

**SUBMISSION TO THE SELECT COMMITTEE ON THE**  
**REFORM OF THE AUSTRALIAN FEDERATION**

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## **Introduction**

In drafting the Australian Constitution, the framers sought to maintain a federal balance in the distribution of powers between the Commonwealth and the states. They designed the Australian Constitution to be an instrument of government intended to distribute and limit governmental powers. Such distribution and limitation upon governmental powers was deliberately chosen by them because of the well-substantiated understanding that concentration of power is often inimical to the achievement of human freedom and happiness.<sup>1</sup>

This paper will be divided into two parts with the first part summarising the main characteristics of a federal system as a system of government worthy of protecting: it controls power, safeguards democracy and promotes liberty. And yet, the approach to constitutional interpretation preferred by the High Court since the 1920's has dramatically expanded Commonwealth power to the point where many of the advantages of federalism have now been lost.

Centralisation indeed has been an on-going pursuit by the Commonwealth, aided by the High Court. The dramatic expansion of the powers of the Commonwealth has completely transformed the federal system in Australia, in a way that was not intended by the drafters of the Australian Constitution. This so being, the second part of our paper will consider the great need for reforming our 'dysfunctional' federal system, thus offering the potential agenda for a comprehensive reform of the Australian Federation.

## **Part I: Australian Federalism**

### **1. Characteristics of Federalism**

The first federal systems emerged via the coming together of a number of established polities that wished to preserve their separate identities and to some extent their autonomy.<sup>2</sup> Some features are common to most, if not all, federal systems: distribution of power between central and local governments; a written and rigid constitution; an independent and impartial umpire to decide on disputes between these

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<sup>1</sup> See: *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1, [555] (Kirby J).

<sup>2</sup> A Heywood, *Politics*, 2<sup>nd</sup> ed (New York: Palgrave Macmillan, 2002), 161.

levels of government; and representation of regional views within the central government.

The type of political decentralisation provided by federalism is in contrast to a unitary system of government, which consists of one sovereign or central government. Although there may be regional units in unitary systems, any authority vested in them is merely delegated by the central government and can be resumed by it. In contrast, the central feature of every federal system is the separation of powers between central and local governments in such a way that each of them cannot encroach upon the power of another. A.V. Dicey explained<sup>3</sup>:

“The distribution of powers is an essential feature of federalism. The object for which a federal state is formed involves a division of authority between the national government and the separate States. The powers given to the nation form in effect so many limitations upon the authority of the separate States, and as it is not intended that the central government should have the opportunity of encroaching upon the rights retained by the States, its sphere of action necessarily becomes the object of rigorous definition”.

In federal systems the regional government enjoys a great degree of political autonomy derived directly from the federal Constitution. A federal Constitution is one which divides legislative power between a central government (Union or Commonwealth) and regional (state or provincial) governments. Such a constitution cannot be amendable unilaterally by any of the spheres of government. This prevents the usurpation of power by the central government of the regions’ powers. As the late W. Anstey Wynes pointed out<sup>4</sup>:

“The division of powers between the Federal and State Governments being of the essence of federalism, it follows that the Constitution of the Federal State must almost necessarily be of the written and rigid, or controlled type. For, in order that the terms of the union may be adequately and permanently defined, the manner of apportionment of powers must be reduced to some definite and tangible form, not alterable by the central authority at will”.

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<sup>3</sup> A. V Dicey, *Introduction to the Study of the Constitution* (London: Macmillan, 1915), 83.

<sup>4</sup> W. Anstey Wynes, *Legislative, Executive and Judicial Powers in Australia* (Sydney: Law Book Co., 1955), 3.

Federal systems also require an arbiter to decide over disputes between governments. As the power of the Federal State is constitutionally divided between the centre and the regions, disputes may arise as to the proper sphere of power to be exercised. So the protection of the federal system is vested in the hands of an independent and impartial constitutional arbiter. Without this the constitutional distribution of powers becomes a dead letter.<sup>5</sup> As John Stuart Mill pointed out:

“Under the more perfect mode of federation, where every citizen of each particular State owes obedience to two Governments, that of his own state and that of the federation, it is evidently necessary not only that the constitutional limits of the authority of each should be precisely and clearly defined, but that the power to decide between them in any case of dispute should not reside in either of the Governments, or in any functionary subject to it, but in an umpire independent of both. There must be a Supreme Court of Justice, and a system of subordinate Courts in every State of the Union, before whom such questions shall be carried, and whose judgment on them, in the last stage of appeal, shall be final. This involves the remarkable consequence... that a Court of Justice, the highest federal tribunal, is supreme over the various Governments, both State and Federal; having the right to declare that any law made, or act done by them, exceeds the powers assigned to them by the Federal Constitution, and, in consequence, has no legal validity”.<sup>6</sup>

Finally, a federation involves linking institutions between each sphere, usually in the form of a bicameral legislature. In theory, the regions or states are represented in an upper house called the Senate whereby the representatives of each State must defend their particular regional interests. However, the reality is that in places like Australia and the United States the Senate has been divided along party lines in the same way as the lower house, or House of Representatives, thus not truly protecting the interests of the particular States.

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<sup>5</sup> See Alexis de Tocqueville, *Democracy in America* (1835), Chapter VIII.

<sup>6</sup> J. S Mill, *Considerations on Representative Government* (1861), Chapter 17.

## **2. Australian Federalism**

Australia acquired the system of responsible government from England and those of bicameral Parliament and federal distribution of powers from the United States,<sup>7</sup> thus establishing a federal system of responsible and representative government. The constitutional drafters favoured the federal system due to its recognised advantages of being able to promote democracy, protect the rights and liberties of citizen, and to prevent the concentration of power.<sup>8</sup> Ever since Australia has comprised a Federation of six States (New South Wales, Queensland, South Australia, Tasmania and Western Australia) and two self-governing Territories (Australian Capital Territory and Northern Territory). Each of them is endowed with its own constitution, parliament, government, and laws. Moreover, the High Court has acknowledged that, together with separation of powers and representative government, federalism comprises one of the main institutional pillars of the country's constitutional order. In *News Pty v Wills* (1992) Deane and Toohey JJ argued that federalism is 'one of the three main general doctrines of government which underlie the Constitution and are implemented by its provisions'.<sup>9</sup>

The Commonwealth of Australia is based on a symmetrical model of federalism, whereby each State maintains the same legal rights and responsibilities with the federal government. Aspects of the nation's symmetry are found in section 7, which provides for equality of representation amongst the original States in the Senate, and section 51 (ii), restricting the power of the federal government over taxation 'so as not to discriminate between States or parts of States'. Further evidence of symmetry are found in sections 51 (iii) and 88, providing uniformity to bounties and custom duties throughout the nation. Finally, section 99 determines that 'the Commonwealth shall not, by any law or regulation of trade, commerce, or revenue give preference to one State or any part thereof over another State or any part thereof'.

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<sup>7</sup> S. Ratnapala et al, *Australian Constitutional Law: Commentary and Cases* (South Melbourne: Oxford University Press, 2007), 6.

<sup>8</sup> G de Q Walker, "Ten Advantages of a Federal Constitution" (Centre for Independent Studies, Sydney, 2001); A Twomey and G Withers, *Australia's Federal Future: Delivering Growth and Prosperity (Federalist Paper I)* (April 2007).

<sup>9</sup> *Nationwide News Pty v Wills* (1992) 108 ALR 681, 721.

### *Formation of Australia's Federalism*

Australia became a federation when it became a nation on 1st January 1901. The Commonwealth Constitution was drafted at two Conventions held in the 1890s. Some of the key issues during those conventions involved questions of finance and trade, and how to conciliate the interests of small States with those of the more populous ones. Also relevant was the issue about the preservation of the rights of the six existing colonies when they became States of the new federation.<sup>10</sup>

The American model was especially attractive to the drafters of the Australian Constitution. According to Sir Owen Dixon, formerly Chief Justice of the High Court, those founders regarded the American system as an 'incomparable model'.<sup>11</sup> Elaborated in 1891 by Andrew Inglis Clark, a Tasmanian jurist who greatly admired the constitutional model of the United States, the first draft of the Australian Constitution followed quite closely that model. The general structure of that first draft continued into the constitution's final version which came into force in 1901.<sup>12</sup>

The framers drew much of their inspiration from the works of A.V. Dicey and James Bryce. Lord Bryce was so influential that the inspiration for the official name of the nation, the *Commonwealth of Australia*, is said to derive from his classic *The American Commonwealth*.<sup>13</sup> The drafters often quoted from him to explain things such as why the new federation should follow the American model of state rights and judicial review of legislation.

### *Federal Distribution of Powers*

The Australian Constitution allocates the areas of legislative power to the Commonwealth in sections 51 and 52, with these powers being variously concurrent with the States and exclusive. Moreover, the federal Parliament has express and

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<sup>10</sup> The drafters of the Australian Constitution created federalism by dividing power solely between the Commonwealth and the States. Although Australia has municipal powers such powers are not mentioned in the Federal Constitution. Local councils therefore exist only so long they are maintained by the States which create them.

<sup>11</sup> O Dixon, 'The Law and the Constitution' (1935) 51 *Law Quarterly Review* 597.

<sup>12</sup> N Aroney, *Federalism and the Formation of the Australian Constitution* from 'Democracy Down Under: Understanding our Constitution' (PCV, 1997) 17.

<sup>13</sup> See J.A. La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, Carlton, 1972). See also: J.A. La Nauze, 'The Name of the Commonwealth of Australia', *Historical Studies*, vol.15, no.57, 1971.

implied incidental powers to deal with areas related to its grants of power. As such, the federal Parliament is allowed to make laws with respect to “matters incidental to the execution of any power vested by this Constitution in the Parliament”. The federal Parliament also has the power to legislate on matters which are incidental to the central purpose of its express heads of power.<sup>14</sup>

The States were left with everything else. So, although the topics granted to the federal legislature are rather significant, ranging from areas such as marriage to quarantine and defence, numerous other areas of law, including health, education and industrial relations, remained with the States (former colonies) and were not included in the list of federal powers. The leading federalist at the first constitutional convention, Sir Samuel Griffith, provided the basic reason for such an arrangement, stating in 1891<sup>15</sup>:

“The separate states are to continue as autonomous bodies, surrendering only so much of their powers as is necessary to the establishment of a general government to do for them collectively what they cannot do individually for themselves, and which they cannot do as a collective body for themselves”.

In fact, Deakin was convinced that the Constitution would succeed in protecting the independence of the States, asserting that<sup>16</sup>:

“... so far from our Federal Government over-awing the States, it is more probable that the States will over-awe the Federal Government”.

One of the most remarkable characteristics of the Australian Constitution is its express limitation on federal legislative powers. Whereas the legislative power of the central government is limited to the express provisions of the constitution, all the

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<sup>14</sup> E Mills and M. Bagaric: “The distinction between the express incidental power of s 51(xxxix) and the implied incidental power was... referred to by the High Court in *Gazzo v Comptroller of Stamps (Vic)* (1981) 7 Fam LR 675 at 680; FLC parags 91-101 per Gibbs CJ, Stephen and Aickin JJ (the majority). There, Gibbs CJ explained that the express incidental power concerns matters which are incidental to the execution of one of the other substantive heads of constitutional power, while the implied incidental power concerns matters which are incidental to the subject matter of a substantive head of power. Together they enable the parliament to make any law which is directed to the aim or object of a substantive head of power, and any law which is reasonably incidental to its complete fulfilment”. – *Family Law* (Sydney: Butterworths, 2005) 12.

<sup>15</sup> S W Griffith, *Convention Debates*, at 31-2.

<sup>16</sup> A Lynch and G Williams, “Beyond a Federal Structure: Is a Constitutional Commitment to a Federal Relationship Possible?” (2008) 31 *UNSW Law Journal* 395, at 400.



remaining residue was left undefined to the Australian States.<sup>17</sup> The drafters of the Constitution thus wished to reserve to the people of each of State the right to decide by themselves on the most relevant issues through their own state legislatures. In a late edition of *Introduction to the Study of the British Constitution*, A.V. Dicey reveals why one of the main goals of the founders was to establish a considerably decentralised federal system for Australia<sup>18</sup>:

“The Commonwealth is in the strictest sense a federal government. It owes its birth to the desire for national unity... combined with the determination on the part of the several colonies to retain as States of the Commonwealth as large a measure of independence as may be found compatible with the recognition of Australian nationality. The creation of a true federal government has been achieved mainly by following, without however copying in any servile spirit, the fundamental principles of American federalism. As in the United States so in the Australian Commonwealth the Constitution... fixes and limits the spheres of the federal or national government and of the States respectively, and moreover defines these spheres in accordance with the principle that, while the powers of the national or federal government, including in the term government both the Executive and the Parliament, are, though wide, definite and limited, the powers of the separate States are indefinite, so that any power not assigned by the Constitution to the federal government remains vested in each of the several States, or, more accurately, in the Parliament of each State. In this point... the States... retain a large amount of legislative independence. Neither the Executive nor the Parliament of the Commonwealth can either directly or indirectly veto the legislation, *e.g.*, of the Victorian Parliament. The founders, then, of the Commonwealth have, guided in the main by the example of the United States, created a true federal government”.

### *Inconsistency*

When a power to legislate on one or more topics is concurrently held by Commonwealth and the States, as it is found in section 51 of the Australian Constitution, a method has to be developed to resolve the possible conflicts between the laws of those different Parliaments. Section 109 provides the solution: “When a

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<sup>17</sup> M Cooray, ‘A Threat to Liberty’, in K Baker (ed.), *An Australian Bill of Rights: Pro and Contra* (Sydney: Institute of Public Affairs, 1986) 35.

<sup>18</sup> A.V. Dicey, *Introduction to the Study of the Constitution* (1885) (Liberty Fund, Indianapolis, 1982) 387. (This edition is a reprint of the eighth edition published by MacMillan in 1915).

law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid”.

Naturally, it is only a valid federal law which prevails over a valid State law. If a federal law goes outside its proper constitutional limits no question of inconsistency arises. The matter is simply of invalidity of the federal law as this is the case of federal violations of the distribution of powers established by the Constitution.

The most accepted view about inconsistency is that a State law is not so much ‘invalid’ because the State Parliament could not pass that type of legislation. Rather, the basic issue lies on the fact that the State law, though it was enacted with full validity by the State Parliament, happens to be inconsistent with a federal law and so it ceases to operate. But if the overriding federal law ceases to operate, then the inconsistent State law which was lying down dormant is automatically reactivated. As explained by Latham CJ in *Carter v Egg Pulp Marketing Board (Vic)*<sup>19</sup>:

“[Section 109] applies only in cases where, apart from the operation of the section, both the Commonwealth and the State laws which are in question would be valid. If either is invalid *ab initio* by reason of lack of power, no question can arise under the section. The word ‘invalid’ in this section cannot be interpreted as meaning that a State law which is affected by the section becomes *ultra vires* in whole or in part. If the Commonwealth law were repealed, the state would again become operative... Thus the word ‘invalid’ should be interpreted as meaning ‘inoperative’. This is, I think, made clear by the provision that the Commonwealth law ‘shall prevail’ – that is, the Commonwealth law has authority and takes effect to the exclusion of the inconsistent State law”.

Several are the occasions on which a conflict between a federal law and a State law may occur. Inconsistency arises whenever a State law cannot be obeyed at the same time as a Commonwealth law<sup>20</sup>. Inconsistency also occurs if a federal law allows something that a State law prohibits;<sup>21</sup> or when a federal law confers some right or immunity that a State law seeks to remove.<sup>22</sup> In addition, inconsistency may arise after the controversial ‘cover the field’ test is applied. When the federal government,

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<sup>19</sup> (1942) 66 CLR 557, 573.

<sup>20</sup> *Mabo v Queensland* (1988) 166 CLR 186.

<sup>21</sup> *Colvin v Bradley Bros Pty Ltd* (1943) 68 CLR 151.

<sup>22</sup> *Clyde Enginnering Co Ltd v Cowburn* (1926) 37 CLR 466.

either expressly or impliedly, evinces the intention to ‘cover the field’, it is then imputed that only its laws must be applicable.

The ‘cover the field’ principle is nowhere found in the constitution. It was created by Isaacs J in *Clyde Engineering Co Ltd v Cowburn*, in 1926. There Isaacs J argued that “if a competent legislature expressly or impliedly evinces its intention to cover the whole field that is a conclusive test of inconsistency where another legislature assumes to enter to any extent upon the same field”.<sup>23</sup> The test was later explained by Dixon J as it follows<sup>24</sup>:

“When the Parliament of the Commonwealth and the Parliament of a State each legislate upon the same subject and prescribe what the rule of conduct shall be, they make laws which are inconsistent... But the reason is that, by prescribing the rule to be observed, the Federal statute shows an intention to cover the subject matter and provide what the law upon it shall be. If it appeared that the Federal law was intended to be supplementary to or cumulative upon State law, then no inconsistency would be exhibited in imposing the same duties or in inflicting different penalties. The inconsistency does not lie in the mere existence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such intention, it is inconsistent with it for the law of a State to govern the same conduct or matter”.

Conceived by Isaacs J and endorsed the High Court in numerous subsequent cases, the ‘cover the field’ test has been instrumental for the expansion of federal powers, at the expense of the powers originally conferred to the States. According to the late Sir Harry Gibbs, once Chief Justice of the High Court, the full adoption of the ‘cover the

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<sup>23</sup> (1926) 37 CLR 466, 486.

<sup>24</sup> *Ex parte Leans* (1930) 43 CLR 472, 483. A few years later, in *Victoria v Commonwealth* (*The Kakariki*) 1937 58 CLR 618 Dixon J would give a shorter definition of the test. He said at 630: “It appears from the terms, the nature or the subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so is inconsistent”.

field' test "no doubt indicates that the Courts have favoured a centralist point of view rather than a federal one".<sup>25</sup>

### **3. The High Court on Federalism**

Every federation requires the establishment of a neutral power to determine whether either level of government – federal or state – has exceeded the constitutional limits of its respective legislative, executive or judicial powers. When Alfred Deakin introduced the Judiciary Bill into Federal Parliament, he made it very clear that the Australian courts were in charge of making sure that that the federal nature of the Commonwealth Constitution would be faithfully preserved. Deakin called the Australian High Court the 'keystone of the federal arch'.<sup>26</sup>

In this sense, the late English constitutional lawyer AV Dicey, whose work deeply inspired the Australian founders, argued that judges who sit on the High Court are 'intended to be the interpreters, and in this sense the *protectors* of the Constitution'.<sup>27</sup> As Dicey also explained, 'they are in no way bound... to assume the constitutionality of laws passed by the federal legislature'.<sup>28</sup>

During its two first decades of existence the High Court interpreted the Commonwealth Constitution in the way it was designed. First appointed in October 1903, the court originally consisted of only three judges: Chief Justice Samuel Griffith and Justices Edmund Barton and Richard O'Connor. Griffith had been the main leader of the Convention of 1891; Barton had been the leader of the Convention of 1897-8; and O'Connor was one of Barton's closest associates during that convention. Therefore, as Professor Nicholas Aroney points out, 'no one could have better understood the process by which the Constitution had been brought into being, the animating ideas and the pattern of debate than these three judges'.<sup>29</sup>

By adopting federal principles of constitutional interpretation the first members of the High Court faithfully sought to protect the federal nature of the Australian

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<sup>25</sup> Harry Gibbs, 'The Decline of Federalism?' (1994) 18 *University of Queensland Law Journal* 1, 3.

<sup>26</sup> *Commonwealth Parliamentary Debates*, 8(1902), at 10967. Cited in G. Gallop, 'The High Court: Usurper or Guardian?' (1995) 92 *Legislative Studies*, 60, 61.

<sup>27</sup> A.V. Dicey, *Introduction to the Study of the Constitution* (1885) (Liberty Fund, Indianapolis, 1982), 387-8 (This edition is a reprint of the eighth edition published by MacMillan in 1915).

<sup>28</sup> *Ibid.*

<sup>29</sup> N Aroney, 'Constitutional Choices in the 'Work Choices' Case, or What Exactly is Wrong with the Reserved Powers Doctrine' (2008) 32(1) *Melbourne University Law Review* 1, 15.

Constitution. They did so by upholding the Constitution in the way it was designed by its drafters. To that goal they borrowed from the United States the doctrine of states' 'reserved powers' so as to ensure 'that the residual legislative powers of the states... were not diminished through an expansive reading of the Commonwealth's legislative powers'.<sup>30</sup> So when a legislative power was found to belong to the States, the States would be entitled to the same level of independence in its exercise as is the central government in wielding its own authority. The states' reserved powers' doctrine thus dictates that each level of government must possess its own sphere of legislative independence. This entitlement to legislative independence was declared a State right. That was the position adopted by the High Court in its first years of existence. After all, as the late US constitutionalist Thomas M. Cooley commented<sup>31</sup>:

“State rights consist of those rights which belonged to the States when the Constitution was formed, and have not by that instrument been granted to the Federal government, or prohibited to the States. They are maintained by limiting the exercise of federal power to the sphere which the Constitution expressly or by fair implication assigns to it”.

The first judges of the High Court considered the 'reserved powers' to directly derive from section 107 of the Australian Constitution. This section informs that 'every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be'. As such, any grant of power which had not been explicitly given by the federal constitution to the central government must be interpreted as legislative powers 'continuing' with the States. The intrinsic correlation between 'reserved powers' and section 107 was clarified by the High Court in *R v Barger*<sup>32</sup>:

“The scheme of the Australian Constitution, like that of the United States of America, is to confer certain definite powers upon the Commonwealth, and to reserve to the States, whose powers before the establishment of the

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<sup>30</sup> P Hanks et al, *Australian Constitutional Law: Materials and Commentary* (Chatswood; Buttersworth, 7<sup>th</sup> ed, 2004), 569.

<sup>31</sup> T. M. Cooley, *Principles of Constitutional Law* (Boston: Little, Brown and Company, 3<sup>rd</sup> edition, 1898) 35-6.

<sup>32</sup> (1906) 6 CLR 41.

Commonwealth were plenary, all powers no expressly conferred upon the Commonwealth. This is expressed by sec.107 of the Constitution.”

A second doctrine adopted by the early High Court to protect the federal system was called the ‘implied immunity of instrumentalities’. Overall, this doctrine ensured that neither the Commonwealth nor the States were constitutionally allowed to control each other. In other words, both tiers of government – state and federal – must be generally immune from each others’ laws and regulations, so that their respective ‘instrumentalities’ (agencies) be protected from any external encroachment. The reason is that if federalism implies that each tier of government must enjoy a certain degree of independence in its own spheres of power, then none of them should be allowed to tell another what it might or might not do.

History reveals that these two basic doctrines of federalism began to be eroded when Isaac Isaacs and Henry Higgins were appointed to the High Court, in 1906. These judges were politically inclined to expand Commonwealth powers and from the beginning they adopted a highly centralist reading of the Constitution. Isaacs and Higgins JJ had participated at both the 1897 and 1899 conventions. But they were in the minority most of the time and had no formal role in the drafting of the Constitution.<sup>33</sup> As Walter Sofronoff points out, Isaacs was so unpopular amongst his peers “that despite his acknowledged skill and talent, he was excluded from the drafting committee which settled the final draft of the Constitution for consideration by the Conventions”.<sup>34</sup>

There is a good reason, therefore, to question the reliability of their views concerning the underlying ideas and general objectives of Federation.<sup>35</sup> Even so, in the *Engineers’ Case*, in 1920, Isaacs J successfully introduced a new method of interpretation whereby no areas of law were assumed to be reserved to the States. Thus the fact that Australia was constituted to be a federation was allowed to play “no significant part in determining the meaning and scope of the various powers conferred by s 51 of the Constitution”.<sup>36</sup> Under Isaacs J’s leadership, the High Court held in

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<sup>33</sup> N Aroney, ‘Constitutional Choices in the *Work Choices Case*, or What *Exactly* is Wrong with the Reserved Powers Doctrine’ (2008) 31(1) Melbourne University Law Review 1.

<sup>34</sup> W Sofronoff, ‘Deakin and the Centralising Tendency’, *Quadrant* (September 2008) 86.

<sup>35</sup> N Aroney, ‘Constitutional Choices in the *Work Choices Case*, or What *Exactly* is Wrong with the Reserved Powers Doctrine’ (2008) 31(1) Melbourne University Law Review 1.

<sup>36</sup> H Gibbs, ‘The Decline of Federalism?’ (1994) 18 *University of Queensland Law Journal* 1, 2-3.

*Engineers'* that the validity of federal industrial laws also regulated State business enterprises. Although an equal result could be reached by simply deciding that State-owned business activities do not comprise basic governmental activity, the majority opted rather to overturn both the 'implied immunity of instrumentalities' and the states' 'reserved powers' doctrine on the grounds that section 107 is just about continuing State powers that are exclusive, or which are protected by express reservation in the Constitution. This is a gross misreading of section 107, which actually refers only to legislative power that is not exclusively granted to the federal government. And yet, ever since the *Engineers' Case* was decided, Professor Geoffrey Walker writes<sup>37</sup>:

“The reserved powers approach has been called unsupportable because s.107 does not, unlike the Tenth Amendment [to the US Constitution], use the word "reserved". That is just an insubstantial matter of labelling. As s.107 says State powers "shall ... continue", the Court could just as easily have called it the "continuing powers" approach. If anything, s.107 is more forcefully expressed, as it saves "every" power and excepts only those powers "exclusively" vested in the Commonwealth, words of emphasis that do not appear in the American model. Chief Justice Marshall in *McCulloch v. Maryland* pointed out that the word "*expressly* [delegated to the central government]" used in the 1781 Articles of Confederation was dropped from the Constitution, probably deliberately.<sup>26</sup> Griffith remarked on this in *D'Emden v. Pedder*, pointing out that s.107 was more definite than the Tenth Amendment.”

The main problem with the majority decision in *Engineers'* was their refusal to interpret the Constitution as a federal document. The court opted instead to interpret this merely as an Act of the Imperial (British) Parliament, meaning that any grant of federal power must be interpreted as expansively as possible. As early as 1906, in *The Railway Servants' Case*<sup>38</sup>, Isaacs, in his capacity of Commonwealth Attorney-General, could already be found advocating the same interpretative approach that as a High Court Justice he would apply in 1920. Back in 1906 Issacs submitted:

“The Constitution must be dealt with in the same way as any other Imperial Act of Parliament. No prohibitions are to be implied in it...

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<sup>37</sup> G de Q. Walker, 'The Seven Pillars of Centralism' in *Upholding the Australian Constitution* (Proceedings of The Samuel Griffith Society Conference, vol. 14, 2002).

<sup>38</sup> (1906) 4 CLR 488.

The Australian Constitution is a grant and distribution of powers by the Imperial Parliament. The Constitutions of the States now depend on the Constitution of the Commonwealth.”

Although justifiable by the fact that the Australian Constitution in its form was a statute of the Imperial Parliament, such an argument ‘completely overlooks the federal basis and structure of the Constitution as a whole’.<sup>39</sup> Since the drafters of the Constitution opted for defining only the federal powers specifically, and also explicitly informed that all the existing powers of the States must continue, there is an obvious reason to assume that the preservation of State powers in section 107 is *logically prior* to the conferral of federal power in section 51. Indeed, according to Professor Aroney, ‘such scheme suggests that there is good reason to bear in mind what is *not* conferred on the Commonwealth by s.51 when determining the scope of what *is* conferred. There is, therefore, good reason to be hesitant before interpreting federal heads of power as fully and completely as their literal words can allow’.<sup>40</sup>

Fortunately, even after *Engineers’* the High Court has declared that there are certain things that the central government is not allowed to do. In *Melbourne Corporation* a federal law was declared invalid if it either discriminates against a State or if it impinges on the capacity of States to exist as ‘independent entities’<sup>41</sup>. In practice, however, this principle has done little to restrict the expansion of Commonwealth power, because it is not uncommon for the High Court to recognise the principle but then suggest that it has not been breached in the particular case. Professor Cheryl Saunders is one academic who has questioned the effectiveness of the *Melbourne Corporation* principle, asking<sup>42</sup>:

“What is the utility of a principle which protects the formal existence of the States in a federation, or that nebulous concept of their capacity to function, while enabling them to be deprived of an unlimited and unpredicted range of functions or the revenue resources to meet those functions?”

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<sup>39</sup> N Aroney, ‘The Ghost in the Machine: Exorcising *Engineers’* in *Upholding the Australian Constitution* (Proceedings of The Samuel Griffith Society Conference, vol. 14, 2002).

<sup>40</sup> N Aroney, ‘The Ghost in the Machine: Exorcising *Engineers’* in *Upholding the Australian Constitution* (Proceedings of The Samuel Griffith Society Conference, vol. 14, 2002).

<sup>41</sup> *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

<sup>42</sup> A Lynch and G Williams, “Beyond a Federal Structure: Is a Constitutional Commitment to a Federal Relationship Possible?” (2008) 31 *UNSW Law Journal* 395, at 412.



Indeed, the fundamental problem of (unconstitutional) centralisation has not been altered, among other things because the general method of interpretation espoused by Isaacs has prevailed as the most frequently adopted by the High Court, so that the supremacy of the Commonwealth has been judicially assured.<sup>43</sup>

### *External Affairs and the Constitution*

A significant example of the High Court's centralist approach is observable in the interpretation given to section 51(xxix) of the Constitution, which says: 'The Parliament shall have, subject to this Constitution, the power to make laws for the peace, order, and good government of the Commonwealth with respect to external affairs'.

The Federal Executive has entered into many thousands of treaties on a wide range of matters. Numerous of these international agreements are related to topics not otherwise covered by the enumerated powers of the Constitution, and which the Commonwealth Parliament has been able to legislate on by enacting laws implementing them.

The High Court has traditionally rejected the argument that s 51(xxix) should not be limited to the external aspects of matters covered by other paragraphs of s 51. In 1936, in *R v Burgess; Ex parte Henry*, the majority (Latham CJ, Evatt and McTiernan JJ) held that s 51 (xxix) should not be restricted to a power only to make laws with respect to the external aspects of the other subjects mentioned in s51. For Latham CJ, it would be 'impossible to say *a priori* that any subject is necessarily such that it could never properly be dealt with by international agreement'<sup>44</sup>.

In his dissenting judgment, however, Starke J criticised that decision by commenting that the external affairs power should be limited to situations where the subject of the treaty is 'of sufficient international significance to make it a legitimate subject for international co-operation and agreement'.<sup>45</sup> Similarly, Dixon J dissented in these terms<sup>46</sup>:

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<sup>43</sup> W Sofronoff, 'Deakin and the Centralising Tendency', *Quadrant* (September 2008), 92.

<sup>44</sup> (1936) 55 CLR 608, 641.

<sup>45</sup> *Ibid*, 641.

<sup>46</sup> *Ibid*, 699 .

“It seems an extreme view that merely because the Executive Government undertakes with some other country that the conduct of persons in Australia shall be regulated in a particular way, the legislature thereby obtains a power to enact that regulation although it relates to a matter of internal concern which, apart from the obligation undertaken by the Executive, could not be considered as a matter of external affairs.”

In 1983, a treaty to protect world heritage areas was used to pass a federal law preventing the building of a dam in an area in Tasmania. In the *Tasmanian Dam Case*, the majority upheld the validity of that law on the basis that the mere entry by the federal Executive into an international treaty is enough to justify a law which gives effect to obligations imposed by that treaty, even if such obligations are related only to domestic conduct, not to relations between countries.<sup>47</sup>

There is a wide range of international treaties and conventions which can be used to underpin a federal legislation. The Commonwealth can undermine federalism just by making a greater use of the external affairs power, without having to rely on any co-operation by the States. Sir Harry Gibbs once argued that, together with the regular operation of s109 (inconsistency) of the Constitution, the external affairs power has the potential to ‘annihilate State legislative power in virtually every respect’.<sup>48</sup> In the *Tasmania Dam Case*, Gibbs CJ declared<sup>49</sup>:

“The division of powers between the Commonwealth and the States which the Constitution effects could be rendered quite meaningless if the federal government could, by entering into treaties with foreign governments on matters of domestic concern, enlarge the legislative powers of the [Commonwealth] Parliament so that they embraced literally all fields of activity... Section 51 (xxix) should be given a construction that will, so far as possible, avoid the consequence that the federal balance of the Constitution can be destroyed at the will of the Executive.”

The above concerns have not been accommodated. Rather, the High Court has given the power to the Commonwealth Parliament to legislate on any area of law covered by a *bona fide* international instrument. Thus what this Parliament could not do under the

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<sup>47</sup> *Commonwealth v Tasmania (Tasmania Dams Case)* (1983) 158 CLR 1.

<sup>48</sup> H Gibbs, ‘The Decline of Federalism?’ (1994) 18 *University of Queensland Law Journal* 1, 5.

<sup>49</sup> *Commonwealth v Tasmania (Tasmania Dams Case)* (1983) 158 CLR 1 – Gibbs CJ, dissenting.

Australian Constitution it can now do by virtue of treaty obligations. As a result of judicial decisions, federal supremacy has been achieved, because the central government can acquire more legislative power simply by agreeing to ratify those treaties.<sup>50</sup> This possibility was recognised by Dawson J, who saw a broad interpretation of the external affairs power as having “the capacity to obliterate the division of power which is a necessary feature of any federal system and our federal system in particular”<sup>51</sup>.

### *Industrial Relations and the Constitution*

For a long time it was argued that the Commonwealth’s power over industrial relations was restricted only to the conciliation and arbitration. After all, s 51 (xxxv) of the Constitution gives the Commonwealth a very limited power over the subject of industrial relations. Under this subsection of s 51, the federal government’s power to regulate industrial relations extends only to matters of ‘conciliation and arbitration’ of industrial disputes ‘extending beyond the limits of any one State’ to which the grant of power refers.

The idea that the Commonwealth Government should have more power to legislate with respect to industrial disputes was first introduced by South Australian Premier Charles Cameron Kingston, in 1891. He contended that the Commonwealth Parliament should be able to make laws ‘for the establishment of courts of conciliation and arbitration, having jurisdiction throughout the Commonwealth, for the settlement of industrial disputes’.<sup>52</sup> The reason for this, according to Nicola Petit, is that ‘the strikes of the early 1890’s were fresh in the framer’s minds and both the supporters and opposers of a federal industrial disputes power saw the industrial conflicts as an ‘evil’ that must be avoided’.<sup>53</sup>

Although Kingston withdrew his proposal before delegates could vote on the subject, a new proposal was presented by Henry Higgins of Victoria, in 1897. He argued that

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<sup>50</sup> M Cooray, ‘A Threat to Liberty’ in Ken Baker (ed.), *An Australian Bill of Rights: Pro and Contra* (Sydney: Institute of Public Affairs, 1986) 35.

<sup>51</sup> *Victoria v Commonwealth* (*‘Industrial Relations Act Case’*) (1996) 187 CLR 416, [9].

<sup>52</sup> R. J. Buchanan and I.M. Neil, ‘Industrial Law and the Constitution in the New Century: An Historical Review of the Industrial Power’ (2001) 20 *Australian Bar Review* 3, 255 – citing *Official Record of the Debates of the Australasian Federal Convention* (Convention Debates), vol I, 688.

<sup>53</sup> N Petit, ‘Did the High Court Kill Federalism?’, Thesis presented for the Honours degree of Bachelor of Laws of Murdoch University (December 2007), 10.

the federal government should have the power to legislate with respect 'to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any State'.<sup>54</sup> Although these are now the words of s51 (xxxv), Higgins proposal was soundly defeated (22 to 12) because some of the delegates were concerned that industrial disputes were essentially local in character.<sup>55</sup>

Higgins put the same proposal again in 1898, and, at this time, the conciliation and arbitration power was narrowly adopted 22 to 19. Arguably, many delegates who voted for the inclusion did so only because they thought that subsection would not be used and so there would be no harm in including it. Even so, delegates such as McMillan of New South Wales expressed the concern that disputes could be manufactured in order to come under federal jurisdiction. Overall, writes Louise Clegg<sup>56</sup>:

“There is no doubt that the architects of the Constitution assumed that the States would be responsible for the regulation of industrial relations generally. The intention was that the Commonwealth should only be permitted to make laws supporting the resolution (by conciliation and arbitration) of a small number of interstate industrial disputes.”

That did not happen to be the case and McMillan's fears were actually fulfilled when the High Court broadened the reach of the industrial disputes, in 1914. In *R v Commonwealth Court of Conciliation and Arbitration; Ex parte GP Jones (the Builders Labourers Case)*<sup>57</sup>, 'paper disputes' (the use of written 'logs of claims' served on employers) were declared by the High Court to be sufficient to generate an interstate industrial dispute. The unions had created excessive log of claims, which then were sent to as many employers as possible across State borders. These claims were excessive precisely to ensure that the employers' would dispute them.

Although these paper disputes enabled many people to come under federal jurisdiction, the Commonwealth Parliament still had a limited power to legislate with

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<sup>54</sup> Higgins thought the power was necessary because some disputes, such as those in the maritime industry, affected people in more than a single state.

<sup>55</sup> *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 27 January 1898, 187 (Sir John Downer) and 199 (Mr O' Connor).

<sup>56</sup> L Clegg, 'The New Era of Uniform Industrial Relations: How Far Does the Corporations Power Extend?' (UNSW, Gilbert + Tobin Centre of Public Law 2006). Accessed at:

<sup>57</sup> [http://www.gtcentre.unsw.edu.au/publications/papers/docs/2006/7\\_LouiseClegg.pdf](http://www.gtcentre.unsw.edu.au/publications/papers/docs/2006/7_LouiseClegg.pdf). (1914) 18 CLR 224.

respect to industrial disputes. The conciliation and arbitration power is a (limited) purposive power that has far more limitations than other plenary powers of the Constitution. Hence, just ten years after Federation, the federal Labor government tried to expand its reach into industrial affairs by referendum. The referendum failed, as did five others put forward by federal Labor governments in 1913, 1919, 1944, 1946 and 1973. The Nationalist Party also unsuccessfully put forward a proposal law affecting industry and commerce in 1926.

Frustrated by the people's reluctance to expand the federal power over the subject matter, the Commonwealth Government sought a way to free itself from such limitations by turning to other grants of legislative power by the Constitution. Other heads of power in s 51 have been used to expand the Commonwealth's reach over industrial affairs, because the High Court has seen no implication in the constitutional text that the words of the arbitration and conciliation power should limit the use of other powers in s 51 by the Commonwealth to legislate over industrial matters. As Professor Williams points out,<sup>58</sup>

“Certain powers may be particularly useful in complementing the law of coverage of other powers. Indeed the current regime of industrial regulation... is based upon a web of complementary powers... For example, because s 51 (xxxv) limits the Commonwealth to “conciliation and arbitration”, the Commonwealth has relied upon its power under s 51 (i) and s 51 (xx) to support legislation introducing “Australian Workplace Agreements” (“AWAs”) between employers and individual employees. Similarly, the Commonwealth has relied upon s 51 (xxix) to enact provisions relating to parental leave in the workplace.”

The industrial relations reforms in the 1990s saw section 51(xx) - the corporations power – emerging as a major source of power to rival the original reliance on the conciliation and arbitration power. Section 51(xx) of the Constitution confers power on the federal government to make laws with respect to foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.

The *Workplace Relations Act 1996* (Cth) and its successor, the *Work Choices' Act 2005* (Cth), are substantially based on the use of the corporations power. Indeed, key definitions on the *Work Choices'* rely primarily on this head of power, namely the

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<sup>58</sup> G Williams, *Labour Law and the Constitution* (1<sup>st</sup> ed, 1998), 24.

provisions removing employers and employees from State workplace systems, and those implementing the Australian Fair Pay Commission and its prescription of minimum working conditions. Where federal and State laws are in conflict, s 109 of the Commonwealth Constitution resolves the matter in favour of the former. According to Williams<sup>59</sup>:

“Section 109 is a powerful means by which the Commonwealth Parliament can ensure the supremacy of its legislation within the field of industrial relations... State legislation and awards are not only rendered inoperative where they are directly inconsistent with a federal law or award, but also where a State law or award intrudes into an area where a federal law or award indicates an intention to ‘cover the field.’”

### *The Work Choices Case*

In 2005 the Commonwealth enacted the Work Choices Act, which sought to create a national industrial relations system throughout Australia. This system would be based mainly on section 51(xx) of the Constitution. As a result, all ‘constitutional corporations’ formed within the limits of the Commonwealth and their employees were covered by this national industrial relations system

The State and Territory Governments expressed strong opposition to the move towards centralization that Work Choices had brought about. They considered Work Choices a hostile takeover by the federal government on the several State industrial relations systems

On 21 December 2005 the New South Wales Government filed its writ in the High Court, challenging the constitutional validity of the Work Choices Act. A total of seven actions were commenced seeking declarations of invalidity of the whole Act, or, alternatively, of specific provisions. The challenge provided the High Court with an opportunity to clarify the scope of the corporations power. The most important issue in the case was the constitutional basis of the legislation.

In *New South Wales v Commonwealth* [2006] HCA 52, a five-to-two majority of the Court held that the Commonwealth Parliament had power to create a national industrial relations system under the corporations power. In a joint judgement,

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<sup>59</sup> G Williams, *Labour Law and the Constitution* (1<sup>st</sup> ed, 1998), 160.

Gleeson CJ and Gummow, Hayne, Heydon and Crennan JJ declared that ‘laws prescribing the industrial rights and obligations of constitutional corporations and their employees and the means by which they are to conduct their industrial relations are laws with respect to constitutional corporations’<sup>60</sup>.

One of the main arguments against the validity of Work Choices was that the corporations power was not the appropriate head of power for regulating industrial relations. The appropriate head of power is found in s51 (xxxv) and it limits this power only to matters of conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. The Plaintiffs contended that a wide reading of another head of power should be limited if there is a clear restriction that is based on the express language used in the Constitution.

The majority did not accept that express limitation of the Constitution. Rather, they followed a centralist approach in which so long as a law could be characterized as a law with respect to a subject-matter within the legislative power, it did not matter that it also affects a different subject-matter altogether. In other words, a head of power does not have to be read narrowly so as to avoid it actually breaching the explicit limitations of another head of power. This so being, the Court concluded that the express limitation contained under s 51(xxxv) can be rendered otiose by the broad reading of s 51(xx).

In his dissenting judgment Kirby J emphasised the need to adopt a narrow approach to the corporations power, stating that a broad view “went a long way to destabilising the federal nature of the Australian Constitution”. He deeply criticised the majority in Work Choices for not properly considering that the preservation of the country’s federal system requires the Commonwealth Constitution to be read as a whole. According to Kirby J<sup>61</sup>:

“In the interpretation of legal words, it is accepted today that serious errors can result from focusing on the words alone, in isolation, and omitting the context in which those words appear. Paying regard to context is now a settled requirement for the construction of statutes. The same is true in ascertaining

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<sup>60</sup> *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1, [232].

<sup>61</sup> *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1, [468], [471], [515].

the meaning of a constitutional provision. Context is critical to the understanding of communication by the use of human language. This is nowhere more so than in deriving the meaning of a constitutional text, typically expressed (as in the Australian instance) in sparse language, designed to apply for an indefinite time and to address a vast range of predictable and unpredictable circumstances...

It follows that, to take the language of the corporations power in par (xx) of s51 in isolation and to ignore the other paragraphs of that section, would involve a serious mistake... Clearly, it was not intended that s 51(xxxv) should be otiose, irrelevant or entirely optional to the Commonwealth in its application. Nor was it intended that the important restrictions imposed on the federal exercise of legislative powers in par (xxxv), with respect to laws on industrial disputes, should be set at nought by invoking another head of power, such as that contained in par (xx)...

It is not irrelevant that the legislative power conferred on the Federal Parliament by s 51(xxxv) appears amongst the powers granted towards the end of the list in s 51. Each of the immediately preceding legislative powers (s51 (xxxi), (xxxii), (xxxiii) and (xxxiv)) contains a grant of power subject to a “safeguard, restriction or qualification”. As a matter of structure, therefore, it would not be surprising to view s 51(xxxv) in the same light. History and the Convention debates, suggest the same conclusion.”

Justice Callinan, who also dissented, agreed that the Constitution must be read as a whole. He argued that the Court’s ‘centralizing principles’ have produced “eccentric, unforeseen, improbable and unconvincing results”, which as a result have threatened the federal structure of the Constitution. Why, he asked, “should the text of the Constitution be so read as to pre-empt the exercise of other heads of legislative power to which s 51(xxxv) could not apply?” The answer, Callinan said, “is that the only place in the constitution in which the text refers to industrial matters is in that placitum; and, secondly, that if control over industrial affairs were to be imported into the subject matter of virtually every placitum of s 51, there would be little of substance left for the States in this area of importance for them”. Nonetheless, he explained<sup>62</sup>:

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<sup>62</sup> *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1, [798], [822], [834].



“There may be, indeed there is in some cases, a clear possibility of some overlapping [between s51 powers], but instance of it are likely to be rare and slight, and a construction which allows them should wherever possible, be avoided, for two reasons: that it is unlikely that the authors of the Constitution intended to repeat themselves, or did so by accident; and because it is an elementary principle of construction that each word and phrase of an instrument has its own work to do...

It is the natural order to deal with s 51(xxxv) before the corporations power because, from beginning to end the Act is an Act concerned with industrial matters. Only s 51(xxxv) in the whole of the Constitution refers to, and confers power upon the Commonwealth with respect to those. It is, in my opinion, an inversion of logical order to go first to the corporations power, so as to try to find somewhere in it a power to regulate industrial affairs, and having chosen to do so, necessarily to confine or reduce the operation of s 51(xxxv). The more expansive the industrial power can be seen to be, the more likely it is that the power is the only power of the Commonwealth to legislate about industrial affairs...

Because of the extent of the power conferred by s 51(xxxv), as repeatedly held by the Court, as well as its usage alone of all the placita, of the language of industrial affairs, it can be seen to represent the totality of the Commonwealth’s powers of control of industrial affairs, and to give rise to a negative or restrictive implication of the absence of a conferral of industrial power elsewhere under s 51, except of course in relation to employees of the Commonwealth and perhaps other limited categories of employees which it is unnecessary to define in this case. I would not regard this holding, of a negative implication, as different in substance from the holding of Kirby that s 51(xx) be read down so as to exclude its application to industrial affairs.”

According to Callinan J, the decision reached by the majority in *Work Choices* would “subvert the Constitution and the delicate distribution or balancing of powers which it contemplates”. Such a broad view of the corporations power, he explained, has the potential to reduce the States to “mere façades of authority possessing Parliaments and courts but little else”. As His Honour reminded<sup>63</sup>:

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<sup>63</sup> *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1, [779].

“There is nothing in the text or the structure of the Constitution to suggest that the Commonwealth’s powers should be enlarged, by successive decisions of this Court, so that the Parliament of each State is progressively reduced until it becomes no more than an impotent debating society. This Court too is a creature of the Constitution. Its powers are defined in Ch III, and legislative made under it. The Court goes beyond power if it reshapes the federation. By doing that it also subverts the sacred and exclusive role of the people to do so under s 128.”

The result in *Work Choices* represented the continuation of how the High Court has approached the Constitution since the *Engineers’ Case*, in 1920. It confirms the centralist method adopted by the High Court, which has given the Commonwealth the potential to further regulate many areas of law that have always been within State control.<sup>64</sup>

### *The Money Problem*

Perhaps the least satisfactory aspect of Australian federalism is its vertical fiscal imbalance.<sup>65</sup> The High Court has allowed for the expansion of Commonwealth powers in areas of taxation that were not envisaged by the drafters of the Constitution. The States have become heavily dependent on the Commonwealth for their revenue and any semblance of balance has largely disappeared. This expansion of federal taxation powers has occurred, among other things, as a result of its exclusive control over levying of income tax. The drafters of the Australian Constitution, however, wished to secure the States’ financial position and independence. At federation, in 1901, only the States levied income tax. After the *Uniforms Tax Cases* of 1942 and 1957, the High Court upheld the federal takeover of the income tax system.

By 1942 the Commonwealth sought to obtain the exclusive control over the income tax system. It was argued that the war effort required this to be so. Thus a series of bills were passed that: a) prohibited taxpayers from paying State income tax until

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<sup>64</sup> Even so, the majority who decided that case suggested that the outcome could have been slightly different had the plaintiffs challenged the *Engineers’ Case* and the centralizing process it has undesirably engendered. Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ said at 50: “No party to these proceedings questioned the authority of the *Engineers’ Case*, or the *Concrete Pipes Case*, or the validity of the *Trade Practices Act* in its application to the domestic (intra-State) trade of constitutional corporations. Necessarily, however, the plaintiffs experienced difficulty in accommodating their submissions to those developments. If s 51(xx) is not affected by the limitations inherent in s 51(i), why is it affected by the limitations inherent in s 51(xxxv)?”

<sup>65</sup> B Galligan and C Walsh, ‘Australian Federalism: Developments and Prospects’, *Plubius*, (Autumn 1990) Vol 20, No.4, 7.

Commonwealth tax had been paid; b) provided that the rate of federal income tax was so high that it became politically impossible for the States to levy a concurrent income tax; c) allowed the Commonwealth Parliament to provide for a grant in order to compensate the States that refrained from imposing their income taxes.

The High Court approved the above scheme in *South Australia v Commonwealth (First Uniform Tax Case)*<sup>66</sup>. Since the Commonwealth continued to monopolise the income tax system, even after the war was over, a second challenge was made against the statutory regime. In *Victoria v Commonwealth (Second Uniform Tax Case)*<sup>67</sup>, the Court confirmed the Commonwealth power to impose whatever conditions it saw fit on the grant of money to the States

The drafters of the Constitution conferred upon the Commonwealth the power to levy customs and excise duties so as to develop a national common market (s90). And yet, they sought also to limit it by specifying that any surplus revenue derived from these two federal taxes be apportioned to the States. This was done so as to prevent any serious dislocation to the States' finances, especially during the transition from colonial to Federal government. They reached a compromise with the draft of sections 87, 89 and 93. In brief, any excess revenues should be returned to the States during a specified period of time. Once that time expired, s. 96 would give power to the Commonwealth to grant financial assistance 'to any State on such terms and conditions as the Parliament thinks fit'.

The High Court has allowed section 90 to be used subject to any conditions the Commonwealth chose to impose.<sup>68</sup> As a result, the States were induced to achieve objects on behalf of the Commonwealth which the Commonwealth itself could not achieve under its enumerated powers, effectively giving it the power to implement policies that otherwise would be unconstitutional.

*Special purpose grants* are moneys transferred pursuant to s.96 which the Commonwealth provides on conditions that are directed towards a certain objective which lies outside its enumerated powers. These conditions may be directed to any

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<sup>66</sup> (1942) 65 CLR 373.

<sup>67</sup> (1957) 99 CLR 575.

<sup>68</sup> In *South Australia v Commonwealth (First Uniform Tax Case)* (1942).

area of State law, including education<sup>69</sup>, health, roads<sup>70</sup> and housing. In *Pye v Renshaw*<sup>71</sup>, the Court upheld the use by the Commonwealth of s 96 to grant money to the States, provided it is used to effect the compulsory purchase of land for returning servicemen at less than its value. As a result, the Commonwealth evaded the s.51 (xxxii) requirement that property must be acquired on just terms. Section 96 grants have become, as Sir Robert Menzies put it<sup>72</sup>:

“... a major, and flexible instrument for enlarging the boundaries of Commonwealth action; or, to use realistic terms, Commonwealth powers”.

In *Deputy Federal Commissioner of Taxation (NSW) v W R Moran Pty Ltd*<sup>73</sup> the High Court upheld a federal scheme in which a tax was imposed on flour millers through Australia by one Act, while another Act provided for the reimbursement to Tasmania of revenue raised from millers in that State as a s 96 grant. As a result, the Commonwealth was allowed to tax all the States except Tasmania. The majority argued that section 51(ii) was not breached because the tax had been raised equally, even though the unequal distribution cancelled its effect in Tasmania. In other words, the Court allowed the Commonwealth to evade from its obligations under section 51(ii) by raising revenue equally but then granting it unequally as between States or parts thereof.

Whereas section 51(ii) assures that federal taxation laws cannot discriminate between States or parts of States, section 99 states that these laws cannot create preferences to the States or part of States. These prohibitions operate in different ways. Section 51(ii) applies only to ‘laws’ on the field of taxation, whereas section 99 applies to any ‘laws or regulations’ involving trade, commerce, or revenue. Both however are conceived to restrict the Commonwealth government, although the States remain free to introduce tax laws that may discriminate between parts of their own territory.

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<sup>69</sup> In *A-G (Vic); ex rel Black v Commonwealth (DOGS Case)* (1981), the High Court held that the Commonwealth could grant the States money on condition that the States then paid it to religious schools.

<sup>70</sup> In *Victoria v Commonwealth (Federal Roads Case)* (1926) 38 CLR 399, the High Court allowed the Commonwealth to grant the States money on the condition that it should be used to construct roads designated by the Commonwealth, even though road building did not fall within any enumerated power.

<sup>71</sup> (1951) 84 CLR 58.

<sup>72</sup> R Menzies, *Central Power in the Australian Commonwealth: An examination of the growth of Commonwealth power in the Federation* (London; Cassell, 1967), 76.

<sup>73</sup> (1939) 61 CLR 735.

Finally, section 114 adds to the list of guarantees and protections to the States by prohibiting the Commonwealth from taxing any State property, and vice-versa.

The classical definition of tax in Australia is found in *Matthews v Chicory Marketing Board*<sup>74</sup>, where the High Court held that tax is a compulsory exaction by a public authority for public purposes which is not a fee for services and a penalty. As such, fines, penalties and fees for licenses or services do not amount to taxes.

Section 90 of the Constitution prohibits the States from levying customs duties and excise duties. Customs duty is a tax imposed on goods imported into, or exported out of, Australia. Excise duty is a tax which is imposed on goods which are already in circulation in Australia. Whereas section 90 prohibits the States from levying customs duties and excise duties, it fails however to provide a clear definition to these taxes. The vast majority of section 90 cases involve claims by individuals that a State has imposed an excise duty which, by virtue of s 90, it is forbidden for a State to impose.<sup>75</sup>

In *Parton v Milk Board (Vic)*, the High Court held that section 90 is not confined only to prohibiting the state from imposing taxes upon production and manufacture, but upon sale and distribution as well. According to Dixon J, “a tax upon a commodity at any point in the course of distribution before it reaches the consumer produces the same effect as a tax upon its manufacture or production”<sup>76</sup>.

Since the decision in *Milk Board* the Court has gradually broadened its approach in identifying and characterising excise duties. The Court has examined whether the tax or levy in question is related to production, manufacture, sale, or distribution of goods. If such relationship can be established then the tax or levy is interpreted as an excise duty and cannot be imposed by a State.

The financial problems of the States have been aggravated by decisions of the High Court that have not allowed them, among other things, to raise their own income taxes. The States cannot raise anywhere near the revenue they need. Over the 2005 to 2006 financial year “the Commonwealth collected over 80% of taxation revenue

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<sup>74</sup> (1938) 60 CLR 263.

<sup>75</sup> This prohibition was extended to the territories in *Capital Duplications Pty Ltd v Australian Capital Territory (No 1)* (1992) 177 CLR 248.

<sup>76</sup> (1949) 80 CLR 229.

(including the GST), but was responsible for 54% of government outlays”. On the other hand, “the States collected only 16% of taxation revenue and accounted for around 39% of outlays”.<sup>77</sup> As a result of these court decisions, the States have turned to new sources of taxation such as gambling, and have remained heavily dependent on Commonwealth grants. When the federal government grants money to them it often does so with strings attached, although “the States have no real choice but to accept the money, even at the cost of doing the Commonwealth’s bidding”.<sup>78</sup>

## **Conclusion**

Although the Australian Constitution’s federal structure, particularly its *limited* powers conferred upon the Commonwealth Parliament, does not support the idea that the express grants of power should be interpreted as fully and completely as their literal words might mean, such an approach still remains the most common guiding principle of interpretation by the High Court.<sup>79</sup>

If the High Court wishes to protect the federal system it must start by enforcing the explicit limitations contained in the constitutional text. Above all, the High Court needs to rediscover the federal nature of the Australian Constitution, meaning that it will have to consider that the treatment given by constitutional law to the Australian States ‘by no means implies that federal legislative power is to be accorded interpretative priority’.<sup>80</sup>

Any amendment to the Constitution needs to be submitted to the approval of the Australian people. Under section 128, the Australian people have the final say on whether a proposed constitutional amendment must be accepted. Such approval needs to come from the majority of the electorate as a whole as well as the majority of the electorate in the majority of the States.

Since the beginning of Federation 44 amendment proposals have been presented to the people. Only 8 of them were carried. The last referenda, in 1999, which proposed

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<sup>77</sup> A Stewart and G Williams, *Work Choices: What the Court Said* (Federation Press, 2007) 12-13.

<sup>78</sup> *Ibid*, at 13.

<sup>79</sup> G de Q. Walker, ‘The Seven Pillars of Centralism’ in *Upholding the Australian Constitution* (Proceedings of The Samuel Griffith Society Conference, vol. 14, 2002).

<sup>80</sup> N Aroney, ‘The Ghost in the Machine: Exorcising *Engineers*’ in *Upholding the Australian Constitution* (Proceedings of The Samuel Griffith Society Conference, vol. 14, 2002).

the abolition of monarchy and the writing of a new preamble for the Constitution, were soundly defeated.

Curiously, no less than 26 of all these amendment proposals involved any attempt to enlarge the Commonwealth power. Only 2 of them were carried: the social services proposal and the 1967 proposal to repeal a discriminatory reference to Aborigines. The Australian people themselves have consistently rejected proposed expansions of Commonwealth powers.

The High Court's centralist reading of the Constitution has effectively done in practice what the Australian people themselves have explicitly rejected. As Justice Callinan reminds in his dissenting judgment in *Work Choices*: "If the Parliament could not convince the people to change, it's not for the Court to subvert their will by making the change for them".

Unfortunately, this is precisely what the High Court has done. The High Court's failure to preserve the federal structure of the Constitution has displaced the exclusive right of the people to effect constitutional change as envisaged by section 128. The implication is that all the advantages of federalism sought by the Australian founders have actually diminished over time, in no small part due to the actions of the High Court of Australia.

## **Part II: One Indissoluble Federal Commonwealth? The Need for Reform**

### **1. Advantages of Federalism**

The initial question that must be asked before considering the key issues and priorities for the reform of the Australian Federation is whether Australia's basic governmental structure should continue to be a Federal Commonwealth? Does federalism still have a place in 21<sup>st</sup> century Australia? Is there any value in recognising federalism as one of our guiding constitutional principles? In our view, the answer to these questions must be a resounding and unequivocal yes.

Associate Professor Anne Twomey and Professor Glenn Withers have previously noted the somewhat unusual disconnect between current Australian attitudes towards federalism and the prevailing attitude in the rest of the world. The modern

international trend is strongly towards federalism and decentralized government. As Twomey and Withers stated<sup>81</sup>:

“In Australia, it is often asserted that federalism is an old-fashioned, cumbersome and inefficient system. Yet internationally, federalism is regarded as a modern, flexible and efficient structure that is ideal for meeting the needs of local communities while responding to the pressures of globalization. The difference between these two views is stark”.

Beyond the simple reality that there would be enormous practical difficulties associated with attempting to govern a country the size of Australia with a single, centralized government, there are numerous other advantages apparent in a federal system. A direct comparison of federal and unitary governments suggests that federal arrangements tend to produce more stable governments, more efficient governments, higher rates of economic growth, and greater integrity in government<sup>82</sup>. If we were to look at quantifying this benefit, it has been suggested that “... the specific advantage achieved by Australia through the federal structure itself is a sum of \$4,507 per capita in 2006 – or \$11,402 per average household”<sup>83</sup>. Twomey and Withers go on to suggest that the ‘federalism dividend’ may be increased by further reform of the Australian Federation<sup>84</sup>.

Twomey and Withers conclude that federalism is the right political structure for Australia. A well-designed federal system has a number of advantages over a unitary system of government. The broad sweep of advantages can be categorised into three key areas: the plurality achieved through increased participation and access to the political system; regional autonomy and diversity<sup>7</sup>; and innovation and competitive efficiencies<sup>85</sup>. Professor Geoffrey Walker writes<sup>86</sup>:

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<sup>81</sup> A Twomey and G Withers, *Australia's Federal Future: Delivering Growth and Prosperity (Federalist Paper 1)* (April 2007), 2.

<sup>82</sup> A Twomey and G Withers, *Australia's Federal Future: Delivering Growth and Prosperity (Federalist Paper 1)* (April 2007), 2, 8; G de Q Walker, “Ten Advantages of a Federal Constitution” (Centre for Independent Studies, Sydney, 2001).

<sup>83</sup> A Twomey and G Withers, *Australia's Federal Future: Delivering Growth and Prosperity (Federalist Paper 1)* (April 2007), 41.

<sup>84</sup> *Ibid*, 41.

<sup>85</sup> A Heywood, *Politics*, (New York: Palgrave Macmillan, 2<sup>nd</sup> ed, 2002), 10.

<sup>86</sup> G de Q Walker, “Ten Advantages of a Federal Constitution” (Centre for Independent Studies, Sydney, 2001).



“An awareness of the positive benefits of federalism will make the constitutional debate a more equal and fruitful one. This will mean recognizing that, in a properly working federation, government is more adaptable to the preferences of the people, more open to experiment and its rational evaluation, more resistant to shock and misadventure, and more stable. Its decentralized, participatory structure is a buttress of liberty and a counterweight to elitism. It fosters the traditionally Australian, but currently atrophying, qualities of responsibility and self-reliance. Through greater ease of monitoring and the action of competition, it makes government less of a burden on the people. It is desirable in a small country and indispensable in a large one. And if, as is often said, the pursuit of truth in freedom is the essence of civilization, this ‘liberating and positive form of organization’ has a special contribution to make to the progress of humankind.”

Galligan and Walsh assert that this enhancement of democratic participation through dual citizenship and multiple governments is undoubtedly federalism’s most positive quality. According to them, this largely explains its strength and resilience in Australia<sup>87</sup>. Federalism preserves the States as small democratic polities, enabling the national strength of a large nation to be added to the enhanced participatory qualities of small democratic states<sup>88</sup>. Related to the idea of the democratic process, a further strength of federalism is its capacity to secure regional autonomy and to accommodate and reconcile competing diversities between and within States;. According to the late Hans Kelsen<sup>89</sup>:

“Democracy ... may be centralized as well as decentralized in a static sense; but decentralisation allows a closer approach to the idea of democracy than centralization. This idea is the principle of self-determination. Democracy demands the utmost conformity between the general will as expressed in the

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<sup>87</sup> B Galligan and C Walsh, “Australian Federalism: Yes or No?” in G Craven (ed), *Australian Federation* (Melbourne; University Press, 1992), 195.

<sup>88</sup> Ibid, 195. The idea certainly comes from Montesquieu’s *The Spirit of the Laws* (1789): “If a republic be small, it is destroyed by a foreign force; if it be large, it is ruined by an internal imperfection ... It is, therefore, very probable that mankind would have been, at length, obliged to live constantly under the government of a single person, had they not contrived a kind of constitution that has all the internal advantages of a republican, together with the external force of a monarchical, government. I mean a confederate republic. This form of government is a convention by which several petty states agree to become members of a larger one, which they intend to establish. It is a kind of assemblage of societies, that constitute a new one, capable of increasing by means of further associations, till they arrive at such a degree of power as to be able to provide for the security of the whole body” (at 126).

<sup>89</sup> H Kelsen, *General Theory of Law and State* (New York: Russell & Russell, 1945), 313.

legal order and the will of the individuals subject to the order; this is why the legal order is created by the very individual who are bound by it according to the principle of majority. Conformity to the order with the will of the majority is the aim of democratic organization. But the central norms of the order, valid of the whole territory, may easily come into contradiction with the majority will of a group living on a partial territory. The fact that the majority of the total community belongs to a certain political party, nationality, race, language, or religion, does not exclude the possibility that within certain partial territories the majority of individuals belong to another party, nationality, race, language, or religion. The majority of the entire nation may be socialistic or Catholic, the majority of one or more provinces may be liberal or Protestant. In order to diminish the possible contradiction between the contents of the legal order and the will of the individuals subject to it, in order to approximate as far as possible the ideal of democracy, it may be necessary, under certain circumstances, that certain norms of the legal order be valid only for certain partial territories and be created only by majority of votes of the individuals living in these territories. Under the condition that the population of the State has no uniform social structure, territorial division of the State territory into more or less autonomous provinces ... may be a democratic postulate.”

The enhancement of democratic participation in a federal system arises from the ordinary citizen being given multiple points of access to the government and through greater choice and diversity being provided. A federal system allows for greater flexibility in policy choices, with the different needs of citizens in different parts of the country able to be met through the customisation of policies at the sub-national level. For a country such as Australia the benefits of this are obvious. The needs and issues of somebody living in Coober Pedy will not be the same as those of somebody living in Coogee, and it simply isn't realistic to expect a bureaucrat in Canberra to be responsive to these differing local concerns. A federal system strengthens participatory democracy by bringing government closer to the people, allowing local people to have a greater say in the local decisions that directly affect them.

Related to this discussion is also the assumption that federalism protects individuals because it prevents an excessive accumulation of power in either level of government. Sir Harry Gibbs once remarked that the most effective way to curb political power

was to divide it<sup>90</sup>. This argument that federalism can better secure human rights and freedoms was supported by Sir Robert Menzies, who once declared that “in the division of power, in the demarcation of powers between a Central Government and the State Government there resides one of the true protections of individual freedom”<sup>91</sup>. A similar point was made by James Madison in *Federalist No. 51*<sup>92</sup>:

“In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself”.

The idea that federalism enhances personal freedom has been bolstered under contemporary ‘public choice’ theories by notions of ‘voice’ and ‘exit’<sup>93</sup>. According to American federal Judge Robert Bork, the federal system enhances personal autonomy because “if another state allows the liberty you value, you can move there, and the choice of what freedom you value is yours alone, not dependent on those who made the Constitution. In this sense, federalism is the constitutional guarantee most protective of the individual’s freedom to make his own choices”<sup>94</sup>. A similar point is made by Justice Antonin Scalia of the United States Supreme Court<sup>95</sup>:

“Now there are many reasons for having a federal system, but surely the most important is that it produces more citizens content with the laws under which they live. If, for example, the question of permitting so-called ‘sexually oriented businesses’ – porn shops – were put to a nationwide referendum, the outcome might well be 51 per cent to 49 per cent, one way or the other. If that result were imposed nationwide, nearly half of the population would be living under a regime it disapproved. But such a huge proportion of the pro-sex-shop vote would be in

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<sup>90</sup> H Gibbs, “Courage in constitutional interpretation and its consequences: one example” (1991) 14 *University of New South Wales Law Journal* 325.

<sup>91</sup> R Menzies, *Central Power in the Australian Commonwealth* (London; Cassell, 1967), 24.

<sup>92</sup> J Madison, *The Federalist No. 51* (6 February 1788).

<sup>93</sup> T Blackshield and G Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Sydney: Federation Press, 4<sup>th</sup> ed, 2006), 243.

<sup>94</sup> R Bork, *The Tempting of America* (New York: Simon & Schuster, 1991), 53.

<sup>95</sup> A Scalia, “Romancing the Constitution: Interpretation as Invention” in G Huscroft and I Brodie (eds), *Constitutionalism in the Charter Era* (LexisNexis, 2004), 342.

states such as New York, California, and Nevada; and a huge proportion of the anti-sex-shop vote would be in the south, and in such western states as Utah and New Mexico. If the question of permitting sexually oriented businesses were left to the states – which is surely where the First Amendment originally left it – perhaps as much as 80 per cent of the population would be living under a regime that it approved. Running a federal system is a lot of trouble; a large proportion of the time of my Court is spent sorting out federal-state relations. It is quite absurd to throw away the principal benefit of that system by constitutionalizing, and hence federalizing, all sorts of dispositions never addressed by the text of the Constitution”.

The competitive nature of a federal system is a further benefit, promoting efficiency, innovation and responsiveness. Competition between State and Federal governments should (theoretically) encourage an overall improvement in government performance. Policy innovations can be tested on a smaller scale and, if these experiments fail, federalism “cushions the nation as a whole from the full impact of government blunders”<sup>96</sup>.

The cooperation that is inevitably required between different levels of government in a federation should also result in better decision-making by building a heightened level of debate and scrutiny into the system. This point has previously been emphasised by Twomey and Withers<sup>97</sup>:

“The involvement of more than one government means that a proposal will receive a great deal more scrutiny than if it were the work of one government alone. Problems with implementing the proposal in different parts of the country are more likely to be identified, where there is conflict between governments on the nature and detail of the proposal, there is more likely to be a public debate as different governments are forced to put their positions and justify them in the public domain. While this has the disadvantage of sometimes slowing down reform, the need for cooperation has the corresponding advantage of ensuring that reform,

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<sup>96</sup> G de Q Walker, “Ten Advantages of a Federal Constitution” (Centre for Independent Studies, Sydney, 2001), 33.

<sup>97</sup> A Twomey and G Withers, *Australia’s Federal Future: Delivering Growth and Prosperity (Federalist Paper I)* (April 2007), 15.

when implemented, is better considered and more moderate in its nature.”

Of course, a federal system is not without its disadvantages also. The most common arguments against federalism are that it is inefficient, expensive, leads to wasteful duplication and excessive bureaucracy, that it reduces accountability by encouraging “conflict and buck-passing”<sup>98</sup> and that it is incompatible with the needs of a modern economy. The first point to note in response to these criticisms is that some of the largest and most internationally competitive economies in the world are federations. A federal system is clearly not itself an impediment to economic success in a globalised world, or to the delivery of competitive and efficient services. Indeed, recent attempts at service delivery at the Commonwealth level reinforce the point that centralized administration does not automatically lead to greater efficiencies, reduced costs, or better outcomes. The second point is that many of the above criticisms are not criticisms of federalism *per se*, but of the way that federalism operates in Australia. Reforms to the federal system may well help to address some of these criticisms and produce a more effective federal system.

It is also necessary to keep in mind the advantages previously discussed when weighing the costs allegedly associated with federalism. As noted by Professor Greg Craven<sup>99</sup>:

“A plausible response is that if federalism is complex, expensive and difficult, so is democracy. In both cases, the question is not simply how much it costs, but what you get for the money and effort you expend ...”.

Finally, before we can begin to minimise any examples of duplication and waste in our federal system it will be important to clearly identify the cause of these problems. In Australia, much of the unnecessary duplication and cost has actually been caused by the Commonwealth Government’s expansion of its sphere of influence. As Craven observed<sup>100</sup>:

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<sup>98</sup> Ibid, 24.

<sup>99</sup> G. Craven, ‘The New Centralism and the Collapse of the Conservative Constitution’ (Papers on Parliament No. 44, Democratic Experiments: Lectures in the Senate Occasional Lecture Series, Parliament of Australia, 2004-2005), 138.

<sup>100</sup> Ibid.

“Perhaps the most popular argument of centralism ... is that federalism in Australia involves duplication and divided accountability in government. There is considerable truth in this argument. One of its dangers for centralisers, however, is that much of the difficulty in this context has occurred because the Commonwealth, through use of its financial muscle, has invaded State areas, such as education and health. Confusion of accountability and responsibility thus may be sheeted home to Commonwealth incursion, not State incompetence. In these circumstances, a reasonable State response might well be that if the Commonwealth is prepared to vacate the field and leave the cheque behind, the State would be more than happy to eliminate all elements of division and overlap”.

The above discussion has been designed to show that there are considerable advantages derived from a well-functioning federal system of government. Given this, and in light of our earlier conclusion that the benefits of federalism are not being fully realised in Australia at present, it is timely to explore a possible agenda for national reform aimed at strengthening federalism, re-establishing the concept as a guiding constitutional value, and restoring the federal balance in Australia.

## **2. A Possible Agenda for National Reform.**

The federal system in Australia has been called “dysfunctional” and in need of rescue<sup>101</sup>. It remains our view that federalism is the right political structure for Australia, but it is also clear that there are significant challenges facing our federal system and that a process of reform offers the opportunity to improve and strengthen the day-to-day operation of federalism in Australia.

This paper will discuss and recommend a number of specific reform proposals in relation to the following areas:

- a) the distribution of constitutional powers and responsibilities;

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<sup>101</sup> See, for example, G Williams, ‘Old flaws in federalism rise again’, *The Sydney Morning Herald* (12 April 2005); K Wiltshire, ‘Academic urges Constitutional reform’, *UQ News Online* (28 February 2007); M Steketee, ‘Federalism is a dead idea. So what now?’, *The Australian* (24 April 2010).

- b) processes for enhancing cooperation between the various levels of Australian government;
- c) financial relations between Federal and State governments; and
- d) possible constitutional amendments.

All of the proposed reforms are aimed towards what we consider to be the primary deficiency in the modern Australian Federation, namely the need to revitalize the Federation by restoring the federal balance, so as to ensure that the ‘federalism dividend’ is fully realised for all Australians.

a) *The Distribution of Constitutional Powers and Responsibilities.*

The world has changed significantly since the Australian Constitution was drafted over one hundred years ago. While the core constitutional principles and structures remain as relevant today as they were at the time of Federation, it is increasingly accepted that it would be beneficial to revisit the distribution of constitutional powers and responsibilities between levels of government to ensure greater clarity and to better reflect modern conditions. The current Australian Federation is characterised by significant areas of shared responsibility, which heightens the opportunity for a “blurring of government responsibilities – from cost and blame-shifting among government levels, wasteful duplication of effort or under-provision of services, and a lack of effective policy coordination”<sup>102</sup>. It is also important to note that the constitutional allocation of powers envisaged by the Founding Fathers – creating a national government with expressly defined and limited powers – has, in a number of significant areas, shifted considerably as a result of an approach to constitutional interpretation in the High Court of Australia that has consistently expanded federal powers. The current constitutional division of powers is, in many respects, the worst of both worlds – it neither faithfully reflects the federal design of the Founding Fathers, nor has it fully evolved to reflect modern realities and challenges.

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<sup>102</sup> OECD, *Economic Surveys: Australia* (2006), 82.

It has been suggested that a constitutional convention should be held to consider the distribution of constitutional powers and responsibilities in the modern context. Any such reallocation of powers should aim, where possible<sup>103</sup>:

“to isolate a particular area of policy and allocate it in its entirety to one level of government ... This enhances responsibility, provides clarity to those who use particular services and avoids the problem of cost-shifting and buck-passing”.

The principle of subsidiarity should be applied in this analysis to appropriately reflect Australia’s federal nature. The word subsidiarity derives from subsidiary, which in turn has its roots in the Latin *subsidium*. Simply stated, subsidiarity means the same as assistance or help. It consists, therefore, in letting people do what they can do by themselves and, on a higher level, leaving up to the federal government what cannot be done by lesser circles of power. In other words, subsidiarity leaves up to the states (and the individual citizens) what they can do by themselves and leaves in the hands of the federal government only what cannot be done otherwise.<sup>104</sup> This principle provides<sup>105</sup>:

“... that functions should, where practical, be vested in the lowest level of government to ensure that their exercise is as close to the people as possible and reflects community preferences and local conditions ... The principle of subsidiarity places the onus on those who seek to place a function with a higher level of government to make the case for it”.

That is not to say that there is no role for the national government. It is recognised that certain powers should be vested in the national government, such as where there are overriding national interest concerns (such as defence), where national uniformity is required for reasons of equity (such as social security benefits), there are significant economies of scale available to a national government, or where there are significant potential inter-jurisdictional spill-overs if a lower level of government is given responsibility. When we speak of re-strengthening federalism this is not just a blanket

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<sup>103</sup> A Twomey and G Withers, *Australia’s Federal Future: Delivering Growth and Prosperity (Federalist Paper 1)* (April 2007), 46.

<sup>104</sup> See: A. Zimmermann, ‘The Principle of Subsidiarity: A Policy for the Democratic Reform of the Brazilian Federal State’. *Democracy – Organization of American States*, Washington/DC, Spring 2000, pp.2 and 7.

<sup>105</sup> A Twomey, ‘Reforming Australia’s Federal System’ (2008) 36 *Federal Law Review* 57, 59.



call to strengthen States rights, but rather a call to establish an effective and clear balance between national and State responsibilities.

It has been suggested that the reallocation of constitutional powers could largely be achieved in practice without the need for formal constitutional amendment. While this may be possible, and may well be the only practical way of enacting agreed reforms in the short to medium term, it would ultimately be preferable and proper to enact any proposed changes through the formal amendment procedure provided under s. 128. As Twomey concluded<sup>106</sup>:

“This ensures that the people are consulted and give their imprimatur to the change and also prevents backsliding or repudiation by future governments”.

b) *Processes for Enhancing Cooperation Between the Various Levels of Australian Government.*

### Reforming the Senate

The Senate was originally intended as the States house, but has increasingly moved away from this characterisation of its role. The central role occupied by political parties in the Australian political system means that the primary loyalty of individual Senators is now generally to the political party on which their pre-selection depends, rather than to their home State. Given that the same party political divide also permeates the State level of government it is difficult to see that devolving the power to appoint Senators to the State Parliaments would actually make any practical difference. There are, however, other reforms that have been suggested that may help to give the Senate a more heightened sense of itself as a States house, and a stronger role in supporting the federal balance. The first of these is the suggestion that a permanent Senate Standing Committee on Federal-State Relations should be established. The second is the suggestion by the Victorian Federal-State Relations Committee<sup>107</sup>:

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<sup>106</sup> Ibid, 63.

<sup>107</sup> Federal-State Relations Committee, ‘Federalism and the Role of the States: Comparisons and Recommendations’ (Third Report, Parliament of Victoria, May 1999), 220.

“That Senators be given the right to appear before the Parliament of the State from which they are elected, to report on a regular basis and answer questions on matters of concern to the State. The intention was to make Senators focus more on their role as representatives of the State, as well as to increase their understanding of matters of importance to the States”.

### Strengthening the Council of Australian Governments

The Council of Australian Governments (“**COAG**”) was established in May 1992, but has had an equivocal history as a mechanism for delivering national reforms. While there have been some significant reforms delivered through COAG, its achievement have been “sporadic and unreliable” and “its effectiveness has waxed and waned depending upon personalities and political events”<sup>108</sup>. There is, however, a clear need for better co-operative mechanisms both to deal with areas of shared responsibility in the federal system and to encourage a co-operative form of federalism. The suggestion by the Business Council of Australia for the institutionalisation and strengthening of COAG is a worthy one, and a reform that could be effectively enacted with relative ease<sup>109</sup>. The Business Council of Australia has suggested that this would involve strengthening the role of COAG (which would include instituting more regular meetings and a permanent secretariat separate from its current location within the Department of Prime Minister and Cabinet) and improving its accountability mechanisms. As part of these efforts to strengthen COAG as a body promoting cooperative federalism it has also been suggested that “efforts should be made to remove the perception of COAG as a creature of the Commonwealth by ensuring that the timing, chairing, hosting and agendas of meetings are determined jointly rather than by the Commonwealth alone”<sup>110</sup>.

It is also proposed that COAG should be given an enhanced and formalised role in certain policy areas. One obvious example is the Commonwealth’s signing and ratification of treaties under the external affairs power. As discussed above<sup>111</sup>, the

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<sup>108</sup> A Twomey and G Withers, *Australia’s Federal Future: Delivering Growth and Prosperity (Federalist Paper I)* (April 2007), 47.

<sup>109</sup> Business Council of Australia, *A Charter for New Federalism* (2007); Business Council of Australia, *Reshaping Australia’s Federation – A New Contract for Federal-State Relations* (2006).

<sup>110</sup> Business Council of Australia, *Reshaping Australia’s Federation – A New Contract for Federal-State Relations* (2006), 35.

<sup>111</sup> See above at 17-19.

external affairs power under s. 51(xxix) of the Constitution has been given an expansive interpretation by the High Court, allowing the Commonwealth to enter into treaties on a wide range of matters that may otherwise be within the exclusive domain of the States. The proliferation of treaties has led to an expansion of Commonwealth powers at the expense of the State as “[s]imply by entering into a treaty, the Commonwealth Government can give the Commonwealth Parliament what is in effect a new head of legislative power”<sup>112</sup>.

There are currently formal mechanisms designed to encourage consultation with State and Territory Governments before treaties are entered into. The key consultative body is the Treaties Council within COAG, while the Commonwealth-State-Territories Standing Committee on Treaties is another potentially significant consultative mechanism. COAG attempted to place the consultative process on a more formal footing with the adoption of the *Principles and Procedures for Commonwealth-State Consultation on Treaties* in 1996.

While consultation is to be encouraged, the insufficient and often symbolic nature of the current mechanisms is evident from an examination of the *Principles and Procedures for Commonwealth-State Consultation on Treaties*. For example, Principle 3.1 provides<sup>113</sup>:

“In the interests of achieving the best possible outcome for Australia and where a treaty or other international instrument is one of sensitivity and importance to the States and Territories, the Commonwealth should, wherever practicable, seek and take into account the views of the States and Territories, in formulating Australian negotiating policy, and before becoming a party to, or indicating acceptance of, that treaty or instrument.”

The use of phrases such as “wherever possible” and “take into account” highlights the discretionary and largely symbolic nature of the consultative mechanism. It is the States who are frequently charged with implementing the international obligations entered into by the Commonwealth, and yet the Commonwealth is free to enter into

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<sup>112</sup> Federal-State Relations Committee, *Report on International Treaty Making and the Role of States* (First Report, Parliament of Victoria, October 1997).

<sup>113</sup> Accessed at <[http://www.coag.gov.au/coag\\_meeting\\_outcomes/1996-06-14/docs/attachment\\_c.cfm](http://www.coag.gov.au/coag_meeting_outcomes/1996-06-14/docs/attachment_c.cfm)>, at 10 August 2010.

obligations directly impacting upon the States over and above their objections. While recognising that it is necessary to speak with one voice at the international level and that only the Commonwealth Government can ultimately have responsibility for entering into treaties on behalf of Australia, it is submitted that the States should be given a more substantive role in this process. This could be done either by providing for a process of approval by State Parliaments or, recognising the delays that might result from the previous suggestion, by requiring that the Treaties Council within COAG be given a more substantive role in the treaty process. This may include a power of veto where a treat is one that impacts on areas of State activity.

*c) Financial Relations Between Federal and State Governments*

Probably the area in which reform is most urgently needed is in the financial relations between federal and state governments. This federal-state relationship has been characterised by an ever-increasing accumulation of financial power on the part of the federal government and ever-decreasing claims to financial independence on the part of the state governments. The States have become “institutionalized beggars”<sup>114</sup> – a somewhat crude, and yet accurate, assessment of the current situation. Alfred Deakin’s prescient claim that the States were “legally free, but financially bound to the chariot wheels of Central Government”<sup>115</sup> presents a realistic picture of the current state of affairs.

This increasingly unequal financial relationship has potentially broader consequences for the federal balance in terms of the allocation of responsibilities. The limited financial capacities of the States as compared to the Commonwealth tend to fuel arguments that the Commonwealth should enter areas that have traditionally been State responsibilities. As Twomey has observed<sup>116</sup>:

“It is disingenuous to suggest that the States are failing in their responsibilities because they require Commonwealth funding and that the Commonwealth should therefore take over State policy functions, when this is the system that the Commonwealth deliberately created”.

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<sup>114</sup> Matthew Franklin, ‘Abbott slams state health “beggars”’, *The Weekend Australia*, 12-13 August 2006.

<sup>115</sup> Anonymous column [written by Alfred Deakin] in the *London Morning Post*, 1902.

<sup>116</sup> A Twomey and G Withers, *Australia’s Federal Future: Delivering Growth and Prosperity (Federalist Paper I)* (April 2007), 26.

The financial relations between federal and state governments, and proposals for reform, will be considered below in terms of the growing vertical fiscal imbalance, the increasing reliance on specific purpose payments, and the need to revisit the extent of horizontal fiscal equity.

### Reducing Vertical Fiscal Imbalance

The term vertical fiscal imbalance (“*VFI*”) “is the term used to describe a mis-match between the revenue raising powers and expenditure responsibilities of each level of government, where a short-fall in revenue for one level of government (typically the regional level) is made up for by grants funded from the surplus revenue of the other (typically the central government)”<sup>117</sup>. In a federal system some level of VFI is realistically to be expected,<sup>118</sup> but it is broadly seen as desirable to aim for an approximate level of fiscal equivalence, where the revenue raising powers and expenditure responsibilities of each level of government are balanced. The central advantage of fiscal equivalence is that it “enhances accountability and responsibility, as the same government has to make the hard choices related to balancing tax and expenditure levels”<sup>119</sup>.

The Australian federal system is characterised by one of the highest levels of VFI amongst federal systems across the world. The result of this is that the States are increasingly dependent on the national government for funding. For example, the WA Department of Treasury and Finance has estimated that the WA government relies on the national government for approximately 50% of its total operating revenue<sup>120</sup>. Statistics from the Australian Bureau of Statistics in 2005 showed that the national government directly collected approximately 82% of taxes, of which approximately 27% is transferred back to State governments. On the other hand, State governments undertake 40% of public spending in Australia, evidencing a

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<sup>117</sup> Department of Treasury and Finance (Government of Western Australia), *Discussion Paper on Commonwealth-State Relations: An Economic and Financial Assessment of how Western Australia Fares* (April 2006), 11.

<sup>118</sup> One reason for this is the practical reality that it is simply more efficient for certain taxes to be collected at a central point and applied uniformly at the national level.

<sup>119</sup> A Twomey, ‘Reforming Australia’s Federal System’ (2008) 36 *Federal Law Review* 57, 65.

<sup>120</sup> Department of Treasury and Finance (Government of Western Australia), *Discussion Paper on Commonwealth-State Relations: An Economic and Financial Assessment of how Western Australia Fares* (April 2006), 15.

significant VFI<sup>121</sup>. This comparatively high level of VFI “largely reflects the erosion since Federation of the States’ revenue powers as seen in the transfer of income taxes to the national government, the abolition of a range of State taxes under the *1999 Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations (“IGA”)*, and the broad interpretation given to section 90 of the Constitution by the High Court of Australia”<sup>122</sup>.

Such a stark degree of VFI is not desirable. Their increasing reliance on grants from the national government means that the States are, to a growing extent, no longer the masters of their own financial destiny. This has a number of consequences including, as described above, a reduction in accountability and fiscal responsibility. It also “exposes State government to budget uncertainty *vis-à-vis* Australian government decisions about the level of grants”<sup>123</sup>, allows the national government to use its heightened fiscal leverage to force its way into policy areas traditionally reserved to the States, and also “reduces incentive for States to put in place growth promoting policies and infrastructure, as the tax benefits flow primarily to the Commonwealth”<sup>124</sup>.

The *IGA*, which was signed by the Federal and State Governments in June 1999, was meant to improve this situation by providing the States with access to a growth revenue stream by the Federal Government agreeing to allocate GST revenues to the States. The WA Department of Treasury and Finance argues, however, that this has actually increased the financial dependence of State Governments on the Federal Government, observing that under the *IGA* “... the States have abolished a number of their own taxes ... so that there are less revenue sources under the State’s direct control”<sup>125</sup> and that “States cannot choose (individually or collectively) to increase their revenue from the GST because the GST is an Australian Government tax and the

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<sup>121</sup> A Twomey and G Withers, *Australia’s Federal Future: Delivering Growth and Prosperity (Federalist Paper 1)* (April 2007), 36.

<sup>122</sup> Department of Treasury and Finance (Government of Western Australia), *Discussion Paper on Commonwealth-State Relations: An Economic and Financial Assessment of how Western Australia Fares* (April 2006), 12.

<sup>123</sup> *Ibid*, 14.

<sup>124</sup> *Ibid*, 14.

<sup>125</sup> *Ibid*, 17.

*IGA* provides that amendments to the GST require unanimous agreement of the Australian Government and all State Governments”<sup>126</sup>.

A number of reforms aimed at reducing the VFI within the Australian federal system have been suggested over the years. These tend to involve either providing state governments with a greater share of overall taxation revenue or enhancing the ability of state governments to raise their own funds. One such suggestion is for the States to impose their own personal income tax. There is no constitutional impediment to the States collecting income tax, and in fact they did so prior to 1942. This is not an unusual arrangement with, for example, state and provincial governments in the USA and Canada collecting their own personal income taxes in addition to income taxes levied by the national government. This would have the advantage of reducing VFI and reducing the financial reliance of the States on Commonwealth transfers, however the Business Council of Australia has warned that “any increase in the tax bases of States would need to be offset by equivalent reductions in Commonwealth taxes” and that there would be a need to avoid “the potential for increased administrative burdens dealing with a more fragmented tax system”<sup>127</sup>.

An alternative reform proposal – which would still achieve the aim of reducing VFI while also addressing concerns about the overall tax burden and avoiding additional administrative burdens – is to introduce a formal tax-sharing arrangement, with the States provided with a guaranteed percentage of Commonwealth tax revenue. In addition to reducing VFI this would also have the benefit of providing all States with a direct interest in the economic success of all other States, with increasing economic growth directly benefiting them through corresponding increases in taxation revenues. A formal tax-sharing arrangement would likely also reduce State reliance on specific purpose payments by increasing the revenue available to them on an unconditional basis, which is itself a considerable benefit for reasons expanded upon below.

### Reducing Specific Purpose Payments

The expansion of specific purpose payments (“*SPPs*”) has further eroded the financial independence of the States and allowed the Commonwealth to enter into

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<sup>126</sup> *Ibid*, 17.

<sup>127</sup> Business Council of Australia, *Reshaping Australia’s Federation – A New Contract for Federal-State Relations* (2006), 41.

policy areas that have previously been the exclusive provinces of the States. The conditions that are attached by the Commonwealth to these payments effectively allow the Commonwealth to impose policy directions and programs on the States, without the limitation of requiring any connection to specific Commonwealth constitutional heads of power. They also significantly constrain State discretion and freedom in allocating their own budgets and designing their own programs. The use of SPPs continues to increase. As Twomey and Withers outlined<sup>128</sup>:

“In the 2006-07 financial year there [were] at least 90 distinct SPP programs providing \$28 billion to the States or directly to non-government schools and local governments. SPPs account for 42% of total payments made by the Commonwealth to the States. The requirements in many SPPs that States match funding and maintain existing efforts means that up to 33% of State budget outlays can be effectively controlled by SPPs, reducing State budget flexibility”.

The increased use of SPPs has obvious consequences for the federal balance, with Professor Ross Garnaut commenting that<sup>129</sup>:

“There is a sense in which [SPPs] have completely undermined the federal character of government in Australia”.

SPPs allow the Commonwealth to assert “financial and policy control over the States” and “are the primary cause of duplication, excessive administrative burdens, blame-shifting and waste in our federal system”<sup>130</sup>. Reducing the use of SPPs in favour of general purpose grants should be a priority for the reform of the Australian federation.

### Revising Horizontal Fiscal Equalization

In addition to its comparatively high degree of VFI the Australian Federation is also characterised by a high degree of horizontal fiscal equalization (“*HFE*”). The Commonwealth Grants Commission applies the HFE principle when advising the Commonwealth government on the allocation of GST revenue between the States. It

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<sup>128</sup> A Twomey and G Withers, *Australia's Federal Future: Delivering Growth and Prosperity (Federalist Paper I)* (April 2007), 47.

<sup>129</sup> Productivity Commission, *Productive Reform in a Federal System* (Roundtable Proceedings, Canberra, 2006), 93.

<sup>130</sup> A Twomey, ‘Reforming Australia’s Federal System’ (2008) 36 *Federal Law Review* 57, 67.



describes the principle of fiscal equalisation as requiring that “each State should be given the capacity to provide the average standard of State-type public services, assuming it does so at an average level of operational efficiency and makes an average effort to raise revenue from its own sources”<sup>131</sup>. In simple terms, it is an attempt to adjust Commonwealth transfers to the States to equalize the capacity of both weaker and stronger States to provide services to their citizens.

While most recognise that “mechanisms that assist fiscally weaker States are generally considered to be fair and conducive to a well functioning federation”<sup>132</sup> there are also costs and disadvantages attached to this process. Most importantly, the equalization process “provides great disincentives for sub-national governments to seek and provide efficient delivery of government services”<sup>133</sup>. The current system has been estimated to create “deadweight losses of between \$150 and \$280 million per annum”<sup>134</sup>.

There is also increasing concern being expressed about the current equalisation formula and particularly its failure to adequately recognise the infrastructure costs and related pressures that are being experienced by States with high levels of economic growth. The argument for reform is being driven most strongly by Western Australia, with the Premier of Western Australia recently observing that changes announced to the Commonwealth Grants Commission funding formula would “short-change” Western Australia in that it would<sup>135</sup>:

“... strip \$443 million from WA’s share of GST funding next year ... Under this proposal, for every dollar Western Australians pay in GST they will only be receiving 68 cents back. Meanwhile people in New South Wales will receive a return of 95 cents, Victorians will receive 93 cents and Queenslanders will receive a return of 91 cents”.

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<sup>131</sup> Accessed at <[http://www.cgc.gov.au/about\\_cgc](http://www.cgc.gov.au/about_cgc)>, at 10 August 2010.

<sup>132</sup> Department of Treasury and Finance (Government of Western Australia), *Discussion Paper on Commonwealth-State Relations: An Economic and Financial Assessment of how Western Australia Fares* (April 2006), 20.

<sup>133</sup> A Twomey and G Withers, *Australia’s Federal Future: Delivering Growth and Prosperity (Federalist Paper I)* (April 2007), 49.

<sup>134</sup> Business Council of Australia, *Reshaping Australia’s Federation – A New Contract for Federal-State Relations* (2006), 42.

<sup>135</sup> Premier of Western Australia, ‘Western Australia short changed in Grant Commission Report’, *Media Release* (26 February 2010).

Premier Barnett stated that if Western Australia received an equal per capita share of the GST the State “would be \$1.5 billion better off in 2010-11”<sup>136</sup>, and noted that within three years, using the amended funding formula “... for every dollar of GST that Western Australians pay at the register, we will only get back 57 cents”<sup>137</sup>.

There is considerable merit in the proposal by the Premier of Western Australia that a floor should be applied to the equalization formula, with a States share of GST revenues unable to fall below that minimum level. An amount of 75 cents in the dollar has been proposed. While some level of equalization is broadly accepted as being in the broader national interest and as the price of being a member of the Federation, there does seem to be a point at which the costs outweigh the benefits, the disincentives limiting growth-creating policies and investment begin to negatively affect our future economic prosperity, and where there is a real risk of a growing resentment amongst citizens in the fiscally stronger States that may undermine national unity.

#### *d) Possible Constitutional Amendments*

##### Federalism as an Express Constitutional Principle

There are numerous examples of federalism, and the need to maintain the federal balance, being recognised as a foundational principle informing the Australian Constitution and resulting governmental structure. The most explicit reference is found in the Preamble, which refers to the people agreeing “to unite in one indissoluble Federal Commonwealth”. Similarly, s. 3 of the *Commonwealth of Australia Constitution Act 1900* (UK) refers to the people of the several Australian colonies being “united in a Federal Constitution”.

There are also numerous references to federalism as a constitutional value that should inform our reading of the Constitution and the interpretation of the respective powers of the different levels of government. For example, Chief Justice Gibbs recognised in *Koowarta v Bjelke-Petersen* that “in determining the meaning and scope of a power conferred by section 51 it is necessary to have regard to the federal nature of the

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<sup>136</sup> Ibid.

<sup>137</sup> Premier of Western Australia, ‘Flawed system must be changed after \$311 million revenue cut to WA’, *Media Release* (11 March 2009).

Constitution”<sup>138</sup>. That view was also expressed in the same case by Justice Stephen<sup>139</sup>. In *Queensland Electricity Commission v The Commonwealth* Chief Justice Gibbs recognised that “the purpose of the Constitution was to establish a Federation” and, again, concluded that “the federal nature of the Constitution” imposed limits upon the powers granted by s. 51<sup>140</sup>. Cooperation between the Commonwealth and State governments was considered by Justice Deane to be “a positive objective of the Constitution” in *R v Duncan; ex parte Australian Iron & Steel Pty Ltd*<sup>141</sup>.

The dissenting judges in the *Work Choices Case* also emphasised the federal nature of the Constitution. Justice Kirby stated that the High Court “needs to give respect to the federal character of the Constitution”<sup>142</sup>. In a similar vein, Justice Callinan concluded that “the Constitution mandates a federal balance”, calling this “a powerful constitutional implication”<sup>143</sup>.

There is, however, considerable evidence suggesting that federalism is not generally accepted as an entrenched constitutional principle that necessarily informs the interpretation of the Constitution. The majority judges in *Work Choices* emphasised that the starting point when interpreting the Constitution will necessarily be “the constitutional text, rather than a view of the place of the States that is formed independently of that text”<sup>144</sup>. This reflects the earlier statement of the Court in the *Engineers Case* that the Constitution should not be interpreted by reference to “a vague, individual conception of the spirit of the compact”<sup>145</sup>. More expressly, in *Re Wakim; Ex parte McNally*, Justice McHugh emphasised that “cooperative federalism is not a constitutional term. It is a political slogan, not a criterion of constitutional validity or power”<sup>146</sup>.

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<sup>138</sup> (1982) 153 CLR 168, 199.

<sup>139</sup> *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 216.

<sup>140</sup> (1985) 159 CLR 192, 205.

<sup>141</sup> *R v Duncan; Ex parte Australian Iron & Steel Pty Ltd* (1983) 158 CLR 535, at 589.

<sup>142</sup> *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1, 229.

<sup>143</sup> *Ibid*, 333.

<sup>144</sup> *Ibid*, 118-119.

<sup>145</sup> (1920) 28 CLR 129, 145.

<sup>146</sup> *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 556.

Professor Andrew Lynch and Professor George Williams have argued that federalism is “not viewed as a constitutional value sufficiently anchored in the text”<sup>147</sup> and have suggested that an express ‘constitutional mandate’ is required before the principle will be formally recognised as a factor properly to be applied in the task of constitutional interpretation. As they have observed<sup>148</sup>:

“... it seems that the weight of precedent will prevent the High Court departing anytime soon from the orthodoxy that the Constitution’s establishment of a federal system does not provide a sufficient basis for consideration of the relationship between the Commonwealth and States as a factor in the interpretation of their respective powers ...”.

It is our view that a ‘constitutional mandate’ could be achieved by the inserting into the constitution express recognition of federalism as a guiding constitutional value and of the maintenance of the federal balance as a factor that must be applied when interpreting the Constitution and (in particular) the scope of Commonwealth powers. An expressed reference in the constitutional text would go some way to redressing the significant expansion of Commonwealth powers that has been facilitated by the generally centralist approach of the High Court towards constitutional questions. It would help to ensure that federalism is “transformed from assumption and aspiration into constitutional text”<sup>149</sup> and to address the current problem of the federal character of the Constitution being too readily ignored in the interpretation of this foundational document.

### The Appointment of High Court Justices

As the “keystone of the federal arch”<sup>150</sup> the High Court of Australia is charged with being the final arbiter in constitutional disputes, including disputes between the States and Commonwealth as to the limits of their respective powers. Under s. 72(i) of the Constitution the Justices of the High Court are appointed by the Governor-General in Council. With all High Court appointments being made by the Commonwealth government it is entirely unsurprising that the High Court has, over time, been

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<sup>147</sup> A Lynch and G Williams, “Beyond a Federal Structure: Is a Constitutional Commitment to a Federal Relationship Possible?” (2008) 31 *UNSW Law Journal* 395, at 414.

<sup>148</sup> *Ibid*, 413.

<sup>149</sup> *Ibid*, 429.

<sup>150</sup> Australia, House of Representatives, *Parliamentary Debates (Hansard)*, 18 March 1902, 10967.

broadly sympathetic towards the expansion of Commonwealth powers. The appointment of the neutral umpire by one of the two competing teams would never be allowed in any of our professional sporting codes. It is difficult to see why it should be allowed to occur in relation to the much more important task of appointments to the High Court of Australia.

There have been periodic calls for States to be given a role in the appointment of High Court Justices, with a variety of mechanisms being suggested. The issue has been acknowledged to an extent by s. 6 of the *High Court of Australia Act 1979* (Cth), which is entitled ‘Consultation with State Attorneys-General on appointment of Justices’ and provides:

“Where there is a vacancy in the office of Justice, the Attorney-General shall, before an appointment is made to the vacant office, consult with the Attorneys-General of the States in relation to the appointment”.

While s. 6 acknowledges the need to provide the States with some input into the appointment process, it is nothing more than a symbolic gesture. There is nothing requiring the consultation process to be anything other than cursory, and nothing to guarantee the States any substantive input into the eventual outcome.

It is difficult to argue against the general proposition that both Commonwealth and State governments should have some role in the appointment of High Court Justices. Under the Constitution neither level of government is ‘superior’ to the other, and with the Court granted original jurisdiction in all matters of constitutional dispute between the Commonwealth and the States<sup>151</sup> and exercising appellate jurisdiction over the State Supreme Courts<sup>152</sup>, the States have as much of a direct interest as the Commonwealth government in appointments to the Court. Three primary objections that seem to have been raised most frequently against this general proposition, with each of these being directly addressed by Craven in his paper *‘Reforming the High Court’*<sup>153</sup>.

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<sup>151</sup> See s. 75(iii) of the *Constitution*.

<sup>152</sup> See s. 73(ii) of the *Constitution*.

<sup>153</sup> G Craven, “Reforming the High Court”, in *Upholding the Australian Constitution* (Proceedings of The Samuel Griffith Society Conference, vol. 7, 1996).

The first is that “it would lead to an orgy of political horse-trading behind closed doors”<sup>154</sup>. Craven argues that while this may be true to some extent, it can surely be no different to what occurs at the moment within the Cabinet and Party Rooms.

The second is that the involvement of the States would inevitably produce compromise candidates. To this, Craven observes<sup>155</sup>:

“This may be true, but it is not clear why it is undesirable. It may well be that the best candidates in practice are those who enjoy a significant degree of confidence among a wide range of Governments and their Attorneys, rather than those who arouse the unbridled passion of the Commonwealth government alone.”

The third common objection is that involving the States “would give undue prominence to regional considerations”<sup>156</sup>. In response, Craven stated:<sup>157</sup>

“... one could be forgiven for believing that ‘regional considerations’ should be given a very greater prominence in the appointment of High Court Justices, on the grounds that the States and the Commonwealth in reality have a roughly equal interest in the operation of the Court”.

If we accept that the States, as a matter of general principle, should be granted a substantive voice in the appointment of High Court Justices, the question then becomes one of the appropriate mechanism. The challenge here is to find a system of appointment that allows the States a substantive role whilst still maintaining the overall integrity of the appointment process. After considering a range of reform proposals submitted in various forms over the years, it is our view that the most practical proposal is the one originally put forward by the Queensland Government in 1983 to the Australian Constitutional Convention. This proposal has subsequently been endorsed by Professor Gabriel Moens, who described it as follows<sup>158</sup>:

“... upon a vacancy occurring on the High Court bench, the Commonwealth Attorney-General asks the State Attorneys-General

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<sup>154</sup> Ibid.

<sup>155</sup> Ibid.

<sup>156</sup> Ibid.

<sup>157</sup> Ibid.

<sup>158</sup> G Moens, “The Role of the States in High Court Appointments”, in *Upholding the Australian Constitution* (Proceedings of The Samuel Griffith Society Conference, vol. 2, 1997).

for suggestions of possible appointees. The Commonwealth itself may then submit suggestions of potential appointees to the scrutiny of the State Attorneys-General. From this consultation the Commonwealth would gain a clear idea about which candidates met with State approval or disapproval. High Court vacancies could only be filled with prospective appointees of whom the Commonwealth government approved and of whom three (or more) State governments had expressed positive approval or had not expressed an opinion upon”

There are a number of advantages to this proposal. Most importantly, it would be a step towards restoring the federal balance by ensuring that both Commonwealth and State governments play a substantive role in the appointment process. It may also be the case that – far from leading inevitably to ‘compromise candidates’ – the new process may ultimately result in candidacies of equal, or even better, quality. The proposed model would require real consultation, and as Craven observed<sup>159</sup>:

“... the general point must be that it is far from clear why we should be so eager to rely upon the judgment of a single government in choosing a High Court Justice as the best guarantee of quality, rather than the collected wisdom of a number of governments”.

#### Proposing Constitutional Amendments:

A similar issue has been raised in relation to the initiation of referenda proposing constitutional amendments. Under the present amendment procedures only the Commonwealth government has the power to initiate a referendum regarding a proposed constitutional amendment. Given this, it is hardly surprising to note that of the 44 amendment proposals put forward under s. 128 of the Constitution, over half of them (23 to be exact) have attempted to expand Commonwealth powers. Further, these proposals have proven consistently unpopular amongst the Australian people, with only two of the 23 proposals being approved<sup>160</sup>. As Goldsworthy has noted<sup>161</sup>:

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<sup>159</sup> G Craven, “Reforming the High Court”, in *Upholding the Australian Constitution* (Proceedings of The Samuel Griffith Society Conference, vol. 7, (1996).

<sup>160</sup> *Parliamentary Handbook of the Commonwealth of Australia (42<sup>nd</sup> Parliament)*. Accessed at: <<http://www.aph.gov.au/library/handbook/index.htm>> on 10 August 2010.

“No Commonwealth government has ever sponsored a constitutional amendment to reduce Commonwealth powers, and none is ever likely to do so”.

Not allowing the States to initiate referenda has obvious negative consequences for the federal balance by effectively excluding proposals that suggest that Commonwealth government powers be limited. It is difficult to see the justification for excluding the States from this process. As Goldsworthy observed<sup>162</sup>:

“Although each State may represent only part of the nation, they are all very important parts, and together they constitute almost all of it. Moreover, the whole point of a federation is that its parts have constitutional standing, and guaranteed rights and powers. The parts no less than the whole are legitimate stake-holders in any federal constitution. If a majority of those parts believe that the constitution could be approved, why should they not be able to put their case directly to the people?”

The proposal to amend the Constitution to allow States to initiate referenda has been previously endorsed. It formed one of the recommendations of the Final Report of the Constitutional Commission<sup>163</sup> and has been approvingly referred to by academics such as Professor Goldsworthy<sup>164</sup> and Associate Professor Anne Twomey<sup>165</sup>. To prevent a sudden rush of frivolous amendment proposals, and recognising the significant costs involved in holding a referendum, it is generally acknowledged that a minimum number of State Parliaments should be required to approve the proposed amendment in identical terms before it is put to the people for approval. The Final Report of the Constitutional Committee put this recommendation in the following terms<sup>166</sup>:

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<sup>161</sup> J Goldsworthy, “A Role for the States in Initiating Referendums”, in *Upholding the Australian Constitution* (Proceedings of The Samuel Griffith Society Conference, vol. 8, 1997).

<sup>162</sup> *Ibid.*

<sup>163</sup> The Constitutional Commission, *Final Report of the Constitutional Commission* (Canberra: Australian Government Publishing Service, 1988), 75-77.

<sup>164</sup> J Goldsworthy, “A Role for the States in Initiating Referendums” in *Upholding the Australian Constitution* (Proceedings of The Samuel Griffith Society Conference, vol. 8, 1997).

<sup>165</sup> A Twomey, ‘Reforming Australia’s Federal System’ (2008) 36 *Federal Law Review* 57, 77-78.

<sup>166</sup> The Constitutional Commission, *Final Report of the Constitutional Commission* (Canberra: Australian Government Publishing Service, 1988), 75.



“A proposal to alter the Constitution would be required to come from the Parliaments of not fewer than half the States. There should be an additional requirement that the State Parliaments concerned represent a majority of Australians overall. It would be a requirement that the proposed alteration be passed in identical terms by the State Parliaments concerned within a 12 month period. The proposed alteration would be required to be put to referendum not less than two months nor more than six months after this requirement was satisfied.”

We would agree with this recommendation, with the exception of the requirement that the State Parliaments concerned represent a majority of Australians overall. Including that requirement will greatly diminish the impact of this proposal, as it would effectively mean that the smaller states would be completely unable to propose constitutional referenda unless they had the support of either New South Wales or Victoria. If this majority requirement is included the proposal will have a significantly reduced impact in terms of promoting a strong federal system.

Allowing the States to initiate referenda is a reform that addresses the overwhelmingly centralist-tendency of past referenda, strengthens the Federation, and would “enhance the right of the people to determine the content of their Constitution”<sup>167</sup>. As noted by Goldsworthy<sup>168</sup>:

“The States as well as the Commonwealth make up the federal system, and have an equal stake in its proper functioning and an intimate knowledge of its day to day operations. They are as well placed as the Commonwealth to detect structural deficiencies which need reform, deficiencies which for reasons of its own the Commonwealth might not want to rectify. To prevent the people from rectifying such deficiencies is unfair to them even more than it is unfair to the States.”

## **Conclusion**

This submission has identified a number of key issues and priorities for the reform of the Australian Federation. We strongly believe that a federal system of government

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<sup>167</sup> J Goldsworthy, “A Role for the States in Initiating Referendums” in *Upholding the Australian Constitution* (Proceedings of The Samuel Griffith Society Conference, vol. 8, 1997).

<sup>168</sup> *Ibid.*

remains the best political structure for Australia, however the continual expansion of Commonwealth powers has resulted in a Federation far removed from that originally envisaged by the framers. Along the way, many of the advantages of federalism have either been lost, or are not being realised to their full extent. The reforms suggested in this paper are designed to improve and strengthen the day-to-day operation of federalism in Australia, primarily by restoring the federal balance between the Federal and State levels of government. It is clear that there are significant challenges facing our federal system, with a national process of reform offering the opportunity to revitalize the Federation and ensure that the ‘federal dividend’ is fully realised for all Australians.