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Parliament's Development of Federalism

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Parliament's Development of Federalism

The Vision in Hindsight: Parliament and the Constitution: Paper No. 13

Vision in Hindsight

Vision in Hindsight is a Department of the Parliamentary Library (DPL) project for the Centenary of Federation.

The Vision in Hindsight: Parliament and the Constitution will be a collection of essays each of which tells the story of how Parliament has fashioned and reworked the intentions of those who crafted the Constitution. The unifying theme is the importance of identifying Parliament's central role in the development of the Constitution. In the first stage, essays are being commissioned and will be published, as IRS Research Papers, of which this paper is the thirteenth.

Stage two will involve the selection of eight to ten of the papers for inclusion in the final volume, to be launched in conjunction with a seminar, in November 2001.

A Steering Committee comprising Professor Geoffrey Lindell (Chair), the Hon. Peter Durack, the Hon. John Bannon and Dr John Uhr assists DPL with the management of the project.



Centenary of Federation 1901-2001

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Contents

Major Issues	1
Introduction	5
The Original Vision.....	6
Parliament as a Federal Institution	8
Dispelling Myths of Federalism.....	11
Which Federal Features Really Matter?.....	14
The Changing Role of the Senate.....	15
Fighting the Fight.....	18
Federalism and Race	20
Federalism and Finance.....	22
Federalism and Globalisation.....	26
The Vision in Hindsight	29
Endnotes	31

Major Issues

Through a century of nationhood Australia has developed and been consolidated as a federal commonwealth within its original constitutional framework, but in ways that were not foreseen by the founders. Commentators like Quick and Garran who saw the Senate as a States' House and the House of Representatives as representing national interests have been largely confounded. Some saw responsible government as extinguishing federalism but they too were somewhat wide of the mark.

A century on, both Houses—not just the Senate—remain federal in character notwithstanding various efforts to submerge federalism beneath a preoccupation with party politics and responsible government. While responsible government shaped by party discipline and Executive dominance are core features of the Australian polity, the federal and republican parts of the Constitution are, if anything, more important.

The Parliament sits at the heart of Australian federalism and remains a dominant player in national political deliberation although it does not have the field entirely to itself. In turn Parliament as an institution has continued to be shaped by the wider forces that have shaped Australian federalism.

Borrowing largely from the American model, the founders adopted a federal system that divided the powers of government between the national or Commonwealth sphere, and the sub-national or State sphere. The National Government was given defined powers—either exclusive or concurrent—whereas the States retained the residual. Where there is overlap, Commonwealth laws prevail to the extent of any inconsistency. By adopting a written Constitution, notions of parliamentary sovereignty were confined by the terms of the Constitution itself. Unlike Westminster, the Commonwealth Parliament is not supreme. Rather the people have sovereign authority over the constitutional system and participate as citizens in two spheres of government. One sphere is national and the other State-based.

Support for a federal rather than a unitary constitution was unanimous amongst the delegates to the 1891 and 1897–1898 Conventions. Labor provided some support for a unitary model but the party itself was not sufficiently established as a force at the national level to influence either the Convention Debates or to shape the federal model in the very early years of the Commonwealth. The appeal of the federal model was that it enabled the creation of a new sphere of national governance while preserving the established colonial systems of self-government including local government.

The growth in federal power has been played out of two sets of issues—Commonwealth versus States powers, and responsible government versus the Senate.

In relation to the first set of issues, those arguing for a strong national government—the likes of Alfred Deakin, H. B. Higgins and Isaac Isaacs—ultimately won out. The reach of Commonwealth power was consolidated through the decades of the 1940s and 1970s prompted initially by the dictates of national defence and subsequently by postwar reconstruction and nation building. The Commonwealth Parliament, encouraged by long periods of liberal interpretation of Commonwealth legislative and executive powers by the High Court of Australia, widened its influence, sometimes at the expense of the States.

According to its critics, Australian federalism has undergone such a sustained process of centralisation that it can scarcely be called a federal system any more. The growth in federal dominance in federal state financial relations is frequently cited disapprovingly as, more recently, has been the High Court's expansive interpretation of the external affairs power during the 1980s and early 1990s. Such developments however, are a consequence of the design that the founders put in place quite deliberately. This entailed leaving key issues such as long-term provisions for taxation and fiscal sharing to future Parliaments to determine. Politics, including inter-governmental politics of competition and cooperation with the States, would decide future policies and hence the shape of federalism. Thus we can conclude that fiscal centralisation, for instance, was neither intended nor precluded by the founders and the design of the Constitution.

At the close of the first 100 years of federalism, intense globalisation has introduced a major new dimension to the development of Australian federalism with the Commonwealth's own independence being increasingly constrained as it becomes party to more international organisations and agreements. On the other hand, globalisation provides Parliament with the opportunity of expanding its legislative power in areas of State jurisdiction through, for example, increased use of the external affairs, taxation, trade and commerce and corporations powers.

The continuing contest between federalism and responsible government—the concept that governments rise and fall according to their support in the popularly elected Lower House—has been shaped by many influences.

The House of Representatives and the Senate have developed quasi-independent roles that are partly national and partly federal. Accordingly, Parliament, and its component parts, can at times be more or less nationally focused, federally co-operative or antagonistic towards the States in the complex politics of federalism.

The Constitution provides for a strong Senate elected under a democratic franchise, albeit one which is structured in a federal way. Thus while not primarily a States' House, the Senate does provide an avenue for enhanced representation from the smaller States in the Federal Parliament and in national decision-making. Giving voice to particular State interests may not always produce beneficial outcomes as was the case when the Parliament

passed the first federal franchise that perpetuated the worst State practice of excluding Aboriginal people from the electoral roll.

The Senate does not have power to initiate or amend money bills—proposed laws raising taxes or appropriating money to be expended by the Commonwealth—but it has the power to reject such laws outright and press the House of Representatives for changes by requesting changes. The Senate also may amend, fail to pass or reject all other proposed laws emanating from the House of Representatives. These powers combined with the Constitution's inadequate deadlock provisions—especially where the two House are at odds over the fate of financial bills—produced the 1975 crisis. They have modified to an extent, but not subverted responsible government.

As Deakin in particular anticipated, party interests have been strongly reflected in both Houses rather than interests arising out of residence in one State or another.

In particular, the performance of the Australian Senate has been most markedly affected by the ebb and flow of party control of that Chamber. With the Australian Labor Party's growing electoral success, culminating in its winning office in 1910, and the fusion of the first non-Labor parties, disciplined party politics tightened their grip on Parliament. Party discipline controlled the Senate and was directed with varying degrees of success by party leaders in the House of Representatives. From 1902 to 1948 this tendency was reinforced by methods for election to the Senate that often produced markedly lopsided results.

Most significant for re-establishing the status of the Senate was the introduction of proportional representation (PR) in 1948. This change has fed (and fed on) the fragmentation of major party control of the Parliament and been the wellspring of significant reforms in the way that the Senate (and the Parliament as a whole) operated. From the 1970s the Senate has extended its legislative review function whilst making government actions more transparent and government itself more accountable. In the process, the Senate's independence has been enhanced and the Parliament to some degree revitalised.

Healthy institutions can be expected to pursue with some vigour their own self-interest through maintaining, expanding and consolidating their own domain. At the end of their first century, the Australian Parliament and Australian federalism have each developed in ways that the founders might neither have desired nor expected. This is not to suggest fault or lay blame. In formulating their Vision for the Parliament and federalism the founders were not overly prescriptive nor was the model they devised impervious to change. The future of Australian federalism remains an open question. Much will depend on the way in which Parliament develops and how it carries out the democratic and national aspirations of the Australian people.

Introduction

Both Parliament and federalism are core features of the Australian Constitution, the purpose of which, as the preamble to the Westminster enabling act so eloquently expressed it, was to create an 'indissoluble Federal Commonwealth' based upon the consent of the people of the Australian colonies. Through a century of nationhood Australia has developed and been consolidated as a Federal Commonwealth within its original constitutional framework, but in ways that were not envisaged by the founders. The institutional framework of the Federal Commonwealth was set out in the constitutional text, the first and most significant chapter of which deals with the Parliament. According to s. 1, the legislative power of the Commonwealth is vested in 'a Federal Parliament' consisting of the Queen, a Senate and a House of Representatives, and which is to be called simply 'The Parliament' or 'The Parliament of the Commonwealth'. While the term 'Federal Parliament' dominates popular and political discourse, the federal character of the Parliament has been less well articulated in official commentary and scholarship.

This has been due at least in part to focusing on parliamentary responsible government that, with the rise of disciplined political parties in the decade after Federation, had become in practice *party* responsible government. According to various proponents, political parties ruled, the Executive dominated Parliament, Parliament was sovereign, and democracy was ensured through electoral politics. There was sufficient partial truth in all of these propositions to lead generations of commentators and analysts into a political discourse that ignored or down played federalism. But as I have argued elsewhere, the federal and republican parts of the Australian Constitution are, if anything, more important than the responsible government parts.¹ In any case, they make up the larger constitutional whole, of which parties, the Executive, Parliament and periodic elections are part. My purpose in this paper is to explore the *federal* character of Parliament within the larger constitutional system.

Other studies of Parliament have focused mainly on its internal operations—most notably Reid and Forrest's outstanding Bicentenary study on the 'trinitarian struggle' between the Executive, the House of Representatives and the Senate.² The canvas has been broadened in John Uhr's study of the changing place of Parliament from a deliberative democracy perspective that re-conceptualises Australian democracy in a sophisticated republican way while incorporating the robust tradition of Australian parliamentary democracy.³ My concern is with Parliament's functioning as a federal institution, and with locating Parliament within the federal constitutional system. This complements Dr Uhr's account

by showing how Parliament is an integral part of the institutional architecture of Australian federal democracy and has become the dominant player in the ongoing process of national political deliberation.

There is an important methodological point to be made at the beginning: we are not simply concerned with what Parliament has done in developing federalism but also what it is as a federal institution. This distinction between being and doing enables us to grasp the dual way in which Parliament has been significant. The action paradigm of what Parliament has done over the course of the twentieth century in shaping and developing federalism is obviously an important part of the story. But if Parliament is itself a federal institution, its own operation and functioning have been as a federal institution and this accounts for much of the development of Australian Federalism. Thus, a major part of the story of Parliament's development of federalism is the development of Parliament itself as a federal institution, including through the changing balance of power among all of its parts. An additional part of the story is Parliament's interactions with the other main institutional parts of the system, most notably the High Court and the States.

The Original Vision

The founders' design and intentions are evident in their constitutional handiwork, as we have seen, and were articulated and discussed at length in the Federation debates. In designing the Australian Constitution the founders embraced and reworked the federal model, copied mainly from the American Constitution. They combined this with the institutions of Parliament and responsible government familiar from British and colonial practice, producing a hybrid of parliamentary and Federal Government. Federation in Australia was a timely extension of self-governance to the national sphere. It preserved the colonies as States along with their established systems of local government, and continued Australia's membership of the British Empire. Local government was not mentioned in the Constitution because it came within State jurisdiction—a fact that some would like to have reversed through constitutional recognition. Imperial membership coloured the way in which the Executive was structured in formal monarchic terms with a vice-regal surrogate, making the task of modern republicanism technically complex. It also affected the way in which the Executive's power over foreign affairs and treaties was left unconstrained because it was to be exercised by the British Imperial government, as was the case until the 1940s.

Within the continuing traditions and arrangements of Australian colonial governance, Federation was a process of nation building on a federal basis. The federal system adopted by the founders divided the powers of government between the federal or national (in Australia called 'Commonwealth') sphere and the sub-national or provincial sphere (in Australia called 'State'). Federalism requires a controlling constitutional document specifying the institutional framework and the division of powers, and usually a superior court to adjudicate jurisdictional disputes and make authoritative rulings about the

meaning and extent of the specified powers. Federalism is antithetical to notions of parliamentary sovereignty, or to one sphere of government having primacy over the other. That is because both Commonwealth and State legislatures have limited jurisdictions set by the Constitution. In a federal democracy such as that of Australia, the people have sovereign authority over the constitutional system and participate as citizens in the two spheres of government. This federal duality is itself only part of a more complex set of citizenship associations that include local and global (British Imperial at Federation).⁴

That Australia would have a federal constitution had overwhelming support throughout the federation period and unanimous support within the 1891 and 1897–98 Conventions. The preliminary Melbourne Conference of 1890 resolved to support a National Australasian Convention 'empowered to consider and report on an adequate scheme for a Federal Constitution'.⁵ The remainder of the decade was dedicated to that purpose. Henry Parkes' framework resolutions introduced at the beginning of the 1891 Convention were 'to establish and secure an enduring foundation for the structure of a Federal Government'. Parkes' first resolution was a classic federal proposition:

That the powers and privileges and territorial rights of the several existing colonies shall remain intact, except in respect to such surrenders as may be agreed upon as necessary and incidental to the power and authority of the National Federal Government.⁶

At the 1890 Melbourne Conference, Parkes had also insisted that 'the Federal Government must be a government of power'. It would need to be 'armed with plenary power for the defence of the country'; 'plenary power for the performance of all other functions pertaining to a National Government' including 'the carrying out of many works in the industrial world which may be necessary for the advancement of a nation'.⁷ Parkes also suggested a 'third way' of operating federal systems: through shared or concurrent jurisdictions and effective inter-governmental relations. 'It may possibly be a very wise thing indeed that some of these powers should come into force with the concurrence of the State Legislatures or the Provincial Legislatures', Parkes suggested.⁸

The Australian founders grappled with these three options for allocating powers—leaving them with the States, giving them to the new national government, or making them concurrent. They plumped mainly for the concurrent option, but also gave the Commonwealth a crisp power of override in the case of conflict. This is formulated in s. 109:

When a 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.

The override power was limited, however, because the Commonwealth was not given the authoritative power of deciding the limits of its own powers and determining conflicts. That was given quite deliberately to the High Court.⁹

The point to be emphasised is that federalism was the foundational institution of the Australian Constitution and the nation it created. Adapting it for Australian purposes in ways that elites could agree upon and the people support was the challenge of the 1890s. The 1891 draft Bill failed because of insufficient political momentum and the federal cause was revived through people's conventions and renewed political leadership. Barton's resolutions that began the Adelaide session of the 1897–98 Convention were similar to those of Parkes in proposing a system of 'Federal Government' with a 'Federal Parliament'.¹⁰ The crucial difference between the 1897–98 Convention and successful adoption of its draft constitution in contrast to the 1891 Convention and its abortive efforts was popular input, but in a federal form. Delegates to the 1897–98 Convention were elected by the people of the Colonies, except for those from Western Australia who were selected by the colonial Parliament. Most significantly, the draft constitution was approved in popular referendums in the Colonies. Despite the limited franchises of the colonies, most of which excluded women and Aboriginal people, this made the Australian constitutional process one of the most radically democratic that had ever been attempted. Moreover, the draft included a Senate directly elected by the people of the States and a referendum process entailing approval of constitutional changes, at the very least, by a double majority of the people overall and in a majority of States. Australia's Constitution was fundamentally democratic as well as federal.

An alternative system of unitary government and a sovereign national Parliament was championed by some of the rising Labor Party leaders and would become prominent when Labor established itself as a major political force by 1910. Labor had no say in the founding conventions, however, and little influence over the making of the Constitution. The federal model seemed tailor-made to most Australians at the time because it enabled the establishment of a new sphere of national governance while preserving the established colonial systems of self-government including local government. Federation was an extension of democratic governance that accommodated existing Colonies of similar political culture and structure, but unequal size. Another possibility would have been for the colonies to remain as separate quasi-independent states and join an imperial federation that some were championing at the time. But this had little public or popular support in Australia or, indeed, within the British Empire.

Parliament as a Federal Institution

The founding consensus about federal arrangements masked sharp differences over key aspects of institutional design concerning the Federal Parliament. The first was what powers Parliament should be given vis-a-vis the States, and the second was how a traditional responsible government executive would fit with a Federal Parliament. Both issues were crucial for determining the shape and relative strength of the new Parliament. If it had greater or more broadly defined powers, the Commonwealth Parliament would be potentially stronger with respect to the States. And if the Senate were modified to fit more readily with responsible government based in the House of Representatives, the new

Parliament would more closely resemble a Westminster Parliament than a federal legislature of coequal Houses, and that would facilitate more centralised government. The founders achieved sufficient consensus and compromise on both issues to reach agreement on the constitutional structures. The playing out of these two sets of issues—Commonwealth versus State powers, and responsible government versus the Senate—accounts for much of the story of the development of the Commonwealth Parliament and Australian Federalism.

Among the founders, there were differences of opinion on both issues with the balance of consensus shifting between 1891 and 1897–98. Sir Samuel Griffith of Queensland, the leader of the 1891 Convention after old man Parkes had proposed the framework principles and taken a back seat, was a strong federalist on both issues. The 'essential condition' for federation, Griffith insisted, was 'that 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'.¹¹ This double test was a strong one that led to a restrictive allocation of basic federal powers such as defence, customs and excise, external trade and commerce and the post office. Griffith also favoured a strong Senate at the expense of responsible government, with the latter being unspecified in the Constitution and left to be adapted in practice to fit the federal bicameral legislature. Griffith's views dominated the 1891 convention and were reflected in the 1891 draft Constitution that did not require a responsible government executive. Griffith's characterisation of the legislative process—

that every law submitted to the Federal Parliament shall receive the assent of the majority of the people, and also the assent of the majority of the states¹²—

was a rather extreme federalist one. This too was reflected in the 1891 draft document that had the Senate made up of delegates appointed by the States.

By the 1897–98 Convention, elite opinion had firmed in favour of a responsible government executive and a somewhat stronger national government. Convention leader Edmund Barton of New South Wales was quite blunt about affirming a strong preference for responsible government.¹³ This view prevailed despite arguments from the likes of Richard Baker (SA) and J. W. Hackett (WA) that responsible government was incompatible with a strong Senate and would 'kill federalism'.¹⁴ Alfred Deakin, H. B. Higgins and Isaac Isaacs from Victoria led the nationalist cause, arguing for a strong national government with flexible powers and rejecting as bogus the institutional logic of those who championed a strong Senate as the protector of States' rights.¹⁵ The States were adequately protected through constitutional entrenchment in their own right, through the limitation on federal powers, and by judicial review by the High Court. Numerous speakers correctly pointed out, developing the earlier insights of Macrossan from Queensland and others, that Senate politics would not be about State representation but party government concerned with the national issues of the day. Macrossan was particularly concerned about a national immigration and racial policy that would put an

end to the importation of Kanaka labourers into tropical Queensland. This was summed up by Deakin as follows:

We shall have party government and party contests in which the alliances will be among men of similar opinions, and will be in no way influenced by their residence in one State or another.¹⁶

Even if party and national issues rather than states' rights were to dominate Senate politics, combining responsible government with a strong Senate remained problematical. Such an unlikely combination was 'the Scylla and Charybdis of this federal enterprise', according to George Reid of New South Wales, and it was addressed in the specific issue of the Senate's powers over money Bills. As Reid put it:

this federation will become an accomplished fact if we can hit upon a solution of the difficulties as to executive responsibility and the difficulties as to the rights of the two Houses over Money Bills.¹⁷

If anything, institutional incompatibility was exacerbated by recognising and partially entrenching responsible government in the Constitution, albeit in the opaque way of requiring ministers to be or become members of one or other House of Parliament, and having the Senate directly elected by the people. A number of measures were adopted that partly alleviated the problem of conflict between the two Houses. One was reaffirmation of the key 'compromise' that the Senate be precluded from amending as well as initiating money Bills. According to Convention delegates Barton¹⁸ and Richard O'Connor¹⁹ of New South Wales, that protected responsible government by ensuring that ministers remained 'responsible to the people through the House of Representatives', and the Senate could not 'amend and amend, and amend, without taking the responsibility of rejection'. Provisions for dialogue between the Houses (s. 53) and for banning the tacking of extraneous matters to money Bills (ss. 54 and 55) were added. These were in addition to the cumbersome s. 57 mechanism for breaking deadlocks that entails an interval of at least three months, dissolution of both Houses, and a joint sitting if necessary. None of these are fail-safe mechanisms for ensuring harmony, however, and the s. 57 mechanism is not adequate for financial deadlocks that require more timely resolution. Nevertheless, the dominant view of the Convention was that the resolution of differences between the Houses should be left to political compromise and the good sense of political leaders, rather than to some 'mechanical' provision regarding possible deadlocks.

Combining federalism with responsible government had other incompatibilities that critics amongst the founders like Richard Baker and John Hackett may have only dimly foreseen. Federalism that divides government between separate spheres, especially when such division is heavily concurrent as in the Australian case, requires extensive inter-governmental relations and arrangements. The resultant system of 'executive federalism' entails dealings between the Commonwealth and State Government in ministerial councils and agreements that are beyond parliamentary scrutiny and responsibility.

Such difficulties aside, we can identify the main institutional arrangements whose interactive development are central to Parliament's evolution as a federal institution and its role in the larger federal system. One is the internal dynamic of relations between responsible government and the Senate that we have been discussing. The other is Parliament's utilisation of its powers vis a vis the states, and the High Court's exercise of judicial review in cases of conflicts. These two institutional dynamics are played out within the larger arena of domestic politics and international affairs.

As pointed out earlier in discussing Parkes' propositions, powers can be reserved to the States, or allocated to the Commonwealth on an exclusive or concurrent basis. The Australian Constitution did all of these things: moderate articulation of Commonwealth powers; with most of these being concurrent but with a Commonwealth power to override the states and monopolise the field; and residual powers reserved for the states. As well, there is the consensual option of referral of powers provided for by s. 51(xxxvii) of the Constitution. In utilising its powers, the Commonwealth has the option of going it alone and occupying the field, if necessary overriding State legislation in the area—the 'monopoly' option. Alternatively, the Commonwealth can share power in its areas of jurisdiction with the States and engage in inter-governmental relations to facilitate cooperation and sort out conflicts—the 'concurrent' option. Parliament's role in this Commonwealth–State domain constitutes a major part of its effect on federal development.

A second dimension of federal development involves the High Court when a centralising Commonwealth goes too far and the exercise of its power is challenged by the States. The High Court's views of federalism and the extent of Commonwealth powers will then be decisive, at least formally. We need to add this proviso because even if it wins the jurisdictional battle, the Commonwealth might be further constrained by political pressures or presumptions from utilising its powers. This was the case during the 1920s when the conservative Bruce-Page government did not exploit the potentially enormous jurisdictional scope for expanding Commonwealth powers that the *Engineers* decision²⁰ of 1920 had opened up. It has also been the case in recent decades when the Commonwealth has been constrained in using its acknowledged powers to regulate environmental issues in which the States have a major stake. The High Court role adds an additional dimension to federal development, but its practical effects cannot be divorced from the political dynamic of inter-governmental relations.

Dispelling Myths of Federalism

An obvious place to begin dispelling historic myths about Parliament's federal capacities is with the Constitution's own specification of Parliament as 'a Federal Parliament'. This has often gone unnoticed and been under theorised because of a common misunderstanding that the Senate is the federal part of the Parliament and the House of Representatives the national part. We need to confront this doctrine at its source, in Quick and Garran's

otherwise authoritative commentary published in 1901, if we are to give a proper account of Parliament as a federal institution.

According to Quick and Garran, 'The national part of the Parliament is the House of Representatives—the organ of the nation. The federal part of the Parliament is the Senate—the organ of the States, the visible representative of the continuity, independence, and reserved autonomy of the States ...'.²¹ Quick and Garran also promoted the House of Representatives as the 'democratic chamber' and the arena of 'national progress', as opposed to the Senate where 'moderating, restraining, conserving and provincial elements of the community are represented'.²² Their evidence for treating the Parliament in this dichotomous way was flimsy, as they admitted:

This characteristic is not founded on any difference in the franchise of the House of Representatives from that of the Senate, because both franchises are the same; it arises from the fact that, by the Constitution it is expressly intended to be such a House, and that by its organisation and functions it is best fitted to be the arena in which national progress will find room for development.²³

Quick and Garran's typecasting of the Senate as a States' House and the House of Representatives as the democratic organ of the nation has been music to the ears of successive generations of commentators who do not understand or like Australia's federal constitution. Instead of the bicameral legislature of Houses with virtually equal powers, the critics typically prefer a Westminster style Parliament where one House is democratic and dominant. Their purpose in such a reinterpretation of the constitutional system is to better accommodate responsible government, to restrict the Senate's powers to its supposed federal role of being a States' House, or to facilitate more majoritarian democracy.²⁴ Prime Minister Paul Keating's denial that Australia needed a Senate and his denigration of Senators as 'unrepresentative swill' represents one prominent face of this position in populist Labor culture.²⁵

But is the House of Representatives, as opposed to the Senate, 'expressly intended' by the Constitution to be the democratic chamber and the arena of national progress, as Quick and Garran claim? And is the House, as opposed to the Senate, best fitted 'by its organisation and functions' to have such a role? We can answer these questions first by reference to the constitutional text itself, and secondly by reference to the founders' design and intentions.

The Constitution is quite clear in its opening s. 1 of chapter 1 which specifies that the legislative power of the Commonwealth is vested in 'a Federal Parliament' consisting of the Queen, Senate and House of Representatives. The chapter on Parliament is the longest and most important of the Constitution's eight chapters. Chapter 1 on the Parliament consists of five parts and has 60 of the Constitution's 128 sections. The parts of chapter 1 deals with respectively the role of the Queen and her surrogate the Governor-General, the structure of the Senate, the structure of the House of Representatives, provisions governing both Houses of Parliament, and the powers of Parliament. The federal character

of the Parliament is most apparent in its powers that are spelt out in the fifth part, particularly the long s. 51 that enumerates 39 concurrent heads of power and s. 52 that spells out three additional exclusive heads of power.

Chapter 1 as a whole and Parliament's enumerated powers in s. 51 need to be read in conjunction with the other parts of the Constitution dealing with the States and the High Court. Chapter 5 of the Constitution and ss. 106 and 107 in particular guarantee the continuation of the States with their own constitutions and powers except in so far as these have been altered or withdrawn by the rest of the Constitution. In other words, we have in Australia's case a classic federal constitution modelled on the American prototype: the institutions of the new federal or national level of government along with its powers are specified in detail, whereas the existing states are preserved with the residual powers not given to the new Federal Commonwealth.

Given the neatness and clarity of the model, it is surprising that commentators have seized upon the Senate as the federal part of the Parliament while overlooking the fact that Parliament itself is a federal institution. The Constitution is quite categorical: it does not say that the Senate is the federal part of the Parliament; rather, it says that the Parliament is 'a Federal Parliament'. Nor is there a sound basis for claiming that the House of Representatives is the democratic chamber. Both Houses of Parliament have the same franchise, as Quick and Garran admit, so the Senate is just as democratic as the House of Representatives. That is, provided we do not assume, as many of the critics do, that democratic always equates to the majoritarian arrangement of equating the value of each vote. Obviously, having equality of representation for the people of each State does not do that if the States are unequal in population size, as they are. Put another way, the Senate's democratic franchise—being 'directly chosen by the people of the State' (s. 7)—is structured in a federal way, but that does not make it undemocratic.

Rather, the two Houses of Parliament are integral parts of the Federal Parliament. The House of Representatives and the Senate each have quasi-independent roles that are partly national and partly federal. Their dynamic interaction within the larger organisational entity of the Federal Parliament gives that body a complex character and role that are also partly national and partly Federal. Parliament, and its component parts, can at times be more or less nationally focused, federally cooperative or antagonistic towards the states in the complex politics of federalism. Furthermore, having a 'national' perspective is not necessarily the preserve of the Commonwealth as the State premiers established in the reform of inter-governmental arrangements during the 1990s.²⁶ At times the States can be better champions of the national interest and more progressive than the Commonwealth, as during the mid-1990s when Prime Minister Keating stalled the federalism/micro economic reform process that his predecessor, Prime Minister Hawke had initiated in conjunction with State premiers. In a federal constitutional system like that of Australia, the national interest is not the preserve of any single institution but is pursued through a complex federal system that established a number of key institutional players that have a voice and a role in the process. The Parliament is the main one of these, but not the only one.

Which Federal Features Really Matter?

The Australian Constitution established an institutional framework that structures the governmental process. Although liberal democratic values and assumptions about good governance are presupposed and implicit in the institutions specified, the Constitution is basically a document governing structures and processes. Outcomes are determined by the political process. That is particularly the case in Australia where there is no bill of rights with Parliaments, at Commonwealth and State level, determining many fundamental rights issues. Moreover, constitutional structures and politics are to an extent interactive. Politics is structured by the constitutional system, and the political process in turn has the effect of reinforcing the constitutional system through crystallising popular sentiment, interests, parties and leadership around the existing structures. At the same time, the constitutional system is developed and modified through political practice. In the following analysis and examples, we examine some of the ways in which Parliament has carried out its role as a Federal Parliament and played a part in shaping the overall federal system. Obviously, because of the scope and complexity of the topic, coverage is selective and partial.

At the beginning, it is perhaps worth emphasising the character of Parliament's federal role and the kind of institutional behaviour we should expect, given the way both Parliament and the Constitution are structured. In this way we might avoid the common error of looking for the wrong things, and finding fault with Parliament for being different from what we uncritically expected. Healthy institutions can be expected to pursue with some vigour their own self interest through maintaining, consolidating and expanding their own domain. It is hardly surprising that a Federal Parliament would use its powers to the full and, when the opportunity arose, increase its sphere of activity subject to the checking and balancing of other rival and moderating institutions. That has typically been the case under centralising Labor governments. On the other hand, depending on political circumstances, Parliament might be moderate and constrained, as was the conservative Bruce-Page Government in the 1920s. Parliament's role is to pursue the national interest as it sees it at the time, and to act either on its own or in conjunction with the states. The latter will frequently be the case because federalism and the constitutional division of powers ensure that Parliament is not sovereign and that its powers are limited. Most major policy issues, such as the environment, public health and economic development, are large and complex and require or invite the attention of both spheres of government.

Since the Parliament is bicameral with the Executive located primarily in one of its chambers, its role and pattern of development are more complicated and in part shaped by the propensities and inter-actions of the parts. Those who mistakenly view the Senate as a States' House will expect that State interests should be represented within Parliament and that legislative outcomes should be a blend of national and State interests. This does not usually happen, and nor should we expect it given the constitutional design and intentions of the founders analysed above. Rather, the Senate is a democratically elected national chamber organised on the basis of equality of State electorates (leaving aside the position of the two internal Territories of the Commonwealth). That weights representation in

favour of smaller States whose smaller electorates elect the same number of Senators as larger states. Because of this, the Senate does have a certain federal character and role: not to represent State interests per se, but to over-represent smaller State populations in national decision making. While the Senate voting system of proportional representation facilitates minor party representation, most notably of the Democratic Labor Party (DLP) in the 1960s and the Australian Democrats in recent decades, such parties have not been State oriented or geographically concentrated. The Country/National Party that has so often been the Coalition king-maker in the House of Representatives is geographically concentrated in, and concerned with, promoting the interests of rural Australia but not in an overtly state-focused way.

State and regional interests are also well represented both within the House of Representatives and the Executive because all members are from electorates based in the states, and small numbers of seats can often determine who forms government. The One Nation Party's current significance at the federal level is through its ability to influence outcomes in contests between the major parties in regional and rural electorates.

What is the point of over-representing smaller States in the Senate if the Senate does not usually represent State interests? The answer has a number of parts. First, weighting Senate representation in this way ensures a somewhat different composition of national representation in one chamber of Federal Parliament. The consequence should be some refinement of national interest and outcomes through sifting and reviewing since two differently constituted popular Houses have to agree. The importance of a non-majoritarian weighting in the Senate has extra significance because of the location of the Executive primarily in the House of Representatives. Secondly, even if parliamentary government becomes mainly party government, the presence of extra smaller-State Senators in party caucuses, committees and probably also ministries, makes some considerable difference. If the issue is one of national interest, the national view will be weighted in favour of smaller State public and party opinion. That view might well be the same as in larger states, but the federal weighting is still significant for boosting the importance and relative power of the smaller State populations. If there are aspects of the national policy that affect smaller states, then those interests can be more readily factored in. Thus the Senate weighting has both refining and federalising effects upon the national legislative process. Nevertheless, Parliament and its parts including the Senate make up a national institution with a primarily national role as opposed to a states' one. As Deakin pointed out would be the case, looking after State interests is the role of the States themselves.

The Changing Role of the Senate

With the Australian Labor Party's growing electoral success, culminating in its winning office in its own right in 1910 and the fusion of the first non-Labour parties, disciplined party politics tightened their grip on Parliament. Party discipline controlled the Senate and

was directed by party leaders in the House of Representatives. The tightening of party control in the Senate was helped by the first two voting methods used in Senate elections. Both the block method (1902–19) and preferential voting (1919–48) tended to produce 'grotesque' results, in which the dominant party tended to win the available Senate seats in each State in a 'windscreen-wiper effect'—in 1943, Labor won all 19 seats being contested. Inevitably, party control ensured that the Senate was an unduly tame institution on those occasions when the same party or coalition controlled both Houses. Reid and Forrest sum up the period between approximately 1910 and 1960 as 'years of dependence', noting that the upper House 'did little to enhance its reputation for proving an effective scrutiny of proposed laws, or of the activities of the Executive Government'. In such a situation, it was inevitable that the bicameral vigour of the Federal Parliament was undermined. Despite this dominant party effect, the Senate retained something of its independence, because its State electoral base and staggered terms ensured that the government party did not always have the majority of Senators. One major innovation that enhances the Senate's role was the establishment in 1932 of the Regulations and Ordinances Committee to review 'delegated legislation' in the form of statutory rules and orders. Its purpose was to ensure that these do not exceed powers given to the Executive under the relevant statute or trespass unduly on individual rights and liberties.

More significant in re-establishing the status of the Senate was the introduction of proportional representation (PR) in 1948, although it was not until the 1960s that minor parties and independents began taking a more independent line. Ironically, the change was made by the Chifley Labor Government that had strong majorities in both Houses of Parliament at the time. While PR had a long gestation period²⁷, its introduction in 1948 was made without careful calculation of the consequences. While Labor retained control of the Senate—despite losing government in the subsequent general election held in December 1949—since the 1951 double dissolution it has not had a Senate majority. Moreover, after the Party split in the mid-1950s, the splinter DLP used its Senate representation to support the Menzies Liberal Coalition Government. According to the late Professor L. F. Crisp, Labor gave little thought to the contradiction between its traditional commitment to majoritarian democracy and the primacy of responsible government on the one hand, and bolstering the independence of the Senate and its propensity to serve minority interests on the other.²⁸

Since the 1960s a quiet revolution in the internal working of Parliament has occurred based upon Senate PR and the consequent influence of minor parties and independent Senators. Holding the balance of power as they invariably do means that neither the government of the day nor the opposition control the Senate through party means. That ensures a Senate of enhanced power and independence, and entails a substantial curb on Executive dominance of Parliament. Since the government of the day needs the support of the controlling minority party or independent Senators to have its legislation passed, it has to engage in negotiation and compromise. An example of how this has changed the approach of the major parties could be seen in a 1993 reference to native title by Gareth Evans (Labor, Vic.) then Government Leader in the Senate. Noting the great many

difficulties involved in the question of compensation for original landowners, Evans assured fellow Senators that many of the issues:

will be perfectly capable of being responded to when the detailed legislation is before the chamber because they go to questions of precise definition, layout and, clause by clause, processes and procedures. The time to deal with that is at the committee stage of the debate in this place and we will be fully and amply willing to do so at that time.²⁹

The point to be emphasised for our purposes is that this major reform that enhanced the independence of the Senate and, to an extent, revitalised Parliament was a by-product of party and executive government. Its effect has been to re-balance the trinitarian parts of Parliament and enhance its national legislative role through broadening inputs into, and providing greater scrutiny of, the legislative process. The Senate's enhanced legislative role is apparent in its effect on most major national legislation ranging from native title to the exemption of food from the new Goods and Services Tax (GST) to annual Budgets.

As well, the Senate has extended its legislative review function. Since the 1970s, under one guise or another, the Senate's legislative and general purpose committees have reinforced the Chamber's standing by acting as a democratic check on government generally. Estimates hearings twice-yearly examine the annual Budgets of Commonwealth agencies and scrutinise the means by which the Executive spends monies appropriated by the Parliament.³⁰ In 1982 the Standing Committee for the Scrutiny of Bills was established to ensure that primary legislation does not inappropriately delegate the Parliament's legislative powers or place individual rights at risk from the unconstrained exercise of administrative discretion. Operating from 1990, the Senate Selection of Bills Committee refers a substantial proportion of government Bills to the array of Senate standing or select committees for detailed consideration. The record of Senate and other parliamentary committees, particularly that of joint and statutory committees such as the Parliamentary Joint Statutory Committee of Public Accounts and Audit is by and large an impressive one. House of Representatives Committees, although somewhat constrained in their operation, have (like their less inhibited counterparts in the Senate) extended the Commonwealth Parliament's purview into areas that might otherwise been the sole preserve of the Executive Government or the States.

While parliamentary committees³¹ serve party purposes of embarrassing the government and delaying its legislative program, they also help to expose ministerial and bureaucratic weaknesses and improve legislative outcomes. John Uhr's legislative scorecard shows that 25 per cent of Bills passed by the Senate have undergone prior committee examination, and that 30 per cent of amendments made are aired or considered in committees. As Dr Uhr concludes, 'the emerging legislative process is an improvement on the traditional modes of party government and shows encouraging signs of a capacity to measure up to effective deliberative standards'.³²

As another academic commentator, Ian Marsh, has argued most eloquently the traditional two party system of adversarial politics that characterises traditional parliamentary life is

inadequate for representing the diversity of modern life and new social movements. In his view, effective public policy and problem solving require a wider and more diverse process that incorporates multiple interests and produces more consensual outcomes. The Senate, underpinned by PR and its committee structure, provides something of that in Australian politics.³³

The fragmentation of party control and development of a complex committee system have enhanced the Senate's independence from Executive dominance and its legislative review function. During a century of Federation and through various phases—of independence during the early period, party domination from 1910 until the 1960s and more deliberative legislative process in recent decades—the Senate has not been a States' House. Its representative character has changed over time, but not from or in the direction of representing the States. To a greater or lesser extent it has enhanced the national legislative role of Parliament and been more or less independent of Executive dominance. It has weighted national representation in favour of smaller State populations, and provided a forum for injecting particular State interests into national consideration. Its significance as a federal chamber is as part of the Federal Parliament, not representing the States but on the contrary contributing to national legislation and pursuing national purposes. For the most part, the States are represented by themselves and protected by the federal constitutional system.

The overall interest of the nation and the development of the federal system are products of the interaction of the two levels of government, both pursuing their interests and using their constitutional powers to the full. At times and in certain policy areas there will be cooperation and at other times or other policy areas conflict.³⁴ The dynamic interaction of Parliament's own 'trinitarian parts' will also affect how it develops and acts.

Fighting the Fight

Clearly since Federation many acts of the Commonwealth have had a significant impact upon the development of Australian federalism. Some have been detrimental, others not. Senators and Members have rarely stood silently by as this occurred. Hansard is full of occasions when the critics have used the parliamentary forum to express their concern over changes to the federal system, very often as they have had an impact on their home State or region. Liberal Coalition parliamentarians in Opposition have often been critics of centralisation attempts by Labor governments. Robert Menzies (Liberal, Kooyong, Vic.) used Parliament very effectively to criticise the Curtin and Chifley Labor Governments, as did Malcolm Fraser (Liberal, Wannon, Vic.) and Doug Anthony (Country Party, Richmond, NSW) in criticising the Whitlam Government.

Parliamentarians from the smaller states have often had the most to say about central government's 'intrusion' into State matters. In the 100 years, two of the most persistent cases have been Western Australia and Tasmania. From the earliest days of the new

federal system, Western Australians were to be heard lamenting their treatment by successive Commonwealth Governments. It was claimed repeatedly that the Commonwealth had no real appreciation of the particular needs and problems of the State with the largest land area. Some problems, such as the tariff were major; some, like lighthouses, seemed relatively minor. Large problem or small, the Commonwealth's handling of a great many antagonised people in the West, many of whom had been lukewarm about coming into the Australian Federation in 1901. Their views were often heard on the floor of the Commonwealth Parliament:

The administration from Melbourne of the lighthouses on the northwest coast of Western Australia is an absolute farce, and there has been no real effort made to improve the lighting of that coast. If the administration of the lighthouses and the expenditure on them had been left to the states, they could have agreed on some uniform system, and given a far better service as far as the ports and harbours of Australia are concerned. Honourable members may accuse me of being a states-righter, but that does not deter me. The position of Western Australia is different from that of other states, because it is far removed from the seat of the Federal Government.³⁵

Such views eventually saw Western Australians vote solidly in favour of secession in a referendum held in 1933 that was ignored both in Canberra and in Westminster. Western Australian Parliamentarians have persisted with their complaints in modern times:

Western Australia, which produces nearly 30 per cent of national export income and yet pays \$1.5 billion more in taxes annually than it receives, has every reason to resent at times its treatment by the increasingly centralist governments of Canberra ... It should never be forgotten that it was the states which created the federation. Yet the federal child is dictating to the parental states in an increasingly worrying manner, by controlling the purse strings which were in the possession of the six self-governing states 96 years ago.³⁶

Tasmania had been an enthusiastic supporter of federation, but many of its representatives became disillusioned with the island State's treatment after 1901. The inability to survive financially, that caused a resented dependence upon Commonwealth support, its difficulties under the *Navigation Act 1912* (Cwlth), and its resentments whenever the Senate seemed threatened by Labor-sponsored constitutional amendments, were just a few of the grievances aired by its parliamentary representatives. For many, the final straw seemed to come in early 1983 when the Hawke Government moved to stop the building of a dam in a World Heritage-listed area in Tasmania's South-West. The Liberal Member for Franklin, Bruce Goodluck, believed he spoke for many fellow islanders—who had just defeated all Labor candidates in the five Tasmanian House of Representatives seats:

Honourable members may laugh, but the five of us came back from Tasmania ... We all came back to fight for the people of Tasmania ... We have come here with a mandate from the people to defend the rights of Tasmania, and we do not intend to move one inch ... We want what the people of Tasmania want: To be left alone. Our Tasmanian

Government made a decision [to build the dam] and that is what we want. We shall not move one inch on this subject.³⁷

Views such as these will not always influence parliamentary debates, but on such occasions the Commonwealth Parliament acts as an important national forum for them to be expressed.

The rest of this paper examines three select cases or areas of development from a century of practice that illustrate how Parliament has evolved as a federal institution and the role it has played in shaping the federal system. The three examples are drawn from Australia's experience in the early, middle and late periods of the twentieth century respectively. The selected cases are supplemented by brief reference to related issues and trends from other periods to facilitate the analysis:

- the first concerns the role of the Senate in the internal trinitarian dynamic of Parliament and begins with an examination of federalism and race as illustrated in debate over the passage of the first *Electoral Franchise Act 1902* (Cwlth), and
- the second focuses on the dualistic dynamic between the Commonwealth and states, and in particular the 'ever increasing centralisation' of fiscal federal relations in the postwar decades.

The third shifts focus to Parliament's role in mediating globalisation in the external trinitarian dynamic between international and federal—Commonwealth and states—that is shaping modern Australian federalism today.

Federalism and Race

The Constitution did not define citizenship rights and entitlements but left that mainly for the Parliaments of the Commonwealth and States to determine. This was in accord with traditional parliamentary practice, and for the good democratic reason of having been elected parliaments set the franchise and specify other citizenship rights in ways that reflected the will of the people and was flexible over time. On the negative side, however, and this was openly acknowledged by the founders, Parliaments would be free to discriminate against minorities as they saw fit. Certain Colonies already discriminated against racial groups such as the Chinese; there were varying forms of exclusion of Aboriginal people; and women had the franchise in only two Colonies at Federation. Thus Colonial discriminatory regimes were left in place and translated into State discriminatory regimes allowed under the Constitution, while the Commonwealth Parliament was left free to pass its own discriminatory legislation.

One of the first acts of the new Parliament was to put in place a national franchise. Until this came into effect, the Constitution specified that State laws would apply in determining who could vote (ss. 10, 30, 31). The *Commonwealth Franchise Act 1902* was universal in

giving women as well as men the vote, but not universal in denying the vote to Aboriginal people, or 'natives of Australia' as they were called. In so doing, the Commonwealth adopted best State practice with respect to women, that of South Australia and Western Australia where women had received the vote in 1894 and 1898 respectively. In barring Aboriginal natives, however, the Commonwealth picked up the worst State practice followed only by Western Australia and Queensland. The other States had restrictions on Aborigines' voting, but did not ban them outright. Thus Australia, along with New Zealand, led the world in enfranchising women, but in the very same Act imposed discrimination against Aboriginal people that persisted until the 1960s.

This is a notable instance in which national and State interests were blended to produce a very mixed outcome. The Commonwealth Parliament controlled the national franchise, but also had a powerful influence on State practice. Within a decade all the States had adopted women's franchise in their own electoral systems, but those denying Aborigines the franchise were reinforced in their discrimination for generations. Such discriminatory practice was doubly extended by Parliament's legislation—to the national franchise and to the Northern Territory when the Commonwealth took over its administration from South Australia in 1911. Excluding Aboriginal people from voting was proposed by Senators from Queensland and Western Australia who championed their States' racist practices in the Senate.

Why go out of the way in our federal legislation to give rights to aboriginals which they do not possess to-day in certain of the states?

asked Senator Matheson (Free Trade, WA). He answered his own question by asserting that such a step would be 'absolutely repugnant to the greater number of the people of the Commonwealth' because Aborigines were 'horrible, degraded, dirty' creatures.³⁸ The contrary view was put by the government Senate leader, Richard O'Connor (Protectionist, NSW), who pointed out that in four of the six States Aborigines had the right to vote, and even in Western Australia and Queensland those who held property of a certain value were not excluded. The explanation given for such inclusion by O'Connor was as follows:

But I think it occurred to those who were framing these laws in the states, that it would be a monstrous thing, an unheard piece of savagery on our part, to treat the aboriginals, whose land we were occupying, in such a manner as to deprive them absolutely of any right to vote in their own country, simply on the ground of their colour, and because they were aboriginals.³⁹

O'Connor initially managed to hold the line in the Senate by having 'Australia' deleted from the amending clause that precluded aboriginal natives of 'Australia Asia Africa or the Islands of the Pacific except New Zealand' from voting. But that was reversed in the House of Representatives, accepted by the Barton Government and the Senate, and finally passed into law. Ironically, it was H. B. Higgins, the Victorian radical liberal and nationalist, who moved the amendment in the House of Representatives to reinstate exclusion of Aboriginal people from voting. They should be sheltered from political life,

Higgins claimed, and in any case there was no constitutional obligation to provide for a uniform franchise for Aborigines.⁴⁰ As Reid and Forrest conclude:

O'Connor's philosophy of using Commonwealth legislation to build upon an existing law of a State towards a national uniformity was acceptable to the House in the case of white women, but not for Aborigines—men or women.⁴¹

They would be subject to a patchwork of more or less discriminatory practices that differed among the States and between States and the Commonwealth.

The above example from the early Parliament shows how the Senate could be used in advancing the preferences of less populous States—in this instance to inject their discriminatory practice into national legislation. But such an outcome was not initially successful in the Senate, and required the concurrence of the House of Representatives in reinstating the exclusion of Australian Aboriginal natives.

The example shows that parliamentary bicameralism and the representation of diverse interests in the two Houses, including State interests in the Senate, need not work to improve legislation but that the two Houses could consort in perpetuating discrimination. The Senate did not act as a State's House but provided a forum for Senators from two of the States to advance their racist cause. The Senate's subsequent adoption of the discriminatory legislation brought it into line with the House of Representatives. How well the resultant patchwork of discriminatory regimes reflected public opinion nationally and in the various States is unclear, but we can conclude that the national legislation implemented minority State practice as well as extending and reinforcing discriminatory laws. It was a case of the Parliament, not the Senate, adopting a discriminatory position consistent with that of two less populous States with higher numbers of Aboriginal citizens. Subsequent Parliaments replicated this formulaic exclusion of 'Aboriginal natives of Australia' from other social rights and entitlements including maternity benefits, disability pensions and the basic wage. The effect was to make Aboriginal people 'citizens without rights' in their own land for more than half a century.⁴² This example aside, the Senate played a significant role in shaping the legislation of the first Parliament and establishing its own procedures that insulated it from Executive dominance.⁴³

Federalism and Finance

According to critics, Australian federalism has undergone such a sustained process of centralisation that it can scarcely be called a federal system at all. Richard Court, when Western Australian Premier, charged that the 'centralisation of power and control in Canberra' was the worst development in Australian federalism and posed the greatest threat to the liberty and independence of all Australians. He blamed the High Court's for 'this reversal from a federal to a centralised system of government', especially through its expansive interpretation of the external affairs power:

The resulting increase in the range and scope of the Commonwealth Parliament's powers has enabled Commonwealth legislation to govern and regulate almost all aspects of Australian life.⁴⁴

Aspects of this will be considered in the next section on Parliament's mediation of globalisation. In this section we are concerned with the other 'more startling' reason that Premier Court gave for centralisation—the Commonwealth's financial dominance that also depended on the High Court's generous interpretations of Commonwealth taxing and spending powers.

In contrast to the previous example where the first electoral franchise was primarily a Commonwealth matter shaped by the internal dynamics within Parliament, this case involved the Commonwealth Executive and Parliament besting the States. Australia's extreme 'vertical fiscal imbalance', whereby the Commonwealth raises the lion's share of revenue, is due mainly to the Commonwealth's monopoly over income tax and excise duties. The former was established as a wartime measure in 1942 and upheld by the High Court on grounds other than the defence power in the first Uniform Tax case.⁴⁵ The latter is constitutionally grounded in one of the few exclusive powers given to the Commonwealth, but has been interpreted broadly by the Court to include any tax on the production or sale of goods.

The Commonwealth income tax monopoly was imposed by the centralist Chifley Labor Government and a supporting Parliament in time of war, and extended to the subsequent period of postwar reconstruction. As Leader of the Opposition and newly constituted Liberal Party, Menzies opposed such centralisation and, after winning office at the end of 1949, proposed that taxing powers be returned to the States. This was opposed by a number of the Premiers, however, and over time the Menzies Liberal Coalition Government consolidated the Commonwealth's uniform tax regime as a permanent feature of Australian fiscal federalism. Parliament's effective power to monopolise income taxation during peacetime was confirmed by the High Court in the *Second Uniform Tax* case in 1957, although a requirement for payment of Commonwealth taxes before State taxes was struck down.⁴⁶ This was not enough to cripple the scheme. The Commonwealth's income tax monopoly was achieved and has persisted because of a combination of political will on the Commonwealth's part, complicity by the States and selective sanctioning by the High Court. While the Fraser Liberal Coalition Government allowed the States some leeway through a mechanism for imposing an income tax surcharge, or rebate, as part of its 'new federalism' from 1977 to 1983, it provided no 'tax room'. The initiative was rejected by aggressive State premiers as a double taxing arrangement, with Queensland National Party Premier Bjelke-Petersen insisting that the only good tax was a Commonwealth tax!

The second revenue pillar of the Commonwealth's fiscal dominance is the preclusion of the States from levying taxes on the sale of goods that are a standard and significant source of revenue for sub-national governments in most other federations. This exclusion is based on the High Court's exaggerated interpretation of its power over 'excise duties'

that is one of the few exclusive powers allocated to the Commonwealth by the Constitution (s. 90). Levying customs and excise duties was made an exclusive Commonwealth power in order to ensure a national economic market free of State border taxes and equivalent internal impositions on trade. This constitutional structure and broad interpretation by the High Court explain why the Howard Government's GST was imposed by Commonwealth legislation even though the entire amount collected is to be handed over to the States.

The centralisation of revenue raising in Australia was justified on grounds of national defence and national interest, considerations of more efficient economic management and greater facility in providing social welfare policies. According to the Constitution, income tax is an area of concurrent jurisdiction. It was primarily the domain of the states until the First World War, and was shared by the Commonwealth and the States until the Second World War. Labor's proposed tax monopoly was rejected outright by the States when Treasurer Chifley first proposed it at an inter-governmental conference. It was then legislated by Parliament as necessary for the more efficient prosecution of the Second World War at a time of national emergency when Australia was threatened by Japanese invasion. It was a heavy-handed measure that entailed taking over the State taxation offices, imposing a uniform high national income tax, requiring the payment of Commonwealth income tax before any State income tax, and imposing prohibitive penalties on the States by way of loss of tax reimbursement grants to keep them from reinstating State income taxes.

The States challenged the measure in the High Court, arguing that this was a scheme that took away an essential State function—the ability to raise their own taxes. In one of its most centralising decisions, the High Court refused to consider the overall uniform scheme, holding that each of the discrete Acts, including the seizure of State tax offices under the Defence power, was a legitimate exercise of the Commonwealth Parliament's powers. Whether Parliament should exercise its legislative powers in this way was, according to Chief Justice Latham, a matter of politics: 'We have nothing to do with wisdom or expediency of legislation. Such questions are for Parliament and the people.'⁴⁷ Latham admitted that the Commonwealth Parliament could use the strategy of the uniform tax scheme, including tying restrictive policy conditions to grants using s. 96, to make the States completely dependent:

Thus, if the Commonwealth Parliament were prepared to pass such legislation, all State powers would be controlled by the Commonwealth—a result which would mean the end of the political independence of the state.⁴⁸

Against the States' wishes, Chifley extended the uniform tax scheme in 1945 to apply to peacetime. In 1957, when Victoria and New South Wales belatedly challenged the uniform scheme during peacetime as an unwarranted interference with the States, a differently constituted High Court again upheld the Commonwealth. As the new Chief Justice Owen Dixon observed, the whole plan of uniform taxation had become 'very much a recognised part of the Australian fiscal system' in the intervening 15 years and should

not be lightly overruled.⁴⁹ The High Court confirmed the Commonwealth's broad powers that could be used to achieve a monopoly, and otherwise left their use to politics.

The expenditure side of fiscal centralism was just as important a part of the Commonwealth's postwar dominance. Not only were the States made dependent upon the Commonwealth for much of their revenue (approaching half before the GST), but the Commonwealth had abundant resources for expanding its policy jurisdiction. This could be done through ambitious spending programs relying upon its own jurisdictional powers. Since *Engineers* in 1920, Commonwealth powers had been expansively interpreted, while the successful 1946 social services amendment provided a constitutional basis for the postwar welfare state. The other method of Commonwealth expansion was to tie policy terms and conditions to a large proportion of grants to the States using s. 96 of the Constitution. The Commonwealth used tied grants to shape large areas of education, health and infrastructure provision, especially roads. According to one of its greatest proponents, Gough Whitlam, s. 96 was Labor's 'charter of public enterprise' because it enabled the Commonwealth to use its fiscal dominance to invade major policy areas of State jurisdiction.⁵⁰

Our concern is not with the detail of fiscal centralisation⁵¹ and its sanctioning where necessary by the High Court, but with what this tells us about Parliament's development of Australian federalism. From the brief outline presented above, we can see that the expansion of the Commonwealth's effective powers can be achieved by vigorous and creative use of its enumerated powers, plus the legitimating endorsement of a sympathetic High Court. The main restraints on Parliament's expansion of its powers and their use at the expense of the States are political. This allows developments in the shape and practice of Australian federalism that the founders did not envisage and probably would not have liked. However, such developments are a consequence of the design that they put in place quite deliberately. This entailed leaving key issues such as long-term provisions for taxation and fiscal sharing to future Parliaments to decide. Politics, including inter-governmental politics of competition and cooperation with the States, would decide future policies and hence the shape of federalism. Thus we can conclude that fiscal centralisation was neither intended nor precluded by the founders and the design of the Constitution.⁵²

In any case, there are qualifications to be made to the thesis of ever increasing centralisation. Fiscal centralism has not spelt the end of the States. Indeed they have learnt to manipulate the system in ways that help retain aspects of State power. To an extent the States collude in the ongoing fiscal arrangements that deliver them large grants of money for which they have no responsibility for collecting as taxes. They reap the political benefits of spending money without attracting the odium of raising it which makes a certain political sense even if it offends good public finance principles. In addition, part of the excess revenues collected by the Commonwealth goes to fund fiscal equalisation that benefits the smaller States. For a mix of these reasons, the States have been less than single minded in trying to reverse fiscal centralisation. How the GST that came into effect on 1 July 2000 will affect vertical fiscal imbalance remains to be seen: it is a

Commonwealth imposed tax but the full benefits go to the States. It will be a political issue as to whether the Commonwealth acts only in accord with State views in varying the tax rate.

The final point concerns the propriety of the Commonwealth Parliament's exercising its powers in ways that give it dominance over, and are at the expense of, the States. There are several parts to the answer: one, constitutional legitimacy; two, federal propriety; and three, the politics of particular instances. As pointed out above, the Commonwealth Parliament has the constitutional power for acting in such ways. One might quibble with the interpretive method of the High Court, but the expansive constitutional jurisprudence of *Engineers* has been applied fairly consistently since 1920.⁵³ The federal propriety of the Commonwealth pursuing its own purposes as fully and vigorously as it sees fit has already been discussed and affirmed. The federal system consists of two spheres of government each pursuing their interests and purposes within the established framework of institutions and powers. The common good is served and is in effect the product of their actions and interactions. In exercising its powers the Commonwealth plays a significant role, and has a legitimate purpose, in shaping the federal system. Incentives and constraints depend on the politics of the period and change over time. Centralisation and the assertion of national policy making by the Commonwealth during the Second World War and subsequent decades achieved and mirrored the consolidation of Australian nationhood. National defence and subsequently national economic management and welfare policies seemed to require it. Whether centralisation remains a likely scenario for the twenty first century is taken up in the final case that considers Parliament's mediation of modern globalisation.

Federalism and Globalisation

While Australia has been shaped and affected by global forces since the beginning of European settlement, for much of that time it enjoyed the protective buffer of the British Empire. When the Commonwealth Constitution was framed, for example, the crucial areas of foreign affairs and decisions about war and peace were left with Britain. In addition, Australia followed a policy of national protection, using State instrumentalities and policies to protect the domestic economy and cushion the impact of international forces. In modern times there has been an intensification of globalisation, through changes in technology, communications, finance and trade. At the same time, Australia has deregulated its economy and exposed its domestic industry to international market pressures. Moreover, since the decline of Britain and its joining the European Union, and the end of the Cold War and a strong American security alignment, Australia has become more independent but also vulnerable as a smallish 'middle power' in a volatile part of the world. Australia has become a member of, and participant in, United Nations human rights organisations and accords as well as peacekeeping activities. The United Nations, however, is a relatively weak and diffuse international organisation, and Australia's commitment especially to its human rights monitoring system is currently under review by the Howard Government.

Our purpose here is not with the complex issues of globalisation, nor with the intricacies of the Commonwealth's external affairs power and treaty making and implementation. There are extensive literatures on both,⁵⁴ and aspects of the latter are covered in other contributions to this collection. Our concern is with the ways in which the new dynamic between international and federal—Commonwealth and States—is shaping modern Australian federalism. In particular, it is with the Parliament's role in mediating globalisation and the way that is affecting Australia's federal system. In the space available we can only make a series of indicative points.

First, as was the case in our second example of postwar centralisation in domestic affairs, Parliament's role in developing federalism during the modern period of more intense globalisation is, for the most part, in concert with the Federal Executive. That is broadly what we would expect given the government's dominance in electoral politics and public affairs and its stranglehold over the House of Representatives. Because of the Senate's somewhat more independent role due to minor parties and independents holding the balance of power, however, Parliament was able to play a significant scrutiny and reform function in the lead up to the 1996 overhaul of the treaty making process.

The previous Labor Government and its forceful Minister for Foreign Affairs, Senator Gareth Evans, had used the untrammelled treaty making power with little concern for parliamentary scrutiny or public accountability. The practice of bulk tabling of treaties in Parliament at six-monthly intervals in batches of between 30 and 50 treaties had developed. In about two-thirds of the cases, Australia had already ratified or acceded to the treaties before tabling and was obliged to comply under international law.⁵⁵ Such contempt for Parliament, combined with concern about the High Court's open-ended interpretation of the external affairs power that favoured the Commonwealth over the states, caused a political backlash. A Senate committee investigated the matter and called for greater public scrutiny and public accountability.⁵⁶ Its recommendations were adopted by the incoming Howard Coalition Government in 1996. The 1996 overhaul of the treaty making process, included: mandatory tabling of a treaty 15 sitting days before the government takes action to bring a treaty into force; provision of an accompanying National Interest Analysis explaining the reasons for Australia's becoming a party; scrutiny by a Parliamentary Joint Standing Committee on Treaties; establishment of a Treaties Council under the auspices of Council of Australian Government; and public access to treaty making information via the Internet.⁵⁷ While the Council of Australian Government Treaties Council has yet to prove itself, other parts of the new policy are operating to give greater scrutiny.

In this instance Parliament was instrumental in triggering the reform of the treaty process, but not solely responsible. Its proposals had to be picked up by one of the major party groups and made part of its winning electoral program. Moreover, in pursuing reform in this area, the Senate sought to achieve mainly a national democratic purpose of public accountability, and only incidentally the States' complaint of being left out of the process when vital State interests were at issue. It has been up to the States to adopt their own

monitoring process, as the Victorian Parliament has done.⁵⁸ While some have recommended that Parliament have a more independent role in treaty making and responsibility for representing States' interests, that is unlikely given the constitutional structure and political dynamics of the present system. The Executive inherited largely unconstrained powers over foreign affairs and treaty making from the British Imperial government, so there is nothing comparable to American-style Senate ratification. And, as argued above, the Commonwealth, including Parliament, can be expected to pursue vigorously the national interest as it sees fit, leaving the States to look after their own interests as best they can.

Some have claimed that the Commonwealth's expansive use of its external affairs power in the 1980s and 1990s has been instrumental in transforming Australia from a federal to a centralised system of government. Others are concerned with the loss of sovereignty and the undermining of national government by globalisation.⁵⁹ While those who are alarmed at centralisation might applaud such a process, nationalists call for the bolstering and enhancement of national power to deal with globalisation. How are we to understand this complex set of relations and contentions? What is the likely impact of globalisation on Australian federalism?

The first point to be made is that globalisation is providing the Commonwealth with greater scope for expanding its role by means of its external affairs power. As key policy areas such as human rights and the environment become internationalised and the Australian government enters into treaties and international accords for setting standards, Parliament's power is expanded. Indeed, on one view, following the logic of the High Court in *Engineers*, there is no limit to the extent to which Commonwealth jurisdiction can expand into otherwise State areas of policy as they become internationalised in this way.⁶⁰ The power of the Commonwealth waxes and that of the States wanes, as approving High Court judges have affirmed.⁶¹ Depending on the politics of the issue including the stance of the States, the Federal Government and Parliament may realise that power. Thus globalisation has provided Parliament with the opportunity for expanding its legislative power into areas of State jurisdiction and, if it chooses, doing so at the expense of the States.

There are other aspects of globalisation, however, that tend to restrict and undermine Commonwealth power. By becoming party to international agreements and standard setting and enforcement, the Commonwealth is restricting its own independence and autonomy. Hence, in this two-level game, the Commonwealth might gain power at the expense of the States within the domestic arena while at the same time losing sovereignty in the international arena.⁶² Nor do the gains and losses balance out as in a zero sum game. In the economic area, deregulation of markets, including currency markets and the winding back of tariff protection, has reduced the Commonwealth's effective power. So has the growth in non-government organisations and issue movements that have proliferated in international as well as national areas of social and humanitarian policy. In certain areas, national governments and parliaments will be bypassed. The overall effect

on the nation State is contested with some predicting the end of the sovereign nation State and the beginning of a new post-national era. While nation states will no doubt continue, their power and independence is being reduced as they become party to regional and international arrangements.

Arguably, globalisation is antithetical to the fundamental idea of a sovereign nation State but not a federal system. Federalism is essentially a system of multiple governments, divided sovereignty, overlapping and shared jurisdictions, and dual citizenship within domestic governance. These aspects of federalism make it congenial with an emerging international/national order in which transnational associations and international centres of policy-making and rule setting overlie and intrude into aspects of domestic governance. Likewise, a diffusion of power centres and a variety of institutional systems, each of which has jurisdiction over some matters but none of which is absolute over all the others, are characteristic of both federalism and the emerging international order.⁶³ In addition there is potential for greater State activity within the umbrella of transnational associations and constrained national government. So the likely outcome from increased globalisation might well be a reduced role for the Commonwealth Parliament compared with its dominance in the postwar decades of centralisation. Much will depend on the complex politics of this new tripartite system, and the ways in which the Commonwealth Parliament mediates globalisation or is simply bypassed in direct global/local interactions.

The Vision in Hindsight

Parliament's development of federalism is quite different in kind from that of the High Court. Whereas the High Court sits in judgment over jurisdictional disputes between the Commonwealth and the States, the Federal Parliament is a major institutional player on the Commonwealth side. Its role is not to develop federalism through impartial adjudication of disputes between the two spheres of government and authoritative interpretation of the federal division of powers. Rather Parliament's role is to represent and give legislative effect to those areas of power and policy that come within its domain. In so doing it defines and pursues the national interest as it sees fit, at times overriding the States and at times competing or cooperating with them.

The story of Parliament's development of federalism is therefore in part the story of Parliament's own development as a federal institution, and the dynamic interaction between its bicameral parts and the Executive that is based primarily in the House of Representatives. The Senate is an important part of Parliament with the same federal or national role as Parliament itself, but with a different electoral base weighted in favour of smaller State populations. While not primarily a States' House, it does provide an avenue for enhanced representation from smaller States in the Federal Parliament and national decision-making. Giving voice to particular State interests may not produce beneficial outcomes, as was the case when Parliament passed the first federal franchise that adopted

and perpetuated worst State practice, followed by Queensland and Western Australia, of excluding Aboriginal people.

A second major way in which Parliament develops federalism is through changing the relative balance of power in Commonwealth–State relations. Particularly during the period between the 1940s through to the early 1980s, Parliament has expanded its legislative domain, often at the expense of the States. During the two world wars the Commonwealth Parliament worked in tandem with the government of the day, passing National Security legislation that allowed virtually complete concentration of power in the Federal Executive for purposes of war. As the veteran Judge Rich, who sat on the High Court during both world wars, put it: national survival required 'an effective dictatorship with power to do anything that contributed to defence'.⁶⁴

During the decades from postwar reconstruction in the late 1940s until the early 1980s, Parliament consolidated and expanded central power in a range of national, economic and social areas that favoured the Commonwealth over the states and skewed the federal system in the Commonwealth's favour. These included: protective policies of high tariffs and national marketing schemes for agriculture, large migration programs to boost population and the workforce in manufacturing industries, huge development projects like the Snowy Hydro scheme, Keynesian economic management of the national economy, expansion of the welfare state, national wage fixing that increasingly usurped the States' role in industrial relations, building up the Commonwealth public service and Canberra, and conducting Australia's foreign affairs that had been largely left with Britain until the Second World War. Fiscal centralisation funded this expansion. Parliament was not the sole agent of centralisation but rather the compliant creature of political parties and governments that pursued centralism. Nevertheless it was an integral and necessary part of the overall expansion of the Commonwealth or federal part of Australian government.

Intense globalisation in recent decades has introduced a major new dimension to the development of Australian federalism—increasing enmeshment in international associations and agreements—that complicates the picture. The Commonwealth's role, including that of its Parliament, is enhanced with respect to the States through the increasing internationalisation of policy areas and the Commonwealth's power over foreign affairs. At the same time, however, the Commonwealth's independence is being undermined as it becomes party to more international organisations and agreements. Thus Parliament's role in mediating globalisation cuts both ways, both increasing and undermining the Commonwealth's relative power. In addition, Parliament can be bypassed by direct global influences and international–local interactions that more readily come within the domain of the States.

The future pattern of Parliament's development of federalism will be a combination of all three types but with different relative weights than in the past. The third globalisation scenario that reduces Parliament's strong centralising role apparent in the second phase is likely to become more predominant. If this is the case, the predominance of the Commonwealth Government and Parliament apparent in the second phase is likely to

decrease and the 'ever increasing centralisation' of Australian federalism to be wound back. Much will depend on the way in which Parliament develops and how it carries out the democratic and nationalist aspirations of the Australian people.

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