went on the record in the case expressing his incredulity that the legislation as drafted reflected how the legislation was intended to work in practice.[27]

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[20] *Atlantic Smoke Shops Ltd v Conlon* [1943] AC 550.

[21] Some earlier High Court judgments did utilise the distinction, but it fell from favour: *Browns Transport Pty Ltd v Kropp* (1958) 100 CLR 117, 129 (Dixon CJ, McTiernan, Fullagar, Kitto, Taylor and Windeyer JJ). In *Ha v State of New South Wales* (1997) 189 CLR 465, 509 (Dawson, Toohey and Gaudron JJ dissenting in the result called the distinction 'discredited' and it was not utilised by the majority).

[22] (1949) 80 CLR 229.

[23] *Viro v The Queen* (1978) 141 CLR 88.

[24] *Bolton v Madsen* (1963) 110 CLR 264, 271 (Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ).

[25] (1949) 80 CLR 229, 260: 'in making the power of the parliament of the Commonwealth to impose duties of customs and of excise exclusive it may be assumed that it was intended to give the Parliament a real control over the taxation of commodities and to ensure that the execution of whatever policy it adopted should not be hampered or defeated by state action'. Examples of decisions in which this view of the purpose of section 90 was accepted include *Capital Duplicators Pty Ltd v Australian Capital Territory* (No 2) (1993) 178 CLR 561, 586 (Mason CJ, Brennan, Deane and McHugh JJ) and *Ha v New South Wales* (1997) 189 CLR 465, 495 (Brennan CJ, McHugh, Gummow and Kirby JJ).

[26] (1974) 130 CLR 177.

[27] Ibid 191–2.

Of the 6 justices who decided the case, 4 found that, as a consumption tax, it was not an excise. These justices followed the decisions in *Parton* and *Bolton v Madsen* to this effect. Two of these justices expressly doubt the correctness of the distinction between consumption taxes and other taxes on goods, but feel duty-bound to accept the (limited) precedents to this effect. Barwick CJ and McTiernan J dissented. Barwick CJ said there was no logic in excluding consumption taxes from other taxes on goods, and doubted that the interpretation of the Privy Council decision that led to this outcome was correct.[28] He noted that the direct/indirect distinction that formed the basis of the Privy Council decision had no counterpart in Australia. McTiernan J adopted a similar view.[29]

I noted earlier that the decision in *Peterswald* must be read in its historical context – at a time when the High Court adopted reserved powers reasoning. That context helps to limit the precedential value of the decision. The same might be said about the *Dickenson's Arcade* decision, for another reason. At this time, the High Court was applying a formalistic, criterion of liability approach to the interpretation of section 90. The focus was the literal provisions of the challenged legislation, as opposed to evidence of parliamentary intent or the substance of the provision.[30] Again, this approach lent itself to relatively easy subterfuge by a clever parliamentary drafter. The High Court would later abandon this formalistic approach to section 90, in favour of an approach based on substance.[31] This broader development in the interpretation of the section inevitably cast doubt on the correctness of decisions based on the opposite approach, favouring formality.

A formalistic approach was also hard to square with the High Court's acceptance, since the *Parton* decision in 1949, that the purpose of section 90 was to give the Commonwealth real control over the taxation of commodities. It is now obvious that, if a Court takes a narrow, formalistic approach to interpreting the section, it may affect the Commonwealth's control over commodity taxation.[32]

The High Court considered the meaning of section 90 in 2 decisions in the 1990s.[33] In both of them, an approach was taken favouring substance over formality. In both of them, that the purpose of section 90 was to give the Commonwealth real control over the taxation of commodities was confirmed by majority.[34] The High Court rejected suggestions of a return to the *Peterswald* definition of excise, and rejected suggestions that section 90 was designed for a more limited purpose. These decisions did not need to consider whether consumption taxes could be excise duties, but the Court expressly left open the question whether a consumption tax could be an excise,[35] and 3 members of the Court suggested that the distinction between consumption taxes and other taxes on goods in the excise context was

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[28] *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177.

[29] Ibid 196.

[30] *Bolton v Madsen* (1963) 110 CLR 264.

[31] *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599.

[32] Peter Hanks, 'Section 90 of the Commonwealth Constitution: fiscal federalism or economic unity?' (1986) 10(3) *Adelaide Law Review* 365, 383: explained how commodity taxation could affect the Commonwealth's management of inflation, monetary policy and distribution functions.

[33] *Capital Duplicators Pty Ltd v Australian Capital Territory* (No 2) (1993) 178 CLR 561; *Ha v State of New South Wales* (1997) 189 CLR 465.

[34] *Capital Duplicators Pty Ltd v Australian Capital Territory* (No 2) (1993) 178 CLR 561, 586 (Mason CJ, Brennan, Deane and McHugh JJ); *Ha v New South Wales* (1997) 189 CLR 465, 495 (Brennan CJ, McHugh, Gummow and Kirby JJ).

[35] *Capital Duplicators Pty Ltd v Australian Capital Territory* (No 2) (1993) 178 CLR 561, 590 (Mason CJ, Brennan, Deane and McHugh JJ); *Ha v New South Wales* (1997) 189 CLR 465, 499-500 (Brennan CJ, McHugh, Gummow and Kirby JJ).

illogical.[36] A definitive decision in that regard would need to wait 26 years, until the 2023 decision in *Vanderstock*, to which my attention now turns.

Majority view – ZLEV levy is an excise and invalid

The majority reasons comprised joint reasons by Kiefel CJ, Gageler and Gleeson JJ (joint reasons), and a separate judgment of Jagot J. The majority re-confirmed that the section was designed to give the Commonwealth real control over the taxation of commodities. This justified the extension of the meaning of excise to include consumption taxes, as earlier decisions such as *Commonwealth Oil Refineries* and *Matthews* had suggested. This was because:

> *A tax on goods imposed on the consumption of those goods will increase the cost of those goods to consumers. Because consumers, acting rationally, will tend to factor the cost of consumption into the price they are prepared to pay for goods to be consumed, a tax on the consumption of goods can tend to depress demand for those goods, no less surely than can a tax on the production or distribution of those goods which increases the price of those goods to consumers. Not only are these tendencies intuitively obvious, they have been observed since the time of (Adam) Smith. They are well documented in economic literature and are referred to in economically literate legal texts. Through its tendency to depress demand, a State or Territory tax on goods imposed on the consumption of those goods … can impact on the flow of trade of goods into and out of that State or Territory. By reason of its cross-border effects as well as by reason of its effect on demand with the State or Territory, such a State or Territory tax can interfere with the outworking of such policy with respect to national or international trade in those or other goods as might from time to time be adopted by the Commonwealth Parliament and implemented by (means of national uniform taxation).*[37]

The joint reasons stated that 2 questions were relevant when considering whether a fee was an excise duty. The first was whether the fee was a tax on goods – whether it bore a close relationship to production, manufacture, sale, distribution or consumption of goods. The fee would have to relate to an activity or relationship in respect of goods. This would exclude fees imposed for the right or privilege to do something, such as a licence fee to conduct a business. The second was whether the tax affected goods as articles of commerce – in other words, was it of a size that would likely reduce demand for the goods. The general tendency of a fee to enter into the cost of the goods was relevant, rather than a high level of specificity in detail about a particular market involving the goods. Applying these tests, the ZLEV levy was clearly a tax on goods, imposed on use of the vehicle. It had a tendency to reduce demand for ZLEVs. Those intending to purchase such a vehicle would rationally take such a fee into account in making their purchasing decision.[38] Jagot J agreed, noting that if

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[36] *Ha v New South Wales* (1997) 189 CLR 465, 510 (Dawson Toohey and Gaudron JJ).

[37] *Vanderstock v Victoria* (2023) 279 CLR 333, 242.

[38] Ibid 245 (Kiefel CJ, Gageler and Gleeson JJ), 422 (Jagot J).

consumption taxes were excluded from the definition of excise, and/or a formalistic approach were taken to the section, the section would be liable to easy subterfuge by clever drafting.[39]

Minority view – ZLEV levy is not an excise and valid

The dissentients sought to distinguish consumption taxes from other taxes on goods. Gordon J confined excise taxes to those likely to enter into the cost of goods to the consumer at the point of sale, thus excluding consumption taxes. Her Honour argued the precise impact of a consumption tax on demand for goods was unknown; it should not be assumed that a tax on usage consumption would reduce demand for the goods.[40] She concluded the majority's position would 'radically affect the scope of the states' ability to raise taxation revenue',[41] in the context of the existing mis-match in the Australian federation between spending and expenditure. Gordon J accused the majority of 'further entrenching the extraordinarily unbalanced fiscal relationship between the states and federal governments to exacerbate a bad system and make it worse'.[42] She argued it was 'about the Commonwealth polity having most of the power to tax and the power to decide how that money is spent, but the States knowing what spending is needed, when and how'.[43]

Edelman J also framed a narrow definition of excise, stating it was a tax that would have a 'real and substantial economic effect in a market for the sale of goods', the effect being on the supply side, changing the sale price. The effect on the sale price would have to be a direct effect in the market of the good taxed, not an indirect effect in the market of another good.[44] His Honour seemed to favour a narrower view of the purpose of section 90 than giving the Commonwealth real control over the taxation of commodities.[45] He claimed that these constraints were part of the 'settlement' in *Capital Duplicators Pty Ltd v Australian Capital Territory* ('*Capital Duplicators No 2*') and *Ha v New South Wales* ('*Ha*').[46] Edelman J claimed that a result of the majority decision was that taxes that had not in the past been considered excises, such as payroll tax, industrial taxes or taxes on the sale of businesses might now be excises.[47] He said the majority had abandoned the 'directness' requirement of an excise.[48] He accused the majority decision of a 'neglect of constitutional structure',[49] citing the so-called *Melbourne Corporation* decision that stated the Constitution contemplated the continued existence of the federal and state governments within the federation. He refers to the work of Hamill in stating that, if states are deprived of fiscal, administrative or legislative capability in areas of major public spending, the question arises as to whether Australia is a federation.[50] Edelman J also accused the majority of neglect of history, citing the speech of one delegate at one of the Convention Debates, and a report of an Accounts Committee from

[39] Ibid 415.
[40] Ibid 275.
[41] Ibid 309.
[42] Ibid 309.
[43] Ibid 309.
[44] Ibid 320.
[45] Ibid 321, 331.
[46] Ibid 324–5.
[47] Ibid 322, 326–7, 328, 371–2.
[48] Ibid 327.
[49] Ibid 357.
[50] Ibid 357–8.

Victoria which had claimed one of the conventions had intended to limit excises to taxes on production and manufacture.[51]

Steward J similarly saw *Ha* as the end of a 'journey' on section 90, which the majority decision here upended.[52] His Honour argued that, at Federation, the meaning of excise was clear, and was reflected in the judgment in *Peterswald*.[53] He found that this fee was not an excise, because it was an ongoing charge, because it was direct, and there was no evidence it impacted demand for ZLEV vehicles.[54] Steward J also disagreed with the purpose of section 90 being to give the Commonwealth real control over the taxation of commodities,[55] preferring a narrower view relating to tariff policy.[56]

Some reflections on the decision

1. *Majority view removes an anomaly from the interpretation of the section and is consistent with the agreed purpose of the section*

The High Court has accepted since 1949 that the purpose of the section was to give the Commonwealth control over the taxation of commodities. It was re-affirmed by High Court majorities in the 2 section 90 cases decided prior to *Vanderstock*, namely *Capital Duplicators No 2* and *Ha*. The simple fact is that the exclusion from the definition of consumption taxes was illogical, once that purpose of the section was accepted. Clearly if states could impose taxes on consumption, the Commonwealth's ability to maintain control over the taxation of commodities could be compromised. It is no answer to say that section 109 would be utilised to remove any state taxation inconsistent with federal taxation, because it remains unclear at this point how section 109 applies in the context of taxation. On this basis, the majority decision is supported because it better aligns the meaning of the section with its stated purpose.

In this light, it was (respectfully) disappointing that each of the dissenting justices in *Vanderstock* took issue with the agreed purpose of the section. Gordon, Edelman and Steward JJ favoured a narrower purpose of the section. With respect, these arguments were fully ventilated in *Capital Duplicators No 2* and *Ha*, with a majority decision to re-affirm the position established in 1949 in the masterly judgment of Dixon J in *Parton*. There is surely a point at which justices need to accept the outcomes of previous decisions, particularly where a position has stood since 1949, and was re-affirmed by differently constituted majorities in the most recent High Court decisions on the matter.

2. *Claims that Capital Duplicators No 2 and Ha reflected a 'settlement' or the end of a 'journey'*

Edelman spoke of the alleged 'settlement' involved in these decisions, and Steward J spoke of the supposed end of a journey in *Ha*. My interpretation of these statements is that these

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[51] Ibid 360.

[52] Ibid 377.

[53] Ibid 378.

[54] Ibid 382.

[55] Ibid 396.

[56] Ibid 399. This narrow view of the purpose of section 90 was rejected by a majority of the Court in *Ha v New South Wales* (1997) 189 CLR 465, 496: 'the history of section 90 denies any necessary linkage between the exclusivity of the power to impose duties of excise and Commonwealth tariff policy' (Brennan CJ, McHugh, Gummow and Kirby JJ).

justices believe that *Vanderstock* was a significant departure from what had been determined in these cases. Respectfully, this would not be correct. The Court in *Capital Duplicators No 2* specifically left open whether consumption taxes should be included within the definition of excise, and 3 justices in *Ha* called the exclusion illogical. Respectfully, it is hard to characterise this as some kind of settlement or end of journey on the matter of whether a consumption tax was an excise. Further, in both *Capital Duplicators No 2* and *Ha*, a majority of the High Court re-affirmed the broad view of the purpose of section 90 as designed to give the Commonwealth real control over the taxation of commodities. Neither Edelman nor Steward JJ accepted this in *Vanderstock*. Thus, they cannot have regarded that part of the judgments in these cases as some kind of final decision or outcome, as the words 'settlement' or 'journey' might suggest.

Thirdly, if I may be permitted a personal observation, I have studied Australian constitutional law for 35 years. One thing I have learned is that very little can be regarded as permanently settled. To give a few instances in my time, it was not known until 2005 that the Commonwealth could utilise the corporations power to regulate in the industrial relations area.[57] The implied freedom of political communication was first discerned in 1992.[58] The High Court has adopted many different approaches to the interpretation of sections 90 and 92. Who could say that the current positions regarding these sections, exemplified in *Vanderstock* and *Palmer* respectively,[59] represent the last word as to how these sections will be interpreted? Both of them changed what had previously been regarded as the law regarding these sections. This is the nature of constitutional law. Experience has taught me it would be a 'brave' person to indicate that anything in constitutional law was settled for eternity.

3. *Claims that tax is too small to change behaviour mixed with fears for future of federalism*

Again, a true tax on consumption of the kind discussed here is very rare. *Vanderstock* represents the third occasion in 120 years that the question whether a consumption tax is an excise has been directly raised for the High Court's determination. This was noted in *Dickenson's Arcade*.[60] Further, the ZLEV levy was set at a low level, expected to cost the average ZLEV owner about $300 per year, and was not expected to raise much revenue. One of the reasons that Edelman J gave for validating the measure was that it was unlikely to have any effect on demand; Steward J reached a similar conclusion.

It is considered noteworthy that in the same judgments where these sentiments appear, dire predictions on the implications for federalism of the majority decision to invalidate the fee are also expressed. Steward J expressed concern with the 'elimination of state legislative power in the pursuit of absolute federal control'. Gordon J said the decision would 'radically affect the scope of the states' ability to raise taxation revenue'. Edelman J warned that the decision might have implications for the ability of states to maintain their status as independent

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[57] *New South Wales v Commonwealth* (2006) 229 CLR 1 ('*WorkChoices Case*').

[58] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

[59] *Palmer v Western Australia* (2021) 272 CLR 505.

[60] Mason J said that such taxes were 'infrequently encountered': *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177, 239 ('*Dickenson's Arcade*').

political entities, and linked this to a question when Australia might practically cease to be a federation. With very great respect, these heightened concerns are difficult to square with the fact that consumption taxes are extremely rare, and raise very little revenue. It is hard to argue the very future of federalism is in peril.

Gordon J also (on one view) betrays a preference for state over Commonwealth legislative control. She said the effect of the majority decision had implications for federal fiscal relations: 'it is about the Commonwealth polity having most of the power to tax and the power to decide how that money is spent, but the States knowing what spending is needed, when and how'.[61] It is arguably (with respect) not appropriate for a justice to make a judgment as to which level of government 'knows' what spending is needed, when and how. It is considered relatively obvious that both levels of government have made good decisions about spending, and bad decisions about spending. Neither has a monopoly. I cannot respectfully agree with any suggestion that states know best or better as to how to spend money efficiently. In Justice Gordon's home state of Victoria, the money spent on the (since abandoned) Victoria Commonwealth Games 2026 project, and the abandoned East West Link Road project, are 2 recent examples. Of course, one could name Commonwealth projects that have also been wastes of money. But the point is that it is not correct to claim that either has a monopoly on good financial decision making. And further that it is questionable (at best) whether that type of sentiment should be the basis of a constitutional law decision in any event.

4. The red herring of 'directness' in Australian constitutional law

Both Edelman and Steward JJ used the concept of 'directness' in explaining why the ZLEV levy was not an excise.

As indicated, the use of the direct/indirect distinction has a lengthy, chequered history in constitutional law. J S Mill introduced this distinction in the mid-19th century.[62] He argued that a direct tax was one levied on the one expected to pay it, whereas an indirect tax was levied on someone expected to pass it on to another. The Canadian Constitution, a product of 1867, embraced this distinction. By the end of the 19th century, the distinction was seen as unsatisfactory, and it was not incorporated into the Australian Constitution. It is conceded that Edelman and Steward JJ use the concept in a different way than this. However, it is still argued that the distinction is unhelpful in this context, and should not be the basis for attempted distinctions. These may lend themselves to circumvention.

From a broader constitutional law perspective too, the distinction has proved troubling. At one time, it was central to interpretation of section 92 – the test was whether a challenged measure directly or merely indirectly impacted interstate trade and commerce. Sections 90 and 92 are the key economic provisions of the Constitution.

In the *Bank Nationalisation case* involving section 92, the Privy Council stated the test was whether the impugned measure 'not remotely, or incidentally … but directly, restrict(s) the interstate business of banking'.[63] The question was whether the measure restricted interstate trade and commerce 'directly and immediately as distinct from creating some indirect or

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[61] *Vanderstock v Victoria* (2023) 279 CLR 333 (Gordon J).

[62] John Stuart Mill, *Principles of Political Economy*, (W Ashley ed), Longmans, Green and Company, London,1848).

[63] *Commonwealth v Bank of New South Wales* (1949) 79 CLR 497, 637 (Lord Porter, for the Privy Council) ('*Bank Naturalisation Case*').

consequential impediment which may fairly be regarded as remote'.[64] A unanimous High Court in *Cole v Whitfield* made a new start regarding section 92.[65] In doing so, it criticised the distinction between direct and indirect burdens as 'unsatisfactory'.[66] There is an obvious equivalence between use of direct and immediate or remote and incidental in the context of section 92, and use of direct and indirect in the context of section 90. The High Court rejected it in the context of section 92; it should not be tempted to re-introduce it into section 90.

The likelihood that such a distinction will facilitate circumvention of the constitutional prohibition has been known for a long time. As Isaacs J stated in *Commonwealth Oil Refineries*:

> *The prohibitions of sections 90 and 92 of the Constitution may be transgressed not merely by a direct and avowed contravention. They are transgressed also by a statute – whatever its ultimate purpose may be, and however its provisions are disguised by verbiage or characterisation, or by numerous and varied operations lengthening the collective chain, or by otherwise paying titular homage to the supreme law of the Constitution – if it operates in the end by its own force so as to do substantially the same thing as a direct contravention would do, either in attaining a forbidden result or in using forbidden means. The relevant constitutional prohibitions include both means and results. It is no justification for using forbidden means that permissible results are sought, nor for securing forbidden results that lawful means are employed.*[67]

Problems with the existing federal system in Australia

Perhaps the most fundamental problem with the Australian Constitution is that it was written in the 1890s, yet it is expected to provide the framework for Australian governance more than 120 years later. There has been so much change in the world since that time. For example, in the late 19th century, the colonies that would unite to become Australia were isolated and largely separate from one another. Transport and communication among them was, understandably, very limited. Individuals would understandably understand governance primarily in 'local' colony terms. Business was overwhelmingly local in nature. Links with other nations were limited. Australia was very much part of the British empire.

Obviously, 120 years later the world is a very different place. Australia is now a closely integrated nation. We have realised that most of the problems we face, and solutions we seek, are national and international in nature. Parts of the nation have common problems – at present, housing and the cost of living are prime examples. Business is typically structured on national (and international) lines. We recognise the concept of Australian citizenship. We are in fact an independent nation, even if our head of state is still the British monarch.

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[64] Ibid 639.
[65] (1988) 165 CLR 360.
[66] Ibid 401 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).
[67] (1926) 38 CLR 408, 423 (Isaacs J).

The federal government has become significantly involved in policy areas that were not anticipated at Federation. This includes health, school education, higher education, disability, aged care, criminal law, and the environment. This has been in response to calls for a national approach, or a recognition that the problem is more 'national' in nature, requiring a coordinated, consistent approach across the federation. As one example, it is hard to justify why a child should learn different things in mathematics in year 5 in one state, but in year 7 in another. Regarding aged care, it is hard to justify why the ratio of staff to residents, or the minimum time spent with each patient, should differ across the country.

Of course, others have noted this evolution in Australian governance. In *Victoria v Commonwealth and Hayden*,[68] Jacobs J noted:

> *The growth of national identity results in a corresponding growth in the area of activities which have an Australian rather than a local flavour. Thus, the complexity and values of a modern national society result in a need for co-ordination and integration of ways and means of planning for that complexity and reflecting those values. Inquiries on a national scale are necessary and likewise planning on a national scale must be carried out … the complexity of society … requires co-ordination of services designed to meet those needs.*[69]

Our difficulty is that, although the nation has changed so much, and the world of which we are a part, our written Constitution has not changed very much. It is notoriously difficult to do, as the recent referendum demonstrates. It requires a majority of people, in a majority of states, and an overall majority, to vote in favour of the change, in order that it occur. There is a high degree of ignorance about the Constitution. When voters are not aware of the details of a particular issue, they often respond negatively towards suggestions to change something, particularly something as important as the Constitution. Of the 45 referenda held in Australia since Federation, only 8 have succeeded. Most of these have been relatively minor changes, the exception being the proposal regarding Indigenous Australians in 1967.

This is highly relevant in the current context because the Constitution specifies a list of topics over which the federal government is to have legislative power. The idea was that the states would have legislative responsibility for other areas not listed. The Constitution sets out important matters over which the federal government is to have control, including defence, interstate and overseas trade and commerce, corporations and external affairs.[70] However, there are important policy areas, such as health, education, aged care and the environment, over which the federal government has no direct legislative power.

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[68] (1975) 134 CLR 338.

[69] Ibid 412; see similarly *Victoria v Commonwealth* (1971) 122 CLR 353, 396, where Windeyer J reflected on the classic *Engineers* decision (*Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129), which overturned past High Court practice of interpreting Commonwealth constitutional powers narrowly, having regard to the position of the states. Windeyer J said that the *Engineers Case* decision reflected 'a growing realisation that Australians were now one people and Australia one country and that national laws might meet national needs … (the decision) was a consequence of developments that had occurred outside the law courts as well as a cause of further developments there'. This was also noted by the Business Council of Australia *Reshaping Australia's Federation A New Contract for Federal-State Relations* (2006): 'the world has changed considerably since federation in 1901. Issues that were once clearly the responsibility of the states have taken on a more national character … as the world globalises, barriers to the free movement of people, goods and services within Australia become increasingly anachronistic'.

[70] *Australian Constitution* ss 51(iv), (i), (xx), (xxix).

This raises the question of constitutional interpretation. As indicated above, the orthodox view of the High Court now is that the intention of the founding fathers does not control (or perhaps even influence) interpretation of the Constitution today.[71] Individuals should not think that the state of federalism as it existed at the time of Federation was somehow set in stone. Sir Anthony Mason makes this point:

> *The Constitution contemplates a flexible balance of powers and … it does not expressly preserve the position and powers of the states free from federal interference … the Constitution (does not) preserve … the actual balance of powers or the actual federal-state relationship as it existed at some undefined time shortly after the Constitution came into operation.*[72]

It is noteworthy that one of the founding fathers themselves, in introducing the bill to create the High Court of Australia, made similar remarks:

> *Our written Constitution, large and elastic as it is, is necessarily limited by the ideas and circumstances which obtained in the year 1900 … (formal amendment) is a comparatively costly and difficult task and one which will be attempted only in grave emergencies. In the meantime, the statute stands and will stand on the statute book just as in the hour in which it was assented to. But the nation lives, grows and expands. Its circumstances change, its needs alter, and its problems present themselves with new facts. The organ of the national life which (while) preserving the union is yet able from time to time to transfuse into it the fresh blood of the living present is the Judiciary, the High Court of Australia … it is one of the organs of government which enables the Constitution to grow and be adapted to the changeful necessities and circumstances of generation after generation that the Constitution operates.*[73]

In other words, the founding fathers did not intend to 'lock in' a particular version of federalism that might have existed at the start of the 20th century. They intended that our constitutional arrangements would evolve, and that the High Court would play an important role in that respect. The genius of the founding fathers was to design a document that would, at the same time, endure as a foundational legal document, but also have the necessary 'fluidity'. It had to 'breathe', in order for the nation to progress.

How has the Constitution 'worked', given that there is much increased demand for federal regulation and responsibility for particular policy areas, but little formal change to the Constitution to facilitate this change? It is suggested that the necessary 'fluidity' has been provided by the Commonwealth's relative financial dominance over the states. The federal government raises the 3 largest taxes in Australia, namely income tax, corporate tax, and the goods and services tax. This provides the federal government with very significant revenue. Through this means the federal government can indirectly have significant control over policy areas which the Constitution does not provide it with directly.[74] The federal government is

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[71] *New South Wales v Commonwealth* (2005) 229 CLR 1, 97 ('*WorkChoices Case*').

[72] Sir Anthony Mason, *The Mason Papers*, (G Lindell ed), The Federation Press, Annandale, 2007, 134.

[73] Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902 (Sir Alfred Deakin).

[74] Anthony Gray, 'The Federal Spending Power in Three Federations: Australia, Canada and the United States' (2011) 40(1) *Common Law World Review* 13.

responsible for significant policy in health, education, aged care, and disability support, though it lacks direct constitutional power over these matters. It can, for example, make financial appropriations to others to effect these policy changes, or make financial grants to states to do so. The Constitution provides power for the Commonwealth to both make financial appropriations to anyone pursuant to section 81,[75] and to make grants to states under section 96.[76] Interpretation of the section 96 grants power has generally been broad, permitting the Commonwealth to impose virtually any (lawful) conditions on the allocation of the money.[77] The High Court's view has been that if the state finds any conditions the Commonwealth seeks to impose to be objectionable, it can decline the grant. This is considered to be a logical interpretation of the section.

Interpretation of section 81 has been more problematic. The section provides that the parliament has power to make appropriations 'for the purposes of the Commonwealth'. Interpretation has oscillated between occasions where a narrow view has been taken, confining the Commonwealth's ability to spend money to areas in which it has specific legislative power,[78] and a broader view, that the 'purposes of the Commonwealth' are for whatever purposes the Commonwealth Parliament deems fit.[79] It has been found that the validity of a parliamentary appropriation 'is not ordinarily susceptible to legal challenge', for practical reasons.[80]

However, in the most recent decision, the High Court preferred a narrow view. In *Pape v Commissioner of Taxation* ('*Pape*'),[81] the Court considered the validity of the Commonwealth's response to the global financial crisis, specifically the payment of money directly to households. It was argued that the federal government lacked constitutional power to do so. Though a majority of the Court validated the measure, it took a narrow view of section 81. It would be necessary, according to the Court, for the Commonwealth to point to a head of power to support the spending. In other words, in contrast to what had previously been decided, section 81 itself was not a head of power. The Court validated the measure on the basis of the inherent nationhood power – this was a spending measure that, for practical reasons, could only be implemented by the Commonwealth. In other words, the Commonwealth both 'won' and 'lost' in this case. It won because the challenge to the specific measure was dismissed. But it lost because the High Court took a much narrower view of the scope of section 81.

With respect, this decision was regrettable, potentially removing the 'fluidity' in Australian constitutional arrangements, whereby the Commonwealth could indirectly implement its policy objectives through the spending of money, even in areas over which it lacked direct legislative power. However, with the benefit of time, it can now be seen that this concern was misplaced. Frankly, the decision has had little practical effect. The Commonwealth continues to spend money in areas over which it has little or no direct legislative power. Sometimes this

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[75] *Australian Constitution* s 81.
[76] *Australian Constitution* s 96.
[77] *South Australia v Commonwealth* (1942) 65 CLR 373 ('*First Uniform Tax Case*').
[78] *Attorney-General* (Vic) *ex rel Dale v Commonwealth* (1945) 71 CLR 237 (Dixon, Starke and Williams JJ).
[79] Ibid (Latham CJ and McTiernan J).
[80] *Combet v Commonwealth* (2005) 224 CLR 494.
[81] (2009) 238 CLR 1.

money is channelled through the states pursuant to section 96, sometimes not. The reality is that it is unlikely that a recipient of a government appropriation (or a person or organisation that might hope to be a recipient in future) will challenge the constitutional validity of a spending measure. Nor would others typically have a sufficient concern with such spending as to mount a challenge.[82]

Costs of federalism

An Access Economics report prepared for the Business Council of Australia considered the costs of federalism.[83] It estimated that it was $9 billion per year, or more than $1,000 per household. This estimate is considered conservative, focussing on the costs to the individual, rather than business costs.[84] This regulation severely impacted business. The report highlighted the 8 different systems of occupational health and safety systems, different payroll tax systems, and different environmental laws. Business licensing varies across states, creating barriers to free movement of families and individuals, and inefficiency.[85] The report quoted a CEO of a large corporation who highlighted the significant cost of complying with multiple regulatory regimes. The CEO claimed that the company was growing by 15% per year, but this would double if the regulatory burden were eased. They estimated the company would have paid between $8 million and $10 million more in tax, and earned between $24 million and $30 million more for investment. If the regulatory burden were streamlined, this would save them about 0.75% of their revenue each year. Another study estimated the costs of Australian federalism at $20 billion per year.[86]

Benefits of federalism

Adherents of federalism point to the possibility of it acting as a check on power – it disperses government power, rather than concentrating it in one body. This provides checks and balances on the exercise of government power, in a way that is potentially liberty enhancing. It might provide greater choice and diversity. Families and individuals might move to a jurisdiction that has the balance between services and tax that suits them best, and a federation of clearly differentiated states in that regard might present a range of options. It is suggested that state governments might be 'closer to the ground', and more in touch with the wishes and will of the people, permitting them to target service delivery more effectively. It is said that federalism encourages competition among states, hopefully providing incentive for state governments to perform at a high level.[87]

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[82] The *Pape* decision was unusual, in that the challenge was commenced by a constitutional law academic who personally argued the case in the High Court.

[83] Business Council of Australia, *Reshaping Australia's Federation: A New Contract for Federal-State Relations, Appendix 2, The Costs of Federalism* (2006).

[84] Major components of this figure include inefficient state taxes ($2.8 billion), overspending by states ($2.2 billion), deadweight loss of unnecessary state spending ($900 million), overlap and duplication between levels of government ($900 million) and costs of administering grants to the states ($860 million).

[85] Anthony Gray, 'State-Based Business Licensing in Australia: The *Constitution*, Economics and International Perspectives' (2009) 14(2) *Deakin Law Review* 165.

[86] Mark Drummond, 'Costing constitutional change: estimating the costs of five variations on Australia's federal system' (2002) 61(4) *Australian Journal of Public Administration* 43.

[87] Anne Twomey and Glenn Withers, *Federalist Paper 1, Australia's federal future: delivering growth and prosperity, A report for the Council for the Australian Federation* (Report, April 2007) 8–17.

Reform of Australian federalism

There have been calls for greater transparency in the Australian federation, so that individuals are aware of which level of government is responsible for what. At present, the lines are blurred, making it difficult to hold government accountable for particular policies. In an ideal world, Australia would have a mature debate regarding which level of government should be responsible for particular areas of policy, and areas where there is expected to be co-operation between the federal and state governments. Given that the nation has changed significantly since the 1890s, in the direction of economic and social integration, it is expected that the federal government might be given more areas of responsibility than were allocated to them when the Constitution was first drafted. For example, the federal government might have regulatory power over commerce generally (at present, it is limited to corporations, and to interstate and overseas trade and commerce). This would reduce the scope for multiple sets of regulation impacting on business, potentially harmonising areas such as occupational health and safety, business licensing, payroll tax, and discrimination law, in a way that would reduce the regulatory burden on business. This harmonisation has already occurred to the extent of creating a national corporate law and national industrial relations system, but more work is required. The Constitution's apparently strict distinction between, on the one hand, interstate and overseas trade and commerce and, on the other intrastate trade and commerce has become particularly difficult to continue to draw, given the realities of how business is structured, when such a strict distinction is typically not made.

Standard treatises on fiscal federalism suggest that federal governments must be responsible for (at least) distribution and stabilisation functions.[88] The former involves spending on the so-called safety net of health, education, social services, housing, and distribution of wealth. The latter involves economic management, including price stabilisation (low inflation), economic growth and employment. The Constitution should reflect the federal government's control over these areas.

Similarly, there would be a strong argument for giving the Commonwealth more direct power over health and education. This would reflect what is already occurring indirectly through funding agreements with the states. The Commonwealth would have direct power over aged care and disability support services. It would also be given direct power over the environment, making it easier to develop and enforce national climate change policy, rather than relying indirectly on powers such as the external affairs power.

The Commonwealth presently has control over income tax, corporate tax and goods and services taxation in Australia. This should continue. It has been noted there are strong administrative efficiencies in having the federal government collect taxation.[89] Australia is relatively highly reliant on income tax to raise revenue, and relatively less reliant on goods and services taxation. The nation might consider reducing reliance on income tax, and increasing taxes on goods and services. A detailed examination of this suggestion is beyond the scope of this paper. However, others have documented the positive economic effects of reducing income tax, including increasing the supply of labour, and bolstering investment.

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[88] Wallace Oates, *Fiscal Federalism* (Harcourt Brace Jovanovich, 1972). There is less agreement on which level of government should be responsible for the allocation function, concerning the allocation of resources towards their most efficient use.

[89] Department of the Prime Minister and Cabinet, *Reform of the Federation Green Paper* (2015).

A shift to goods and services taxation could also reduce consumption and increase the incentive for saving and investment, in a way that is economically beneficial.[90] These taxes are generally efficient, compared with stamp duty, income tax and corporate tax, being less distortionary of economic activity.[91] There is a debate about the extent to which goods and services taxation is regressive.[92] If it is accepted that it is, there are obviously means available to compensate those disproportionately impacted. We might also consider (federally-administered) death duties and/or super profits tax.[93]

The states currently levy highly inefficient taxes, such as stamp duty.[94] States must review their existing taxes, with a view to reducing their inefficiency. They might consider, for example, a shift from stamp duty to land tax, which previous New South Wales Governments have flagged. Land tax is typically regarded as more efficient than stamp duty, which acts as a disincentive for the movement of goods to more efficient uses. Further, payroll tax may act as a disincentive to employ individuals.

Conclusion

The majority decision in *Vanderstock* should be commended for removing a longstanding anomaly in our constitutional jurisprudence. Prior to the decision, there was a fundamental disjunct between the purpose of the section accepted by the High Court since 1949 and the exclusion of consumption taxes from the definition of excise. The High Court's exclusion of consumption taxes from the definition worked to undermine the purpose of the section as identified and accepted by the Court. This anomaly is finally gone. Apart from that, the majority did not make substantive changes to the law as it was understood to be prior to *Vanderstock*. In this light, expressed fears by some that the decision will radically re-shape the federation, or that the future of federation itself is in peril, should be treated with great caution. The most recent previous decisions on section 90 had expressly left open the question whether consumption taxes were excises or not. The matter can hardly have been considered settled. Thus, it is incorrect (respectfully) to represent these cases as having represented a 'settlement' or 'end of journey' which *Vanderstock* somehow upended. These previous decisions had, though, settled upon a purpose of section 90, a purpose basically accepted since 1949. Members of the dissent in *Vanderstock* refuse to accept this purpose. To that extent, at least, they cannot have regarded these previous decisions as reflecting a settlement. And respectively, we have seen the use in the past of distinctions between direct

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[90] Dale Jorgensen and Peter Wilcoxen, 'The Economic Impact of Fundamental Tax Reform' in George Zodrow and Peter Mieszkowski (eds), *United States Tax Reform in the 21st Century* (Cambridge University Press, 2002) 73 (substituting sales tax for income tax would increase investment by 17%); Erin Engen and William Gale, 'The effects of fundamental tax reform on saving' in Henry J Aaron and William G Gale (eds) *Economic Effects of Fundamental Tax Reform* (Brookings Institution Press, 1996) 84 (shifting to a national consumption tax would increase national savings by nearly 1% GDP).

[91] John Freebairn, 'A better and larger GST?' (2011) 22(3) *The Economic and Labour Relations Review* 85, 86. Here it was noted that the Henry Review found the welfare cost of the GST in Australia at 8c per dollar, compared with 68c in the dollar for stamp duty on insurance, 44c for corporate tax, 35c for stamp duty on conveyancing, and 25c for income tax on labour.

[92] David Gamage and Darien Shanske, 'Tax cannibalization and fiscal federalism in the United States' (2017) 111(2) *Northwestern University Law Review* 295; Robin Cooper Feldman, 'Consumption taxes and the theory of general and individual taxation' (2002) 21(3) *Virginia Tax Review* 293, 341; Neil Warren, Ann Harding and Rachel Lloyd, 'GST and the Changing Incidence of state taxes: 1994–1995 to 2001–2002' (2005) *eJournal of Tax Research* 114, 130; Anthony Gray, 'Consumption taxes and section 90 of the Australian Constitution' (2023) 38(2) *Australian Tax Forum* 305, 322–4.

[93] *Australia's Future Tax System* (Henry Review) recommended the introduction of a so-called super profits tax on the mining industry.

[94] Robert Albon, 'The efficiency of state taxes' (1997) 30 *Australian Economic Review* 405.

and indirect in Australian constitutional law. It was abandoned in the context of section 92 interpretation. It should not find a new place in section 90 jurisprudence. We forget the lessons of history at our peril. And resort to scant evidence of what the founding fathers might have meant, but did not actually express in the Constitution, regarding section 90 are not convincing. The orthodoxy since the *WorkChoices* decision is that, at the very least, such evidence is not controlling in terms of constitutional interpretation. And there is evidence that the founding fathers themselves did not think it would be.

At a broader level, Australia does need a deep conversation about federal fiscal reform. It is suggested that this involves a move from less efficient to more efficient taxes. There should be less reliance on corporate tax and income tax, and more on goods and services type tax. Inefficient state taxes, particularly stamp duty and also payroll tax, should be the subject of serious reconsideration. It would be much better to replace these with more efficient taxes. Super-profits taxes and death duties might also be considered. It would be necessary to consider compensation (which the federal government would be suitable to provide) to protect the vulnerable from any changes to our tax system. But for too long Australia has had 'make-do' constitutional arrangements, which most would not consider to be desirable, regardless of the criteria used for assessment. In an ideal world, there would be a constitutional reset, with a modern view of the allocation of responsibilities between the federal government and sub-national governments given the world we live in today, not that which existed in the 1890s, and then provision of appropriate taxation levers to carry out those responsibilities, with a hope that national and sub-national governments could work together for the benefit of the nation.

Compulsory voting, political legitimacy and public reason in Australian democracy

Matteo Bonotti*

Introduction

Compulsory voting is currently adopted in around 20 to 30 countries around the world.[1] In Australia, it was introduced at the federal level in 1924 and employed for the first time in a national election in 1925, having been previously already adopted in Queensland in 1915. Following its introduction at the federal level, compulsory voting was gradually also adopted within all the other subnational jurisdictions. This paper focuses on compulsory voting in Australia. However, it does not engage with the history of compulsory voting or the specific political dynamics that led to its adoption and which have contributed to its continuous use up to this day. Instead, it focuses on the justification for compulsory voting, offering a novel perspective on why compulsory voting is desirable, and why, more specifically, it is beneficial to Australian democracy given the latter's distinctive features.

Justifying compulsory voting is, of course, not a new endeavour. There are already a number of arguments in political theory that support this practice, with 3 of them being particularly prominent in the literature. Perhaps the most influential one is the idea that compulsory voting contributes to greater *democratic representativeness*.[2] This argument starts from the assumption that turnout under voluntary voting is normally lower among members of more disadvantaged groups (in terms of class, ethnicity, gender, etc.). Therefore, compulsory voting is considered important and valuable by many precisely because it helps to ensure the members of disadvantaged groups vote and, therefore, that their voices are heard during the democratic process. A second important argument is that compulsory voting facilitates *coordination* among like-minded citizens.[3] When voting is voluntary—the argument goes—people who believe in the same values or who have similar interests may often be unable to coordinate and ensure that they all vote in order to advance their interests. This is more likely to occur, once again, among members of disadvantaged groups. Indeed, members of privileged groups normally possess the financial resources and networks that enable them to

* This paper was presented as part of the Senate Lecture Series on 26 July 2024.

1 S Birch, *Full Participation: A Comparative Study of Compulsory Voting*, Manchester University Press, Manchester, 2009; M Bonotti and P Strangio, *A Century of Compulsory Voting: Genesis, Impact and Future*, Palgrave Macmillan, Singapore, 2021.

2 A Lijphart, 'Unequal participation: Democracy's unresolved dilemma', *American Political Science Review*, 1997, 91(1):1–14.

3 L Hill, 'Low voter turnout in the United States: Is compulsory voting a viable solution?', *Journal of Theoretical Politics*, 2006, 18(2):207–232.

coordinate and mobilise, and thus influence politicians (for example, through lobbies or other channels). Members of disadvantaged groups are instead less likely to possess these resources, and therefore often lack the ability to coordinate and mobilise, resulting in many of them deciding not to vote. Compulsory voting helps address this dilemma, by providing all citizens with the assurance that like-minded citizens will also vote, thus resolving the coordination problem. Finally, a third influential argument is centred around the idea of *fairness*.[4] According to this argument, not voting (which is an option under voluntary systems) is unfair. When our fellow citizens make the effort to vote in order to sustain democratic institutions, we treat them unfairly if we decide not to vote, de facto acting as free riders. Once again, compulsory voting helps to address this problem, by ensuring that people do not act in an unfair way towards their fellow citizens.

This paper, drawn from a longer piece in an edited collection on compulsory voting,[5] defends a different argument. It is based on the idea of public reason, which is a very influential idea in political theory, a branch of political science. The paper first introduces the concept of public reason to explain why it is important for the political legitimacy of laws and policies in a liberal democracy. It then argues that in parliamentary democracies like Australia, compulsory voting is crucial for the promotion of public reason, and that it can therefore contribute to the political legitimacy of political rules. In defending this argument, the paper relates the idea of public reason to the aforementioned democratic representativeness, coordination and fairness arguments. Finally, the paper zooms in on the relationship between compulsory voting and public reason by unpacking the mechanisms through which the former can contribute to the latter.

What is public reason?

The idea of public reason was first introduced by John Rawls, arguably the most important political theorist of the 20th century.[6] According to Rawls and other defenders of public reason (who normally call themselves 'political liberals'), laws and policies can only be politically legitimate in a diverse society if they are publicly justified by those who promote and implement them, rather than simply being imposed upon citizens through coercion. Majority rule, however, is not sufficient to guarantee public justification. Instead, those who defend and wish to implement laws and policies—especially politicians and public officials—should provide arguments for those measures, for example in parliament or during electoral campaigns. Crucially, such arguments should appeal to the public good of all citizens rather than to the sectarian interests of a specific party or faction. For example, a politician should not defend a tax cut because this measure benefits them, their family or a specific interest group but should rather aim to explain in what ways—if any—the tax cut benefits society as a whole, for example, by improving economic growth, which will benefit all members of the political community. Vice versa, a politician who defends tax increases for the wealthy should not do so based on the idea that this measure will benefit them or members of certain social groups. Instead, public reason demands that the justification for the policy should appeal to

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4 LM Umbers, 'Compulsory voting: A defence', *British Journal of Political Science*, 2020, 50(4):1307–1324.

5 M Bonotti, 'Public reason, compulsory voting and Australian democracy', in Bonotti and Strangio (eds), *A Century of Compulsory Voting in Australia: Genesis, Impact and Future*, pp 189–211.

6 J Rawls, *Political Liberalism* (expanded edition), Columbia University Press, New York, 2005.

the well-being of the whole political community, for example, the view that more taxes allow the state to provide more social services, and these ultimately benefit all citizens in some way.

In summary, public reason demands that there should always be an effort to formulate the justification for policies and laws by appealing to the public good, or what Rawls and other political liberals call 'public reasons'. These kinds of reason relate to widely endorsed values such as individual rights and liberties, or equality of opportunity.[7] These are values which all citizens arguably endorse, regardless of their political convictions and personal preferences. By appealing to these and similar values when justifying their proposed laws and policies, citizens (and especially politicians and public officials) display their commitment to the public good. Furthermore, public reasons also include scientific evidence. That is, we expect laws and policies to be justified based not only on widely shared values but also on scientific evidence—laws and policies grounded in false information and incorrect facts are unjustified and, therefore, politically illegitimate.

One of the key implications of public reason is that citizens, and especially politicians and public officials, should not justify laws and policies by appealing to controversial values or doctrines. Imagine, for example, a politician defending the implementation of a specific law based on Catholicism or Islam. In liberal democratic societies like Australia, there are citizens who endorse these religious doctrines but also, crucially, citizens who follow other religions or no religion at all. It would therefore be unfair to impose upon all citizens laws and policies based on religious views that most of them reject. More specifically, defenders of public reason argue, doing so would imply failing to treat one's fellow citizens as free and equal persons. This is because, according to political liberalism, there is a presumption in favour of freedom which applies equally to all citizens: all citizens, that is, are naturally free from others' authority, therefore any law or policy imposed upon them is a limitation of that freedom which requires a justification, more specifically a public reason.[8]

The idea of public reason, however, is not without critics. Indeed, some argue, asking all citizens to refrain from appealing to their controversial values and doctrines when justifying laws and policies—what is often referred to as the *direct* model of public reason[9]—is very demanding. For example, asking religious citizens not to appeal to their religious beliefs when they defend their policy positions or when they explain why they voted for a certain party or candidate would be very limiting in a liberal democracy. According to some, it would almost undermine religious people's integrity, by asking them to separate their private selves from their public selves, so to speak. In response to this very common critique, a second *indirect* understanding of the implications of public reason focuses more on politicians and public officials, rather than on citizens generally. According to this interpretation of public reason, ordinary citizens should be free to use whichever arguments they want to use to justify their political positions whereas politicians and public officials (especially elected representatives) should use public reasons to justify the policies and laws they defend in parliament or other

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7 Rawls, *Political Liberalism*.

8 J Quong, '[Public reason]', in EN Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer Edition), 2022, accessed 2 February 2025.

9 K Vallier, *Liberal Politics and Public Faith*, Routledge, New York, pp 50–51.

institutional forums.[10] For example, if constituents support a certain law because of some religious or other controversial reason, it is the duty of their representatives (that is, of their members of parliament (MPs) to reformulate the justification for the policy in a way that appeals to the public good— for instance, by translating non-public justifications like 'this is good for those who live in this area' or 'this is good for members of a certain religious group' into public justifications such as 'this is good for Australia as a whole because of reasons x, y and z', where x, y and z should be public reasons. This is a more persuasive and inclusive approach to public reason. One of its key implications is that institutions in a society should be designed in a way that encourages this way of thinking. Indeed politicians, like any human beings, have flaws and may sometimes not feel incentivised to think and justify their preferred policies in terms of public reasons. Therefore, we should try to design institutions in a way that encourages them to do so. This paper argues that compulsory voting should be central to that institutional set-up.

Understanding Australian democracy

In order to fully understand the link between public reason and compulsory voting, however, it is necessary to understand first what kind of democracy Australia is. Here Rawls's work is once again useful. According to him, we can identify 2 main models of liberal democracy: what he calls 'constitutional democracies', on the one hand, and what he refers to as 'parliamentary supremacy democracies', on the other hand.[11] Constitutional democracies, Rawls argues, include countries like the United States, where there is a separation of powers and a very strong constitutional court (the Supreme Court), which has the duty to protect citizens' individual rights and liberties, and ensure that they are not violated by majoritarian decisions. '[C]onstitutional democracy', Rawls points out:

> *is dualist: it distinguishes constituent power from ordinary power as well as the higher law of the people [which is embodied in the constitution] from the ordinary law of legislative bodies. Parliamentary supremacy is rejected.*[12]

The central role played by constitutional courts in constitutional democracies is particularly evident in Rawls's analysis. Indeed, according to him, the Supreme Court represents the 'exemplar of public reason'[13] since, when scrutinising a law in view of constitutional principles, 'by applying public reason the court is to prevent that law from being eroded by the legislation of transient majorities, or more likely, by organised and well-situated narrow interests skilled at getting their way'.[14] This is a very important point. The Supreme Court helps to protect not only citizens' rights and liberties but also public reason, by ensuring that political rules are publicly justified. Consider, for example, the 'Lemon test', which the Supreme Court employs in order to evaluate the compliance of laws and policies with the Establishment Clause of the First Amendment. The test demands that laws and policies

[10] M Bonotti, *Partisanship and Political Liberalism in Diverse Societies*, Oxford University Press, Oxford, 2017, pp 124–151.
[11] Rawls, *Political Liberalism*, pp 233–235.
[12] Rawls, *Political Liberalism*, p 233.
[13] Rawls, *Political Liberalism*, p 231.
[14] Rawls, *Political Liberalism*, p 233.

should have a secular rationale, should not advance or undermine religion, and should not involve government involvement in religious matters.[15]

Australia, however, is different and falls under the parliamentary supremacy democracy category. According to Rawls, this kind of regime is grounded in the view that 'parliamentary supremacy with no bill of rights at all is superior to our [that is, the US] dualist regime. It offers firmer support for the values that higher law in the dualist scheme tries to secure'.[16] In this kind of democracy, the protection of individual rights and liberties is not (or, at least, not mainly) guaranteed by a constitutional court but by democratic monitoring. In other words, it is the democratic system, and especially the parliament, that has the task of protecting citizens' rights and liberties. This understanding of Australian democracy is widely endorsed. Consider, for example, the following statement by Lisa Hill, an influential scholar of compulsory voting:

> *The absence of entrenched rights in the Australian Constitution reflected a belief on the part of the framers that the law produced by a popularly elected parliament was the best safeguard of rights.*[17]

Likewise, according to Haig Patapan:

> *[t]he absence of entrenched Bills of Rights and rights-based limitations on the exercise of power would seem to suggest that the colonists were unconcerned with the protection of civil liberties. In fact, the common law was regarded as one of the most important measures for the protection of immemorial rights and liberties. Though common law rights were subject to parliamentary control and therefore could be limited for the public good, this was not considered to pose a major threat to liberty because Parliament itself was seen as a manifestation and defence of another form of liberty—the right to be represented and participate, through voting, in the formulation of laws.*[18]

A similar view can also be found in the words of Edward Mann, a Nationalist member of the Australian House of Representatives who, when supporting the adoption of compulsory voting in the House of Representatives in 1924, claimed: 'Individual liberty is less likely to be invaded when the legal control is that exercised by the real majority of the people'.[19] To summarise, in Australia the protection of rights and liberties is guaranteed not by a constitutional court that operates alongside—and, somehow, in opposition to—democratic institutions but by the parliament, whose members are democratically elected. This guarantees the democratic monitoring of individual rights and liberties.

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[15] *Lemon v Kurtzman*, 403 U.S. 602 (1971).

[16] Rawls, *Political Liberalism*, p 234.

[17] L Hill, 'Compulsory voting and the promotion of human rights in Australia', *Australian Journal of Human Rights*, 2017, 23(2): 188–202.

[18] H Patapan, *Judging Democracy: The New Politics of the High Court of Australia*, Cambridge University Press, Cambridge, 2000, p 42.

[19] E Mann, quoted in J Brett, *From Secret Ballot of Democracy Sausage: How Australia Got Compulsory Voting*, Text Publishing, Melbourne, 2019, p 136.

Public reason and compulsory voting

The central argument of this paper is based on the understanding of Australian democracy presented in the previous section. More specifically, the argument is that in parliamentary supremacy democracies like Australia, compulsory voting is desirable and citizens have a duty to vote—regardless of which specific reasons they vote based on—in order to contribute to the political and institutional democratic process through which a) their individual rights and liberties are protected and b) public reason is promoted while non-public reasons are excluded from the public justification of laws and policies. Let us unpack this argument.

When all citizens vote, they all contribute to electing their MPs. As previously argued, it is the latter's task to engage in the process of public reasoning in order to ensure the laws and policies are justified by appealing to public reason and the public good, rather than controversial reasons and sectarian interests. By voting, citizens enable this system to function and to filter out non-public reasons from the process of public justification. How does this work exactly? To answer this question, it is necessary to return to the 3 arguments for compulsory voting briefly discussed in the introduction.

The first argument, recall, was the idea that compulsory voting helps to ensure that a political system is more representative, because when vote is voluntary it is normally members of more disadvantaged groups who do not vote. Compulsory voting therefore ensures that members of these groups do vote, and that their interests and voices are heard during the democratic process. There is evidence that this normally leads to more egalitarian and progressive policies—for example, in Australia there is evidence that the introduction of compulsory voting was soon followed by 'dramatic increases in pension spending'.[20] But what are the implications of the democratic representativeness argument for public reason? When all citizens vote, more voices and interests are represented in parliament, not by citizens directly, of course, but by their representatives. As a result, the latter will be able to act on behalf of their constituents by exercising 'justificatory pressure'[21] on other legislators, especially those who are members of a governing majority. More specifically, when members of a governing party (or coalition) defend their proposed laws and policies in parliament, compulsory voting ensures that they will be subject to the opposition, criticisms and challenges of a more diverse range of MPs, who represent a more diverse range of citizens—including members of disadvantaged groups—than under voluntary voting. These challenges and criticisms will often manifest in the form of demands for public reasons.

But there is also a second way in which compulsory voting can contribute to the process of public reasoning. This relates to the second argument for compulsory voting introduced earlier, that is, the coordination argument, according to which compulsory voting helps like-minded people—particularly, once again, members of disadvantaged groups—to coordinate their mobilization efforts and ensure that their interests are advanced and heard. This coordination can help generate a critical mass of citizens which will be more effective

[20] A Fowler, 'Electoral and policy consequences of voter turnout: evidence from compulsory voting in Australia', *Quarterly Journal of Political Science*, 2013, 8(2):159–182.

[21] Bonotti, *Partisanship and Political Liberalism in Diverse Societies*, p 147.

than isolated and uncoordinated individual citizens in influencing representatives, contesting their policy decisions, and demanding public reasons for those policies.

Third, and finally, compulsory voting can also contribute to public reason in a way that relates to the fairness argument. This, recall, was the idea that by not voting a citizen is being unfair towards their fellow citizens and, therefore, that compulsory voting prevents this kind of free riding by compelling all citizens to contribute to the well-being of the democratic system. The implication of the fairness argument for public reason is the following. By voting, citizens contribute to public reasoning by ensuring that there is a representative democratic system in which non-public reasons are filtered out and in which the interests of all citizens are taken into account, since legislators are constantly under justificatory pressure to provide public reasons for their proposed policies. Under voluntary voting, a citizen can free ride on other citizens' contribution to this process. Compulsory voting prevents this kind of free riding, by ensuring that all citizens participate in the process of public reasoning.

In summary, in countries like Australia characterised by parliamentary supremacy, compulsory voting can play a key role in sustaining the process of public reasoning through which elected representatives provide public justifications for laws and policies, and in ensuring that political decisions take into account the interest and values of a broad variety of citizens. This will result in laws and policies that are more politically legitimate in view of societal diversity.

Compulsory voting, democratic monitoring and accessible reasons

This section of the paper zooms in on the idea that compulsory voting can help citizens to contribute to the process of public reasoning in ways that align with the 3 main arguments for compulsory voting already present in the literature. Compulsory voting encourages greater monitoring (that is, than voluntary voting) of the reasons provided by legislators for their proposed laws and policies. However, what does this mean in practice? Answering this question requires introducing a further aspect of public reason, which has received particular attention in recent years. This aspect concerns the so-called 'structure' of public reason.[22] Debates regarding the structure of public reason have focused on understanding what, exactly, makes certain reasons 'public'. Here opinions among scholars of political liberalism are divided and we can identify 3 main positions.

According to the first one, public reasons are reasons which are *shared* among citizens, in other words reasons that are exactly the same for all citizens.[23] The second position is endorsed by those who believe that public reasons do not need to be shared but only *accessible*, that is, that they may differ between citizens as long as they are grounded in 'common evaluative standards' that all citizens share.[24] Such standards may include basic political values (for example, individual rights and liberties) and epistemic standards (for example, guidelines of scientific inquiry) that all citizens of a liberal democracy endorse.[25]

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[22] Quong, 'Public Reason'.

[23] G Badano and M Bonotti, 'Rescuing public reason liberalism's accessibility requirement', *Law and Philosophy*, 2020, 39(1):35–65.

[24] Vallier, *Liberal Politics and Public Faith*, p 108.

[25] Badano and Bonotti, 'Rescuing public reason liberalism's accessibility requirement'.

As long as reasons are based on these standards, they are public even if they vary between different individuals and groups. A third position is that public reason does not require any shared or accessible reasons but only *intelligible* reasons. These are reasons which different citizens endorse based on their own personal non-shared evaluative standards.[26] For example, these may include Catholic reasons for Catholics, Islamic reasons for Muslims, Jewish reasons for Jews, etc. If a law or policy is based on intelligible reasons that members of each of these (and other) groups in society can endorse, then it meets the standards of public reason even in the absence of shared or accessible reasons.

Why does the structure of public reason matter for compulsory voting? For a start, it is important to stress that neither the shareability view nor the intelligibility view offers a persuasive account of public reason.[27] The shareability view is clearly too demanding, since in diverse societies like Australia, there are very few (if any) reasons that are shared among all citizens. After all, what kinds of reasons could Catholics, Jews, Muslims, Hindus, Marxists, atheists and libertarians (and others) share? Therefore, based on the shareability view, very few (if any) policies and laws would be justified. Conversely, the intelligibility view is insufficiently demanding, to the extent that it risks rendering the process of public reasoning self-defeating. Indeed, according to this view, most if not all reasons for laws and policies are acceptable. But this also means that most if not all reasons could be used to challenge proposed legislation, thus undermining its public justification and political legitimacy. In this case too, therefore, only a very limited number of laws and policies would be publicly justified. The accessibility view of public reason strikes a balance between these 2 extremes. It does not demand that all citizens share the same reasons but, at the same time, it does require that citizens only appeal to reasons that are based on shared standards. This has a twofold advantage. On the one hand, it helps rule out idiosyncratic controversial reasons from the process of public reasoning, thus preventing those holding such reasons from de facto vetoing political decisions. On the other hand, it still allows members of the public to put forward reasons that may not be shared by their fellow citizens, but which the latter can at least see as grounded in evaluative standards (that is, principles and values) they *do* share, thus resulting in a kind of second-order consensus.[28]

Compulsory voting can play a pivotal role under the accessibility view of public reason. First, it can help ensure that the shared evaluative standards underlying public reasons in this conception—for example, basic rights and liberties as well as guidelines of scientific inquiry—are not violated. More specifically, by producing a more diverse legislature, compulsory voting can provide a stronger incentive (that is, than voluntary voting) for political representatives to monitor one another's compliance with those shared evaluative standards. To put it in simple terms, if a parliament represents, say, 50 social groups instead of 20, there will be greater scrutiny (by the representatives of all those groups) of government legislation and its compliance with accessibility standards. When those standards are violated, there is

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[26] Vallier, *Liberal Politics and Public Faith*, p 106. See also G Gaus, *The Order of Public Reason*, Cambridge University Press, Cambridge, 2010; G Gaus and K Vallier, 'The roles of religious conviction in a publicly justified polity', *Philosophy and Social Criticism*, 2009, 35(1–2):51–76.

[27] Bonotti, *Partisanship and Political Liberalism in Diverse Societies*; Badano and Bonotti, 'Rescuing public reason liberalism's accessibility requirement'.

[28] Bonotti, *Partisanship and Political Liberalism in Diverse Societies*; Badano and Bonotti, 'Rescuing public reason liberalism's accessibility requirement'.

likely to be criticism of those infringements emerging from a diverse range of legislators (as representatives of a diverse range of societal groups and interests).

Second, it should be reasserted that the accessibility conception of public reason allows a diversity of reasons to enter the process of public justification, as long as they are based on shared evaluative standards. A key way in which reasons may differ among citizens (while being grounded in shared standards) is by drawing on different interpretations of shared political values. For example, different citizens may disagree regarding what equality of opportunity or freedom of religion or freedom of speech (to name only a few shared political values in liberal democratic societies) entails. In the presence of compulsory voting, politicians have stronger incentives than under voluntary voting to be attentive to this diversity of interpretations, including the interpretations ascribable to members of less privileged social groups, which compulsory voting helps include in the democratic process. For instance, citizens may agree that freedom of speech is important but disagree regarding what it involves or requires. Indeed, as Teresa Bejan points out, free speech can be understood either as '*isegoria* … [that is,] … the equal right of citizens to participate in public debate in the democratic assembly…[or as] *parrhesia*, the license to say what one pleased, how and when one pleased, and to whom'.[29] The latter interpretation is likely to entail very limited government interference with what citizens can say and hear, whereas the former may justify the regulation of various forms of expression that can often arguably result in certain individuals and groups being silenced or marginalised in public debate. These may include pornography and hate speech as well as campaign donations to parties and politicians by powerful individuals and corporations. Likewise, in the case of equality of opportunity (another shared political value in liberal democracies),[30] diversity of opinions may be even more significant. Citizens may hold different views, for instance, regarding whether equality of opportunity should be purely 'formal'—that is, entailing 'careers open to talent'[31]—or 'fair',[32] which demands that 'those who have the same level or talent and ability and the same willingness to use these gifts should have the same prospects of success *regardless of their social class of origin*'.[33] Accessibility allows scope for these and other similar disagreements regarding how shared political values are interpreted. The diversity of views present in the legislature as a result of compulsory voting can help ensure that none of these interpretations is simply dismissed by those in power, perhaps because it threatens their interests. For example, if members of a marginalised social group believe that equality of opportunity should be 'fair' rather than 'formal', it is more likely under compulsory voting that their interpretation, channelled into parliamentary debates by those legislators who represent their interests, is given a fair hearing during public reasoning, thus exercising justificatory pressure on those in power.

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[29] T Bejan, 'The two clashing meanings of "free speech": today's campus controversies reflect a battle between two distinct conceptions of the term—what the Greeks called isegoria and parrhesia', *The Atlantic*, 2 December 2017, accessed 2 February 2025.

[30] Rawls, *Political Liberalism,* p 224.

[31] G Elford, 'Equality of opportunity', in EN Zalta and U Nodelman (eds), *The Stanford Encyclopedia of Philosophy* (Fall 2023 Edition), accessed 2 February 2025.

[32] J Rawls, *A Theory of Justice* (revised edition), Harvard University Press, Cambridge, MA, 1999, p 63; J Rawls, *Justice as Fairness: A Restatement*, E Kelly (ed), Belknap Press, Cambridge, MA, 2001, pp 43–44.

[33] Rawls, *Justice as Fairness: A Restatement*, p 44, emphasis added.

Third, the accessibility view of public reason also implies that different citizens may assign different weight (that is to say, that they may rank in different ways) shared political values. For instance, as Jonathan Quong explains,[34] 2 citizens may agree that both religious liberty and non-discrimination in employment are important values in a liberal democratic society but disagree on whether the Catholic Church should be allowed to hire male priests only. In this case, Quong argues, the 2 citizens do not necessarily disagree as to whether religious liberty and non-discrimination in employment should be protected—it can be assumed that both of them consider both values fundamental in a liberal democracy—but only as to whether the former or the latter value should be prioritised. More specifically, if religious liberty is prioritised, the implication is that the Catholic Church should not be compelled by the state to hire female priests. If, however, non-discrimination in employment is assigned greater weight in the ranking, then one might conclude that the state can legitimately force the Catholic Church to employ female priests. Both arguments, Quong argues, are consistent with public reason, as long as both citizens recognise the importance of both of the shared political values involved, and provide 'a plausible explanation as to why one public value ought to be prioritised over the other'.[35] By generating a more diverse legislature than its voluntary counterpart, compulsory voting can therefore help ensure not only that different interpretations of shared basic political values are heard but also that different ways of balancing those (differently interpreted) values are also taken into account during public reasoning among political representatives. When a specific balancing reflects the views of a marginalised group, it is less likely to be dismissed by those in power if there are legislators who speak on behalf of that group—an occurrence that is more likely under compulsory voting than under voluntary voting.

Conclusion

Public reason plays a key role in ensuring that laws and policies in diverse liberal democracies are publicly justified and legitimate. This paper has argued that in parliamentary supremacy democracies like Australia, compulsory voting helps sustain the indirect process of public reasoning through which elected representatives provide public justifications for their proposed laws and policies. More specifically, by producing a more diverse legislature, it puts legislators under a greater pressure to take into account a broad range of societal perspectives, interests and demands, resulting in a more inclusive process of public reasoning and, therefore, in more legitimate laws and policies.

[34] Quong, *Liberalism Without Perfection*, p 205.
[35] Quong, *Liberalism Without Perfection*, p 209.

A century of compulsory voting and the character of Australian democracy

Paul Strangio*

Introduction

Australia is a nation bashful about extolling its democratic achievements. How else can we explain that this month marks the centenary of the most extraordinary feature of the country's democratic architecture and yet the anniversary is slipping by with scant comment nor reflection.[1] I refer, of course, to compulsory voting, which was legislated in the federal Parliament in July 1924. Maybe the inattention is also due to the fact that the practice is second nature after 100 years. Habituated to being compelled to participate in elections, we are inured to its specialness.

Compulsory voting is not unique to Australia. Calculating how many countries have compulsory voting is notoriously difficult since, in around half the nations where the practice exists in name, it is not enforced. However, most estimates put the figure in the vicinity of 20 to 30.[2] If not unique, Australia's experience of compulsory voting is distinctive for a number of reasons. First, its emergence in the early 20th century was consistent with the nation's larger tradition of precocious innovation and ready experimentation when it came to electoral institutions and practices.[3] This record is typically traced back to the pioneering in the 1850s of the secret ballot (sometimes called the 'Australian ballot') in a number of the Australian colonies and the embrace of other advanced democratic measures in the second half of the 19th century. These included manhood suffrage, payment of members of

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1 After I wrote an article marking the anniversary (see P Strangio, 'Compulsory voting in Australia is 100 years old. We should celebrate how special it makes our democracy', *The Conversation*, 22 July 2024, I was invited to do several radio interviews on the topic. There was also some belated recognition of the significance of the centenary and compulsory voting's central part in the nation's distinctive electoral system. For example, G Brandis, 'Australia's democratic wonderland. A vote of thanks to one rather strange man', *Sydney Morning Herald*, 25 August 2024, accessed February 2025.

2 An illustration of the variability in estimates of the number of countries with compulsory voting can be found in respective studies by S Birch, *Full participation: A comparative study of compulsory voting*, Manchester University Press, Manchester, 2009, pp 1, 36; I McAllister, The Australian voter: 50 years of change, UNSW Press, Sydney, 2011, p 20. Birch put the figure at 29 whereas McAllister identified 19. More recently, the Commonwealth Parliament's Joint Standing Committee on Electoral Matters inquiring into the 2016 federal election stated that 'Australia was one of only 27 countries in the world that practices compulsory voting'. See Joint Standing Committee on Electoral Matters, *Report on the conduct of the 2016 federal election and matters related thereto*, Parliament of the Commonwealth of Australia, Canberra, 2018, p 53. In their recent work, R Dassonneville, T Barbosa, A Blais, I McAllister and M Turgeon, *Citizens under compulsory voting: a three-country study*, Cambridge University Press, Cambridge, UK, 2023, p 1, agreed on the figure of 27 'countries or regions' having 'some form of compulsory voting' in 2021.

3 Among the excellent sources on that record are J Brett, *From secret ballot to democracy sausage: how Australia got compulsory voting*, Text Publishing, Melbourne, 2019; M Sawer, 'Pacemakers for the world?' in M Sawer (ed), *Elections: full, free and fair*, Federation Press, Sydney, 2001, pp 1–27.

parliament and the extension of the franchise to women, beginning in South Australia in 1894. The innovations continued in the 20th century with such things as preferential voting legislated in 1918 and non-partisan bureaucratic electoral administration. Second, Australia is alone in embracing compulsory voting among the Anglophone democracies to which it typically compares itself. The electoral systems of Britain, Canada, New Zealand and the United States (US) are all based on voluntary voting (it is compulsory to register to vote in New Zealand). Third, unlike many other compulsory voting countries, Australia does not pay lip service to its operation. Compulsory voting is enforced by electoral authorities, albeit leniently, has been strongly upheld by the courts, and is backed by a regime of sanctions for non-compliance.[4] Fourth, compulsory voting has been consistently and unambiguously successful in achieving high voter turnout. Though there has been a slight downtrend in turnout at the past 5 national elections (it hit a low of 89.8% for the House of Representatives in 2022), it has generally been in the mid-90% range since the adoption of compulsory voting a century ago. At the last election before its introduction, in 1922, turnout was 59.4%.[5] To put this turnout level in comparative perspective, it is some 30% higher than the recent average figure in countries with voluntary voting and also well above the recent average in other countries with compulsory voting systems. Further highlighting the point, turnout at the 2024 British general election was 59.7% and an estimated 59% at the 2024 US presidential election.[6] Fifth, is how strongly and consistently the public has backed the practice. Evidence from more than half a century of opinion polls and the Australian Election Study surveys show support hovering around the 70% mark.[7] Indeed, a new study of 3 places where compulsory voting exists, Australia, Belgium and Brazil, shows that support for the practice is significantly greater in Australia than in the other 2 countries.[8]

Perhaps the most singular aspect of the nation's experience of compulsory voting, however, is how seemingly impregnable is the practice if measured by its durability, the dearth of controversy over it, the consistency of its enforcement by authorities and the way it has been dutifully complied with, and supported by, citizens. Together these things make Australia an exemplar of compulsory voting internationally.

The campaign against compulsory voting

This is not to say compulsory voting has been a sacred cow in Australia. In the final decades of the 20th century and first decade of this century, there was a concerted push to end the

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[4] See G Orr, '"Choice of the manner in which thou wilt die": The Australian courts on compulsory voting', in M Bonotti and P Strangio (eds), *A century of compulsory voting in Australia: genesis, impact and future*, Palgrave Macmillan, Singapore, 2021, pp 141–164.

[5] Voter turnout figures can be found at the Australian Electoral Commission website, one theory for the recent downturn in turnout is that it is a product of the Australian Electoral Commission's success in raising voter registration levels.

[6] See respectively, G Sturge, '2024 general election: turnout', UK Parliament, House of Commons Library, 5 September 2024, accessed February 2025; Wikipedia, 'Voter turnout in United States presidential elections', accessed February 2025.

[7] S Cameron and I McAllister, *Trends in Australian political opinion: results from the Australian Election Study 1987-2022*, Australian National University in partnership with Griffith University, Canberra, 2022, p 75. Also see M Mackerras and I McAllister, 'Compulsory voting, party stability and electoral bias in Australia', *Electoral Studies*, 1999, 18(2):217–233.

[8] Dassonneville et al, *Citizens under compulsory voting*, pp 28-30. Interestingly, this study suggests that support for compulsory voting in Australia is substantially greater among women than men and among those with higher education as opposed to those without, pp 30–35.

practice from within the Liberal Party.[9] The principal torchbearer of the agitation for voluntary voting was the avowed libertarian South Australian senator, Nick Minchin. For former Senator Minchin compulsory voting was anathema:

> *…in relation to the most important single manifestation of democratic will, the act of voting, I profoundly detest Australia's denial of individual choice. It seems to me that an essential part of a liberal democracy should be the citizen's legal right to decide whether or not to vote. The denial of that right is an affront to democracy.*[10]

But Nick Minchin was far from alone in opposing compulsory voting on the conservative side of politics in this period. A survey of Coalition candidates at the 1996 election indicated that 60% favoured voluntary voting. In 1988, the Liberal Party's federal council resolved in support of voluntary voting, and that position was also held by the South Australian and Victorian divisions. At the leadership level, among those who were either on record as opposing compulsory voting or believed it ought to be reviewed were John Hewson (federal leader, 1990–1994), Nick Greiner (NSW Premier, 1988–1992), and Jeff Kennett (Victorian Premier, 1992–1999). Most promising for the advocates of voluntary voting was that John Howard, elected Prime Minister in 1996, had been on record as a critic of compulsory voting since entering the federal Parliament in 1974.[11] John Howard's opposition to the practice appeared to be partially based on the individual rights argument, but also derived from a calculation that its abolition would advantage his side of politics. This was consistent with most of the political science literature, which suggested that compulsory voting (narrowly) benefited Labor.[12]

The cause of voluntary voting was ultimately a futile one. At times its champions seemed on the cusp of progress only to be frustrated. In May 1992, early in Paul Keating's Labor government, a coalition shadow cabinet endorsed proposal for a change of policy to voluntary voting was presented to the Liberal-National joint party room. It provoked strong resistance and was subsequently referred back to the shadow cabinet by the Liberal leader, John Hewson. It did not see the light of day again. Later that year, Jeff Kennett, the Victorian Liberal opposition leader, who was on the verge of winning the premiership, abandoned plans to take a policy of abolishing compulsory voting to the October election. While he personally favoured voluntary voting, Jeff Kennett had been dissuaded from pursuing that course by the party's polling that showed overwhelming public support for maintaining the status quo. Similarly, once in office, Jeff Kennett spurned calls from the Victorian Liberal division for his government to end compulsory voting. In 1993, in South Australia, there was more promising news for abolitionists with the election of a Liberal government, led by Dean Brown, on a platform that included the repeal of compulsory voting. A bill for that purpose passed the South Australian House of Assembly in the first-half of 1994 but was narrowly defeated in the

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[9] This section draws on P Strangio, '"A lonely and quixotic battle": A short history of agitation against compulsory voting in Australia' in M Bonotti and P Strangio (eds), *A century of compulsory voting in Australia: genesis, impact and future*, Palgrave Macmillan, Singapore, 2021, pp 33–57.

[10] N Minchin, 'Voluntary voting', *Samuel Griffith Society*, 2002, 15:82.

[11] For John Howard's early statements against compulsory voting in the House of Representatives see Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 1974, 3977; 10 April 1975, 1550 (John Howard).

[12] For example, I McAllister, 'Compulsory voting, turnout and party advantage', *Politics,* 1986 21(1):89–93.

Legislative Council by the combined votes of Labor and the Australian Democrats. In 1998, another South Australian Liberal government, led by John Olsen, attempted to legislate voluntary voting, only for the bill to be left languishing in the upper house.

The election of the Howard Coalition government in March 1996 was ostensibly a fillip to the voluntary voting cause. In mid-1997, the government bloc on the Joint Standing Committee on Electoral Matters (JSCEM), which included Nick Minchin, recommended an end to compulsory voting: 'If Australia is to consider itself a mature democracy, compulsory voting should now be abolished,' they declared.[13] However, with National Party members opposed to change and with little or no prospect of the required legislation passing through the upper house, the government declined to act on the recommendation. The hopes of the abolitionists were raised again when the Coalition won control of the Senate at the October 2004 election. Nick Minchin and other supporters of voluntary voting egged on speculation that the future of compulsory voting was under question. Howard responded by dousing down the idea of imminent change, yet left the door ajar to action in the next parliamentary term. In 2005, however, with the issue causing friction within the Coalition, the prime minister decisively closed down the issue. Though restating his personal preference for voluntary voting, John Howard acknowledged that many in his government disagreed: 'I don't feel that strongly about it that I would want to change it in the face of those [opposing] views'. Nor had he found the issue a barbecue stopper: 'As I move around the country, I don't get people stopping me in the street and saying, "You've got to get rid of compulsory voting"'.[14] In short, at a point when his government was spending large amounts of political capital on one of the prime minister's idee fixes (industrial relations deregulation), John Howard was unwilling to risk Coalition discord or open up another political battle front on a matter about which the public was wholly unperturbed.

The debate on compulsory voting thereafter petered out. Moreover, the closure of the Howard era at the November 2007 election, effectively left Liberal Party champions of voluntary voting at a dead end. The surest sign that they were beaten was Nick Minchin's forlorn admission when delivering his valedictory address to the Senate in June 2011:

> *I have fought a lonely and quixotic battle to restore to Australians the legal right to choose whether or not to exercise their right to vote. I have not been able to convince even my own federal parliamentary party of the worth of that great cause.*[15]

An impregnable institution?

Why did the struggle to abolish compulsory voting in Australia conclude in meek defeat? The most fundamental reason is that, as Howard acknowledged in 2005, the public were unexercised over the matter. The near two-decade long opposition campaign spearheaded out of the Liberal Party abjectly failed to disturb voter acceptance of the system. To the contrary, Australian Election Study data indicates that support for compulsory voting had

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[13] Joint Standing Committee on Electoral Matters, Report of the inquiry into all aspects of the conduct of the 1996 federal election and matters related thereto, Parliament of the Commonwealth of Australia, Canberra, 1997, p 118.

[14] M Grattan, 'Minister pushes for voluntary voting—PM denies plan for policy change', *The Age*, 5 October 2005, p 2.

[15] Commonwealth, *Parliamentary Debates*, Senate, 21 June 2011, 3419 (Nick Minchin).

declined to (a still healthy) low of 64% as that campaign gathered force in the late 1980s, but by the time the Howard government lost office in 2007, support had rebounded to an equal record high of 77%.[16] In sum, far from stimulating community concern about the practice, the agitations had coincided with a strengthening of faith in it.

What else accounts for the failure of the opponents to seriously threaten compulsory voting and to weaken public satisfaction in it? As Judith Brett persuasively contends, there is an affinity between compulsory voting and Australia's majoritarian political temperament. In that sense, the individual rights argument against compulsion prosecuted by Nick Minchin and his allies fell on stony ground.[17] In a pragmatic-minded political culture like Australia's, opponents have also been disadvantaged by the fact that in advocating for voluntary voting they were typically dependent on abstract principles or untested assertions about what would happen in the circumstances of that change. By way of contrast, upholders of the status quo have been able to point to demonstrable benefits, not least the consistently high voter turnout. Equally, the existing system's defences are buttressed by path dependency. As the political scientist Don Aitkin noted in the 1960s, 'the fact that compulsion applies in all State and Federal elections and referenda has helped to perpetuate [it]'.[18] Australians voters, in other words, know no other way. Writing in the same period, Aikin's political science colleague and later the inaugural Australian Electoral Commissioner, Colin A Hughes, agreed, observing that compulsory voting had acquired the standing of 'settled policy'.[19]

The lack of consensus in favour of voluntary voting within the Liberal Party was another impediment to change. While evidence suggests that from the late 1980s that position was ascendant in some of the state divisions, support was less reliable where it principally mattered—in the federal parliamentary party. On the one known occasion when the matter was tested in the Coalition joint party room in May 1992, there was a rebellion against a proposed change to a policy of voluntary voting. Some Liberals were genuinely convinced of the democratic value of compulsory voting while others, contrary to the conventional view that the practice electorally benefited Labor, feared that voluntary voting would gift its opponent because of the voter mobilising force of trade unions. Moreover, the federal Liberals had to take account of the views of their Coalition partner, the National Party. While there were examples of National members supporting the campaign against compulsory voting, in the main that position enjoyed little sympathy in the party and among its leaders. It was more common for Nationals to believe that voluntary voting would penalise the party given their vast regional seats, ageing membership and stretched resources.

A final plausible reason why opponents of compulsory voting have proved incapable of rousing public resentment is that the system is not especially oppressive. As frequently pointed out by both opponents and supporters, the compulsion is not to vote per se but rather for an elector to attend a polling booth, have their named crossed off the electoral roll and receive a ballot paper. Electoral authorities have also generally treated non-compliance leniently. Typically, among those who offer an explanation for their non-compliance, only a small number are judged to have provided an inadequate reason and only a miniscule

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[16] Cameron and McAllister, *Trends in Australian Political Opinion*, p 75.

[17] Brett, *From secret ballot to democracy sausage*, pp 2–8.

[18] Don Aitkin, 'To vote—A duty or a right?', *Canberra Times*, 28 March 1968, p 2.

[19] CA Hughes, 'Compulsory voting', *Politics*, 1966, 1(2):84.

proportion of them are eventually convicted.[20] And while it has not been unusual following elections for a tiny number of non-voters to be gaoled rather than pay the small fine for failing to vote, there have been few, if any, high-profile conscientious objectors or 'martyrs' to the cause of opposition to compulsory voting.[21] In fact, a more common theme, as articulated by the JSCEM report on the 2016 election, is that the penalty for non-voting is insufficient and ought to be reviewed.[22]

All of this leads to the conclusion that compulsory voting is a highly resilient institution in Australia. Of course, we cannot rule out opposition to it, despite currently being dormant, bestirring, as happened in the 1980s. For the foreseeable future, though, Australia's compulsory voting regime is robust and secure.

Australia's democratic exceptionalism

Though enjoying sustained and widespread public support, compulsory voting's importance to Australia's democratic system is largely under appreciated.[23] Moving to a conclusion, I would like to suggest that it is one of the elements of the nation's democratic exceptionalism, and one of the reasons why the political centre holds better here than in many other comparable societies.[24] Writing a few years ago, the eminent historian, Stuart Macintyre, observed that, unlike the case in the US and parts of Europe, right-wing populist politics had not really taken root in Australia. This may be too sanguine an interpretation. It is the case that, as Macintyre asserted, insurgencies such as Pauline Hanson's One Nation Party have been mostly 'ephemeral'.[25] Yet, my view is that, beginning with the era of Howard's prime ministership, and particularly from 2001 onwards, conservative populism has been smuggled into mainstream Australian politics through the Liberal Party's rightwards ideological pivot.[26] Still, Macintyre's fundamental point stands. Australia has been more resistant to aggressive political populism than have advanced democracies in Europe and North America. Australia has endured nothing commensurate to a Trump or Brexit moment. Why?

One answer is that, while not without substantial destabilising effects, the big modernising reforms executed in the final decades of the 20th century by the Labor governments of Bob Hawke and Paul Keating and the early Howard government, laid the foundations for a

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[20] This leniency was evident as early as the system's first implementation at the 1925 federal election. Of the 285,187 persons who failed to vote only 4.6% of those who offered an explanation for their non-compliance were judged to have provided an inadequate reason and only a tiny number of them were convicted. See *The Age*, 11 November 1926, p 18.

[21] M Healy and J Warden, *Compulsory voting*, *Research Paper*, Parliamentary Library, Canberra, 5 April 1995.

[22] Joint Standing Committee on Electoral Matters, *Report on the conduct of the 2016 federal election and matters related thereto*, pp 56–58.

[23] In the context of Donald Trump's second presidency, the wider advance of right-wing populism, intensifying political polarisation and a global democratic recession some commentators and writers have recently identified compulsory voting as a factor insulating Australia against the worst of these trends. See for example, N Bryant, 'Defending our democracy: how a cranky uncle, Swedish inspo and "pre-bunking" help out', *The Age and Sydney Morning Herald* (*Good Weekend)*, 6 September 2024, accessed February 2025; B Wolpe, *What Trump's second term means for Australia: the shocking consequences for us and the world*, Allen & Unwin, Sydney, 2025, c 20–21.

[24] Here I am drawing upon ideas in my forthcoming book, P Strangio, *The Democracy Laboratory: A quarter century of trial and resilience in Australian national politics*, Melbourne University Publishing, Melbourne, 2025.

[25] S Macintyre, 'Geoffrey Bolton Lecture—From Bolshevism to Populism: Australia in a century of global transformation', *ANU Historical Journal II*, 2019, 1: 222.

[26] I am certainly not the first writer to link John Howard's prime ministership to a swing towards conservative populism. See for example, D Snow and B Moffitt, 'Straddling the divide: mainstream populism and conservatism in Howard's Australia and Harper's Canada', *Commonwealth & Comparative Politics*, 2012, 50 (3): 271–292; Rae Wear, 'Permanent populism: the Howard government', *Australian Journal of Political Science*, 2008, 43 (4): 617–634.

robust economy that has helped insulate the nation from the drastic austerity measures and severe erosion of living standards experienced in many other countries. In a similar way, the Global Financial Crisis of the first decade of the 21st century was, compared to its severe economic and social effects in other parts of the globe, mostly harmlessly shrugged off by Australia. This resilience was again attributed to the reforms of the previous quarter of a century, as well as the good fortune of the nation's buoyant trade relationship with China.

Another reason why Australia has been mostly immune to seduction by militant right-wing populism relates to what I have already suggested is an imperturbable and pragmatic national temperament. This seems to go hand in hand with what Judith Brett identifies as the powerful majoritarian impulse and lack of worship of individual rights in the country's political culture.[27] Correspondingly, too, the public has a discerning antennae for political moonshine—as displayed, for example, by its swift waking up to the inauthenticity of the Coalition prime minister Scott Morrison with his habitual performative contrivances. By the time of the 2022 federal election, he was the least popular major party leader in the nearly half century old Australian Election Study.[28] History suggests, as well, that Australians have little truck with leadership demagoguery.

That the centre has held better in Australia can also be attributed to institutional bulwarks. Though, in common with many other countries, there is plenty of evidence in Australia of growing disenchantment with the political system.[29] One thing that helps to put a floor under faith in the nation's democracy is the politically independent electoral authority, the AEC. The 2022–23 survey of trust in Australian public services, a regular national survey of the population, found that the AEC was the most trusted national public service institution, enjoying a trust level of 83%.[30] The very high public confidence in the AEC and its impartial administration of the electoral system undoubtedly lends credibility to election results and integrity to the democratic process as a whole. So do the whole raft of procedures it manages to facilitate voting. To name a few: Saturday election days, assistance for the ill and aged and those from non-English speaking backgrounds, mobile polling stations, postal, absentee and early voting, and active and regular updating of registration. Indeed, Australia has been described as 'the most voter-friendly country in the world'.[31] Contrast this to state-based voter suppression practices in the US.

Voter participation is, of course, mandated by the other major institutional bedrock of the nation's electoral system, compulsory voting. As noted early on, compulsory voting has kept voter turnout above 90% for all but one election over the past century. It is a level of

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[27] Brett, *From secret ballot to democracy sausage*, pp 2–8.

[28] See S Cameron, I McAllister, S Jackman and J Sheppard, T*he 2022 Australian Federal Election: results from the Australian Election Study*, School of Politics and International Relations ANU College of Arts and Social Sciences in partnership with Griffith University, Canberra, December 2022, pp 13–14.

[29] For example, the Australian Election Study has tracked a decline in the number of respondents that express satisfaction in Australian democracy since 2007, although satisfaction rebounded somewhat in 2022 after reaching a nadir of 59% in 2019. Equally, there has been a slide in the number of respondents who believe government is run for a 'all of the people' and a corresponding rise in the number who think that government is run for a 'few big interests'. See Cameron and McAllister, *Trends in Australian Political Opinion*, pp 100–102.

[30] Australian Public Service Commission, 'Trust and satisfaction with Australian public services', accessed February 2025.

[31] Mackerras and McAllister, 'Compulsory voting', p 223.

participation marvelled at, and envied by, kindred democracies.[32] It affords legitimacy to election outcomes in this country. Significantly, it also produces a socially even turnout.[33] Compare this to the situation in the 2024 British general election. With turnout slumping to 59.7%, the lowest in a quarter of a century, an investigation by the Institute for Public Policy Research revealed a clear pattern of the 'haves' exercising much greater say at the ballot box than the 'have nots'. Those who stayed away from the polls were predominantly less well off, non-homeowners, the young, the lower educated, and of minority ethnic background.[34] Australia is not blemish free in this regard. Low and declining turnout in remote electorates with high Indigenous populations is the most worrying chink in the performance of compulsory voting. In 2022, turnout in the Northern Territory seat of Lingiari, the electorate with the highest proportion of Aboriginal and Torres Strait Islander inhabitants in the nation, fell to a record low of 66.8%, down from 72.6% in 2019.[35] Even so, the practice largely succeeds in achieving inclusive voter participation across the country.

Crucially, compulsory voting is also generally recognised for its moderating influence because it ensures that it is not only impassioned partisans at either end of the political spectrum who participate in elections and who are therefore the chief focus of governments and political parties. Under a compulsory voting system, middle-of-the-road citizens and their concerns and sensibilities count. Politics, as a consequence, generally gravitates to the centre inhibiting the trend towards polarisation and grievance politics so powerfully evident in other parts of the globe.[36]

What I have described as Australia's democratic exceptionalism is not a cause for complacency. The 21st century has been mostly a story of underperformance in national politics as reflected in such things as instability in government and relative policy stasis. Against that background and in an environment of a global contagion of democratic recession, as already noted, public confidence in the political system has dwindled. The introduction of compulsory voting 100 years ago sprang out of a spirit of innovation and experimentation in democratic practices going back to the colonial era. Perhaps it's time to mine that spirit once more.

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[32] Among the scholars, commentators and politicians who have expressed admiration of Australia's system of compulsory voting is US President, Barack Obama. See Australian Associated Press, 'Barack Obama praises Australia's mandatory voting rules', *The Guardian*, 10 April 2016, accessed February 2025.

[33] The enhanced legitimatisation of election results, and achievement of a socially even turnout are two of benefits of compulsory voting that have been emphasised by the most indefatigable scholarly writer on, and defender of, the system in Australia, Professor Lisa Hill. See for example, L Hill, 'Compulsory Voting: Activating the demos and enhancing procedural democracy in Australia' in M Bonotti and P Strangio (eds), *A century of compulsory voting in Australia: genesis, impact and future*, pp 165–188.

[34] Rowena Mason, 'Lowest turnout in UK general election since universal suffrage, report shows', *The Guardian*, 12 July 2024, accessed February 2025.

[35] This is despite the AEC making strenuous efforts to increase the election participation of First Nations people. Ironically, those efforts by resulting in a significant increase in enrolment rates of Indigenous Australians, up from 74.7% in June 2017 to 94.1% in June 2023, may have contributed to the decline in the percentage of turnout in a seat such as Lingiari. The comparatively low participation of First Nations people in the 2022 federal election was a major focus of the inquiry by the Joint Standing Committee on Electoral Matters into the poll. See Joint Standing Committee on Electoral Matters, '*Conduct of the 2022 federal election and other matters*', Commonwealth Parliament of Australia, Canberra, 2023, c 2, accessed February 2025.

[36] There is some dissent from the conventional assumption that compulsory voting has a moderating influence on election outcomes. For example, in 2017, though previously an advocate of compulsory voting, the leading political scientist, Professor Simon Jackson, worried that in the midst of rising tide of political grievance the practice was 'delivering to the polls a bunch of mad as hell voters that would probably have [otherwise] stayed at home'. See E Bagshaw, 'Plea to rethink compulsory voting', *The Age*, 16 July 2017, p 15.