

**School of Business Law and Taxation**

**The Use of the Principle of Subsidiarity in the Reformation of  
Australia's Federal System of Government**

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**This thesis is presented for the Degree of  
Doctor of Philosophy  
of  
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## **Declaration**

To the best of my knowledge and belief this thesis contains no material previously published by any other person except where due acknowledgment has been made.

This thesis contains no material which has been accepted for the award of any other degree or diploma in any university.

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## ABSTRACT

Australia's federal system of government is established by the structure of the *Constitution* which provides for a central federal government and six state governments. When the *Constitution* was originally drafted, the framers sought to make the states central players in the new federation, on an equal footing with the new Commonwealth government. This is evident from the Convention Debates, from federal theory itself, and from the manner in which the early High Court of Australia interpreted the Constitution. However, in the *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* ('*Engineers*'), the High Court broke with this tradition of originalist interpretation by utilising a method of constitutional interpretation (literalism) which favoured centralisation of power, and thus compromised the federal balance. This trend toward centralisation continued and is evident in more recent decisions. These include *New South Wales v Commonwealth of Australia* ('*Work Choices*' case), where a majority of the High Court affirmed that the federal balance is not relevant when interpreting the *Constitution* and *Ha v New South Wales* ('*Ha*'), which affirmed a broad interpretation of excise duties resulting in a loss of \$5 billion per annum to the states. This thesis will evaluate whether aspects of the principle of subsidiarity can be implemented by way of constitutional amendment and legislative and procedural reforms, to restore the federal balance. The principle of subsidiarity has its origins in Catholic social theory and has been incorporated into European Union law in art 5(3) of the *Treaty on European Union* ('*TEU*'). The principle guards against centralisation by providing that governance should be undertaken at a local or community level, as opposed to a central level, wherever possible.

## CHAPTER 1: INTRODUCTION

### I BACKGROUND

The principle of subsidiarity was enunciated by Pope Pius XI in 1931 as a central principle of social theory in the Catholic Church. In *Quadragesimo Anno* he outlined the principle as follows:

Just as it is gravely wrong to withdraw from the individual and commit to the community at large what private enterprise and industry can accomplish, so, too, it is an injustice, a grave evil, and a disturbance of right order for a larger and greater organisation to arrogate to itself functions which can be performed efficiently by smaller and lower bodies. This is a fundamental principle of social philosophy, unshaken and unchangeable. Of its very nature the true aim of all social activity should be to help individual members of the social body, but never to destroy or absorb them.<sup>1</sup>

In Catholic social theory, the principle is premised upon empowering the individual with decision-making ‘carried out as close to the citizen as is viable’,<sup>2</sup> or in simpler words, at a ‘grassroots level’.<sup>3</sup> The individual citizen’s autonomy is respected, and there is a hierarchy consisting of the individual citizen, the family, the local community, and the Church or the State in which centralised power is limited in favour of matters being resolved at the lowest possible level, or in other words, ‘closest to the problem at hand’.<sup>4</sup>

When applied to the workings of government, subsidiarity can be said to

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<sup>1</sup> Pius XI, *Quadragesimo Anno: Reconstructing the Social Order and Perfecting it Conformably to the Precepts of the Gospel in Commemoration of the Fortieth Anniversary of the Encyclical ‘Rerum Novarum’* (Australian Catholic Truth Society, 1931) 25. For a discussion of this quotation see Robert K Vischer, ‘Subsidiarity as a Principle of Governance: Beyond Devolution’ (2001) 35 *Indiana Law Review* 103, 107–108 cited in Peter Widulski, ‘Bakke, Grutter, and the Principle of Subsidiarity’ (2005) 32 *Hastings Constitutional Law Quarterly* 847, 847.

<sup>2</sup> Hunnings (ed), *Encyclopaedia of European Law* (Sweet & Maxwell, 1998) s 12.0120A cited in John Warwick Montgomery, ‘Subsidiarity as a Jurisprudential and Canonical Theory’ (2002) 148 *Law and Justice The Christian Law Review* 46, 48.

<sup>3</sup> John Warwick Montgomery, ‘Subsidiarity as a Jurisprudential and Canonical Theory’ (2002) 148 *Law and Justice: The Christian Law Review* 46, 48.

<sup>4</sup> Robert A Sirico, ‘Subsidiarity, Society, and Entitlements: Understanding and Application’ (1997) 11 *Notre Dame Journal of Law Ethics and Public Policy* 549, 551–552.

mean that decisions, whether legislative or administrative acts, should be taken at the lowest practicable political level, that is as close as possible to those who are to be affected by them. Subsidiarity therefore presupposes an allocation of decision making powers within the state or other polity according to certain criteria designed to ensure that each decision is taken at the appropriate political level. The allocation of a particular decision making power to a higher or to the highest political level rather than to a lower or to the lowest political level might be made, for example, on such grounds as subject matter or effectiveness or efficiency or necessity or a combination of such grounds.<sup>5</sup>

Hence, the principle of subsidiarity in a political context aims to empower individual citizens and thus enhance democracy<sup>6</sup> through encouraging decision-making closer to the region or problem at hand. Subsidiarity ‘sets limits for state intervention’<sup>7</sup> in order to discourage centralisation. However, at the same time, the principle provides ‘justification of central involvement in affairs that cannot adequately be handled at the local level.’<sup>8</sup>

This was the intention behind incorporating the principle of subsidiarity into European Union law. The European Union consists of 27 countries which agreed to form ‘an economic trading bloc’.<sup>9</sup> These countries are known as ‘member states’ and retain their status as separate and independent countries with their own governments, languages and cultures. Hence, the philosophy of subsidiarity was of utmost importance to the member states which were wary of centralisation.<sup>10</sup> The principle of subsidiarity, as it was originally intended in European Union law, provides that if a matter does not fall within the exclusive competence of the Community and can be better resolved by the individual member states, the central authority (Community)

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<sup>5</sup> John W Bridge, ‘Subsidiarity as a Principle of Constitutional Law’ in K D Kerameus (ed), *XIV International Congress of Comparative Law, Athens 1994, General Reports* (1996) 613 cited in John W Bridge, ‘Constitutions, Powers and the Doctrine of Subsidiarity’ (1999) 31 *Bracton Law Journal* 49, 50–51.

<sup>6</sup> Michael Longo, ‘Subsidiarity and Local Environmental Governance: A Comparative and Reform Perspective’ (1999) 18 *University of Tasmania Law Review* 225, 225.

<sup>7</sup> Catechism of the Catholic Church (2000) para 1883 cited in Peter Widulski, ‘Bakke, Grutter, and the Principle of Subsidiarity’ (2005) 32 *Hastings Constitutional Law Quarterly* 847, 855.

<sup>8</sup> Daniel Halberstam, ‘Federal Powers and the Principle of Subsidiarity’ in Vikram David Amar and Mark V Tushnet (eds), *Global Perspectives on Constitutional Law* (Oxford University Press, 2009) 34, 35.

<sup>9</sup> Gabriël A Moens and John Trone, *Commercial Law of the European Union* (Springer, 2010) 1.

<sup>10</sup> W Gary Vause, ‘The Subsidiarity Principle in European Union Law — American Federalism Compared’ (1995) 27 *Case Western Reserve Journal of International Law* 61, 64–65.

should *not* intervene, so that these matters can be resolved at a member state level.<sup>11</sup>

The principle, in the context of European law, is summarised by Vause:

The principle of ‘subsidiarity’ in EU law requires that action to accomplish a legitimate government objective should in principle be taken at the lowest level of government which is capable of effectively addressing the problem. In effect, subsidiarity is a guideline for contemporary power-sharing between the relatively new institutions of the EU and the constituent Member States that formed the Union.<sup>12</sup>

The current principle of subsidiarity is contained in art 5(3) of the *Treaty on European Union* (‘TEU’).<sup>13</sup> The principle has been implemented in the European Union to provide effective procedural safeguards in the legislative process to guard against centralisation. However, at a judicial level, the principle has been disregarded by the European Court of Justice, as evidenced by no directives or regulations being

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<sup>11</sup> Gabriël A Moens and John Trone, *Commercial Law of the European Union* (Springer, 2010) 27–28. For a discussion of ‘exclusive competence’ see Ronald van Ooik, ‘The European Court of Justice and the Division of Competence in the European Union’ in D Obradovic and N Lavranos (eds), *Interface between EU Law and National Law: Proceedings of the Annual Colloquium of the G K van Hogendorp Centre for European and Cultural Studies* (Europa Law Publishing, 2007) 13, 14–19. Areas of exclusive competence include common commercial policy, establishing internal competition rules, monetary policy, customs and international agreements involving the Union: see Van Ooik (at 14–15). For a discussion of the principle of subsidiarity in the context of European Union law see Ronald van Ooik, ‘The European Court of Justice and the Division of Competence in the European Union’ in D Obradovic and N Lavranos, *Interface Between EU Law and National Law: Proceedings of the Annual Colloquium of the G K van Hogendorp Centre for European and Cultural Studies* (Europa Law Publishing, 2007) 13; Josephine Steiner and Lorna Woods, *EU Law* (Oxford University Press, 2009) 61–62.

<sup>12</sup> W Gary Vause, ‘The Subsidiarity Principle in European Union Law — American Federalism Compared’ (1995) 27 *Case Western Reserve Journal of International Law* 61, 62.

<sup>13</sup> *Treaty on European Union*, opened for signature 7 February 1992, [2009] OJ C 115/13 (entered into force 1 November 1993) (‘TEU’). TEU art 5(3) states:

‘Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at a central level or at a regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.’

For an overview of the operation of the principle of subsidiarity in European Union law see Gabriël A Moens, ‘The Subsidiarity Principle in European Union Law and the Irish Abortion Issue’ in Guenther Doeker-Mach and Klaus A Ziegert (eds), *Law, Legal Culture and Politics in the Twenty First Century* (Franz Steiner Verlag Stuttgart, 2004) 424.

annulled on the basis of it.<sup>14</sup> As Sander states, '[t]he Court's present track record on subsidiarity issues reveals judicial reluctance rather than a proactive approach.'<sup>15</sup>

In Australia, the framers of the *Constitution*,<sup>16</sup> by adopting a federal system of government, intended to protect state power and autonomy against centralisation. Central to both theories (federalism and subsidiarity) is the ideal of maintaining 'states' rights'<sup>17</sup> and reserving state power and autonomy over local issues wherever possible. The Commonwealth *Constitution* that resulted from the Constitutional Convention Debates of the 1890s limits central powers; provides for the continued existence of the states, their Constitutions and powers; and consequently, mandates a federal balance between the central and state governments. Like subsidiarity in the European Union, the federal balance in Australia has been destabilised by the High Court of Australia's interpretation of the *Constitution* which has at first gradually, and in recent years exponentially, resulted in the centralisation of power that should belong to the states.

Although federalism and subsidiarity are different philosophical concepts, there is a strong theoretical correlation between the principle of subsidiarity and federal theory. This is evident from the wording of the *TEU*, as noted above, when compared to the Australian *Constitution*. Specifically, the Australian *Constitution* in s 107 'reserves' state powers after federation:

Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this *Constitution* exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.<sup>18</sup>

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<sup>14</sup> See generally Gabriël A Moens, 'The Subsidiarity Principle and E.C. Directive 93/104' (1997) 34 *Australia and World Affairs* 51.

<sup>15</sup> Florian Sander, 'Subsidiarity Infringements before the European Court of Justice: Futile Interference with Politics or a Substantial Step Towards EU Federalism?' (2006) 12 *Columbia Journal of European Law* 517, 517.

<sup>16</sup> *Commonwealth of Australia Constitution Act 1900* (UK) ('*Constitution*').

<sup>17</sup> I am referring to 'Member States' in the European Union and 'states' in the Australian federation.

<sup>18</sup> Similarly, the 10<sup>th</sup> Amendment to the *United States Constitution* provides, 'The powers not delegated to the United States by the *Constitution*, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'

Further, whilst some commentators deny the compatibility of the two principles,<sup>19</sup> there are significant parallels in governance between the principles of subsidiarity and federalism. For example, Vause notes that:

Although the analogy [between federalism and subsidiarity] is justified, it is clear that subsidiarity does not have an exact counterpart in the American system of federalism. Nevertheless, the underlying concern over the division of powers is essentially the same under both systems of government.<sup>20</sup>

In addition, Longo notes that ‘subsidiarity, as an organisational principle, has the potential to contribute to defining the federal balance.’<sup>21</sup> Further, Halberstam states that:

Federal systems across the world are generally designed according to the principle of subsidiarity, which in one form or another holds that the central government should play only a supporting role in governance, acting if and only if the constituent units of government are incapable of acting on their own.<sup>22</sup>

These parallels have also been noted by many academic commentators with respect to existing federal systems of government. For example, Bridge argues that the principle of subsidiarity is implied in the Canadian federal system by virtue of the way that the judiciary has interpreted its Constitution.<sup>23</sup> Vischer highlights the parallels between the United States federal system and the principle of subsidiarity when he states:

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<sup>19</sup> Regarding federalism and subsidiarity as theoretical concepts, see for example Yishai Blank, ‘Federalism, Subsidiarity, and the Role of Local Governments in an Age of Global Multilevel Governance’ (2010) 37 *Fordham Urban Law Journal* 509, 523; regarding the compatibility of the United States federal system, see George A Bermann, ‘Taking Subsidiarity Seriously: Federalism in the European Community and in the United States’ (1994) 94 *Columbia Law Review* 331, 403. This thesis will address these arguments in Chapter 4.

<sup>20</sup> W Gary Vause, ‘The Subsidiarity Principle in European Union Law — American Federalism Compared’ (1995) 27 *Case Western Reserve Journal of International Law* 61, 62.

<sup>21</sup> Michael Longo, ‘Subsidiarity and Local Environmental Governance: A Comparative and Reform Perspective’ (1999) 18 *University of Tasmania Law Review* 225, 230.

<sup>22</sup> Daniel Halberstam, ‘Federal Powers and the Principle of Subsidiarity’ in Vikram David Amar and Mark V Tushnet (eds), *Global Perspectives on Constitutional Law* (Oxford University Press, 2009) 34, 34.

<sup>23</sup> John W Bridge, ‘Constitutions, Powers and the Doctrine of Subsidiarity’ (1999) 31 *Bracton Law Journal* 49, 54.

From executive orders requiring that a proposed federal action be weighed against the efficacy of state action, to congressional restraint in areas of state regulatory competence, to judicial enforcement of state-federal boundaries, much of this country's political and legal landscape comports fully with subsidiarity's ideal.<sup>24</sup>

Thus, there is much common ground between federalism and subsidiarity in both a practical and theoretical sense.

It will be argued in this thesis that Australia's move toward centralisation is flawed, and is inconsistent with the federal balance mandated by the *Constitution* and the federal theory upon which it is premised.<sup>25</sup> It will also be argued that federalism in Australia has been compromised to such an extent that Australia can no longer be seen as an authentic federation<sup>26</sup> and that constitutional, legislative and procedural reforms are required in order to restore the federal balance.

These reforms are also necessary because it is impracticable to reconcile the considerable conflicting judicial and academic conflict about which of the methods of interpretation previously employed by the Australian High Court should prevail. In other words, judicial and academic conflict over the existing theories of interpretation (originalism, literalism, living constitution) is unlikely to be resolved. Even if one of these interpretive methods was agreed upon, the federal balance has been compromised to such an extent that a consistent interpretive method alone would not be sufficient. This thesis will show that more extensive reforms are required in order to remedy the negation of the federal balance.

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<sup>24</sup> Robert K Vischer, 'Subsidiarity as a Principle of Governance: Beyond Devolution' (2001) 35 *Indiana Law Review* 103, 123 cited in Peter Widulski, 'Bakke, Grutter, and the Principle of Subsidiarity' (2005) 32 *Hastings Constitutional Law Quarterly* 847, 849.

<sup>25</sup> For a contrary view see Gordon Greenwood, *The Future of Australian Federalism: A Commentary on the Working of the Constitution* (Melbourne University Press, 1946) in which he argues that the Australian federation should be abolished in favour of a unified state. It should be noted that this view is contrary to the prevailing academic view that a federation is beneficial for Australia and should be maintained. See, for example Paul Kildea, Andrew Lynch and George Williams (eds), *Tomorrow's Federation: Reforming Australian Government* (Federation Press, 2012) and Gabrielle Appleby, Nicholas Aroney and Thomas John (eds), *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (Cambridge University Press, forthcoming 2012).

<sup>26</sup> For an overview of the evolution of federalism in Australia, the centralisation of legislative powers and vertical fiscal imbalance, see Alan Fenna, *Australian Public Policy* (Pearson Longman, 2<sup>nd</sup> ed, 2004) 171–175.

This thesis argues that the principle of subsidiarity in its original form (to protect the rights of member states by ensuring that matters are dealt with at a local level wherever possible in order to guard against centralisation) would be an appropriate starting point from which to formulate reforms to the Australian federal system. This is because it is consistent with the true intent of federalism (in theoretical form and as envisaged by the framers of the Australian *Constitution*) to protect states' rights against centralisation. The principle has the additional advantage of more specifically identifying the autonomy of the states with respect to local issues and through its acknowledgment that the states are better equipped to deal with local issues directly.

This thesis will conclude by making recommendations as to how constitutional, legislative and procedural aspects of subsidiarity could be implemented in Australia. In making these recommendations for reform, consideration will be given to the failure of the principle at a judicial level in the European Union and how such a failure could be prevented in Australia.

This thesis will not be a comparative analysis of the differences and similarities in governance between the European Union and Australia. However, some comparisons may be drawn to highlight the suitability of subsidiarity to Australian federalism, and to discuss how to prevent the principle of subsidiarity from being overlooked in favour of centralisation, as has occurred in the European Union.

## **II FEDERALIST ASSUMPTIONS**

This thesis is premised upon the assumption that a states-centred federal system of government is the best political structure for Australia. It is contended that the advantages of federalism far outweigh its disadvantages. The prolific commentary on the advantages and disadvantages of a federal system is too extensive to thoroughly traverse in this thesis. Instead, this section will briefly highlight the strengths and advantages of a federal system for Australia.

Geographically, Australia is a vast and isolated nation. It is significantly larger than the United Kingdom which has a unitary government. The Australian states have different climates, different natural resources and industries, and diverse

multicultural and also indigenous populations. In short, there is environmental, economic and social diversity between the Australian states. Federalism is the best type of governance to deal with Australia's geographic remoteness and diversity because it allows local issues to be dealt with locally and more effectively because problems are able to be addressed and resolved closest to their source and impact.<sup>27</sup> A 'one size fits all' approach would be unable to address adequately the diversity that is Australia, nor respond quickly enough to local issues and local needs which would be subsumed as less important to national concerns.

Governance at a state level allows those who are living in that state and who are affected by, or at least close to, local issues to address them directly and more effectively as they are in a more informed position to be able to do so.<sup>28</sup> This local knowledge, as well as resulting in more informed and appropriate solutions, also enhances democracy because it allows more citizens to participate directly in governance. Citizen participation in dual levels of government also guards against the totalitarianism that can arise when power is concentrated at one level, in the hands of fewer people.<sup>29</sup> Voters have greater 'choice and diversity' by being able to vote differently at separate state and federal elections.<sup>30</sup>

Federalism also allows state governments to relieve some of the burden on the central government through the division of powers between them. This allows the central government to focus on 'national business' without getting distracted by many and varied regional issues.<sup>31</sup> In other words, dual governance ensures the freedom of the central government to govern on and address 'bigger picture' issues that pertain to the nation as a whole, such as relations with other nations and defence,

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<sup>27</sup> See, for example, K R Cramp, *State and Federal Constitutions of Australia* (Angus and Robertson, 1913) 111. Cramp stated that in 'large areas' federalism is preferable because 'it is the best means of developing a new and extensive country with some interest in common with all its parts, yet with local conditions so diverse as to necessitate separate treatment'.

<sup>28</sup> This advantage was noted by K R Cramp, *State and Federal Constitutions of Australia* (Angus and Robertson, 1913) 112 who stated that federalism allows regional governments to specifically address local issues, so citizens are represented at both a local and a central level. This representation leads to a better representation and greater involvement of the citizen in political issues.

<sup>29</sup> See, for example, K R Cramp, *State and Federal Constitutions of Australia* (Angus and Robertson, 1913) 111–112 who stated that federalism promotes 'internal peace and economic progress' by uniting otherwise separate states, and in doing so: 'It remedies the narrowness of outlook of provincialism, yet avoids the possibility of a despotic central government.'

<sup>30</sup> Anne Twomey and Glen Withers, *Federalist Paper 1 Australia's Federal Future: A Report for the Council for the Australian Federation* (2007) 9.

<sup>31</sup> K R Cramp, *State and Federal Constitutions of Australia* (Angus and Robertson, 1913) 112–113.

rather than becoming ensconced in day-to-day details that are, for the reasons outlined above, best addressed at a local level.

One of the major advantages of a dual system is the checks and balances it provides,<sup>32</sup> thus enhancing responsible government. The states can question the actions of the central government, and vice versa. This accountability is further enhanced by different political parties being in power at the different levels of government, creating more debate, dialogue, discussion and co-operation.

The main criticism of federal systems is that their dual systems of government result in duplication and therefore, inefficiency.<sup>33</sup> However, this duplication and the side effect of inefficiency in fact underscores one of the major benefits of federalism, being the encouragement of dialogue between governments and thus accountability, which promotes democracy and responsible government.<sup>34</sup> Further, it has been argued that this duplication and inefficiency is most often caused by the Commonwealth itself when it interferes with areas of state responsibility. This has happened in the areas of education and health.<sup>35</sup> A further beneficial side effect of federalism is the requirement for co-operation between the levels of government, which can lead to greater innovation and reform and also more ‘checks and balances’ to proposed reforms.<sup>36</sup>

Federalism also encourages law reform by encouraging experimentation and innovation. This was noted by Cramp who stated that ‘Federalism allows of

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<sup>32</sup> Anne Twomey and Glen Withers, *Federalist Paper 1 Australia’s Federal Future: A Report for the Council for the Australian Federation* (2007) 8.

<sup>33</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan, 8<sup>th</sup> ed, 1926) 167–168. This argument was also raised by former Prime Minister Gough Whitlam, who also argued that Australia’s federal system of government is inefficient: ‘It is possible to advance historical or geographical reasons for having a federal system in Australia; but it is impossible to deny that Australians pay for it dearly in delays and duplication’: E G Whitlam, ‘The Cost of Federalism’ in Allan Patience and Jeffrey Scotts (eds), *Australian Federalism: Future Tense* (Oxford University Press, 1983) 28.

<sup>34</sup> See, for example Greg Craven, *Conversations with the Constitution* (University of New South Wales Press, 2004) 74–75. Craven stated that ‘government is not all about economy and efficiency: democracy itself is slow and messy, but we have yet to abandon it in favour of a fast, logical dictatorship. In the same way, if we have a price for the diversity, democracy and independence of the states, we can file the bill under “value”’.

<sup>35</sup> Greg Craven, *Conversations with the Constitution* (University of New South Wales Press, 2004) 74–75.

<sup>36</sup> Anne Twomey and Glen Withers, *Federalist Paper 1 Australia’s Federal Future: A Report for the Council for the Australian Federation* (2007) 13.

experiments in legislation and administration which could not safely be made in a large unified country'.<sup>37</sup> This means that a state could introduce innovative legislation, which, if it failed, would not affect other states, or the country as a whole.<sup>38</sup> However, if it was successful, it could result in great benefits for other states and the nation as a whole. In this sense, federalism can be said to encourage competition between states to improve services, resources and to 'attract business and residents'.<sup>39</sup> Research also shows that countries with federal systems of government perform better economically than those with a 'unitary' government.<sup>40</sup>

In conclusion, it will be argued that the many advantages of federalism make it the most beneficial system of government for Australia and that it is vital to retain federalism, instead of moving toward centralisation. This lends support to the proposition that Australia's compromised federal system of government is in need of reform to restore the federal balance and ensure that these benefits are retained.

### III RESEARCH QUESTIONS AND OBJECTIVES

The research question for this thesis is whether reforms can be devised and implemented, based on the principle of subsidiarity, to restore the Australian federal balance. In order to assess this research question, this thesis will:

1. provide an outline of the theory and philosophy behind federalism;
2. explain how Australia's Commonwealth *Constitution* establishes and provides for a federal balance between the Commonwealth and state governments with reference to the structure and specific provisions of the *Constitution* and constitutional convention debates;
3. provide an outline of the history and theory behind the principle of subsidiarity in its many facets from Catholic social theory to European Union law;

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<sup>37</sup> K R Cramp, *State and Federal Constitutions of Australia* (Angus and Robertson, 1913) 113.

<sup>38</sup> K R Cramp, *State and Federal Constitutions of Australia* (Angus and Robertson, 1913) 113.

<sup>39</sup> Anne Twomey and Glen Withers, *Federalist Paper 1 Australia's Federal Future: A Report for the Council for the Australian Federation* (2007) 12.

<sup>40</sup> Anne Twomey and Glen Withers, *Federalist Paper 1 Australia's Federal Future: A Report for the Council for the Australian Federation* (2007) 15–16.

4. provide an outline of the similarities and compatibility of the principle of subsidiarity with federalism;
5. outline principles of interpretation used by the High Court of Australia to interpret the Commonwealth *Constitution* and their advantages and disadvantages;
6. examine whether the High Court has weakened the federal balance through expansive interpretations of the Commonwealth's financial and legislative powers to the extent that reform is required;
7. determine whether legislative, procedural and constitutional reforms appropriate to an Australian context can be based upon the principle of subsidiarity; and
8. determine how the reforms in Research Question 7 can be implemented, including an assessment of how Australia can overcome the problems experienced by the European Union in the judicial application of the principle to permanently guard against centralisation.

#### **IV CHAPTER DIVISION**

In addition to this introduction, this thesis will be divided into the following chapters:

- Chapter 2: Introduction to Federal Theory and the Philosophy Behind Federalism.
- Chapter 3: Introduction to the Principle of Subsidiarity: From Catholic Social Theory to European Union Law.
- Chapter 4: A Conceptual Comparison of Federal Theory and Subsidiarity.
- Chapter 5: Why Australian Federalism is in Need of Reform (Part 1): An Overview of Constitutional Interpretation by the High Court Leading up to the *Engineers Case*.
- Chapter 6: Why Australian Federalism is in Need of Reform (Part 2): The Demise of State Financial and Legislative Powers after the *Engineers Case*.
- Chapter 7: How can the Principle of Subsidiarity be Implemented to Enhance Australian Federalism?
- Chapter 8: Conclusion.

## ***A Chapter Breakdown***

### *1 Chapter 2: Introduction to Federal Theory and the Philosophy Behind Federalism*

This chapter will provide a comprehensive background to the philosophical theory behind federalism (Research Objective 1). It will discuss the main characteristics of federalism, identified by key legal and political theorists such as Bryce, Dicey, Montesquieu, de Tocqueville and Sawyer. This discussion will show the centrality and importance of the states vis-a-vis the central government in federal theory and will provide commentary from the Constitutional Convention Debates as to the importance of states' rights to the drafters of the *Australian Constitution*. This chapter will outline how the structure and provisions of the *Commonwealth Constitution* establish a federal system which makes the states fundamental and autonomous with significant powers (Research Objective 2).

### *2 Chapter 3: Introduction to the Principle of Subsidiarity: From Catholic Social Theory to European Union Law*

This chapter will comprehensively define the principle of subsidiarity and will outline its history and development from its origins in Catholic social theory and its development as a political philosophy, through to its incorporation in European Union law in the *TEU* (Research Objective 3). The principle of subsidiarity will be examined as a social, political and legal concept.

### *3 Chapter 4: A Conceptual Comparison of Federal Theory and Subsidiarity*

This chapter will emphasise the similarities between subsidiarity and federalism. It will highlight the compatibility of the two principles which both support the decentralisation of power and issues being dealt with at a local/community level wherever possible (Research Objective 4). This chapter will also consider academic commentary that is adverse to the compatibility of the two concepts (Research Objective 4 continued) and will assess whether constitutional, legislative and other reforms based on subsidiarity, are possible (Research Objective 7).

4 Chapter 5: Why Australian Federalism is in Need of Reform (Part 1): An Overview of Constitutional Interpretation by the High Court Leading up to the *Engineers Case*

This chapter will commence by outlining how the methods of constitutional interpretation employed by the High Court have played a central role in defining the federal balance (Research Objective 5). It will outline the operation of the originalist method employed by the early High Court Justices and how this approach was disregarded in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (*'Engineers'*)<sup>41</sup> in favour of a literalist approach that advocated centralisation through a generous construction of Commonwealth powers. In addition to the originalist and literalist approaches, at times Justices of the High Court have employed a revisionist approach (also known as the 'living constitution' method of interpretation). This approach advocates that the *Constitution* is a 'living instrument' that must be adapted and revised to meet new social and political situations that were not envisaged by the framers of the *Constitution*.

This chapter will also outline the benefits and shortcomings of each method of interpretation, together with the considerable body of conflicting academic and judicial commentary as to which method should be preferred. It will argue that the problematic nature of these methods, together with the lack of agreement on which method should prevail suggest that a revised method of constitutional interpretation is preferable.

This chapter will then examine the history and development of federalism in Australia by examining the application of the federal balance as a limiting principle in early decisions of the High Court. This includes a discussion of the reserved powers doctrine and intergovernmental immunities doctrine, both implied by the High Court from the federal nature of the *Constitution* to protect states' rights and powers. This chapter will then discuss how these doctrines were discarded by the landmark *Engineers* case which rejected any constitutional limitations or implications based on the federal balance (Research Objective 6).

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<sup>41</sup> *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 (*'Engineers'*).

5 Chapter 6: Why Australian Federalism is in Need of Reform (Part 2): The Demise of State Financial and Legislative Powers after the *Engineers* Case

This chapter examines how the High Court altered the federal balance using the *Engineers* case as precedent (Research Objective 6 continued). It will commence by examining the role of precedent and *stare decisis* in the High Court in order to shed light on why the *Engineers* case was so enduring. This chapter will then outline how the High Court's interpretation of the *Constitution* has compromised the federal balance using excise duties as an example of the demise of state financial powers and the corporations power in s 51(xx) as an example of the demise of state legislative powers. The significant cases of *New South Wales v Commonwealth of Australia (Work Choices)*<sup>42</sup> and *Ha v New South Wales*,<sup>43</sup> which have considerably broadened the legislative and financial powers of the Commonwealth to the detriment of the states, will be discussed. It will be argued that these, and other cases discussed in this chapter, illustrate that the federal balance has been compromised to such an extent that major reforms are required (Research Objective 6).

6 Chapter 7: How Can the Principle of Subsidiarity be Implemented to Enhance Australian Federalism?

This chapter will consider the reasons for increased centralisation in the European Union, despite the existence of the principle of subsidiarity. It will examine the way in which the principle has been read down by the European Court of Justice, by studying case law from the European Union where the principle of subsidiarity has been considered or pleaded. This case analysis will lead to a discussion of how subsidiarity could help to reform Australian federalism (Research Objective 7), so that it is permanently maintained and not overlooked in favour of centralisation (Research Objective 8). Specific recommendations will be made as to how subsidiarity could be implemented through legislative, procedural and constitutional reforms (Research Objective 7).

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<sup>42</sup> *New South Wales v Commonwealth of Australia* (2006) 229 CLR 1 ('*Work Choices*').

<sup>43</sup> *Ha v New South Wales* (1997) 189 CLR 465 ('*Ha*').

## 7 Chapter 8: Conclusion

The conclusion will draw together and summarise the material and arguments made in each chapter of this thesis. It will also summarise the detailed recommendations for reform that were outlined earlier in the thesis.

## V SIGNIFICANCE

There is much academic and judicial commentary on the subject of federalism and constitutional interpretation. This commentary is premised upon existing theories of constitutional interpretation, namely originalism, literalism and revisionism (the living constitution approach). There has also been much academic criticism and commentary regarding how the High Court of Australia has compromised the federal balance. The relationship between federalism and subsidiarity has been analysed to some extent in the United States and in the European Union, however there has been very little analysis in an Australian context. Aroney<sup>44</sup> has recently outlined the nature of subsidiarity as a decentralising principle in the European Union, but did not recommend or suggest specific reforms in an Australian context. In summary, there is no academic commentary suggesting extensive reforms to Australia's federal system on the basis of subsidiarity such as those recommended in this thesis.

## VI RESEARCH METHODS

The legal research methodology adopted in this thesis involves a review of existing literature. This literature includes primary legal sources such as the Commonwealth *Constitution*, case law (primarily from the High Court and the European Court of Justice) and legislation. Secondary sources will also be reviewed, including transcripts of the Constitutional Conventions, scholarly books and journal articles and government reports.<sup>45</sup>

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<sup>44</sup> Nicholas Aroney, 'Reflections on Subsidiarity: European Lessons for Australia's Federal Balance?' (2011) 39 *Federal Law Review* 31.

<sup>45</sup> This is a recognised category of legal research methodology known as 'doctrinal research'. See Terry Hutchinson, *Researching and Writing in Law* (Lawbook Co, 2002) 9.

## CHAPTER 2: INTRODUCTION TO FEDERAL THEORY AND THE PHILOSOPHY BEHIND FEDERALISM

### I INTRODUCTION

Within Australia, federalism has been under attack. The Commonwealth has been using its financial powers and increased legislative power to intervene in areas of State responsibility. Centralism appears to be the order of the day.<sup>1</sup>

Today the federal landscape looks very different to how it looked when the Australian colonies originally ‘agreed to unite in one indissoluble Federal Commonwealth’,<sup>2</sup> commencing from 1 January 1901. The original Australian federation was premised on the significance and centrality of the states. This was of utmost concern to the framers, as evidenced by their commentary at the Constitutional Conventions of the 1890s<sup>3</sup> and the text and structure of the

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<sup>1</sup> Anne Twomey and Glen Withers, *Federalist Paper 1 Australia’s Federal Future: A Report for the Council for the Australian Federation* (2007) Executive Summary.

<sup>2</sup> Preamble, *Commonwealth of Australia Constitution Act 1900* (UK) (‘*Constitution*’) and s 3.

<sup>3</sup> These Conventions were:

The Australasian Federation Conference, held in Melbourne, from 6 February 1890 until 14 February 1890. At the 1890 Conference the delegates resolved that Australia should federate, and that when they returned to their colonies they would seek to influence their respective governments to elect delegates to attend a further conference. For commentary on the 1890 Convention see Robin Sharwood, ‘The Australasian Federation Conference of 1890’ in Robin Sharwood (ed), *Official Record of the Proceedings and Debates of the Australasian Federation Conference 1890* (Legal Books, 1990) 465.

The National Australasian Convention held in Sydney, from 2 March 1891 until 9 April 1891, was where the delegates came up with a draft *Constitution*. It was intended that this draft would be presented to the people of each colony. However, the Parliaments of the colonies were reluctant to have a final draft imposed on them and were sceptical at accepting the work of a convention that was ‘indirectly representative’ of them. See John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, first published 1901, 2002 ed) 143–144. See also J A La Nauze, *No Ordinary Act: Essays on Federation and the Constitution* (Melbourne University Press, 2001) 173; and Zelman Cowan, “‘Is it not time’? The National Australasian Convention of 1891’ in Patricia Clarke (ed), *Steps to Federation: Lectures Marking the Centenary of Federation* (Australian Scholarly Publishing, 2001) 26.

The Australasian Federal Convention 1897/8 where the people of each colony (with the exception of Queensland, which did not take part) elected delegates to attend. This conference was held in several sessions. The First Session was in Adelaide from 22 March 1897 until 23 April 1897. During this session, delegates came up with a new draft of the *Constitution*, which was substantially similar to that of the 1891 Convention. The delegates then returned to their colonies so that the colonial legislatures could consider and debate the draft. See John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, first published 1901, 2002 ed) 165–182. On 2 September 1897, the delegates resumed the Convention in Sydney to consider and debate the amendments (286 in total) suggested by their respective Parliaments. Due to the number of amendments, the Convention proceeded to ‘settle some of the most important questions’ which could

*Constitution* they drafted. The premise of equality between the Commonwealth and the states and the role of the states in facilitating and consenting to federation in the first place was discussed by Callinan J in his dissenting judgment in *Work Choices*. His Honour stated:

The whole *Constitution* is founded upon notions of comity, comity between the States which replaced the former colonies, comity between the Commonwealth as a polity and each of the States as a polity, and comity between the Imperial power, the Commonwealth and the States. It is inevitable in a federation that the allocation of legislative power will have to be considered from time to time. Federations compel comity, that is to say mutual respect and deference in allocated areas.<sup>4</sup>

This chapter examines the meaning of federalism itself, drawing upon federal theory (Research Question 1). It seeks to place Australian federalism within the broader context of federal theory and considers how it should be applied to protect the

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be categorised under four main areas: ‘the financial problem, the basis of representation in the Senate, the power of the Senate with regard to money Bills, and the insertion of a provision for deadlocks’. However, by the time the Sydney session was adjourned on 24 September (due to the departure of the Victorian delegates for their general election) only half of the draft *Constitution* had been considered: See John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, first published 1901, 2002 ed) 182–194. See generally J A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972).

The next and final session of the Convention was scheduled for 20 January 1898 in Melbourne, and went until 17 March 1898. The Melbourne session had the extensive task of reviewing the whole of the draft *Constitution* thus far in order to come up with a final document that was agreeable to the Convention. On the final day of the Convention, 17 March 1898, it was resolved that the delegates would ensure that a copy of the draft would be made available to their voters, and many ‘pledged themselves to its support’: John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, first published 1901, 2002 ed) 194–205.

Each of the colonies passed enabling legislation, with the exception of Western Australia, which requested amendments. Despite the path toward federation being impeded by Western Australia, the British Government invited a delegation from the colonies to visit Britain to discuss and negotiate the Bill with the British Colonial Secretary with a view to achieving submission of the Constitution Bill to the British Parliament. Several changes to the draft were requested by the Colonial Secretary. However in the end, only one change to s 74, concerning appeals to the Privy Council, was made. The Constitution Bill was introduced into the House of Commons on 14 May 1900. It passed through the House of Lords and Committee without any amendment on 5 July 1900, and received Royal Assent on 9 July 1900. Finally, Western Australia passed an enabling Act on 31 May, which received Royal Assent on 13 June 1900. A referendum took place in Western Australia on 31 July 1900, and achieved a majority of ‘yes’ votes. This was followed by both Houses of Western Australian Parliament passing addresses to the Queen to pray that Western Australia be included as an original state to the federation. The Queen signed a proclamation on 17 September 1900 to the effect that the Commonwealth of Australia would commence on 1 January 1901: John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, first published 1901, 2002 ed) 221–251. See also Geoffrey Sawer, *The Australian Constitution* (Australian Government Publishing Service, 1975) 22–23; and J A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 248–269.

<sup>4</sup> *Work Choices* (2006) 229 CLR 1, 322.

*Constitution* as a federal document. When federal theory itself is examined, it becomes evident that an authentic federal system is one in which the states are equal and sovereign<sup>5</sup> participants, rather than being secondary to the Commonwealth — the current state of the Australian federation, as will be demonstrated in Chapters 5 and 6.

This chapter commences by outlining a basic definition of ‘federalism’ premised upon its key characteristics. An analysis of three key theoretical texts relied upon by the framers of the *Constitution* expands upon and supports this definition. These are: James Bryce’s *The American Commonwealth*,<sup>6</sup> Edward A Freeman’s *History of*

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<sup>5</sup> I have used the term ‘sovereign’ and ‘sovereignty’ throughout this chapter to describe the power of the states in a federal system. By this terminology, I mean ‘supreme power’. To expand on this, both the Australian States and Commonwealth have ‘sovereign power’ in their respective jurisdictions. That is, the Australian federation is a system of ‘dual sovereignty’ in which the state and federal governments are autonomous in their own spheres and of equal importance. For a discussion of ‘sovereignty’ see Max Frenkel, *Federal Theory* (Centre for Research on Federal Financial Relations, 1986) 69–76. I acknowledge that under the Commonwealth *Constitution*, the ultimate source of sovereignty is the Australian people, a majority of which in a majority of states must provide the ultimate approval for any constitutional changes under the referendum process in s 128 of the Commonwealth *Constitution*. See, for example, McHugh J in *McGinty v Western Australia* (1996) 186 CLR 140, 237:

Under the *Constitution*, therefore, individual Australians do not have an equal share in the sovereignty of Australia. Lord Bryce asserted that, in a country governed by a rigid *Constitution* which limits the power of the legislature to certain subjects or forbids it to transgress certain fundamental doctrines, the sovereignty of the legislature is necessarily restricted. In that case, ultimate sovereignty resides in the body which made and can amend the *Constitution*. On that view, the sovereignty of Australia originally resided in the United Kingdom Parliament. Since the *Australia Act* 1986 (UK), however, the sovereignty of the Australian nation has ceased to reside in the Imperial Parliament and has become embedded in the Australian people. Only the people can now change the *Constitution*. They are the sovereign. But, because their rights to amend the *Constitution* are not equal, the Australian people do not have equal shares in that sovereignty.

To put this quotation in context, in *McGinty v Western Australia* a majority of the High Court held that despite the sovereignty of the Australian people, the Western Australian *Constitution* did not guarantee that all votes were equally weighted. Hence, the provisions of the *Electoral Distribution Act 1947* (WA) which permitted less electors in country areas of the State to elect their Member of the Legislative Assembly than city electorates, which had approximately double the amount of electors, were nevertheless valid. However, I note that McHugh J’s comments above concern the Commonwealth *Constitution*. The High Court had previously held that the Commonwealth *Constitution* did not guarantee ‘one vote one value’ in *Attorney-General (Vic); ex rel McKinlay v Commonwealth* (1975) 135 CLR 1.

<sup>6</sup> James Bryce, *The American Commonwealth* (MacMillan and Co, 1889). For a discussion of the role that Bryce’s *The American Commonwealth* played in the formation of the Commonwealth *Constitution*, see Matthew N C Harvey, ‘James Bryce, “The American Commonwealth”, and the Australian Constitution’ (2002) 76 *The Australian Law Journal* 362.

*Federal Government in Greece and Italy*, and Alexander Hamilton, James Madison and John Jay's *The Federalist Papers*.<sup>7</sup>

This chapter then discusses federal theory posited by scholars such as John Stuart Mill, A V Dicey, K C Wheare, K R Cramp, Pierre-Joseph Proudhon, Geoffrey Sawyer, J A La Nauze, Daniel J Elazar, Greg Craven, and Nicholas Aroney to further explain these characteristics and emphasise the centrality of the states in a federal system of government. A discussion of the work of theorists such as Montesquieu and de Tocqueville explores the centrality of the states as evidenced by the necessary conditions for the formation of a federation.

The chapter goes on to outline the federal nature of the *Constitution*, specifically the way in which the structure and provisions of the *Constitution* establish a federal system (Research Question 2), and the central role of the states embodied in the *Constitution*. As part of this discussion, commentary from the Constitutional Convention Debates will be examined to highlight the intended central role and retention of constitutional powers of the states after federation, which was translated into the final constitutional document by the framers. However, as will be discussed in Chapters 5 and 6, this is a very different version of federalism to the one that currently exists in Australia, which, supported by the High Court's interpretation of the *Constitution*, has become progressively more centralist.

The chapter concludes with an examination of different models of federalism to show how Australia has departed from the true federal model prescribed by federal theory, in which the states are sovereign and have equal standing with the central (Commonwealth) government. The reasons for Australia's departure from this federalist model, namely the High Court's support of the centralisation of legislative and financial powers through its interpretation of the *Constitution*, will be discussed in Chapters 5 and 6.

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<sup>7</sup> Harvey identifies these sources as being frequently cited by the founders at the Melbourne Conference and the Constitutional Conventions: Bryce, 70 times, Freeman, 45 times; and Hamilton, Madison and Jay, 25 times. Matthew N C Harvey, 'James Bryce, "The American Commonwealth", and the Australian Constitution' (2002) 76 *The Australian Law Journal* 362, 366.

In summary, an examination of federal theory illustrates that a system of federal government in which the states are inferior to the Commonwealth is something less than a true federation. This is certainly the position in Australia where, post-*Engineers*, the federal balance has moved towards centralisation. It will be argued that major constitutional, legislative and procedural reforms are required if federalism is to be restored.

## **II DEFINING FEDERALISM: WHAT IS A FEDERAL SYSTEM OF GOVERNMENT?**

Many theorists have attempted to define federalism with reference to its key characteristics. For example, Sawer has identified the following characteristics as having to exist for a governmental system to be properly defined as ‘federal’:

1. An independent country with a central government that has the institutionalised power to govern the whole of the country.
2. The country is divided into separate geographical regions which have their own institutions of government to govern in their particular regions.
3. The power to govern is distributed between central and regional governments.
4. The distribution of power between the central and regional governments is set out in a constitution and is rigidly entrenched by the constitution so that it cannot be amended by the central government or any region or regions.
5. The constitution contains rules to determine any conflict of authority between the centre and the regions. In most constitutions, the general rule is that the law of the central government will prevail.
6. The distribution of powers between the central and regional governments is interpreted and policed by a judicial authority. The judicial authority has the constitutional power to make binding decisions about the validity of legislation and government action, or where there is a conflict of the laws of the central and regional governments.<sup>8</sup>

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<sup>8</sup> Geoffrey Sawer, *Modern Federalism* (Pitman Australia, 1976) 1. Sawer also defines ‘federalism’ similarly in Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 1, as having:

three common features; first, the existence in a geographical area of several governmental units, one having competence over the whole area, the others over defined parts of it, and sharing between them the power to govern; second, a relation between the governing units such that each has a reasonable degree of autonomy within its prescribed competence; third, an inability of any one unit to destroy at will the autonomy of the others.

Many more criteria could be added, such as: that each unit government should possess the means of exercising its competence without relying on instrumentalities of other units; that

Similarly, Lijphart listed ‘five principal attributes’ of federalism as follows:

1. A written constitution which specifies the division of power and guarantees to both the central and regional governments that their allotted powers cannot be taken away.
2. A bicameral legislature in which one chamber represents the people at large and the other the component units of the federation.
3. Over-representation of the smaller component units in the federal chamber of the bicameral legislature.
4. The right of the component units to be involved in the process of amending the federal constitution but to change their own constitutions unilaterally.
5. Decentralised government, that is, regional government’s share of power in a federation is relatively large compared to that of regional governments in unitary states.<sup>9</sup>

Aroney has observed the complexity of pinpointing an exact definition of federalism. From a constitutional perspective, Aroney has defined federalism as follows:

[T]he defining feature of a federal system is the existence of a ‘division of power’ between central and regional governments. The basic idea is that of a political system in which governmental power is divided between two territorially defined levels of government,

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the area of competence of the unit governments should in each case be substantial; that the areas of competence should be judicially interpreted and adherence to them judicially enforced; that the possibilities of *de facto* coercion or inducement of one government by another should not be such as to impair in a substantial way the legal autonomy of the weaker unit.

Sawer’s ‘federal principles’ have been reiterated by other constitutional law academics such as Irving who states:

A federation is a political system in which the power to make laws is divided between a central legislature and regional legislatures. The centre makes laws for the nation as a whole, while the regions make laws for their region only. Both sets of laws impact directly upon the lives of the citizens. The power of the centre is limited, in theory at least, to those matters which concern the nation as a whole. The regions are intended to be as free as possible to pursue their own local interests. Historically, federations have adopted written constitutions in which this division is described, and which include a means of settling disputes between the regions and the centre.

See Helen Irving (ed), *The Centenary Companion to Australian Federation* (Cambridge University Press, 1999) xix.

<sup>9</sup> Arend Lijphart, ‘Non-Majoritarian Democracy: A Comparison of Federal and Consociational Themes’ (1985) 15(2) *Publius* 3, cited in Daniel J Elazar, *Exploring Federalism* (The University of Alabama Press, 1991) 22–23.

guaranteed by a written constitution and arbitrated by an institution independent of the two spheres of government, usually a court of final jurisdiction.<sup>10</sup>

However, from a political science perspective, Aroney notes that this constitutional definition, whilst a good starting point, does not adequately explain how federalism operates in reality:

Rather than displaying a strictly defined distribution of responsibility between two or more ‘co-ordinate’ levels of government, federal systems tend in practice to resemble something more like a ‘marble cake’, in which governmental functions are shared between various governmental actors within the context of an ever-shifting set of parameters shaped by processes of negotiation, compromise and, at times, cooperation.<sup>11</sup>

In fact, Aroney argued that ‘conceptualising federalism’ is difficult and that the changing nature of the concept of federalism depends upon who is defining it.<sup>12</sup> He therefore devised a new theory of states-centred federalism in the form of an enhanced originalist approach premised upon the history, prevailing views and conceptions leading up to the drafting of the *Constitution*, including the *Constitution*’s formation as a federal compact, and the federal principles embodied in the *Constitution*’s provisions.<sup>13</sup> This chapter, although defining federalism from a

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<sup>10</sup> Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009) 17.

<sup>11</sup> Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009) 18.

<sup>12</sup> Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009) 17. Further, Aroney argues that the constitutional definition does not take into account how power is allocated, and does not adequately explain the type of power that each level of government has. That is, are powers ‘enumerated, residual, or reserved’? (18–19). In addition, Aroney argues that, the type of power allocated to each level of government tends to be determined by the manner in which the federal system of government came to be formed in the first place (19). Using this example, Australian federalism came about through a process of ‘integration’ (that is, by modifying the system already in existence) whereby the States agreed to allocate some of their existing powers to a central government. This led to the Commonwealth’s powers being ‘enumerated’ and state powers being ‘residual’ (19). However, a different type of federal system could be formed by a process of ‘disintegration’ (19), where the current system of government is completely abandoned to start the new federal system of government afresh. This could result in a different division of powers between the central and regional governments. Aroney also argues that the constitutional definition of ‘federalism’ in terms of a division of powers, does not explain the difference between a ‘federation’ and a ‘confederation’ (19–20).

<sup>13</sup> See generally, Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009). For a detailed analysis of Aroney’s book see Michelle Evans, ‘Book Review: *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009)’ 17(1) 2010 *Murdoch University Electronic Journal of Law* 83.

constitutional viewpoint, aims to clarify some of this potential confusion by defining federalism with reference to its key characteristics, expanding upon what federal theory says about these characteristics, and finally, outlining different models of federalism in order to determine how the High Court has shifted the federal balance from one premised upon the equality of the states to one that has supported increased centralisation. To use Aroney's analogy, this chapter aims to provide a more complete picture of this 'marble cake'.

It is argued that a definition of a federal system of government can be derived from an examination of these characteristics and is supported by various other constitutional and political theorists whose works will be discussed later in this chapter. The following definition identifies four key characteristics of a federal system of government and highlights, as a central characteristic, the sovereignty and independence of the states in a federation. It also highlights federalism's objective to protect and preserve the balance of power between the federal and state governments. This chapter contends that a federal system of government can be defined with reference to the following four characteristics:

1. The constitution is written, and difficult to alter, so its institutions and their powers cannot be easily interfered with.
2. The *Constitution* specifies, and thereby limits, the powers of the Commonwealth government, leaving the balance of 'unwritten' powers to the states. That is, specific legislative and other powers are divided between the Commonwealth and state governments.
3. The sovereignty of the Commonwealth and state governments is protected so they can exercise these powers free of interference from one another.
4. The *Constitution* establishes an independent High Court of appeal to act as an independent constitutional 'umpire' to ensure that these powers are not transgressed or eroded. That is, it is the role of this court to maintain the 'federal balance' of power between the Commonwealth and state governments, including determining the demarcation of any disputes between the two levels of government.

This chapter will now expand on the commentary of key political and constitutional theorists with respect to these characteristics, commencing with those relied upon by the framers of the Australian *Constitution*. This discussion will serve to illustrate how the states and the maintenance of state powers are central to any concept of federalism. This discussion will be further built upon in Chapter 5 of this thesis, which outlines how the High Court has misinterpreted the *Constitution* in order to centralise legislative and financial powers. It supports the contention of this thesis that the Australian federal system is in need of reform to restore this loss of state powers and guard against future erosion of state powers.

### **III DEFINING FEDERALISM: THREE KEY TEXTS REFERRED TO BY FRAMERS**

The four key characteristics of a federation identified above can also be found in three key constitutional texts that the framers of Australia's federal *Constitution* examined and discussed in the various debates leading up to the formation of the Australian *Constitution*. The first and most significant of these is James Bryce's *The American Commonwealth*.<sup>14</sup>

#### **A James Bryce: The American Commonwealth**

After more than 100 years of federation, governance by two levels of government — state and Commonwealth — is a familiar and everyday concept to Australians. However, at the time of the Melbourne Conference in 1890 (the first conference to discuss federation), the concept of federalism was largely unfamiliar to the delegates, who were mostly English, Irish or Scottish and predominantly familiar with Britain's unitary system of government.<sup>15</sup> As a consequence, the delegates primarily looked to Bryce's *The American Commonwealth*, for guidance as to the form that the new *Constitution* should take. In the two volumes of *The American Commonwealth*, Bryce detailed the American system of government as a 'Federation of States'.<sup>16</sup> In outlining this, Bryce provided detailed commentary about the operation of federalism

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<sup>14</sup> James Bryce, *The American Commonwealth* (MacMillan and Co, 1889).

<sup>15</sup> J A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 12.

<sup>16</sup> James Bryce, *The American Commonwealth* (MacMillan and Co, 1889) 305.

in American government, and the importance of the states in the American federal system.<sup>17</sup>

### 1 A Written Constitution that is Difficult to Alter

As noted above, Bryce outlined the provisions of the American federal system, including institutions and powers, detailed in its written *Constitution*. Hence, there is an assumption in his work as to the importance of specifying these in a form that is difficult to alter. Bryce did acknowledge, however, that although it is possible to have a federation without a written constitution (such as the Achaean League), a written constitution serves as a ‘fundamental document’ which serves to ‘define and limit the power of each department of government’.<sup>18</sup> In contrasting the (written) *United States Constitution* which can only be altered with the consent of the people, with the unwritten British Constitution which is instead subject to Parliament, Bryce pointed out the important role of a rigid constitution to ‘safeguard the rights of the several states ... [by] limiting the competence of the national government.’<sup>19</sup>

### 2 Division of Power Between Federal and State Governments

Bryce wrote that in a federal system of government, there is a ‘distribution of powers’<sup>20</sup> between a central ‘federal’ government and the state governments. These powers are categorised as ‘Executive, Legislative and Judicial.’<sup>21</sup> Bryce wrote that the central federal government and state governments<sup>22</sup> operate separately, but at the same time complement one another:

The characteristic feature and special interest of the American Union is that it shows us two governments covering the same ground, yet distinct and separate in their action. It is like a great factory wherein two sets of machinery are at work, their revolving wheels apparently intermixed, their bands crossing one another, yet each set doing its own work without touching or hampering the other.<sup>23</sup>

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<sup>17</sup> For a history of the formation of the United States Constitution, see R C van Caenegem, *An Historical Introduction to Western Constitutional Law* (Cambridge University Press, 1995) 150–158.

<sup>18</sup> James Bryce, *The American Commonwealth* (MacMillan and Co, 1889) 33, fn 1.

<sup>19</sup> James Bryce, *The American Commonwealth* (MacMillan and Co, 1889) 33.

<sup>20</sup> James Bryce, *The American Commonwealth* (MacMillan and Co, 1889) 306.

<sup>21</sup> James Bryce, *The American Commonwealth* (MacMillan and Co, 1889) 303.

<sup>22</sup> James Bryce, *The American Commonwealth* (MacMillan and Co, 1889) 29.

<sup>23</sup> James Bryce, *The American Commonwealth* (MacMillan and Co, 1889) 318.

As part of the ‘distribution of powers’<sup>24</sup> between the federal and state governments, Bryce stated that there are five classes of powers:

Powers vested in the National government alone.

Powers vested in the States alone.

Powers exercisable by either the National government or the States.

Powers forbidden to the National government.

Powers forbidden to the State governments.<sup>25</sup>

Firstly, the powers exclusive to the national government primarily relate to matters that pertain to the country as a whole, whereas exclusive state powers pertain to more everyday local governance issues. Bryce outlined the nature of these powers:

The powers vested in the National government alone are such as relate to the conduct of the foreign relations of the country and to such common national purposes as the army and navy, internal commerce, currency, weights and measures, and the post-office, with provisions for the management of the machinery, legislative, executive and judicial, charged with these purposes.

The powers which remain vested in the States alone are all the other ordinary powers of internal government, such as legislation on private law, civil and criminal, the maintenance of law and order, the creation of local institutions, the provision for education and the relief of the poor, together with taxation for the above purposes.<sup>26</sup>

Secondly, powers that are concurrent (that is, that can be exercised by both the national government and the states) include: certain legislative powers, with federal legislation prevailing over state legislation if there is a conflict of laws; taxation; and judicial powers (that is, both federal and state courts).<sup>27</sup> If there is any doubt about whether a power belongs to the national government or state governments, the power is deemed to belong to the state governments unless the *Constitution* has specifically allocated it to the national government.<sup>28</sup> In other words, ‘when a question arises

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<sup>24</sup> James Bryce, *The American Commonwealth* (MacMillan and Co, 1889) 306.

<sup>25</sup> James Bryce, *The American Commonwealth* (MacMillan and Co, 1889) 307.

<sup>26</sup> James Bryce, *The American Commonwealth* (MacMillan and Co, 1889) 308–309.

<sup>27</sup> James Bryce, *The American Commonwealth* (MacMillan and Co, 1889) 309.

<sup>28</sup> James Bryce, *The American Commonwealth* (MacMillan and Co, 1889) 311.

whether the National government possesses a particular power, proof must be given that the power was positively granted. If not granted, it is not possessed.’<sup>29</sup>

Thirdly, powers that are ‘forbidden’ to *both* the federal government and the states include a constitutional prohibition on granting a ‘title of nobility’ at both state and federal level,<sup>30</sup> and the acquisition of public or private property by the federal government or the state without ‘just compensation’.<sup>31</sup> Other powers are only forbidden to either the federal or state governments. For example, the federal government is prohibited from giving ‘commercial preference’ to one state over another<sup>32</sup> and is constrained by ‘personal freedoms’ when enacting legislation such as freedom of religion, speech, public assembly and the right to bear arms.<sup>33</sup>

### 3 Sovereignty of the States

As part of the federal and state governments operating independently of one another, their powers are mostly<sup>34</sup> exercised without reference to, or interference with, one another:

The authority of the National government over the citizens of every State is direct and immediate, not exerted through the State organisation, and not requiring the co-operation of the State government. For most purposes the National government ignores the States; and it treats the citizens of different States as being simply its own citizens, equally bound by its laws ...

On the other hand, the State in no wise depends on the National government for its organisation or its effective working. It is the creation of its own inhabitants. They have given it its constitution. They administer its government. It goes on its own way, touching the

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<sup>29</sup> James Bryce, *The American Commonwealth* (MacMillan and Co, 1889) 311.

<sup>30</sup> James Bryce, *The American Commonwealth* (MacMillan and Co, 1889) 307; *United States Constitution* art I § 9; art I § 10.

<sup>31</sup> James Bryce, *The American Commonwealth* (MacMillan and Co, 1889) 307; *United States Constitution* amend V and amend XIV.

<sup>32</sup> James Bryce, *The American Commonwealth* (MacMillan and Co, 1889) 309; *United States Constitution* art I § 9.

<sup>33</sup> James Bryce, *The American Commonwealth* (MacMillan and Co, 1889) 309–10; *United States Constitution* art I § 9; amends I and II.

<sup>34</sup> Bryce details exceptions where there is some co-operation between the federal and state governments: see James Bryce, *The American Commonwealth* (MacMillan and Co, 1889) 312–313. For example, states choose two senators to represent the state at a federal level.

National government at but few points. That the two should touch at the fewest possible points was the intent of those who framed the *Constitution*.<sup>35</sup>

Bryce emphasised how the central nature of the states in the American federal system was influenced by the states' concern that they should not hand over substantial power to the new central government. Specifically, Bryce referred to 'the anxiety of the States to fetter the master they were giving themselves ...'<sup>36</sup> and explained that one of the objects of the founders 'was to restrict the functions of the national government to the irreducible minimum of functions absolutely needed for the national welfare, so that everything else should be left to the States'.<sup>37</sup> This resulted in the states retaining their 'original and inherent'<sup>38</sup> powers which are 'prima facie unlimited'<sup>39</sup> except to the extent that the federal *Constitution* has removed, restricted or reallocated them to the national government. Bryce described the legislative powers of the states as being more extensive than those of the national government: 'Prima facie, every State law, every order of a competent State authority, binds the citizen, whereas the National government has but a limited power: it can legislate or command only for certain purposes or on certain subjects'.<sup>40</sup>

Consequently, when the *United States Constitution* was drafted, the founders ensured that the continued existence of the states was guaranteed. In the words of Bryce, the *Constitution*

presupposes the State governments. It assumes their existence, their wide and constant activity. It is a scheme designed to provide for the discharge of such and so many functions of government as the States do not already possess and discharge. It is therefore, so to speak the complement and crown of the State Constitutions, which must be read along with it and into it in order to make it cover the whole field of civil government ...<sup>41</sup>

The states were seen by Bryce as critical in the American federal system. They have their own separate and extensive powers that are uncompromised by those of the

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<sup>35</sup> James Bryce, *The American Commonwealth* (MacMillan and Co, 1889) 312.

<sup>36</sup> James Bryce, *The American Commonwealth* (MacMillan and Co, 1889) 306.

<sup>37</sup> James Bryce, *The American Commonwealth* (MacMillan and Co, 1889) 318.

<sup>38</sup> James Bryce, *The American Commonwealth* (MacMillan and Co, 1889) 311.

<sup>39</sup> James Bryce, *The American Commonwealth* (MacMillan and Co, 1889) 311.

<sup>40</sup> James Bryce, *The American Commonwealth* (MacMillan and Co, 1889) 324.

<sup>41</sup> James Bryce, *The American Commonwealth* (MacMillan and Co, 1889) 29–30.

national government. The states work independently, and at the same time side by side with the federal government, with each complementing the existence of the other. The continued existence of the states is so imperative to the federal system of government that it must be guaranteed by the *Constitution*:

A State is, within its proper sphere, just as legally supreme, just as well entitled to give effect to its own will, as is the National government within its sphere; and for the same reason. All authority flows from the people. The people have given part of their supreme authority to the Central, part to the State governments. Both hold by the same title, and therefore the National government, although superior wherever there is a concurrence of powers, has no more right to trespass upon the domain of a State than a State has upon the domain of Federal action. 'When a particular power,' says Judge Cooley, 'is found to belong to the States, they are entitled to the same complete independence in its exercise as is the National government in wielding its own authority.'<sup>42</sup>

This raises the question of who will enforce the guarantee that the states will remain sovereign, independent, and retain the bulk of their powers after federation, and leads to a discussion of Bryce's commentary on the role of the courts in protecting the federal balance mandated by a federal *Constitution*.

#### *4 Independent Judicial Guardian of the Constitution*

Bryce stated that it is the role of the courts to determine whether a statute passed by Congress exceeds the power granted to it by the *Constitution*.<sup>43</sup> Bryce stated that the courts are essentially the only bodies which can objectively determine whether constitutional powers have been transgressed because they are impartial.<sup>44</sup> Bryce stated:

It is therefore obvious that the question, whether a congressional statute offends against the *Constitution*, must be determined by the courts, not merely because it is a question of legal construction, but because there is no one else to determine it. Congress cannot do so, because Congress is a party interested. If such a body as Congress were permitted to decide whether the acts it had passed were constitutional, it would of course decide in its own favour, and to

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<sup>42</sup> James Bryce, *The American Commonwealth* (MacMillan and Co, 1889) 314. The concept of the autonomy of the state and federal governments from interference with one another was recognised by the early High Court of Australia in the form of the doctrine of implied intergovernmental immunities. This is discussed in Chapter 5.

<sup>43</sup> James Bryce, *The American Commonwealth* (MacMillan and Co, 1889) 242.

<sup>44</sup> James Bryce, *The American Commonwealth* (MacMillan and Co, 1889) 242.

allow it to decide would be to put the *Constitution* at its mercy. The President cannot, because he is not a lawyer, and he also may be personally interested. There remain only the courts, and these must be the National or Federal courts, because no other courts can be relied on in such cases.<sup>45</sup>

In addition, Bryce observed that when an issue of inconsistency arises between a federal and state law, the *Constitution* must provide for a means of resolution by specifying that the federal law will prevail so far as it is inconsistent with the state law.<sup>46</sup> However, as indicated in the penultimate quotation, this rule regarding inconsistency is not an indication of central government supremacy, but instead, the most logical means of resolving conflict between the two levels of government.

In summary, an examination of Bryce's *The American Commonwealth* highlights the theory behind, and the central characteristics of a federal system of government. His commentary emphasises the importance of the states in a federal system of government. The states' sovereignty, equality and continued existence are critical and fundamental aspects of federal theory.

The characteristics of a federal system of government as identified by Bryce, and the necessary pre-eminence of the states in a federal system of government, have also been highlighted in the work of other theorists referred to and relied upon by the framers of the Australian *Constitution*. These are discussed below, and include Edward A Freeman's work: *History of Federal Government in Greece and Italy*.

### **B Edward A Freeman: History of Federal Government in Greece and Italy**

As observed by Harvey,<sup>47</sup> the second most quoted text relied upon by the framers of the Australian *Constitution* was Edward A Freeman's *History of Federal Government in Greece and Italy*.<sup>48</sup> Freeman was an historian who described himself as 'a historian of Federalism.'<sup>49</sup> Before detailing the history and workings of the

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<sup>45</sup> James Bryce, *The American Commonwealth* (MacMillan and Co, 1889) 242.

<sup>46</sup> James Bryce, *The American Commonwealth* (MacMillan and Co, 1889) 242–243.

<sup>47</sup> Matthew N C Harvey, 'James Bryce, "The American Commonwealth", and the Australian Constitution' (2002) 76 *The Australian Law Journal* 362.

<sup>48</sup> Edward A Freeman, *History of Federal Government in Greece and Italy* (MacMillan and Co, 1893).

<sup>49</sup> Edward A Freeman, *History of Federal Government in Greece and Italy* (MacMillan and Co, 1893) xiii.

federal systems of government in ancient Greece and Rome,<sup>50</sup> Freeman discussed the concept of federalism generally. This discussion will now be outlined.

### *1 A Written Constitution that is Difficult to Alter*

As noted above, Freeman's primary focus was the federal systems of government in ancient Greece and Rome. His coverage of these was preceded by a discussion of the general characteristics of a federation, with a primary focus on federalism's division of power between two sovereign levels of government. His acceptance of a constitution being in a written form, or at the very least in a form that is difficult to change, is suggested by his evaluation of the United States as an example of a 'most perfect' model of a federation.<sup>51</sup>

### *2 Division of Power between Federal and State Governments*

Freeman wrote that 'federalism' is difficult to define. He stated that: 'The exact definition, both of a federation in general and of the particular forms of federations, has often taxed the ingenuity both of political philosophers and of international lawyers.'<sup>52</sup> And further: 'Controversies may thus easily be raised both as to the correct definition of a Federal Government and also whether this or that particular government comes within the definition'.<sup>53</sup> Freeman stated that the nature of federalism is that it is essentially a 'compromise ... between two extremes'<sup>54</sup> and that:

A Federal Government is most likely to be formed when the question arises whether several small states shall remain perfectly independent, or shall be consolidated into a single great state. A Federal tie harmonises the two contending principles by reconciling a certain amount of union with a certain amount of independence.

Despite the difficulty in defining a federal system of government, Freeman provided a basic definition of a 'Federal Government' as follows:

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<sup>50</sup> It is beyond the scope of this chapter to summarise the history and workings of federalism in ancient Greece and Rome, as outlined by Freeman. Instead, this chapter is concerned with defining federalism and the key characteristics of a federal government.

<sup>51</sup> Edward A Freeman, *History of Federal Government in Greece and Italy* (MacMillan and Co, 1893) 5.

<sup>52</sup> Edward A Freeman, *History of Federal Government in Greece and Italy* (MacMillan and Co, 1893) 1.

<sup>53</sup> Edward A Freeman, *History of Federal Government in Greece and Italy* (MacMillan and Co, 1893) 1.

<sup>54</sup> Edward A Freeman, *History of Federal Government in Greece and Italy* (MacMillan and Co, 1893) 13.

The name of Federal Government may ... be applied to any union of component members, where the degree of union between the members surpasses that of mere alliance, however intimate, and where the degree of independence possessed by each member surpasses anything which can fairly come under the head of merely municipal freedom.<sup>55</sup>

Freeman argued that there is a 'Federal ideal' where it is possible for federal government to work almost flawlessly: 'There is what may be called a certain Federal ideal, which has sometimes been realised in its full, or nearly its full, perfection...'<sup>56</sup> The conditions that Freeman said are necessary to achieve this federal ideal provide some insight into defining the concept of federalism. These conditions are described in the following passage:

Two requisites seem necessary to constitute a Federal Government in its most perfect form. On the one hand, each of the members of the Union must be wholly independent in those matters which concern each member only. On the other hand, all must be subject to a common power in those matters which concern the whole body of members collectively. Thus each member will fix for itself the laws of its criminal jurisprudence, and even the details of its political constitution. And it will do this, not as a matter of privilege or concession from any higher power, but as a matter of absolute right, by virtue of its inherent powers as an independent commonwealth. But in all matters which concern the general body, the sovereignty of the several members will cease ... A Federal Union, in short, will form one State in relation to other powers, but many States as regards its internal administration. This complete division of sovereignty we may look upon as essential to the absolute perfection of the Federal ideal.<sup>57</sup>

Later, Freeman summarises the definition by saying: 'A Federal Commonwealth, then, in its perfect form, is one which forms a single state in its relations to other nations, but which consists of many states with regard to its internal government'.<sup>58</sup>

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<sup>55</sup> Edward A Freeman, *History of Federal Government in Greece and Italy* (MacMillan and Co, 1893) 2.

<sup>56</sup> Edward A Freeman, *History of Federal Government in Greece and Italy* (MacMillan and Co, 1893) 2.

<sup>57</sup> Edward A Freeman, *History of Federal Government in Greece and Italy* (MacMillan and Co, 1893) 2-3.

<sup>58</sup> Edward A Freeman, *History of Federal Government in Greece and Italy* (MacMillan and Co, 1893) 7.

### 3 *Sovereignty of the States*

Freeman also emphasised the independence and sovereignty of both levels of government (state and federal) in a federation. He stated: ‘We may then recognise as a true and perfect Federal Commonwealth any collection of states in which it is equally unlawful for the Central Power to interfere with the purely internal legislation of the several members, and for the several members to enter into any diplomatic relations with other powers.’<sup>59</sup>

Freeman expanded on the requirement of state sovereignty by identifying two classes of federal governments. Firstly, a federal government can be a ‘System of Confederated States’.<sup>60</sup> This means that the central government can issue directions to the state governments as to how they must govern. Hence, the central government does not directly govern the people; rather, it directs the states as to how to do this. The result is a lesser degree of state independence and equality.

The second class of federal government is a ‘Composite State’,<sup>61</sup> in which the central government directly governs the people in specified areas of responsibility, with the states having the sovereignty to deal with their own areas of responsibility. In summary, the state and federal governments are ‘co-ordinate’ and at the same time ‘sovereign’.<sup>62</sup> Freeman advocated that this second class was the preferable form of federal government:

It is enough to enable a commonwealth to rank, for our present purpose, as a true Federation, that the Union is one which preserves to the several members their full internal independence, while it denies to them all separate action in relation to foreign powers. The sovereignty is, in fact, divided; the Government of the Federation and the Government of the State have a co-ordinate authority, each equally claiming allegiance within its own range.<sup>63</sup>

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<sup>59</sup> Edward A Freeman, *History of Federal Government in Greece and Italy* (MacMillan and Co, 1893) 8.

<sup>60</sup> Edward A Freeman, *History of Federal Government in Greece and Italy* (MacMillan and Co, 1893) 8–9.

<sup>61</sup> Edward A Freeman, *History of Federal Government in Greece and Italy* (MacMillan and Co, 1893) 9.

<sup>62</sup> Edward A Freeman, *History of Federal Government in Greece and Italy* (MacMillan and Co, 1893) 9.

<sup>63</sup> Edward A Freeman, *History of Federal Government in Greece and Italy* (MacMillan and Co, 1893) 11–12.

An example of this is the Australian federal system of government, as envisaged by its framers.

#### *4 Independent Judicial Guardian of the Constitution*

As noted above, Freeman's primary concern was with the division of powers and sovereignty of the two respective spheres of government by way of introduction to federalism in ancient Greece and Rome. However, there is reference in Freeman's work, as noted in the quotation above, to both spheres of government being 'subject to a common power in those matters which concern the whole body of members collectively'.<sup>64</sup> This could be interpreted as referring to the *Constitution* itself, but undoubtedly, an independent body must exist in order to enforce and interpret this 'common power' and any disputes between the two spheres of government.

It is evident from the above discussion that the key characteristics of federalism identified by Freeman and premised upon the rights and sovereignty of the states, mirror those identified by Bryce in *The American Commonwealth*. Once again, these characteristics can be seen in another text relied upon by the framers of the *Australian Constitution*: Alexander Hamilton, James Madison and John Jay's *The Federalist Papers*.

#### ***C Alexander Hamilton, James Madison and John Jay: The Federalist Papers***

The concept behind *The Federalist*, commonly referred to as *The Federalist Papers*, was formulated by Hamilton who 'had in mind a long series of letters or essays defending the proposed *Constitution*'.<sup>65</sup> The *Constitution* in question was the final draft of the *American Constitution* agreed upon by 40 delegates from 12 states at the Federal Convention held between 25 May 1787 and 17 September 1787. *The Federalist Papers* were intended to answer criticisms of the proposed new *Constitution*, including a discussion of the 'dangers of disunion and the advantages of a stronger union',<sup>66</sup> the powers of the federal government, its relationship with the

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<sup>64</sup> Edward A Freeman, *History of Federal Government in Greece and Italy* (MacMillan and Co, 1893) 2.

<sup>65</sup> Benjamin Fletcher Wright, 'Introduction' in Howard Mumford Jones (ed), Alexander Hamilton, James Madison and John Jay, *The Federalist* (Belknap Press of Harvard University Press, 1972) 7. This text is also commonly known as *The Federalist Papers*.

<sup>66</sup> Benjamin Fletcher Wright, 'Introduction' in Howard Mumford Jones (ed), Alexander Hamilton, James Madison and John Jay, *The Federalist* (Belknap Press of Harvard University Press, 1972) 7.

states, and the checks and balances on the new federal government's powers set out in the *Constitution*.<sup>67</sup> The aim of *The Federalist Papers* was to 'aid in securing the ratification of the *Constitution*'<sup>68</sup> by the American states.

There has been considerable debate as to whether Hamilton, Madison or Jay wrote the documents that comprise *The Federalist Papers*.<sup>69</sup> However, each was eminently qualified to write on the merits of the new federal system of government. Hamilton was the third member of the New York delegation to the Federal Convention in Philadelphia in 1787. He engaged John Jay, a lawyer in New York who had held the position of Secretary of Foreign Affairs, and later first Chief Justice of the United States, before eventually becoming Governor of New York.<sup>70</sup> Hamilton also enlisted Madison, who had held public office in Virginia for 11 years, and who had been one of the most outspoken members at the Federal Convention.<sup>71</sup>

The main focus of *The Federalist Papers* was on the advantages of a federal system of government, as opposed to the characteristics of one. However, some of the key characteristics of a federal system of government are identified in *The Federalist Papers* in the course of this discussion.

### 1 A Written Constitution that is Difficult to Alter

Federalist Paper 53 discussed the importance of having a constitution that is difficult to alter, particularly by the central government. Although Madison, who is attributed as its author,<sup>72</sup> did not expressly state the need for a written constitution in a federal system, this need is evident from his comments about the unwritten British

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<sup>67</sup> Benjamin Fletcher Wright, 'Introduction' in Howard Mumford Jones (ed), Alexander Hamilton, James Madison and John Jay, *The Federalist* (Belknap Press of Harvard University Press, 1972) 7.

<sup>68</sup> Benjamin Fletcher Wright, 'Introduction' in Howard Mumford Jones (ed), Alexander Hamilton, James Madison and John Jay, *The Federalist* (Belknap Press of Harvard University Press, 1972) 11.

<sup>69</sup> Benjamin Fletcher Wright, 'Introduction' in Howard Mumford Jones (ed), Alexander Hamilton, James Madison and John Jay, *The Federalist* (Belknap Press of Harvard University Press, 1972) 8–9. Wright states that the authorship of 49–58 and 62–63 is unknown. Also Hamilton claimed he wrote 18–20 jointly with Madison, yet Madison claimed sole authorship of these (9).

<sup>70</sup> Benjamin Fletcher Wright, 'Introduction' in Howard Mumford Jones (ed), Alexander Hamilton, James Madison and John Jay, *The Federalist* (Belknap Press of Harvard University Press, 1972) 7.

<sup>71</sup> Benjamin Fletcher Wright, 'Introduction' in Howard Mumford Jones (ed), Alexander Hamilton, James Madison and John Jay, *The Federalist* (Belknap Press of Harvard University Press, 1972) 7–8.

<sup>72</sup> Benjamin Fletcher Wright, 'Introduction' in Howard Mumford Jones (ed), Alexander Hamilton, James Madison and John Jay, *The Federalist* (Belknap Press of Harvard University Press, 1972) 6–7.

Constitution being subject to Parliament rather than the people, through a process of amendment that is difficult to achieve:

The important distinction so well understood in America, between a *Constitution* established by the people and unalterable by the government, and a law established by the government and alterable by the government, seems to have been little understood and less observed in any other country. Wherever the supreme power of legislation has resided, has been supposed to reside also a full power to change the form of the government. Even in Great Britain, where the principles of political and civil liberty have been most discussed, and where we hear most of the rights of the *Constitution*, it is maintained that the authority of the Parliament is transcendent and uncontrollable, as well with regard to the *Constitution*, as the ordinary objects of legislative provision.<sup>73</sup>

As this quotation illustrates, constitutional powers that are difficult to alter ensure that the balance of power between the federal and state governments is protected, in particular from a federal Parliament, which may be tempted to centralise power allocated to the states.

## *2 Division of Power Between Federal and State Governments*

Federalist Paper 39 attributed to the authorship of Madison, also outlined some of the foundations and characteristics of a federal system of government. It described how in a federal system there are two levels of government, state and federal, that coexist but have distinct areas of responsibility, namely that:

the local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority, than the general authority is subject to them, within its own sphere. In this relation, then, the proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other subjects.<sup>74</sup>

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<sup>73</sup> Howard Mumford Jones (ed), Alexander Hamilton, James Madison and John Jay, *The Federalist* (Belknap Press of Harvard University Press, 1972) 365. This quotation is discussed in Benjamin Fletcher Wright, 'Introduction' in Howard Mumford Jones (ed), Alexander Hamilton, James Madison and John Jay, *The Federalist* (Belknap Press of Harvard University Press, 1972) 7–8.

<sup>74</sup> Howard Mumford Jones (ed), Alexander Hamilton, James Madison and John Jay, *The Federalist* (Belknap Press of Harvard University Press, 1972) 285.

This point was reiterated by Madison in Federalist Paper 51 when he said of the division of powers between the state and federal governments:

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.<sup>75</sup>

Madison's comment that the two spheres of government 'control each other' refers to the checks and balances created by a federal system in which distinct (and thereby limited) powers are allocated to the federal government. This is enhanced by the sovereignty of each sphere, and the existence of an independent judicial umpire to police alleged transgressions between the two levels of government. These are discussed in the following sections.

### *3 Sovereignty of the States*

In Federalist Paper 39, Madison also identified the necessary sovereignty and equality of the states, and their importance in agreeing to the creation of a federal government in the first place:

Each State, in ratifying the *Constitution*, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act. In this relation, then, the new *Constitution* will, if established, be a *federal* and not a *national* constitution.<sup>76</sup>

Hence, the federal government is not allocated a status that is superior to that of the states. In agreeing to federate, the states have agreed to be constitutional equals with the federal government, with both levels having sovereignty over their own allocated powers.

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<sup>75</sup> Howard Mumford Jones (ed), Alexander Hamilton, James Madison and John Jay, *The Federalist* (Belknap Press of Harvard University Press, 1972) 357.

<sup>76</sup> Howard Mumford Jones (ed), Alexander Hamilton, James Madison and John Jay, *The Federalist* (Belknap Press of Harvard University Press, 1972) 283.

#### *4 Independent Judicial Guardian of the Constitution*

Madison also stated in Federalist Paper 39 that it is necessary in a federal system to have an impartial ‘tribunal’, established by the federal constitution, to determine disputes between the central and regional governments:

It is true that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general government. But this does not change the principle of the case. The decision is to be impartially made, according to the rules of the *Constitution*; and all the usual and most effectual precautions are taken to secure this impartiality.<sup>77</sup>

In summary, although *The Federalist Papers* sought to espouse the merits of the new draft *United States Constitution*, they outline some of the key aspects of federalism: a rigid constitution that delineates power between two levels of government (state and federal) that coexist and yet have sovereign areas of responsibility, and the need for a tribunal to resolve disputes and ensure that the balance of power is maintained between the two jurisdictions, as opposed to a central Parliament being the final arbiter.

### **IV DEFINING FEDERALISM: ADDITIONAL THEORETICAL COMMENTARY**

The federalist philosophies expressed by Bryce, Freeman, and Hamilton, Madison and Jay, as outlined above, are also supported by many other federal theorists, whose commentary will be discussed in this section. They are particularly significant when contrasted with the High Court of Australia’s centralist interpretation of the Australian *Constitution* which is detailed in Chapters 5 and 6. In these chapters, it will be argued that the degree of departure from these federalist principles warrants major reforms, detailed in Chapter 7, due to its detrimental impact on the legislative and financial powers of the states.

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<sup>77</sup> Howard Mumford Jones (ed), Alexander Hamilton, James Madison and John Jay, *The Federalist* (Belknap Press of Harvard University Press, 1972) 285.

### *A A Written Constitution that is Difficult to Alter*

As noted in the preceding section of this chapter, a key feature of a federal system of government is that governmental institutions and powers are set out in a written constitution that is difficult to alter, and impossible for the federal government to alter alone. The use of a written constitution to define and maintain the federal balance in a federation has been identified by many key theorists. Dicey, for example, wrote of ‘the supremacy of the *Constitution*’.<sup>78</sup> He wrote that a ‘leading characteristic’ of federalism is the existence of a written constitution<sup>79</sup> that is the ‘supreme law of the land’<sup>80</sup> where ‘every power, executive, legislative, or judicial, whether it belong to the nation or to the individual states, is subordinate to and controlled by the constitution’.<sup>81</sup> Cramp also observed this supremacy, noting that for a federal system to work properly, it is necessary to have a written constitution that sets out the allocation of these powers, and which is ‘supreme’, rendering any legislation or action outside these set powers constitutionally invalid.<sup>82</sup>

This written constitution should also be ‘rigid’ or ‘inexpansive’<sup>83</sup> so that it can only be altered by a supreme authority ‘above and beyond’ the legislature,<sup>84</sup> or in other words, in a ‘body outside the *Constitution*.’<sup>85</sup> Dicey stated that the Federal Parliament cannot alter the *Constitution*, but the *Constitution* can limit the powers of the Federal Parliament:

A federal constitution is capable of change, but for all that a federal constitution is apt to be unchangeable.

Every legislative assembly existing under a federal constitution is merely a subordinate law-making body, whose laws are of the nature of bye-laws, valid whilst within the authority

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<sup>78</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan and Co, 8<sup>th</sup> ed, 1926) 140. The first edition of this text was published in 1885.

<sup>79</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan and Co, 8<sup>th</sup> ed, 1926) 142.

<sup>80</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan and Co, 8<sup>th</sup> ed, 1926) 140.

<sup>81</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan and Co, 8<sup>th</sup> ed, 1926) 140.

<sup>82</sup> K R Cramp, *State and Federal Constitutions of Australia* (Angus and Robertson, 1913) 116–117.

<sup>83</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan and Co, 8<sup>th</sup> ed, 1926) 142–143.

<sup>84</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan and Co, 8<sup>th</sup> ed, 1926) 142–143.

<sup>85</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan and Co, 8<sup>th</sup> ed, 1926) 145.

conferred upon it by the constitution, but invalid or unconstitutional if they go beyond the limits of such authority.<sup>86</sup>

Sawer's definition of federalism (as a series of 'basic federal principles') was noted at the beginning of this chapter. In this definition, Sawer stated that a key 'federal principle' was that the division of state and federal powers should be set out in a constitution.<sup>87</sup> This is taken up by other commentators, such as Singleton et al who state that 'federalism' is 'a division of powers between the national (federal) government and the states. ... Such a division had to be recorded in a detailed, written constitution.'<sup>88</sup>

In summary, a written constitution, in which the parameters of state and federal powers are rigidly set out and difficult to alter, ensures that the balance of power between the two levels of government is maintained, so that the states are protected from any federal attempts to usurp their power or make them in any way subordinate. Australia has a written *Constitution*, but as will be demonstrated in Chapters 5 and 6, the High Court of Australia has assumed the role of the Australian people under s 128 by interpreting it in a centralising manner.

### ***B Division of Power Between Federal and State Governments***

A discussion of federalism's requirement of a written constitution leads us to a discussion of what must be contained within it. Federal theory specifies that a written constitution distributes power between the central and regional governments. In doing so, it will frequently list, and thereby limit, the powers allocated to the central government. As noted earlier in this chapter, in delineating these powers, the written constitution provides for a federal balance of power that must be maintained between the two levels of government. Once again, it will be argued later in this thesis (in Chapters 5 and 6) that the High Court has disregarded this balance, and has in fact expressly stated that the federal balance should not be a consideration, or a limitation, when interpreting the constitutional powers of the Commonwealth.<sup>89</sup>

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<sup>86</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan and Co, 8<sup>th</sup> ed, 1926) 145–146.

<sup>87</sup> Geoffrey Sawer, *Modern Federalism* (Pitman Australia, 1976) 1.

<sup>88</sup> Gwynneth Singleton et al, *Australian Political Institutions* (Pearson Longman, 8<sup>th</sup> ed, 2006) 31.

<sup>89</sup> *Work Choices* (2006) 229 CLR 1, 120–121.

This balance of power has been identified by theorists such as Dicey, who stated that a key characteristic of federalism was ‘the distribution among bodies with limited and co-ordinate authority of the different powers of government.’<sup>90</sup> Dicey said of this distribution of powers between the federal and state governments:

The distribution of powers is an essential feature of federalism. The object for which a federal state is formed involves a division of authority between the national government and the separate States. The powers given to the nation form in effect so many limitations upon the authority of the separate States, and as it is not intended that the central government should have the opportunity of encroaching upon the rights retained by the States, its sphere of action necessarily becomes the object of rigorous definition.<sup>91</sup>

Dicey stated that federalism balances the interests of the nation as a whole with the rights of the states by dividing power between the two levels of government in accordance with local and national issues:

the method by which Federalism attempts to reconcile the apparently inconsistent claims of national sovereignty and of state sovereignty consists of the formation of a constitution under which the ordinary powers of sovereignty are elaborately divided between the common or national government and the separate states. The details of this division vary under every different federal constitution, but the general principle on which it should rest is obvious. Whatever concerns the nation as a whole should be placed under the control of the national government. All matters which are not primarily of common interest should remain in the hands of the several States.<sup>92</sup>

La Nauze acknowledged the division of powers between the central and regional governments in *The Making of the Australian Constitution*. He outlined an early definition of a federal system of government, or ‘federation’, as those debating whether Australia should federate in the 1840s would have understood it. He stated that a ‘federation’ was ‘a system of government in which a central or “general” legislature made laws on matters of common interest, while the legislatures of the

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<sup>90</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan and Co, 8<sup>th</sup> ed, 1926) 140.

<sup>91</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan and Co, 8<sup>th</sup> ed, 1926) 147.

<sup>92</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan and Co, 8<sup>th</sup> ed, 1926) 139.

member states made laws on matters of local interest'.<sup>93</sup> Wheare also wrote that federalism allows the states to deal with local issues that are relevant to them, whilst leaving national issues to the central government:

Federal government exists, it was suggested, when the powers of government for a community are divided substantially according to the principle that there is a single independent authority for the whole area in respect of some matters and that there are independent regional authorities for other matters, each set of authorities being co-ordinate with and not subordinate to the others within its own prescribed sphere.<sup>94</sup>

Further to powers being allocated between the two spheres of government in terms of local and national importance, federalism also limits the centralisation of power. Proudhon<sup>95</sup> explained how federalism serves to limit central powers: '[I]n a federation, the powers of central authority are specialised and limited and diminish in number, in directness, and in what I may call intensity as the confederation grows by the adhesion of new states'.<sup>96</sup> In fact, Proudhon described the federal government as 'subordinate to the states',<sup>97</sup> and noted that the 'essence' of a federal system of government 'is always to reserve more powers for the citizen than for the state, and for municipal and provincial authorities than for central power ...'.<sup>98</sup>

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<sup>93</sup> J A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 4.

<sup>94</sup> K C Wheare, *Federal Government* (Oxford University Press, 1967) 35.

<sup>95</sup> Proudhon was a French political theorist, most often described as an 'anarchist' due to his socialist views with respect to economics and property. He fled to Belgium in 1858 after writing *De la Justice* for which a French Court handed him a prison sentence. During this exile Proudhon became concerned about the Italian Nationalist Movement and began to write about the evils of centralisation and the benefits of federalism to protect individual liberty. For further background to Proudhon, see Richard Vernon, 'Introduction' in P-J Proudhon, *The Principle of Federation* (University of Toronto Press, 1979).

<sup>96</sup> P-J Proudhon, *The Principle of Federation* (University of Toronto Press, 1979) 41. Proudhon has used the term 'confederation' in this quotation. It should be noted that he does not distinguish the terms 'federation' and 'confederation'. That is, he is using the terms interchangeably here.

<sup>97</sup> P-J Proudhon, *The Principle of Federation* (University of Toronto Press, 1979) 61.

<sup>98</sup> P-J Proudhon, *The Principle of Federation* (University of Toronto Press, 1979) 45. A parallel can be drawn here with the principle of subsidiarity in European Union law. *TEU* art 5(3) states that if a matter does not fall within the exclusive competence of the community and can be better resolved by the individual countries that comprise the European Union (Member States), the central authority (Community) should *not* intervene, so that these matters can be resolved at a local level.

Consequently, there is a correlation between the principle of subsidiarity and definitions of federalism. Both are premised upon notions of 'states' rights'. Specifically, both are concerned with retaining state power and control over local issues. In fact, the principle is reproduced in the *Australian Constitution* in s 107 which 'reserves' state powers after federation: 'Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this *Constitution* exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be'. Similarly, the 10<sup>th</sup> Amendment to the *United States Constitution* provides,

The observation that federalism limits the power of the central government so as not to detract from that of the states was also made by Dicey who described ‘[t]he tendency of federalism to limit on every side the action of government and to split up the strength of the state among co-ordinate and independent authorities ...’<sup>99</sup>

In summary, federal theory dictates that centralised power is defined and limited. This means that the central government can only act within the constraints of the power allocated to it by the *Constitution*, with all remaining residual power being left to the states. It can therefore be said that the states retain the bulk of the powers they possessed prior to federation, and that their powers are more numerous than those of the central government.<sup>100</sup> Hence, increased centralisation of powers to the Commonwealth goes against the fundamental nature and federal structure of the *Constitution*.

### ***C Sovereignty of the States***

As this chapter has outlined, federalism allocates powers between two separate spheres of government, federal and state. Crommelin stated that: ‘Federalism required two levels of government, each complete in itself, operating directly upon the people, with limited powers, without the capacity alone to alter the allocation of powers.’<sup>101</sup>

This distinct allocation of powers requires each level of government to operate autonomously and free from interference from the other. Hence, each level of government is intended to be sovereign in its own sphere. This sovereignty and importance of the states was acknowledged by Galligan, who said that ‘the essence

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‘The powers not delegated to the United States by the *Constitution*, nor prohibited by it to the States, are reserved to the States respectively, or to the people.’

For a discussion of the principle of subsidiarity, together with further scholarly references, see Gabriël Moens and John Trone, *Commercial Law of the European Union* (Springer, 2010) 27–28.

<sup>99</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan and Co, 8<sup>th</sup> ed, 1926) 151.

<sup>100</sup> For example, s 2(1) *Constitution Act 1889* (WA) gives the Western Australian Legislative Council and Legislative Assembly the general power ‘to make laws for the peace, order, and good Government of the Colony of Western Australia ...’ without being limited to specific subject areas.

<sup>101</sup> Michael Crommelin, ‘The Federal Model’ in Gregory Craven (ed), *Australian Federation Towards the Second Century* (Melbourne University Press, 1992) 33, 36.

of federalism is the division of political power and government institutions between two levels of government, both of which are sovereign in limited fields and neither of which is subject to the other in certain core areas.<sup>102</sup>

The intention of the states to retain their powers and sovereignty after federation and to remain on an equal footing with each other and the central government was also explained by Proudhon:<sup>103</sup>

Federation, from the latin *foedus*, genitive *foederis*, which means pact, contract, treaty, agreement, alliance, and so on, is an agreement by which one or more heads of family, one or more towns, one or more groups of towns or states, assume reciprocal and equal commitments to perform one or more specific tasks, the responsibility for which rests exclusively with the officers of the federation.<sup>104</sup>

It is argued that the key descriptor of Commonwealth–state relations in a federal system of government is ‘reciprocal and equal’. Hence, one of the central features of federalism is the striking of a balance between state and central power whilst protecting the sovereignty of each. In the words of Proudhon:

the contract of federation has the purpose, in general terms, of guaranteeing to the federated states their sovereignty, their territory, the liberty of their subjects; of settling their disputes; of providing by common means for all matters of security and mutual prosperity; thus, despite the scale of the interests involved, it is essentially limited. The authority responsible for its execution can never overwhelm the constituent members; that is, the federal powers can never exceed in number and significance those of local or provincial authorities, just as the latter can never outweigh the rights and prerogatives of man and citizen.<sup>105</sup>

Craven has argued that the ‘crucial importance’ of the states as constitutional equals with the central government is often overlooked by academic commentators. He commented:

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<sup>102</sup> Brian Galligan, ‘Australian Federalism: Perceptions and Issues’ in Brian Galligan (ed), *Australian Federalism* (Longman Cheshire, 1989) 2, 3.

<sup>103</sup> See generally P-J Proudhon, *The Principle of Federation* (University of Toronto Press, 1979). The first edition of this text was published in 1863.

<sup>104</sup> P-J Proudhon, *The Principle of Federation* (University of Toronto Press, 1979) 38. The first edition of this book was published in 1863. My emphasis is in bold.

<sup>105</sup> P-J Proudhon, *The Principle of Federation* (University of Toronto Press, 1979) 39–40.

To discuss the federal system as if it consists merely of a series of disparate impediments to the exercise of general power by the Commonwealth, rather than as involving the complex interaction between two essentially complete governmental structures is a mistake that is too often made. Australian federalism is comprised of the operations of and relationships between two systems of government: its study necessarily involves a consideration of the place of each of these systems in their own right, and not merely as an adjunct to the other.<sup>106</sup>

Wheare, who wrote about the nature of American federalism, discussed the division of powers between the central government and the states, and their respective equality and sovereignty: ‘By the federal principle I mean the method of dividing powers so that the general and regional government are each, within a sphere, co-ordinate and independent.’<sup>107</sup> Cramp also said of this division: ‘it [federalism] seeks to retain the sovereignty for the states in matters of provincial interest, and establish a national sovereignty in matters of a national significance’.<sup>108</sup> Further, Cramp emphasised that, in a federation, state sovereignty is retained:

It differs from other systems of government in attempting to bring together under a political bond a number of States without sacrificing their individuality. The States still retain their separate existence and independence in some particulars, though they surrender their powers to a central government in matters that affect the Federated States in common. Thus we have sovereign powers existing within a sovereign power, and neither can encroach on the sovereignty of the other.<sup>109</sup>

Similarly, Elazar defined federalism as ‘a comprehensive system of political relationships which has to do with the combination of self-rule and shared rule within a matrix of constitutionally dispersed powers’<sup>110</sup> in which power is ‘non-centralised’ with the power to govern ‘diffused among many centres’.<sup>111</sup> This sharing of power, according to Elazar, is premised upon mutual respect and understanding between the two levels:

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<sup>106</sup> Gregory Craven, ‘The States — Decline, Fall, or What?’ in Gregory Craven (ed), *Australian Federation: Towards the Second Century* (Melbourne University Press, 1992) 49, 49.

<sup>107</sup> K C Wheare, *Federal Government* (Oxford University Press, 1967) 10.

<sup>108</sup> K R Cramp, *State and Federal Constitutions of Australia* (Angus & Robertson, 1913) 115.

<sup>109</sup> K R Cramp, *State and Federal Constitutions of Australia* (Angus & Robertson, 1913) 105–106.

<sup>110</sup> Daniel J Elazar, ‘Viewing Federalism as Grand Design’ in Daniel J Elazar (ed), *Federalism as Grand Design: Political Philosophers and the Federal Principle* (University Press of America, 1987) 1.

<sup>111</sup> Daniel J Elazar, *Exploring Federalism* (The University of Alabama Press, 1991) 34.

The term ‘federal’ is derived from the latin *foedus*, which, like the Hebrew term *brit*, means covenant. In essence, a federal arrangement is one of partnership, established and regulated by a covenant, whose internal relationships reflect the special kind of sharing that must prevail among the partners, based on a mutual recognition of the integrity of each partner and the attempt to foster a special unity among them.<sup>112</sup>

Elazar expanded on this notion of sharing of power whilst maintaining sovereignty that is central to defining federalism:

Federal principles are concerned with the combination of self rule and shared rule. In the broadest sense, federalism involves the linking of individuals, groups and polities in lasting but limited union in such a way as to provide for the energetic pursuit of common ends while maintaining the respective integrities of all parties. As a political principle, federalism has to do with the constitutional diffusion of power so that the constituting elements in a federal arrangement share in the processes of common policy making and administration by right, while the activities of the common government are conducted in such a way as to maintain their respective integrities. Federal systems do this by constitutionally distributing power among general and constituent governing bodies in a manner designed to protect the existence and authority of all.<sup>113</sup>

In summary, definitions of federalism are premised upon the independence, sovereignty and importance of the states as constitutional equals to each other, and more significantly, to the central government. In these definitions, the states occupy a place of equality, and are by no means subordinate to the central government. Consequently, the balance between the two levels of government must be maintained in a true federation.

### ***D Independent Judicial Guardian of the Constitution***

Federal theory requires the existence of an independent judicial body to ensure that the sovereignty of each level of government (that is, the federal balance) is maintained and not transgressed by either level of government. As stated by Dicey, a key characteristic of a federal system of government is ‘the authority of the Courts to act as interpreters of the *Constitution*.’<sup>114</sup> To be more specific, federalism requires a

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<sup>112</sup> Daniel J Elazar, *Exploring Federalism* (The University of Alabama Press, 1991) 5.

<sup>113</sup> Daniel J Elazar, *Exploring Federalism* (The University of Alabama Press, 1991) 5–6.

<sup>114</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan and Co, 8<sup>th</sup> ed, 1926) 140.

judicial body to determine disputes about the demarcation of powers.<sup>115</sup> Consequently, this judicial body acts as ‘a guardian of the *Constitution*’<sup>116</sup> in ensuring that the federal balance is not transgressed. In an Australian context, this ‘guardian’ was intended to be the High Court of Australia. However, as will be shown in Chapters 5 and 6, the High Court has failed in this role, opting instead for a centralist approach.

John Stuart Mill commented on the role of the courts in maintaining this federal balance:

the more perfect mode of federation, where every citizen of each particular state owes obedience to two governments, that of his own state and that of the federation, it is evidently necessary not only that the constitutional limits of the authority of each should be precisely and clearly defined, but that the power to decide between them in any case of dispute should not reside in any of the governments, or in any functionary subject to it, but in an umpire independent of both ...<sup>117</sup>

According to Dicey, a federal supreme court must have the authority to interpret the *Constitution* and to hand down independent judgments.<sup>118</sup> Dicey also stated that an independent federal court would prevent bias in favour of either level of government. For example, the independence of the constitutional court would prevent state Judges from interpreting the constitution with a view to preserving the rights of the states, and would also prevent ‘judges depending on the federal government’ from interpreting the constitution in favour of the federal government.<sup>119</sup> This ‘guardianship’ role is therefore fundamentally important and when the Australian High Court adopts a centralist agenda, contrary to the text, structure and provisions of the *Constitution*, (that is, when the High Court fails to interpret federal powers

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<sup>115</sup> K R Cramp, *State and Federal Constitutions of Australia* (Angus and Robertson, 1913) 116.

<sup>116</sup> K R Cramp, *State and Federal Constitutions of Australia* (Angus & Robertson, 1913) 117–118.

<sup>117</sup> John Stuart Mill, ‘Of Federal Representative Governments’ in Dimitrios Karmis and Wayne Norman (eds), *Theories of Federalism: A Reader* (Palgrave MacMillan, 2005) 165, 167. This ‘umpire’ is a supreme court, empowered by the constitution to make final decisions about the powers of the state and federal governments, including disputes between them, or between these governments and citizens (168–169).

<sup>118</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan and Co, 8<sup>th</sup> ed, 1926) 140, 155.

<sup>119</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan and Co, 8<sup>th</sup> ed, 1926) 155.

with a view to maintaining the federal balance), the power and sovereignty of the states is significantly compromised, and so is the *Constitution* itself.

## V CONDITIONS REQUIRED TO ESTABLISH A FEDERAL SYSTEM OF GOVERNMENT

This section discusses the conditions that must exist for federation to be achieved. It will show that the states are not only paramount in a federal system, as demonstrated earlier in this chapter, but are instrumental in achieving federation in the first place. This analysis further supports the argument that in an authentic federal system, the states must be equal with the Commonwealth and must retain the bulk of their powers, except to the extent that certain powers are required to be reallocated to the central government in the *Constitution*.

### *A Desire*

John Stuart Mill, in his work *Considerations on Representative Government*, outlined the conditions necessary to achieve a federal system of government. Firstly, Mill stated that there must be ‘a sufficient amount of mutual sympathy among the populations’.<sup>120</sup> Specifically, factors such as a common culture and desire to form a union are necessary. In the words of Mill, ‘The sympathies available for the purpose are those of race, language, religion, and, above all, of political institutions, as conducing most to a feeling of identity of political interest.’<sup>121</sup>

Like Mill, Dicey also observed that the ‘sentiment’ of the citizens of a country is essential to the formation of a federal nation. Dicey stated that a

condition absolutely essential to the formation of a federal system is the existence of a very particular state of sentiment among the inhabitants of the countries which it is proposed to unite. They must desire union, and must not desire unity. If there be no desire to unite, there is clearly no basis for federalism ...The phase of sentiment, in short, which forms a necessary condition for the formation of a federal state is that the people of the proposed state should wish to form for many purposes a single nation, yet should not wish to surrender the

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<sup>120</sup> John Stuart Mill, ‘Of Federal Representative Governments’ in Dimitrios Karmis and Wayne Norman (eds), *Theories of Federalism: A Reader* (Palgrave Macmillan, 2005) 165.

<sup>121</sup> John Stuart Mill, ‘Of Federal Representative Governments’ in Dimitrios Karmis and Wayne Norman (eds), *Theories of Federalism: A Reader* (Palgrave Macmillan, 2005) 165.

individual existence of each man's State or Canton. We may perhaps go a little farther, and say, that a federal government will hardly be formed unless many of the inhabitants of the separate States feel stronger allegiance to their own State than to the federal state represented by the common government. ... The sentiment therefore which creates a federal state is the prevalence throughout the citizens of more or less allied countries of two feelings which are to a certain extent inconsistent — the desire for national unity and the determination to maintain the independence of each man's separate State. The aim of federalism is to give effect as far as possible to both these sentiments.<sup>122</sup>

This 'sentiment' was also expressed by de Tocqueville,<sup>123</sup> who went further in stating that a common desire to form one nation is crucial to the effective operation and continued existence of a federal system of government:

the Federal compact cannot be lasting unless there exists in the communities which are leagued together a certain number of inducements to union which render their common dependence agreeable, and the task of the Government light, and that system cannot succeed without the presence of favourable circumstances added to the influence of good laws. All the peoples which have ever formed a confederation have been held together by a certain number of common interests, which served as the intellectual ties of association.

But the sentiments and the principles of man must be taken into consideration as well as his immediate interests. A certain uniformity of civilisation is not less necessary to the durability of a confederation than a uniformity of interests in the States which compose it.<sup>124</sup>

Wheare, in outlining the 'conditions' required for a federal system of government, also stated that there must be a 'desire' of the 'communities or states' to form a central government,<sup>125</sup> whilst at the same time retaining their independence:

So far, then, it would seem that federal government is appropriate for a group of states or communities if, at one and the same time, they desire to be united under a single independent general government for some purposes and to be organised under independent regional

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<sup>122</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan and Co, 8<sup>th</sup> ed, 1926) 137–139.

<sup>123</sup> Alexis de Tocqueville, 'Federal Theory in *Democracy in America*', in Dimitrios Karmis and Wayne Norman (eds), *Theories of Federalism: A Reader* (Palgrave Macmillan, 2005) 147, 160.

<sup>124</sup> Alexis de Tocqueville, 'Federal Theory in *Democracy in America*', in Dimitrios Karmis and Wayne Norman (eds), *Theories of Federalism: A Reader* (Palgrave Macmillan, 2005) 147, 160.

<sup>125</sup> K C Wheare, *Federal Government* (Oxford University Press, 1967) 35.

governments for others. Or, to put it shortly, they must desire to be united, but not to be unitary.<sup>126</sup>

The ‘desire’ to federate necessarily involves the consent of the states agreeing to federate. Montesquieu provided the following definition of a federal system of government, which he named a ‘confederate republic.’ It is ‘a convention by which several small states agree to become members of a larger one, which they intend to establish. It is a kind of society of societies, that constitute a new one ...’<sup>127</sup> Montesquieu observed that all states must consent to this union of states: ‘one province cannot conclude an alliance without the consent of the others.’<sup>128</sup>

This ‘desire’ to federate, according to Wheare, may arise for a number of reasons including ‘military insecurity’, ‘a desire to be independent of foreign powers’, ‘a hope of securing economic advantage from union’, political ties between the communities that will federate, and ‘geographical neighbourhood [sic]’.<sup>129</sup> Similarly, Cramp stated that certain conditions, first identified by Dicey, are required before a federal government can be formed.<sup>130</sup> One of these was the desire to federate, based on ‘community of race, language, history or economic interest’. He also stated that ‘geographical adjacency’ was present in most federal models.<sup>131</sup>

As well as describing the central role of the states in the Australian federation, the following quotation from the dissenting judgment of Kirby J in *New South Wales v Commonwealth of Australia* (‘*Work Choices*’) illustrates how this desire on the part of the states to federate, and at the same time retain the bulk of their powers, is enshrined in the Australian *Constitution*:

It is impossible to ignore the place envisaged for the States in the *Constitution*. Reference is made to that role throughout the constitutional document. It is the people of the several states who ‘agreed to unite in one indissoluble Federal Commonwealth’. Both in the covering

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<sup>126</sup> K C Wheare, *Federal Government* (Oxford University Press, 1967) 36.

<sup>127</sup> Montesquieu, ‘Combining the Advantages of Small and Large States’ in Dimitrios Karmis and Wayne Norman (eds), *Theories of Federalism: A Reader* (Palgrave Macmillan, 2005) 55, 55.

<sup>128</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan and Co, 8<sup>th</sup> ed, 1926) 55, 57.

<sup>129</sup> K C Wheare, *Federal Government* (Oxford University Press, 1967) 37.

<sup>130</sup> K R Cramp, *State and Federal Constitutions of Australia* (Angus and Robertson, 1913) 106.

<sup>131</sup> K R Cramp, *State and Federal Constitutions of Australia* (Angus and Robertson, 1913) 106.

clauses and in the text of the *Constitution* itself, the federal character of the polity thereby created is announced, and provided for, in great detail.<sup>132</sup>

In summary, the element of ‘desire’ to federate signifies the crucial role that the regional governments play in forming a federation. Put simply, it is the states who decide whether to federate or not. It follows logically that they would not be eager to surrender the bulk of their powers to a new and as yet unknown central government.

### **B Capacity**

As well as having the ‘desire’ to form a federal system of government, Wheare argued that a community must also have the means or ‘capacity’ to do so.<sup>133</sup> Factors that contribute to this capacity include the desire to federate: ‘If states really desire to form an independent general government for some purposes, then they have gone a long way towards being able to work such a government’.<sup>134</sup> Factors such as a common race, language, religion or nationality also contribute to this capacity.<sup>135</sup> So too does the need to strengthen defence, for example, to defend against a common enemy.<sup>136</sup> Commonality in political and social institutions contributes to this ‘capacity’ to make a federation work.<sup>137</sup> However, Wheare expressed doubts as to whether a federal system would work amongst states that were ‘autocratic or dictatorial’ prior to federation:

Not only is it desirable that there should be similarity of political institutions in the majority, at any rate, of the federating units, but it is essential, I believe, that these institutions should not be autocratic or dictatorial. For autocracy or dictatorship, either in the general governments or in the regional governments, seems certain, sooner or later, to destroy that equality of status and that independence which these governments must enjoy, each in its own sphere, if federal government is to exist at all. Thus, suppose all the regional governments or a majority of them were dictatorships, what machinery could exist to choose a general government which would be independent of the regional governments? No free election by the people of the autocratic regions is to be expected. The general government would be composed of nominees of the autocrats in the regions.<sup>138</sup>

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<sup>132</sup> *Work Choices* (2006) 229 CLR 1, 226.

<sup>133</sup> K C Wheare, *Federal Government* (Oxford University Press, 1967) 44.

<sup>134</sup> K C Wheare, *Federal Government* (Oxford University Press, 1967) 44.

<sup>135</sup> K C Wheare, *Federal Government* (Oxford University Press, 1967) 44–45.

<sup>136</sup> K C Wheare, *Federal Government* (Oxford University Press, 1967) 44.

<sup>137</sup> K C Wheare, *Federal Government* (Oxford University Press, 1967) 45.

<sup>138</sup> K C Wheare, *Federal Government* (Oxford University Press, 1967) 46–47.

Dicey stated this commonality was a condition required for the successful ‘formation’ of a ‘federal state’:<sup>139</sup>

There must exist, in the first place, a body of countries such as the Cantons of Switzerland, the colonies of America, or the Provinces of Canada, so closely connected by history, by race, or the like, as to be capable of bearing, in the eyes of their inhabitants, an impress of common nationality. It will also be generally found (if we appeal to experience) that lands which now form part of a federal state were at some stage of their existence bound together by close alliance or by subjugation to a common sovereign ...<sup>140</sup>

De Tocqueville also stated, ‘One of the circumstances which most powerfully contribute to support the federal government in America is that the states have not only similar interests, a common origin, and a common tongue, but that they are also arrived at the same stage of civilisation; which almost always renders a union feasible.’<sup>141</sup>

### ***C Equality***

The third condition required to form a federal system of government is that there should be equal bargaining strength between the states that will form the federation.<sup>142</sup> States can differ in the wealth and resources they possess, as long as their bargaining power remains on a relatively equal level.<sup>143</sup> This will ensure that more powerful states do not attempt to exert their influence at the expense of other states, causing conflict between them.<sup>144</sup> Significantly, a true federation also requires that this equality must extend to state equality with the central government. This was identified by Watts who stated: ‘The fundamental and distinguishing characteristic of

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<sup>139</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan and Co, 8<sup>th</sup> ed, 1926) 135–136.

<sup>140</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan and Co, 8<sup>th</sup> ed, 1926) 137.

<sup>141</sup> Alexis de Tocqueville, ‘Federal Theory in *Democracy in America*’, in Dimitrios Karmis and Wayne Norman (eds), *Theories of Federalism: A Reader* (Palgrave Macmillan, 2005) 147, 160–161.

<sup>142</sup> John Stuart Mill, ‘Of Federal Representative Governments’ in Dimitrios Karmis and Wayne Norman (eds), *Theories of Federalism: A Reader* (Palgrave Macmillan, 2005) 165, 166.

<sup>143</sup> John Stuart Mill, ‘Of Federal Representative Governments’ in Dimitrios Karmis and Wayne Norman (eds), *Theories of Federalism: A Reader* (Palgrave Macmillan, 2005) 165, 166.

<sup>144</sup> John Stuart Mill, ‘Of Federal Representative Governments’ in Dimitrios Karmis and Wayne Norman (eds), *Theories of Federalism: A Reader* (Palgrave Macmillan, 2005) 165.

a federal system is that neither the central nor regional governments are subordinate to each other, but are instead co-ordinate.’<sup>145</sup>

Wheare agreed with Mill’s argument that the size of the states will also contribute to the capacity of a federal system to work. Wheare stated: ‘It is undesirable that one or two units should be so powerful that they can overrule the others and bend the will of the federal government to themselves.’<sup>146</sup> Hence, one or more states should not be so powerful that they can ‘dominate’ the others as this will affect a state’s capacity to contribute equally to the federal union.<sup>147</sup> Once again, this demonstrates the requirement for equality in a federal system — between the states themselves, as well as between the state and federal governments.

#### **D Established Government**

According to Wheare, another factor required to establish a federal system of government and to make it work, is the fact that the states already have established systems of government. This ensures stable regional government whilst the new government is being established, and the ongoing independence of the state governments.<sup>148</sup> Wheare stated that

this factor ... gives the regions strength to stand upon their own feet; it also allows the energies of statesmen to be concentrated upon one task, the making of the general government. It helps to produce both the capacity to be separate and independent in some things and to be under a general government for others.<sup>149</sup>

Cramp added that ‘a high degree of political capacity and a habit of observance of law’ is required for a successful federation to be formed.<sup>150</sup> This is a necessary consequence of having an already established system of government. Specifically, the states will have their own laws, legal systems and courts that maintain the rule of law for the states and their citizens. So the formation of an additional level of

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<sup>145</sup> R L Watts, *New Federations: Experiments in the Commonwealth* (Oxford University Press, 1966) 10.

<sup>146</sup> K C Wheare, *Federal Government* (Oxford University Press, 1967) 50.

<sup>147</sup> K C Wheare, *Federal Government* (Oxford University Press, 1967) 50–51.

<sup>148</sup> K C Wheare, *Federal Government* (Oxford University Press, 1967) 48.

<sup>149</sup> K C Wheare, *Federal Government* (Oxford University Press, 1967) 49.

<sup>150</sup> K R Cramp, *State and Federal Constitutions of Australia* (Angus and Robertson, 1913) 106.

government with its own laws and courts is simply a continuation of those that the states already have in existence.

When defining federalism, Elazar also observed its democratic foundations. That is, the people are the ultimate source of power, and the two levels of government operate directly on the people: ‘A federation is a polity compounded of strong constituent entities and a strong general government, each possessing powers delegated to it by the people and empowered to deal directly with the citizenry in the exercise of those powers’.<sup>151</sup> In the words of Elazar, ‘The simplest possible definition is *self-rule plus shared rule*.’<sup>152</sup> These democratic foundations are also evident in the following comment from Elazar:

Federal principles grow out of the idea that free people can freely enter into lasting yet limited political associations to achieve common ends and protect certain rights while preserving their respective integrities. As the very ambiguity of the word ‘federal’ reveals, federalism is concerned simultaneously with the diffusion of political power in the name of liberty and its concentration on behalf of unity or energetic government. The federal idea itself rests on the principle that political and social institutions and relationships are best established through covenants, compacts or other contractual relationships, rather than, or in addition to, simply growing organically; in other words, that humans are able to make constitutional choices.<sup>153</sup>

In summary, it follows that if, at the time of federation, there are established state governments in existence, there will be a corresponding ‘desire’ on the part of the states to retain independence after federation.<sup>154</sup> Thus, it is not the states’ intention to transfer the majority of their powers to the new central government. Rather, it is their intention to preserve their existing powers as much as possible.

### ***E Financial Viability***

Wheare also stated that finances will also be a determinative factor in whether a federal system of government is viable.<sup>155</sup> In summary, both levels of government, federal and state, should be able to support themselves financially. If, for example,

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<sup>151</sup> Daniel J Elazar, *Exploring Federalism* (The University of Alabama Press, 1991) 7.

<sup>152</sup> Daniel J Elazar, *Exploring Federalism* (The University of Alabama Press, 1991) 12, see also 16.

<sup>153</sup> Daniel J Elazar, *Exploring Federalism* (The University of Alabama Press, 1991) 33.

<sup>154</sup> K R Cramp, *State and Federal Constitutions of Australia* (Angus and Robertson, 1913) 106.

<sup>155</sup> K C Wheare, *Federal Government* (Oxford University Press, 1967) 51.

the states cannot support themselves, they ‘will be unable to perform their functions or they will be able to perform them only at the price of financial dependence upon the general government, that is, at the price of financial unification.’<sup>156</sup> Consequently, some thought must be given to the allocation of financial resources before federation occurs.<sup>157</sup> This is a theme that will be explored in more detail later in this thesis, specifically in Chapters 5 and 6, which outlines the demise of state financial powers and in Chapter 7, which suggests recommendations to restore state financial powers.

## VI THE FEDERAL NATURE OF THE COMMONWEALTH CONSTITUTION

The fundamental and pivotal role of the states in the Australian federation is evident from an examination of the structure and provisions of the Commonwealth *Constitution*. As stated by Kirby J in his dissenting judgment in *Work Choices*:

It is impossible to ignore the place envisaged for the States in the *Constitution*. Reference is made to that role throughout the constitutional document. It is the people of the several states who ‘agreed to unite in one indissoluble Federal Commonwealth’. Both in the covering clauses and in the text of the *Constitution* itself, the federal character of the polity thereby created is announced, and provided for, in great detail.<sup>158</sup>

The provisions and structural aspects that provide for a federal balance are discussed below, starting with the preamble. However, prior to this discussion it should be noted that there was much commentary about ‘states’ rights’ from the Convention debates, in particular the Sydney session of the Australasian Federal Convention in 1891, which supports the prevailing view of the paramountcy of the states. Before noting some of the specific commentary in this regard, it is important not to overlook the diversity of views of the delegates who attended the Constitutional Conventions. This is summarised by Sawyer:

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<sup>156</sup> K C Wheare, *Federal Government* (Oxford University Press, 1967) 51.

<sup>157</sup> K C Wheare, *Federal Government* (Oxford University Press, 1967) 52. In Australia, there is currently a fiscal imbalance between the Commonwealth and the states which has undermined the federal balance. This issue will be discussed in Chapter 6.

<sup>158</sup> *Work Choices* (2006) 229 CLR 1, 226.

The main political divisions at the Conventions were between liberals and conservatives, between State-righters and centralisers, and between ‘small-Staters’ and ‘big-Staters’. However ... to an important degree an overwhelming majority of the delegates at all stages were State-righters. It was federation they aimed at, and furthermore, a federation in which there was a strong emphasis on preserving the structure and powers of the States so far as consistent with union for specific and limited purposes. Few consistently advocated outright unification.<sup>159</sup>

Despite this diversity, an examination of the debates illustrates the sentiment amongst the delegates that the federated states should retain their powers unless it was absolutely necessary to transfer them to the Commonwealth, and that the states would have a central role in the new Commonwealth. This sentiment is also summarised by Craven as follows:

The central purpose of most if not all the founding fathers was the creation of a strictly limited central government subject to the absolute condition that the government so created did not unduly impinge upon the powers of the States. Given a choice between a centrally dominated federation and no federation at all, most of the founding fathers would undoubtedly have had little difficulty in accepting disunity as the lesser of two evils.<sup>160</sup>

The commentary from the Sydney session of the Australasian Federal Convention of 1891 contains many examples of the delegates’ concern to protect the rights and powers of the states. For example, Sir Henry Parkes, in his discussion of his resolution ‘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’ stated:

I think it is in the highest degree desirable that we should satisfy the mind of each of the colonies that we have no intention to cripple their powers, to invade their rights, to diminish their authority, except so far as is absolutely necessary in view of the great end to be accomplished, which, in point of fact, will not be material as diminishing the powers and privileges and rights of the existing colonies. It is therefore proposed by this first condition of mine to satisfy them that neither their territorial rights nor their powers of legislation for the

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<sup>159</sup> Geoffrey Sawer, *The Australian Constitution* (Australian Government Publishing Service, 1975) 23.

<sup>160</sup> Gregory Craven, ‘The States — Decline, Fall, or What?’ in Gregory Craven (ed), *Australian Federation: Towards the Second Century* (Melbourne University Press, 1992) 49, 51.

well being of their own country will be interfered with in any way that can impair the security of those rights, and the efficiency of their legislative powers.<sup>161</sup>

These views were reiterated by Sir Thomas Playford (of South Australia), who had also attended the Australasian Federal Conference of 1890, and who said, ‘we should most strictly define and limit the powers of the central government, and leave all other powers not so defined to the local legislatures.’<sup>162</sup> He continued on to say that it was necessary to ‘lay down all such powers as are necessary for the proper conduct of the federal government, and not interfere with the slightest degree with any other power of the local legislatures.’<sup>163</sup> This sentiment was also expressed by Mr Philip Oakley Fysh, of Tasmania, who expressed the importance of state Parliaments retaining their legislative powers over local issues, in a discussion of the word ‘surrender’ in Parkes’ resolution:

it will be absolutely unnecessary to ask the people of these colonies to surrender to the dominion parliament anything which can best be legislated for locally — anything which cannot be best legislated for by a central executive. Now, these may be far embracing words, but every man who runs may read in connection with an opinion of this kind, because he himself will be able as well as any of us to detect what it is that is best discharged locally... He must know that, in connection with the various developments of his own province, there can be no interference by an executive which will sit 1,000 miles away, and which cannot, except in regard to some individual members thereof, have so close an identity with the work in which he is engaged, or such a knowledge of the necessities which surround the country in which he is living, as those who represent him in the local parliaments. I believe, therefore, that we may limit our explanation of the term ‘surrender’ to these very few words, and that the people may at once feel sure that this Convention is unlikely to ask them to give up any important right; but that its purpose will be to continue in all its harmony, in all its prestige, the position of the local parliaments, and that the dominion parliament, the great executive of the higher national sphere at which we are to arrive, will not in any way detract from it.<sup>164</sup>

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<sup>161</sup> *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 4 March 1891, 24 (Sir Henry Parkes).

<sup>162</sup> *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 13 March 1891, 328 (Sir Thomas Playford).

<sup>163</sup> *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 13 March 1891, 328 (Sir Thomas Playford).

<sup>164</sup> *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 4 March 1891, 42 (Mr Philip Oakley Fysh).

Alfred Deakin of Victoria, also a veteran of the Australasian Federation Conference of 1890, in speaking of this same resolution by Parkes also noted that state powers should be interfered with as little as possible, and that Federal Parliament's legislative powers should be clearly defined:

The first of these establishes beyond doubt the sovereignty proposed to be conserved to the several colonies of Australasia, subject to the limitations and surrenders which will appear set out in detail in the constitution proposed to be adopted for the federal parliament. Subject to the express terms of that constitution, every liberty at present enjoyed by the peoples of the several colonies, and every power of their legislatures, and every potentiality which is within their constitutions remains with them and belongs to them for all time ... This is the postulate that to the several colonies should be left all possible powers and prerogatives, defined and undefined, while the federal government itself, however largely endowed should have a certain fixed and definite endowment within which its powers may be circumscribed.<sup>165</sup>

Deakin expanded on this later in the debate by clarifying the fact that the Federal Parliament's legislative authority should be restricted to limited subjects:

It is not a question of establishing a federal legislature, which is to have unlimited authority. The federal government is to have a strictly limited power; it is not to range at will over the whole field of legislation; it is not to legislate for all conceivable circumstances of national life. On the contrary, its legislation is to be strictly limited to certain definite subjects. The states are to retain almost all their present powers, and should be quite able to protect their own rights.<sup>166</sup>

And subsequently, Deakin reiterated the point that a system of federal government would, by its nature, intrinsically protect states' rights, whilst at the same time providing for the best interests of the Australian nation as a whole:

The argument which I have endeavoured to maintain from the beginning of this debate has been that, while there are certain state rights to be guarded, most of those rights, if not all of them, can be guarded by the division of powers between the central government and the local governments. The states will retain full powers over the greater part of the domain in which they at present enjoy those powers, and will retain them intact for all time. But in national

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<sup>165</sup> *Official Record of the Debates of the Australasian Federal Convention, Sydney, 5 March 1891, 70* (Alfred Deakin).

<sup>166</sup> *Official Record of the Debates of the Australasian Federal Convention, Sydney, 5 March 1891, 79–80* (Alfred Deakin).

issues, on the subject of defence, as people who desire to have their shores defended, and to see their resources developed by means of a customs tariff and a customs union — on these questions there are no longer state rights and state interests to be guarded in the constitution, but the people's interests are one, and they call upon us to deal with them as one.<sup>167</sup>

The view that state powers should be retained as much as possible after federation, and the acknowledgment that this would be necessary to secure the acceptance of the states to federation, was expressed by Mr Richard Chaffey Baker of South Australia:

I am sure we must all agree that there can be no union of these colonies unless upon such terms as there are set forth — that there shall be no surrender of any right, or power, or privilege, except such as is admitted to be absolutely necessary for the good government of the union as a whole. And if we should formulate any scheme which would invade the rights and privileges of the several states, I am sure it will be in vain that we shall go back to our respective colonies and ask them to accept the scheme and join the union.<sup>168</sup>

This view was also taken up later in the debates by Mr Charles Cameron Kingston of South Australia, who stated:

I think we shall do well to emphasise the fact that we are dealing with autonomous states, who have long enjoyed the blessing of self government, and who should not be asked — and who, if asked, would not be likely to accede to the request — to sacrifice any of their existing powers other than those which it is absolutely necessary should be surrendered in the national interest. I hope we shall set clearly before us the fact that a national government should be strictly limited to dealing with subjects in which the interests of the community as a nation are involved. I hope that in our proceedings we shall feel that it is our duty, in approaching the several colonies, as we shall require to approach them at the conclusion of the deliberations of this convention, to state in precise language that which we desire they should surrender for the benefit of the nation. I hope, also, that we shall make no request for a surrender which cannot be justified on the score of the requirements of the national interest.<sup>169</sup>

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<sup>167</sup> *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 16 March 1891, 383 (Alfred Deakin).

<sup>168</sup> *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 6 March 1891, 117 (Richard Chaffey Baker).

<sup>169</sup> *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 9 March 1891, 153 (Charles Cameron Kingston).

Later, Mr Duncan Gillies of Victoria, made similar comments. Specifically, he stated that federation should be brought about through minimal interference with the existing powers of the states:

we must bear this in mind, that the powers that it is proposed should be given to the federal parliament are reduced to the smallest possible compass, with the object of not disturbing in the slightest degree the right to legislate on all subjects which has been granted to the several parliaments throughout this continent. We disturb that power as little as possible; and the range of the subjects which the states will have to discuss and determine is scarcely interfered with, and not interfered with in any degree that will affect their legal rights and interests.<sup>170</sup>

The role of the Senate in the protection of states' rights, and as a means by which the states would be directly involved and represented in the Federal Parliament, was discussed by Mr Arthur Rutledge of Queensland:

the voice of the States, as distinct states, with separate claims and separate interests, shall be heard with equal emphasis and with equal effect in a second chamber, which may be called the senate or the council of states, or by whatever other name it may be designated. I do not think that we ought for a single moment to attempt in what we do here to obliterate in any degree the individuality of the States which, taken as a whole, are to form the great federation of Australasia. To endeavour to do that — to destroy the individuality of the States — seems to me to strike at the very root of the leading principle of federation, and if we are to have a federation that shall be something of which we could be proud — if we are to have a federation that shall satisfy the aspirations of the people of the several colonies whom we are here to represent — we must have a federation that will recognise that principle in the fullest and most marked degree.<sup>171</sup>

The role of the Senate was also acknowledged by Dr John Alexander Cockburn of South Australia, as being necessary to protect against centralisation, thus protecting the states' interests, and to uphold democracy:

the principle of federation is that there should be houses with co-ordinate powers — one to represent the population, and the other to represent the states. We know the tendency is always towards the central authority, that the central authority constitutes a sort of vortex to

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<sup>170</sup> *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 11 March 1891, 231 (Duncan Gillies).

<sup>171</sup> *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 9 March 1891, 145 (Arthur Rutledge).

which power gradually attaches itself. Therefore, all the buttresses and all the ties should be the other way, to assist those who uphold the rights of the states from being drawn into this central authority, and from having their powers finally destroyed ... it is only when you have state rights properly guarded, and safeguard local government, that you can have government by the people. Government at a central and distant part is never government by the people, and may be just as crushing a tyranny under republican or commonwealth forms as under the most absolute monarchy. ... I maintain that unless the state rights are in every way maintained — unless buttresses are placed to enable them to stand up against the constant drawing toward centralisation — no federation can ever take root in Australia. It will not be a federation at all. It will be from the very start a centralisation, a unification, which, instead of being a guardian of liberty of the people, will be its most distinct tyrant, and eventually will overcome it.<sup>172</sup>

The concern of the delegates overall to retain states' rights and sovereignty is consequently reflected in the structure, form and provisions of the federal *Constitution* which took effect on 1 January 1901. The following part of this chapter illustrates how the federal system established by the Commonwealth *Constitution* is premised upon the equality of the federal and state governments.

### ***A The Preamble***

The federal nature of the Commonwealth *Constitution* is evident in the preamble to the *Constitution* which declares that the *states* have agreed to the formation of a central government:

Whereas the *people of New South Wales, Victoria, South Australia, Queensland; and Tasmania*, humbly relying on the blessing of Almighty God, have *agreed to unite in one indissoluble Federal Commonwealth* under the Crown of the United Kingdom of Great Britain and Ireland, and *under the Constitution* hereby established ...<sup>173</sup>

The desire and consent of the states to form a federation, whilst maintaining their independence was also stated by Dicey:

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<sup>172</sup> *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 3 April 1891, 707–708 (John Alexander Cockburn).

<sup>173</sup> *Constitution*, Preamble. Emphasis added. Western Australia is absent because it delayed in passing an enabling Act and Referendum to approve the final draft of the Constitution Bill. However, it did so prior to Proclamation of the new Commonwealth by the Queen. Hence, Western Australia was able to be admitted as an original State of the new Federation.

The Commonwealth is in the strictest sense a federal government. It owes its birth to the desire for national unity which pervades the whole of Australia, combined with the determination on the part of the several colonies to retain as States of the Commonwealth as large a measure of independence as may be found compatible with the recognition of Australian nationality.<sup>174</sup>

Hence, in the words of Sawyer: ‘The *Constitution* is on its face federal and is so described in the Covering Clauses’.<sup>175</sup>

Covering cl 9, which contains the *Constitution* in full<sup>176</sup>, commences by setting out the chapter division of the *Constitution*. Of significance is ch V entitled ‘The States’. An examination of ch V shows that the states continued to play a vital role in governance post-federation. Chapter V and its key federal provisions will now be discussed.

### ***B Saving of State Constitutions and State Powers***

Chapter V commences with s 106, which provides that after federation, state constitutions will continue to have force. Hence, the Constitutions of the states, being their fundamental and ultimate source of power, are protected. In their discussion of this provision, Quick and Garran cite Sir Henry Parkes from the Sydney Convention in 1891 whose comments on s 106 emphasise the sentiment of the states that their constitutional and legislative powers should be retained as fully as possible after federation:

I, therefore, lay down certain conditions which seem to me imperative as a ground work of anything we have to do, and I prefer stating that these first four resolutions simply lay down what appear to me the four most important conditions on which we must proceed. First: ‘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’. *I think that it is in the highest degree desirable that we should satisfy the mind of each of the colonies that we have no intention to cripple their powers, to invade their rights, to diminish their authority, except so far as it is absolutely necessary in view of the great end to be accomplished, which, in*

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<sup>174</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan and Co, 8<sup>th</sup> ed, 1926) 529–530.

<sup>175</sup> Geoffrey Sawyer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 121.

<sup>176</sup> The Australian *Constitution* is an enactment of the British Parliament, the *Commonwealth of Australia Constitution Act 1900* (Imp). The Constitution is contained in covering clause 9.

*point of fact, will not be material as diminishing the powers and privileges and rights of the existing colonies. It is therefore proposed by this first condition of mine to satisfy them that neither their territorial rights nor their powers of legislation for the well being of their own country will be interfered with in any way that can impair the security of those rights, and the efficiency of their legislative powers.*<sup>177</sup>

Parkes' comments reveal his strong conviction that the impact of federation on the states and their constitutional and legislative powers should be minimal. This is also evident from s 107 which provides that the powers of state Parliaments shall remain, except for those that have been reallocated to the Federal Parliament by the Commonwealth *Constitution* on federation. Quick and Garran's comments on this provision are also indicative of the intended centrality of the states under the new federal *Constitution*:

The Parliament of each State is a creation of the *Constitution* of the State. The *Constitution* of each State is preserved, and the parliamentary institutions of each State are maintained without any structural alteration, but deprived of power to the extent which their original legislative authority and jurisdiction has been transferred to the Federal Parliament.<sup>178</sup>

Section 108 in ch V further provides that state laws existing at the time of federation will continue to have force after federation, and can even be amended or repealed by a state, if they have not been made exclusive to the Commonwealth, and if the Commonwealth has not enacted the same law. It is evident from these provisions that great care was taken by the framers to make interference with state constitutions, state law-making powers, and state executive powers as minimal as possible. Hence, it was clear that: 'The *Constitution* was intended to preserve a wide area of governmental authority for the States ...'<sup>179</sup>

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<sup>177</sup> Sir Henry Parkes, Convention Debates, Sydney, 1891, 24 cited in John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, first published 1901, 2002 ed) 930. My emphasis added.

<sup>178</sup> John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, first published 1901, 2002 ed) 933. Quick and Garran continue on to comment that State powers will be lessened as the Federal Parliament enacts more and more legislation. They note (933) that these powers can be classified as 'exclusive' or 'concurrent'. These classes will be discussed later in this chapter.

<sup>179</sup> Geoffrey Sawer, *The Australian Constitution* (Australian Government Publishing Service, 1975) 87.

As stated by Quick and Garran in the preceding quotation, and by Sawer in his basic federal principles (discussed earlier in this chapter), it is essential for the efficient working of the federal system that there is a provision in the *Constitution* outlining a procedure to determine any conflict that may arise between state and federal laws.<sup>180</sup> This is dealt with by s 109, also in ch V, which provides that if there is inconsistency between a Commonwealth and state law, the Commonwealth law will prevail to the extent of the inconsistency. Whilst the majority of the High Court in *Engineers* pointed to this as evidence of federal supremacy over the states,<sup>181</sup> it is argued that this is the most logical way of resolving the inconsistency between these conflicting laws, and is not in itself an indication of federal supremacy. This view is also supported by the fact that if the inconsistent Commonwealth legislation is repealed or amended so that it is no longer inconsistent, the state law will ‘revive’ if it has not been repealed.<sup>182</sup> Hence, s 109 does not operate to completely invalidate the state law.

### ***C Limiting the Number of Federal Legislative Powers and the Residual Powers of the States***

In addition to the provisions of ch V, which provides for the continuance of state constitutions, legislative powers and laws, the framers of the *Constitution* limited the powers of the Federal Parliament by specifically listing them. Section 51 sets out a list of matters with respect to which the Federal Parliament can legislate.<sup>183</sup> If the Federal Parliament legislates on any matter not listed in s 51 or otherwise authorised by the Commonwealth *Constitution*, it will be beyond the legislative power of the Federal Parliament, and unconstitutional. By listing, and thereby limiting, the Federal Parliament’s legislative powers, the framers left the power to legislate on all other topics to the states, thus giving the states a far greater scope of legislative power. Dicey stated how the *Constitution* delineates the division of power between the Commonwealth and the states, with the states having ‘indefinite’ powers:

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<sup>180</sup> Geoffrey Sawer, *Modern Federalism* (Pitman Australia, 1976) 1.

<sup>181</sup> *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 (‘*Engineers*’), 155 (Knox CJ, Isaacs, Higgins, Rich and Starke).

<sup>182</sup> Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 142.

<sup>183</sup> Originally, the Federal Parliament could legislate with respect to 39 matters. This was increased to 40 in 1946 with the insertion of s 51(xxiiiA) which allowed the Federal Parliament to legislate with respect to certain social security allowances such as unemployment, pharmaceutical and medical benefits.

the *Constitution* itself ... fixes and limits the spheres of the federal or national government and of the States respectively, and moreover defines these spheres in accordance with the principle that, while the powers of the national or federal government, including in the term government both the Executive and the Parliament of the Commonwealth, are, though wide, definite and limited, the powers of the separate States are indefinite, so that any power not assigned by the *Constitution* to the federal government remains vested in each of the several States, or, more accurately, in the Parliament of each State.<sup>184</sup>

In addition, upon reviewing the matters listed in s 51, it is evident that many of the matters concern subjects that pertain to, or affect, the nation as a whole, and are therefore best left to the Federal Parliament as a matter of consistency and practicality. In the words of Quick and Garran, these powers ‘are of such a character that they could only be vested in and effectually exercised by the Federal Parliament’.<sup>185</sup> These subjects include trade and commerce with other countries,<sup>186</sup> borrowing money on the public credit of the Commonwealth,<sup>187</sup> defence,<sup>188</sup> currency,<sup>189</sup> immigration and emigration<sup>190</sup> and external affairs,<sup>191</sup> to name a few. The listing, and therefore limiting, of Federal Parliament’s legislative power is indicative of the framers’ intention that the bulk of legislative power would remain with the states after federation.

Some of these enumerated powers appear quite broad in scope, for example, ‘external affairs’ in s 51(xxix). However, some powers are expressly limited to ensure that the states retain sovereignty over their internal affairs. Quick and Garran provide the example of the trade and commerce power in s 51(i). They state that although the power allows the Parliament to legislate with respect to ‘trade and commerce’, the power contains ‘words of limitation’, namely, ‘with other countries, and among the States’ so that the Federal Parliament cannot legislate with respect to

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<sup>184</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan and Co, 8<sup>th</sup> ed, 1926) 530.

<sup>185</sup> John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, first published 1901, 2002 ed) 934.

<sup>186</sup> *Constitution* s 51(i).

<sup>187</sup> *Constitution* s 51(iv).

<sup>188</sup> *Constitution* s 51(vi).

<sup>189</sup> *Constitution* s 51(xii).

<sup>190</sup> *Constitution* s 51(xxvii).

<sup>191</sup> *Constitution* s 51(xxix).

a state's internal trade and commerce (that is, intra-state trade and commerce).<sup>192</sup> Such words of limitation protect the sovereignty of the states from the interference of the Federal Parliament in their internal operations, or in this case, intra-state commerce. Quick and Garran also give the example of the taxation power in s 51(ii) with words of limitation 'so as not to discriminate between states or parts of states', noting its importance in a federal system:

So the condition annexed to the grant of taxing power is, that there must be no discrimination between States in the exercise of that power. This, again, is not a limitation for the protection of private citizens of the Commonwealth against the unequal use of the taxing power; it is founded on federal considerations; it is a part of the federal bargain, in which the States and the people thereof have acquiesced, making it one of the articles of the political partnership, as effectually as other leading principles of the *Constitution*.<sup>193</sup>

Other examples of words of limitation to prevent interference by the Federal Parliament in the internal affairs of the states include: 'Banking, other than State Banking' in s 51(xiii); 'Insurance, other than State insurance' in s 51(xiv); and 'Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State' in s 51(xxxv).

### ***D Exclusive and Concurrent Powers***

A discussion of exclusive and concurrent powers is necessary to explain how the *Constitution* contemplates the reallocation of federal and state powers to operate after federation in order for the state and federal governments to successfully coexist. When federation occurred on 1 January 1901, the powers of the federal and state governments could be classified as 'exclusive' or 'concurrent'. Quick and Garran explain the distinction:

In the early history of the Commonwealth the States will not seriously feel the deprivation of legislative power intended by the *Constitution*, but as Federal legislation becomes more active and extensive the powers contemplated by the *Constitution* will be gradually withdrawn from the States' Parliaments and absorbed by the Federal Parliament. The powers to be so withdrawn may be divided into two classes — 'exclusive' and 'concurrent'.

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<sup>192</sup> John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, first published 1901, 2002 ed) 510.

<sup>193</sup> John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, first published 1901, 2002 ed) 510.

Exclusive powers are those absolutely withdrawn from the State Parliaments and placed solely within the jurisdiction of the Federal Parliament. Concurrent powers are those which may be exercised by the State Parliaments simultaneously with the Federal Parliament, subject to the condition that, if there is any conflict or repugnancy between the Federal law and the State law relating to the subject, the Federal law prevails, and the State law to the extent of its inconsistency is invalid.<sup>194</sup>

The language used by Quick and Garran in this quotation may appear to some to suggest that a gradual ‘deprivation’ of state power was contemplated as acceptable and inevitable. However, it is argued that Quick and Garran are merely describing the reallocation of powers that must necessarily occur after federation in order for the federal system to work. The analysis below seeks to explain and expand on this further.

As Quick and Garran explain in the quotation above, 13 of the 39 powers in s 51 were specifically created by the *Constitution* and were exclusively vested in the Federal Parliament.<sup>195</sup> Section 52 also gives exclusive powers to the Federal

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<sup>194</sup> John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, first published 1901, 2002 ed) 933.

<sup>195</sup> There are now 40 powers due to the addition of placitum (xxiiiA) by referendum in 1946. In 1901 Quick and Garran noted that these powers included:

- (iv) Borrowing money on the public credit of the Commonwealth;
- (x) Fisheries in Australian waters beyond territorial limits;
- (xxiv) The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States;
- (xxv) The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States;
- (xxix) External affairs;
- (xxx) The relations of the Commonwealth with the islands of the Pacific;
- (xxxi) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;
- (xxxiii) The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State;
- (xxxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State;
- (xxxvi) Matters in respect of which this *Constitution* makes provision until the Parliament otherwise provides;
- (xxxvii) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law;
- (xxxviii) The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this *Constitution* be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia;
- (xxxix) Matters incidental to the execution of any power vested by this *Constitution* in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

Parliament. Hence, the *Constitution* specifically provides that the states cannot legislate on these topics from the time of federation. The 23 remaining powers, which, prior to federation were in the domain of the state Parliaments, were ‘concurrent’ as at the time of federation. In other words, state legislation on these matters would continue to be valid until the Federal Parliament enacted inconsistent legislation which would trigger the operation of s 109.<sup>196</sup> The operation of exclusive powers, and concurrent powers that became exclusive to the Federal Parliament by virtue of the enactment of inconsistent legislation, left a balance of powers which Quick and Garran describe as ‘residuary legislative powers’ to the states, and which they define as follows: ‘The residuary authority left to the Parliament of each state, after the exclusive and concurrent grants to the Federal Parliament, embraces a large mass of constitutional, territorial, municipal and social powers ...’<sup>197</sup>

These residuary state powers, as described by Quick and Garran above, are ‘plenary’ and thus unlimited in scope,<sup>198</sup> and are only subject to limited restrictions.<sup>199</sup> So although the *Constitution* does remove some areas of power originally allocated to the states, and creates some new powers in favour of the Commonwealth, the states received a constitutional mandate, post-federation, to legislate over a far wider range

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See John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, first published 1901, 2002 ed) 933.

<sup>196</sup> John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, first published 1901, 2002 ed) 933.

<sup>197</sup> John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, first published 1901, 2002 ed) 935.

<sup>198</sup> *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1.

<sup>199</sup> Quick and Garran list examples from powers requiring consent by the Federal Parliament before a State may exercise that power. These include: s 91, which provides that a State may only grant an aid or bounty on the production or export of goods with the consent of Federal Parliament. Another example can be found in s 114, which provides that a State cannot raise or maintain naval or military forces, or tax property of the Commonwealth, without the consent of the Federal Parliament. See John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, first published 1901, 2002 ed) 936.

Quick and Garran also note examples of where the *Constitution* restricts State powers. These include: s 51(xxxii), which, in providing that the Parliament can legislate with respect to the control of railways with respect to transport for the naval or military purposes of the Commonwealth, restricts State control of railways to that extent. Similarly, s 98 allows the Federal Parliament to make laws about State railways in connection with the trade and commerce power; s 90 restricts the power of the States with respect to taxation by making the ability to levy duties of customs and excise exclusive to the Federal Parliament; and s 92 restricts the States and Commonwealth from restricting freedom of interstate trade and movement. John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, first published 1901, 2002 ed) 936.

of topics than the Federal Parliament. Hence, the states retained the bulk of legislative power after federation.

### ***E State Representation in Federal Parliament: The Senate as a States House***

Adequate representation for the states, and the protection of states' rights after federation, were specifically incorporated into the composition of the Houses of Parliament by the framers through the creation of the Senate. In ch I, pt II, entitled 'The Senate', the framers made specific provision for state representation in the Federal Parliament. Section 7 provides that 'The Senate shall be composed of Senators for each State, directly chosen by the people of the State ...' Thus, Parliament's upper house was designed to specifically represent the people of each state, and consequently, the interests of each state. Dicey also commented that the composition of Parliament serves to protect the rights of the states, and to give the states 'a large amount of legislative independence'.<sup>200</sup>

The Parliament of the Commonwealth is so constituted as to guarantee within reasonable limits the maintenance of States' rights. For whilst the House of Representatives represents numbers, the Senate represents the States of the Commonwealth, and each of the Original States is entitled, irrespective of its size and population, to an equal number of senators.<sup>201</sup>

Quick and Garran, in their commentary on s 7, describe the Senate's central role in protecting and representing state interests:

The Senate is one of the most conspicuous, and unquestionably the most important, of all the federal features of the *Constitution*. ... It is the chamber in which the States, considered as separate entities, and corporate parts of the Commonwealth, are represented. They are so represented for the purpose of enabling them to maintain and protect their constitutional rights against attempted invasions, and to give them every facility for the advocacy of their peculiar and special interests, as well as for the ventilation and consideration of their grievances. It is not sufficient that they should have a Federal High Court to appeal to for the review of federal legislation which they may consider to be in excess of the jurisdiction of Federal Parliament. In addition to the legal remedy it was deemed advisable that Original States at least should be endowed with a parity of representation in one chamber of the

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<sup>200</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan and Co, 8<sup>th</sup> ed, 1926) 530–531.

<sup>201</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan and Co, 8<sup>th</sup> ed, 1926) 530.

Parliament for the purpose of enabling them effectively to resist, in the legislative stage, proposals threatening to invade and violate the domain of rights reserved to the States.<sup>202</sup>

In fact, Dicey takes this further, emphasising the paramountcy of the Senate over the House of Representatives. His description below appears to endorse a view of the Senate as superior to, and hence the interests of the individual states that make up the federation as preferential to, any notion of centralised power:

The *Constitution*, further, is so framed as to secure respect for the Senate; the longer term for which the Senators are elected and the scheme of retirement by rotation, which will, in general, protect the Senate from a dissolution, are intended to make the Senate a more permanent, and therefore a more experienced, body than the House of Representatives, which can under no circumstances exist for more than three years, and may very well be dissolved before that period has elapsed; then too the senators will, as the *Constitution* now stands, represent the whole of the State for which they sit.<sup>203</sup>

The federal *Constitution* contemplates that the Senate is a ‘States House’.<sup>204</sup> The Senate was not only designed to ensure adequate representation for the states in the Federal Parliament, but was also seen as an essential requirement for the Australian federal system to function effectively in order to prevent encroachment by the Commonwealth on the powers of the states. Barton observed the importance of the Senate in protecting the interests of the states at the Adelaide Convention Debates:

The individualism of the States after Federation is of as much interest to each colony as the free exercise of national powers is essential to that aggregation of colonies which we express in the term Federation. If the one trenches upon the other, then, so far as the provinces assert their individuality overmuch, the fear is an approach to a mere loose confederation, not a true Federation. The fear on the other hand is, if we give the power to encroach — that is if we represent the federated people only, and not the States in their entities, in our Federation — then day by day you will find the power to make this encroachment will be so gladly availed

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<sup>202</sup> John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, first published 1901, 2002 ed) 414.

<sup>203</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan and Co, 8<sup>th</sup> ed, 1926) 530.

<sup>204</sup> The operation of the Senate has become dominated by party politics so that Senators vote in accordance with party politics, rather than in the interests of their States. See Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 150. It is argued that the actuality of the Senate becoming less of a ‘States House’ in modern politics does not detract from the intention of the framers, and from the provision in the *Constitution* that the Senate should be fundamental in ensuring State approval to federal legislation and the protection of State interests against encroachment by the central government.

of that, day by day and year by year, the body called the Federation will more nearly approach the unified or 'unitarian' system of government. We cannot adopt any form of government the tendency of which will be, as time goes on, to turn the constitution toward unification on the one hand, and towards a loose confederacy on the other. We must observe that principle, or else we do not observe the charge laid upon us by the enabling Act, which lays on us the duty to frame a 'Federal' *Constitution* under the Crown. So, therefore, I take it there must be two Houses of Parliament, and in one of these Houses the principle of nationhood, and the power and scope of the nation, as constituted and welded together into one by the act of Federation, will be expressed in the National Assembly, or House of Representatives, and in the other Chamber, whether it is called the Council of the States, the States Assembly, or the Senate, must be found not the ordinary checks of an Upper House, because such a Chamber will not be constituted for the purposes of an Upper House; but you must take all pains, not only to have a Parliament consisting of two Chambers, but to have it constituted in those two Chambers in such a way as *to have the basic principle of Federation conserved in that Chamber which is representative of the rights of the States; that is that each law of the Federation should have the assent of the States as well as of the federated people*. If you must have two Chambers in your Federation, it is one consequence of the Federation that *the Chamber that has in its charge the defence of State interests will also have in its hands powers in most matters coordinate with the other House*.<sup>205</sup>

Barton's concluding statements are significant. They emphasise that the central role of the Senate is to ensure that every Commonwealth law must be approved by the states. This means that the states would play a central role in approving the enactment of legislation for the nation, and in doing so, would be able to protect their own interests.

### **F The High Court of Australia**

The Commonwealth *Constitution* establishes the High Court of Australia in s 71. The High Court members are, to use the words of Dicey, 'intended to be the interpreters, and in this sense the protectors of the *Constitution*.' The High Court is, in this sense, a Constitutional referee empowered to strike down any law that transgresses the authority conferred on both the federal and state Parliaments by the *Constitution*. This point is made by Quick and Garran:

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<sup>205</sup> Mr Edmund Barton, Adelaide Convention Debates, 21–23, cited in John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, first published 1901, 2002 ed) 417. My emphasis added.

The High Court, like the Supreme Court of the United States, is the ‘guardian of the Federal *Constitution*’; that is to say, it has the duty of interpreting the *Constitution*, in cases that come before it, and of preventing its violation. But the High Court is also — unlike the Supreme Court of the United States — the guardian of the Constitutions of the several States; it is as much concerned to prevent encroachments by the Federal Government upon the domain of the States as to prevent encroachments by the State Governments upon the domain of the Federal Government.<sup>206</sup>

Thus the *Constitution* provides that the High Court is pivotal in maintaining the federal balance of power between the Commonwealth and the states in the Australian federal system of government. Its existence is a further acknowledgment by the framers that state powers must not be diminished after federation and that the federal balance must be preserved and maintained so as to avoid centralisation of government power.

## **VI DIFFERENT TYPES OF FEDERALISM: WHAT HAS THE AUSTRALIAN SYSTEM OF GOVERNMENT BECOME?**

Federal theory, and the *Constitution* itself which took effect from 1 January 1901, both envisage the states as sovereign participants on an equal footing with the federal government. However, the result of the High Court’s decision in *Engineers*, which will be outlined in detail in Chapter 5, was to reject this premise of the equality of the states and to interpret the *Constitution* in a manner that has resulted in increased centralisation of powers. Thus, Australia is no longer the federation that it once was. The question then becomes: what type of federation does Australia now have?

It is necessary to examine the various types of federalism, or rather variations on the federal model, in order to assess how the High Court’s interpretation of the *Constitution* post-*Engineers* has displaced the federal balance and Australia’s position as a true federation. This section will commence by distinguishing a federal system of government from a unitary one, and from a ‘confederation’. This will be followed by a discussion of Sawyer’s ‘stages of federalism’, namely co-ordinate, co-operative and organic federalism. As well as highlighting the central role and

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<sup>206</sup> John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, first published 1901, 2002 ed) 725.

sovereignty of the states in a true federal system, this analysis will serve to assess the type of federation (if it can be described as one at all) that the Australian system of government has become.

### ***A Unitary Government***

Firstly, a ‘unification of states’, or in other words, a unitary system of government, differs from a federation. In his influential work *Introduction to the Study of the Law of the Constitution*, Dicey outlines the key features of a federal system, in order to contrast it with the ‘unitary’ system of government in Britain.<sup>207</sup> In summary, the differences between the two systems of government were described by Dicey as follows:

Unitarianism, in short, means the concentration of the strength of the state in the hands of one visible sovereign power, be that power Parliament or Czar. Federalism means the distribution of the force of the state among a number of co-ordinate bodies each originating in and controlled by the constitution.<sup>208</sup>

Therefore, in a unitary system, the states have surrendered their powers to a central body and have therefore lost their sovereignty. The states can only exercise powers that the central government has delegated to them, with the corollary being that the central government can also take these powers away.<sup>209</sup>

### ***B Confederation***

Cramp stated that the classification of a system of government is dependent upon the amount of power allocated to the central government.<sup>210</sup> One classification is known as a ‘confederation’ or ‘Staatenbund’ in which the federal government has limited power and acts at the direction of the states.<sup>211</sup> To put it simply, in a confederation the central government is ‘weak’ and has ‘limited powers’, and state governments have ‘a high level of autonomy’.<sup>212</sup>

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<sup>207</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan and Co, 8<sup>th</sup> ed, 1926) 134–135.

<sup>208</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan and Co, 8<sup>th</sup> ed, 1926) 153.

<sup>209</sup> K R Cramp, *State and Federal Constitutions of Australia* (Angus and Robertson, 1913) 110.

<sup>210</sup> K R Cramp, *State and Federal Constitutions of Australia* (Angus and Robertson, 1913) 107.

<sup>211</sup> K R Cramp, *State and Federal Constitutions of Australia* (Angus and Robertson, 1913) 108.

<sup>212</sup> Gwynneth Singleton et al, *Australian Political Institutions* (Pearson Longman, 2006) 31.

In a confederation, the central government is ‘selected by, and communicates with, the governments of the various provinces’.<sup>213</sup> It has little or no control over making the states comply with its laws, or to remain with the union if they disagree with the actions of the federal government.<sup>214</sup> An example of a confederation, given by Cramp, is that of the United States prior to 1787.<sup>215</sup> Cramp concluded that, as a result of the lack of autonomy of the central government, this can hardly be described as a proper federal system.

Mill, like Cramp, commented that this type of federalism was inefficient because internal conflict could result from a lack of agreement between states, with the federal government, or other authority, having no power to dictate to the states to resolve any conflict: ‘A union between the governments only is a mere alliance, and subject to all the contingencies which render alliances precarious’.<sup>216</sup>

### ***C League of States***

Cramp also discussed the concept of a ‘league of states’, as differing from a federal system of government. In a ‘league of states’ there is no central government. Instead, the states act by collective agreement, with the consequence that any state can withdraw from the league at any time if they disagree with the majority of states.<sup>217</sup>

### ***D Stages of Federalism***

Three ‘stages of federalism’ were identified by Sawyer and assist in determining the current placement of the Australian system of government within the federal spectrum. These ‘stages’ are ‘co-ordinate federalism’ (also known as ‘dual federalism’),<sup>218</sup> ‘co-operative federalism’ and ‘organic federalism’.<sup>219</sup> It is argued that the Australian *Constitution* establishes a system of co-ordinate federalism, in which the central and state governments are equal. In practice, the Australian federal system also contains aspects of co-operative federalism in terms of mutual co-

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<sup>213</sup> K R Cramp, *State and Federal Constitutions of Australia* (Angus and Robertson, 1913) 107.

<sup>214</sup> K R Cramp, *State and Federal Constitutions of Australia* (Angus and Robertson, 1913) 108.

<sup>215</sup> K R Cramp, *State and Federal Constitutions of Australia* (Angus and Robertson, 1913) 108.

<sup>216</sup> John Stuart Mill, ‘Of Federal Representative Governments’ in Dimitrios Karmis and Wayne Norman (eds), *Theories of Federalism: A Reader* (Palgrave MacMillan, 2005) 165, 166–167.

<sup>217</sup> K R Cramp, *State and Federal Constitutions of Australia* (Angus and Robertson, 1913) 110.

<sup>218</sup> Geoffrey Sawyer, *Modern Federalism* (Pitman Australia, 1976) 51.

<sup>219</sup> Geoffrey Sawyer, *Modern Federalism* (Pitman Australia, 1976) 98.

operation between the two levels of government. However, Australia has moved towards a system of organic federalism (that is, centralisation) in which the federal balance has been distorted by the High Court's failure to fulfil its obligation to maintain the federal balance, as mandated by the *Constitution* and the federal theory upon which it is premised.

### 1 *Co-ordinate Federalism*

'Co-ordinate federalism' involves each of the states and central government being equal to one another. That is, there is an 'absence of *formal subordination* of the units to one another.'<sup>220</sup> However, Sawer pointed out that most often it will be the states that are equal to one another, with the central government occupying a more influential position because of its 'actual wealth, military strength, prestige, [and] influence'.<sup>221</sup> More specifically, Sawer defined 'co-ordinate federalism', which was the model preferred by the founders of the Australian *Constitution*, and requires the

centre and regions respectively to be completely equipped for the business of government, without part in each other's affairs, and engaging in areas of activity so defined that while conflict might occur — to be judicially resolved — there could be no question of the policy of one being guided by reference to the policy of the other.<sup>222</sup>

In other words, co-ordinate federalism is premised upon the independence and sovereignty of the states and central government from one another:

The Australian Founders intended to create what has come to be called a 'co-ordinate' federal system, in which the two sets of authorities — central and regional — would act independently of each other, in relation to topics so defined as to reduce to a minimum the possibility of overlap or collision. On such assumptions, the necessity and opportunity for co-operation between centre and regions would be small.<sup>223</sup>

Thus, both the central and regional governments are independent and sovereign in their respective areas — the states do not dictate to the central government, and vice

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<sup>220</sup> Geoffrey Sawer, *Modern Federalism* (Pitman Australia, 1976) 98. The italics are Sawer's.

<sup>221</sup> Geoffrey Sawer, *Modern Federalism* (Pitman Australia, 1976) 98.

<sup>222</sup> Geoffrey Sawer, *Modern Federalism* (Pitman Australia, 1976) 51–52.

<sup>223</sup> Geoffrey Sawer, *The Australian Constitution* (Australian Government Publishing Service, 1975) 34.

versa. A consequence of this is that citizens are subject to both laws of the central government, and their state.<sup>224</sup>

## 2 *Co-operative Federalism*

‘Co-operative federalism’ occurs when the various governments in a federal system co-operate with one another on joint projects or issues.<sup>225</sup> However, Sawyer noted the correlation between co-ordinate federalism and co-operative federalism. Specifically, if there is not equality of ‘bargaining strength’ between the parties, there is less ‘co-operation’ and more likely ‘domination’, often by the centre over the regions. For example, Sawyer stated, ‘The situation may arise in which a region cannot say “no” to some sort of scheme such as the centre proposes, yet it has a good deal of bargaining capacity as to the details.’<sup>226</sup>

## 3 *Organic Federalism*

The final type of federal system identified by Sawyer was ‘organic federalism’<sup>227</sup> which Sawyer defined as follows:

Organic federalism is federalism in which the centre has such extensive powers, and gives such a strong lead to regions in the most important areas of their individual as well as their co-operative activities, that the political taxonomist may hesitate to describe the result as federal at all. Taking a lead from the discussion of co-operative federalism, one may say that the organic stage begins to develop as the regions lose any substantial bargaining capacity in relation to the centre.<sup>228</sup>

Cramp also described this type of federal system under the name of ‘Federation’ or ‘Bundesstatt’. In such a federation, the central government

may have very complete and far reaching powers, enabling it to legislate and to administer its own laws, and within certain limits to be independent of State control; whilst the States, shorn of the powers which are transferred to the Federal Government, are to that extent restricted in their sovereignty. Moreover, the Federal lawmakers and administrators receive their office, not from the State governments, but directly from the people — though, as will

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<sup>224</sup> K R Cramp, *State and Federal Constitutions of Australia* (Angus and Robertson, 1913) 109.

<sup>225</sup> Geoffrey Sawyer, *Modern Federalism* (Pitman Australia, 1976) 101. See also Geoffrey Sawyer, *The Australian Constitution* (Pitman Australia, 1975) 93–95 for a discussion of co-operative federalism.

<sup>226</sup> Geoffrey Sawyer, *Modern Federalism* (Pitman Australia, 1976) 102.

<sup>227</sup> Geoffrey Sawyer, *Modern Federalism* (Pitman Australia, 1976) 104.

<sup>228</sup> Geoffrey Sawyer, *Modern Federalism* (Pitman Australia, 1976) 104.

be shown later, a proportion of the representatives are commissioned to safeguard State interests.<sup>229</sup>

As a consequence of the High Court's adoption of a literalist approach to constitutional interpretation, Australia has moved from a system of co-ordinate federalism, premised upon the equality of the states with the central government, to a system of organic federalism. It is argued that organic federalism is currently the most appropriate description of what the Australian federal system has now become — a system in which the central government has far-reaching powers to the detriment of the states whose powers are necessarily diminished.

## VII CONCLUSION

It is evident from this chapter's discussion of federal theory that a central characteristic of a federal system of government is the prominence, sovereignty and independence of the states from each other and from the central government. This intention, to preserve state power, sovereignty and equality, was incorporated by the framers into the Australian *Constitution* and is evident from the convention debates and the text and provisions of the *Constitution* itself. The importance of the states in a federal system was summarised by The Hon Richard Chaffey Baker, a delegate from South Australia, on the third day of the Sydney Convention in 1891:

Now, what is a federation? Does a federal system consist in delegating to the central authority certain powers and functions, and in delegating to the legislatures of the states certain other powers and functions? I think not. I think a federation consists in a great deal more than that. A federation, as it appears to me, consists in the fact that the compact made between the constituent states who wish to enter into that federation provides that not only shall the legislatures of the different states be supreme concerning the powers which have been delegated or left to them, but that they shall also have a voice as states concerning the powers which are delegated to the federal government.<sup>230</sup>

This chapter has examined the principles that form the basis of the Australian federation, the Constitutional provisions that provide for Australia's federal system

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<sup>229</sup> K R Cramp, *State and Federal Constitutions of Australia* (Angus and Robertson, 1913) 108–109.

<sup>230</sup> *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 6 March 1891, 111 (Richard Chaffey Baker). This quotation refers to the representation of the states in Federal Parliament by virtue of the Senate.

of government, and how they provide for the balance of power between the state and federal governments. The following chapter, Chapter 3, provides a similar overview of the principle of subsidiarity. This overview of subsidiarity is fundamental to this thesis because it will be argued in subsequent chapters that the principle of subsidiarity could form the basis of reforms to the Australian federal system to restore the federal balance and guard against further encroachment on state powers.

## **CHAPTER 3: INTRODUCTION TO THE PRINCIPLE OF SUBSIDIARITY: FROM CATHOLIC SOCIAL THEORY TO EUROPEAN UNION LAW**

It is the main contention of this thesis that the Australian federal system of government requires reform, and that the principle of subsidiarity could offer some guidance in designing these reforms. Consequently, this chapter momentarily departs from federalism and the Australian *Constitution* to examine a related concept, the principle of subsidiarity (Research Question 3). The origin of the principle of subsidiarity in Catholic social theory will first be examined. This will be followed by a brief discussion of its development as a political philosophy. Finally, this chapter will discuss what subsidiarity means in the context of European Union law through examining the incorporation and operation of the principle in the European Union. This will lead into a discussion in Chapter 4 as to the compatibility of federalism and subsidiarity. Later, Chapter 7 will expand upon potential reforms that could be made to the Australian federal system of government, based on the operation of the principle of subsidiarity in the European Union, to enhance the operation of federalism in Australia.

### **I SUBSIDIARITY AND CATHOLIC SOCIAL THEORY**

The word ‘subsidiarity’ is derived from the latin term ‘subsidium’ which means ‘to help or to aid’.<sup>1</sup> Carozza notes that the principle of subsidiarity can be traced back to ancient Greece, in the work of Plato and Aristotle, and can be seen subsequently in the work of Thomas Aquinas, Johannes Althusius, and John Stuart Mill. He notes that ‘subsequent echoes’ of the principle can be seen in the work of Montesquieu, Locke, de Tocqueville, Lincoln and Proudhon.<sup>2</sup> Subsidiarity was also discussed in ancient Rome by Marcus Aurelius, and by St Bernard in the 12<sup>th</sup> century.<sup>3</sup> However, it is beyond the scope of this thesis to trace the principle from ancient Greece and Rome. Instead, the analysis of the principle will start with its enunciation in Catholic

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<sup>1</sup> Robert A Sirico, ‘Subsidiarity, Society, and Entitlements: Understanding and Application’ (1997) 11 *Notre Dame Journal of Law Ethics and Public Policy* 549, 549.

<sup>2</sup> Paolo G Carozza, ‘Subsidiarity as a Structural Principle of International Human Rights Law’ (2003) 97 *American Journal of International Law* 38, 41.

<sup>3</sup> Dinah Shelton, ‘Subsidiarity, Democracy and Human Rights’ in Donna Gomien (ed), *Broadening the Frontiers of Human Rights: Essays in Honour of Asbjørn Eide* (Scandinavian University Press, 1993) 43, 44.

social theory, a place where subsidiarity was nurtured in its development not only as a social principle, but also a political and governmental principle.<sup>4</sup>

Subsidiarity was particularly asserted as a central principle of social theory in the Catholic Church by Pope Pius XI on 15 May 1931.<sup>5</sup> In Part 5 of his Encyclical Letter, *Quadragesimo Anno*, titled ‘The Reconstruction of the Social Order’, he advocated for a social hierarchy starting with the individual, and progressing

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<sup>4</sup> For a discussion of Thomas Aquinas’ influence on subsidiarity see, Nicholas Aroney, ‘Subsidiarity, Federalism and the Best Constitution: Thomas Aquinas on City, Province and Empire’ (2007) 26 *Law and Philosophy* 161.

<sup>5</sup> The principle of subsidiarity is similar to the concept of ‘sphere sovereignty’ from the Dutch Calvinist tradition. For a discussion of the two concepts and the differences between them see Kent A Van Til, ‘Subsidiarity and Sphere-Sovereignty: A Match Made In ...?’ (2008) 69 *Theological Studies* 610. Van Til outlines that the concept of ‘sphere sovereignty’ was developed by Abraham Kuyper in 1880. Kuyper was a theologian, academic and politician who had also been Prime Minister of the Netherlands from 1901 to 1905. Kuyper rejected the concept of French popular sovereignty in which God and any notion of common moral good were rejected in favour of each person’s own ‘self sufficiency’. His view was that God was present in ‘every sphere of life’ and that consequently, each sphere, for example ‘family life, economic life, churchly life, sports’ must be sovereign (619–626). Van Til cites Kuyper (625) from his *Lectures on Calvinism* as follows (emphasis from original):

From this *one* source, in God, *sovereignty in the individual sphere*, in the family and in every social circle, is just as directly derived as the supremacy of State authority. These two must therefore come to an understanding, and both have the same sacred obligation to maintain their God-given sovereign authority and to make it subservient to the majesty of God.

Van Til notes (625) that, according to Kuyper, the individual may operate in several spheres at once, for example, as ‘a member of a church, a citizen of the state, and a participant in any number of social spheres. In all these aspects of life, the basic convictions of the Christian faith would direct his or her activities.’ In sphere sovereignty, Van Til explains (625) that the Church educates the individual about God, whilst the State is responsible for ‘regulating the interactions amongst the spheres, assuring that the weak are not trampled, and calling on all persons to contribute to the common good.’ Van Til explains the difference between subsidiarity and sphere sovereignty (626) as follows:

In sum, I find many similarities between Kuyper’s principle of sphere sovereignty and the principle of subsidiarity. First, both derive from a worldview that is assumed to be divinely ordered. Subsidiarity derives from natural law and sphere sovereignty from the reformed doctrine of common grace. Second, both limit state-sovereignty and seek to develop the roles and scope of intermediate institutions. Third, both insist that all areas of life are influenced by faith. Fourth, both agree that the state can and should have an active role in society, but do not wish to see the state dictate to, or take over the roles of, lesser institutions. In general, the principle of subsidiarity seems to construct a hierarchy that leads to the common good, whereas sphere sovereignty provides a process by which diverse spheres may successfully interrelate.

For a further discussion of subsidiarity and sphere sovereignty, see also David H McIlroy, ‘Subsidiarity and Sphere Sovereignty: Christian Reflections on the Size, Shape and Scope of Government’ (2003) 45(4) *Journal of Church and State* 739. For additional discussion of the meaning of sphere sovereignty, see also Lael Daniel Weinberger, ‘The Business Judgment Rule and Sphere Sovereignty’ (2010) 27(2) *Thomas M Cooley Law Review* 279, 294–310. For a discussion of sphere sovereignty and the separation of Church and State, see generally Robert Joseph Renaud and Lael Daniel Weinberger, ‘Spheres of Sovereignty: Church Autonomy Doctrine and the Theological Heritage of the Separation of Church and State’ (2008) 35(1) *Northern Kentucky Law Review* 67.

upwards to the community, to organisations and corporations, and finally the State. He recommended action at an individual or lower level, wherever possible, as being preferable to action at a higher level, such as at a community or corporate level:

It is indeed true, as history clearly proves, that owing to the change in social conditions, much that was formerly done by small bodies can nowadays be accomplished only by large corporations. None the less, just as it is wrong to withdraw from the individual and commit to the community at large what private enterprise and industry can accomplish, so, too, it is an injustice, a grave evil, and a disturbance of right order for a larger and higher organization to arrogate to itself functions which can be performed efficiently by smaller and lower bodies. This is a fundamental principle of social philosophy, unshaken and unchangeable, and it retains its full truth today. Of its very nature the true aim of all social activity should be to help individual members of the social body, but never to destroy or absorb them.<sup>6</sup>

Pope Pius expanded upon the State's role in this hierarchy. In this sense the 'State' is taken to refer to the central governing body of a country. As noted above, the State should not intervene when it would be more appropriate for a lower level body or the individual to do so:

The State should leave to these smaller groups the settlement of business of minor importance; it will thus carry out with greater freedom, power, and success the tasks belonging to it, because it alone can effectively accomplish these, directing, watching, stimulating, and restraining, as circumstances suggest or necessity demands. Let those in power, therefore, be convinced that the more faithfully this principle be followed, and a graded hierarchical order exist between the various subsidiary organizations, the more excellent will be both the authority and the efficiency of the social organization as a whole, and the happier and more prosperous the condition of the State.<sup>7</sup>

The State also has a role in empowering the individual by providing the necessary conditions for the individual to prosper. For example, in his Encyclical Letter, *Centesimus Annus*, Pope John Paul II stated that the individual had a right to 'humane working hours' and 'adequate free time'. He said of the role of the State in this context:

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<sup>6</sup> Pius XI, *Quadragesimo Anno: Reconstructing the Social Order and Perfecting it Conformably to the Precepts of the Gospel in Commemoration of the Fortieth Anniversary of the Encyclical 'Rerum Novarum'* (Australian Catholic Truth Society, 1931) 29.

<sup>7</sup> Pius XI, *Quadragesimo Anno: Reconstructing the Social Order and Perfecting it Conformably to the Precepts of the Gospel in Commemoration of the Fortieth Anniversary of the Encyclical 'Rerum Novarum'* (Australian Catholic Truth Society, 1931) 29.

The State must contribute to the achievement of these goals both directly and indirectly. Indirectly and according to the *principle of subsidiarity*, by creating favourable conditions for the free exercise of economic activity, which will lead to abundant opportunities for employment and sources of wealth. Directly and according to the *principle of solidarity*, by defending the weakest, by placing certain limits on the autonomy of the parties who determine working conditions, and by ensuring in every case the necessary minimum support for the unemployed worker.<sup>8</sup>

This quotation from Pope John Paul II suggests that trade unions would be met with approval by the Catholic Church as playing a role in protecting the autonomy and rights of the individual worker. Subsidiarity and trade unions will be discussed further below. The principle of subsidiarity also lends support to workers being paid a just wage, defined by Abela as ‘sufficient to maintain a family with enough left over to allow for savings to help meet the uncertainties of life and to leave to children.’<sup>9</sup> This is discussed by Pope John Paul II in his Encyclical, *Laborem Exercens*, in which he states that workers must receive ‘just remuneration for work done’.<sup>10</sup>

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<sup>8</sup> John Paul II, *Centesimus Annus: Encyclical Letter of John Paul II* (St Paul Publications, 1991) 33–34.

<sup>9</sup> Andrew Abela, ‘Subsidiarity and the Just Wage: Implications of Catholic Social Teaching for the Minimum Wage Debate’ (2009) 12(1) *Journal of Markets and Morality* 7, 9.

<sup>10</sup> John Paul II, *Laborem Exercens* (St Paul Publications, 1981) 77. It should be noted that the Pontiff’s view is that women who are mothers should not work, and should remain in the home to attend to the moral, religious and psychological development of their children, and that when mothers engage in paid work it inhibits their ability to perform this role (79–80). However, the Pontiff states that at the same time, working women should not be discriminated against in employment (80). He states (80, emphasis in original):

it should be emphasized that, on a more general level, the whole labour process must be organized and adapted in such a way as to respect the requirements of the person and his or her forms of life, above all life in the home, taking into account the individual’s age and sex. It is a fact that in many societies women work in nearly every sector of life. But it is fitting that they should be able to fulfil their tasks *in accordance with their own nature*, without being discriminated against and without being excluded from jobs for which they are capable, but also without lack of respect for their family aspirations and for their specific role in contributing, together with men, to the good of society. The *true advancement of women* requires that labour should be structured in such a way that women do not have to pay for their advancement by abandoning what is specific to them and at the expense of the family, in which women as mothers have an irreplaceable role.

The writer disagrees with the view that mothers should be relegated to the home and child rearing. Despite the assertion that women should not be discriminated against in employment, the writer believes this approach would encourage such discrimination by providing a theological basis for it. The writer believes that these comments are inconsistent with the basis of subsidiarity to empower the individual, unless the individual is defined as a ‘male individual’.

Subsidiarity advocates a social order for the more efficient functioning of society. Specifically, if individuals or ‘subsidiary organisations’ are left to resolve the matters closest to them, larger organisations, such as the State, are better able to carry out their allocated functions. The object is that individuals are empowered and responsible for problems affecting them and close to them. At the same time, the State and its organisations function more efficiently, without overlap, and are able to more efficiently resolve matters pertinent to their respective spheres. Overall, ‘subsidiarity helps to establish the autonomy of groups and to specify the correct relationships that ought to exist between different organisations and associations within society.’<sup>11</sup>

It is interesting to note that the Church is not expressly included in the passages discussed above. It would appear from elsewhere in these Encyclical letters that the Church sits outside of this hierarchy with the ability to intervene at any level, including in social and economic issues, when morality requires it. Pope Pius XI stated that:

she [the Church] never can relinquish her God-given task of interposing her authority, not, indeed, in technical matters, for which she has neither the equipment nor the mission, but in all those that have a bearing on moral conduct. For the deposit of truth entrusted to Us by God, and Our weighty office of propagating, interpreting, and urging in season and out of season the entire moral law, demand that both social and economic questions be brought within Our supreme jurisdiction, in so far as they refer to moral issues.<sup>12</sup>

The Catholic Church’s interpretation of the principle was further expounded by Pope John Paul II in his Encyclical Letter, *Centesimus Annus*. Pope John Paul II emphasises the importance of the individual in the hierarchy, and the reasons why the individual must be empowered. Consequently, the individual occupies a higher place in the social order than the State. As noted in *The New Dictionary of Catholic Social Thought*, subsidiarity supposes that ‘the individual and the family precede the state; that is, individuals do not exist for the state but rather the state exists for the

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<sup>11</sup> Judith A Dwyer (ed), *The New Dictionary of Catholic Social Thought* (The Liturgical Press, 1994) 928.

<sup>12</sup> Pius XI, *Quadragesimo Anno: Reconstructing the Social Order and Perfecting it Conformably to the Precepts of the Gospel in Commemoration of the Fortieth Anniversary of the Encyclical ‘Rerum Novarum’* (Australian Catholic Truth Society, 1931) 15–16.

well being of individuals and families entrusted to its care ...'<sup>13</sup> In his discussion of 'State and Culture', Pope John Paul II denounced totalitarianism and emphasised the divine nature of the individual:

the root of modern totalitarianism is to be found in the denial of the transcendent dignity of the human person who, as the visible image of the invisible God, is therefore by his very nature the subject of rights which no one may violate — no individual, group, class, nation or State. Not even the majority of a social body may violate these rights, by going against the minority, by isolating, oppressing, or exploiting it, or by attempting to annihilate it.<sup>14</sup>

The individual is the vessel of God, through whom God speaks, and who is made in God's image: 'God has imprinted his own image and likeness on man (cf. Gen 1:26), conferring upon him an incomparable dignity ...'<sup>15</sup> Consequently, there is a sacred link between the individual human being and spiritual integrity, or in other words, 'one's transcendent dignity as a person'.<sup>16</sup> The Pontiff said that the relationship between the individual and the Church was fundamental to the social philosophy of the Church:

Her [the Church's] sole purpose has been *care and responsibility* for man, who has been entrusted to her by Christ himself: for *this man*, whom, as the Second Vatican Council recalls, is the only creature on earth which God willed for its own sake, and for which God has his plan, that is, a share in eternal salvation. We are not dealing here with man in the 'abstract', but with the real, 'concrete', 'historical' man. We are dealing with *each individual*, since each one is included in the mystery of redemption, and through this mystery Christ has united himself with each one forever. It follows that the Church cannot abandon man, and that '*this man* is the primary route that the Church must travel in fulfilling her mission ... the way traced out by Christ himself, the way that leads invariably through the mystery of the Incarnation and the Redemption. This, and this alone, is the principle which inspires the Church's social doctrine.'<sup>17</sup>

Further in his denunciation of totalitarianism, the Pope commented that the institutions of 'nation, society, the family, religious groups and individuals

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<sup>13</sup> Judith A Dwyer (ed), *The New Dictionary of Catholic Social Thought* (The Liturgical Press, 1994) 927.

<sup>14</sup> John Paul II, *Centesimus Annus: Encyclical Letter of John Paul II* (St Paul Publications, 1991) 84.

<sup>15</sup> John Paul II, *Centesimus Annus: Encyclical Letter of John Paul II* (St Paul Publications, 1991) 25.

<sup>16</sup> John Paul II, *Centesimus Annus: Encyclical Letter of John Paul II* (St Paul Publications, 1991) 88.

<sup>17</sup> John Paul II, *Centesimus Annus: Encyclical Letter of John Paul II* (St Paul Publications, 1991) 99–100.

themselves ... enjoy their own spheres of autonomy and sovereignty'.<sup>18</sup> This suggests that each institution in the hierarchy is respected as a separate, autonomous entity that should be given complete power over its own sphere of social governance, but at the same time complements the others. For example, in commenting on 'the role of the State in the economic sector', the Pope discusses the ways in which the State can regulate the 'economic sector'. This discussion presupposes that the State will exercise some restraint by overseeing, but not interfering with, economic rights which are the responsibility of individuals. The Pontiff stated:

Another task of the State is that of overseeing and directing the exercise of human rights in the economic sector. However, primary responsibility in this area belongs not to the State but to individuals and to the various groups and associations which make up society. The State could not directly ensure the right to work for all its citizens unless it controlled every aspect of economic life and restricted the free initiative of individuals. This does not mean, however, that the State has no competence in this domain, as was claimed by those who argued against any rules in the economic sphere. Rather, the State has a duty to sustain business activities by creating conditions which will ensure job opportunities, by stimulating those activities where they are lacking or by supporting them in moments of crisis.<sup>19</sup>

Thus there is a separate, but complementary relationship between the individual and the State. The individual is empowered to create his or her own wealth and to determine the manner by which to do so without State interference, but at the same time, the State must create the necessary policy initiatives to empower the individual to achieve this. A further example of the importance of empowering the individual, the need to guard against State intervention, and yet at the same time uphold, the complementary roles of the individual and State, is given by the Pope in his discussion of State welfare:

By intervening directly and depriving society of its responsibility, the Social Assistance State leads to a loss of human energies and an inordinate increase of public agencies, which are dominated more by bureaucratic ways of thinking than by concern for serving their clients, and which are accompanied by an enormous increase in spending. In fact, it would appear that needs are best understood and satisfied by people who are closest to them and who act as neighbours to those in need. It should be added that certain kinds of demands often call for a

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<sup>18</sup> John Paul II, *Centesimus Annus: Encyclical Letter of John Paul II* (St Paul Publications, 1991) 85.

<sup>19</sup> John Paul II, *Centesimus Annus: Encyclical Letter of John Paul II* (St Paul Publications, 1991) 89–90.

response which is not simply material but which is capable of perceiving the deeper human need. One thinks of the condition of refugees, immigrants, the elderly, the sick, and all those in circumstances which call for assistance, such as drug abusers: all these people can be helped effectively only by those who offer genuine fraternal support, in addition to the necessary care.<sup>20</sup>

In summary, in the case of welfare, the Pope is saying that the State is too distant and removed from the individual in need of assistance to have a positive impact. When the State is responsible for welfare it becomes bureaucratic and lacks empathy. The individual is best served by being helped closer to home by friends and family who can best empathise with his or her needs, and can adopt a solution to best address the individual's personal situation. Individuals are better respected in this sense because they are assisted on a personal level by those who care about them, rather than the bureaucratic State which is incapable of having any direct personal concern for them. The family, being close to the individual, is an important institution whose autonomy must be protected and which must be empowered to resolve matters affecting it.

As has been illustrated, the principle of subsidiarity concerns the individual's relationship with the State and its institutions on the basis that the individual is to be empowered as far as possible to resolve his or her own issues and to make his or her own decisions. Consequently, as noted earlier in this chapter, it is not surprising that the principle lends support to the individual's right to 'associate and organize', for example, by being a member of a trade union.<sup>21</sup> This right was emphasised by Pope Pius XI, who cited with approval *Rerum Novarum*, the Encyclical Letter of Leo XIII, in which he endorsed trade unions which he said could 'better his [the individual union member's] condition to the utmost in body, soul and property'.<sup>22</sup>

The importance of trade union membership in the promotion of individual rights and the individual's participation in political life was also noted by Pope John Paul II in *Centesimus Annus*. The Pope explained the union's role in empowering the

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<sup>20</sup> John Paul II, *Centesimus Annus: Encyclical Letter of John Paul II* (St Paul Publications, 1991) 91.

<sup>21</sup> Michael P Hornsby-Smith, *An Introduction to Catholic Social Thought* (Cambridge University Press, 2006) 106.

<sup>22</sup> Pius XI, *Quadragesimo Anno: Reconstructing the Social Order and Perfecting it Conformably to the Precepts of the Gospel in Commemoration of the Fortieth Anniversary of the Encyclical 'Rerum Novarum'* (Australian Catholic Truth Society, 1931) 12.

individual against unwarranted interference from larger organisations, such as employers and the State. Pope John Paul II, also quoting Pope Leo XIII, noted

the ‘natural human right’ to form private associations. This means above all the right to establish professional associations of employers and workers, or of workers alone. Here we find the reason for the Church’s defence and approval of the establishment of what are commonly called trade unions: certainly not because of ideological prejudices or in order to surrender to a class mentality, but because the right of association is a natural right of the human being, which therefore precedes his or her incorporation into political society. Indeed, the formation of unions ‘cannot ... be prohibited by the State’, because ‘the State is bound to protect natural rights, not destroy them; and if it forbids its citizens to form associations, it contradicts the very principle of its own existence’.<sup>23</sup>

In summary, the principle of subsidiarity in the context of Catholic social theory is premised upon empowering individuals to resolve issues that affect them without interference from larger, and often more centralised, social, religious or governmental bodies.<sup>24</sup> The individual citizen’s autonomy is respected, and there is a hierarchy consisting of the individual citizen, the family, the local community, and the State in which centralised power is limited in favour of matters being resolved at the lowest possible level, or in other words, ‘closest to the problem at hand’.<sup>25</sup> Its aim is to provide a social hierarchy which ensures that the most efficient and appropriate institution in the hierarchy deals with issues relevant to it. In this hierarchy, social institutions are sovereign and autonomous, but at the same time complement one another to achieve an efficient way of solving issues.

## II SUBSIDIARITY AS A POLITICAL PHILOSOPHY

As seen in the discussion of subsidiarity above, the principle recognises that individuals must be empowered to autonomously deal with issues directly affecting them. Similarly, groups closest to the individual, such as family and community organisations, must also have the autonomy to deal with matters affecting them,

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<sup>23</sup> John Paul II, *Centesimus Annus: Encyclical Letter of John Paul II* (St Paul Publications, 1991) 18.

<sup>24</sup> Hunnings (ed), *Encyclopaedia of European Law* (Sweet & Maxwell, 1998) s 12.0120A cited in John Warwick Montgomery, ‘Subsidiarity as a Jurisprudential and Canonical Theory’ (2002) 148 *Law and Justice: The Christian Law Review* 46, 48.

<sup>25</sup> Robert A Sirico, ‘Subsidiarity, Society, and Entitlements: Understanding and Application’ (1997) 11 *Notre Dame Journal of Law Ethics and Public Policy* 549, 551–552.

rather than having a larger body that is more removed from the problem intervening. Subsidiarity in a political sense discourages centralisation and advocates that matters should be resolved locally, and closest to the individual, wherever possible. In a governmental context, subsidiarity can be said to

mean that decisions, whether legislative or administrative acts, should be taken at the lowest practicable political level, that is as close as possible to those who are to be affected by them. Subsidiarity therefore presupposes an allocation of decision making powers within the state or other polity according to certain criteria designed to ensure that each decision is taken at the appropriate political level. The allocation of a particular decision making power to a higher or to the highest political level rather than to a lower or to the lowest political level might be made, for example, on such grounds as subject matter or effectiveness or efficiency or necessity or a combination of such grounds.<sup>26</sup>

In this sense, it is analogous to federalism, the philosophy of which is to protect the autonomy of the states and to discourage centralisation of power. The parallels, and also the differences, between federalism and subsidiarity will be explored in the following chapter.

In this chapter's discussion of subsidiarity in the context of Catholic social theory, it was also noted that the principle requires the individual to be able to fully participate in society, including having the right to earn a living, and participate in social and political life. Consequently, a key term that helps to define subsidiarity in a political sense is 'participation'. That is, a proper implementation of the principle empowers the individual to participate in, and to make a contribution to society.<sup>27</sup> As part of this participation, the Catholic Church's position is that the individual must be able to make a political contribution by being able to participate in the democratic process. In the words of the Pontifical Council for Justice and Peace:

Participation in community life is not only one of the greatest aspirations of the citizen, called to exercise freely and responsibly his civic role with and for others, but is also one of

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<sup>26</sup> John W Bridge, 'Subsidiarity as a Principle of Constitutional Law' in K D Kerameus (ed), *XIV International Congress of Comparative Law, Athens 1994, General Reports* (1996) 613 cited in John W Bridge, 'Constitutions, Powers and the Doctrine of Subsidiarity' (1999) 31 *Bracton Law Journal* 49, 50–51.

<sup>27</sup> Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church* (Libreria Editrice Vaticana, 2004) 96.

the pillars of all democratic orders and one of the major guarantees of the performance of the democratic system. Democratic government, in fact, is defined first of all by the assignment of powers and functions on the part of the people, exercised in their name, in their regard and on their behalf. It is therefore clearly evident that every democracy must be participative. This means that the different subjects of civil community at every level must be informed, listened to and involved in the exercise of the carried-out functions.<sup>28</sup>

Hence, the principle of subsidiarity, in a political context, aims to empower individual citizens and enhance democracy<sup>29</sup> through providing greater opportunities for the individual to participate in government and government decision-making that affects them.

Subsidiarity can also be regarded as a human rights principle, having its basis in the dignity of each individual.<sup>30</sup> Carozza argues that even though much human rights discourse focuses on the rights of the individual, human rights instruments, such as the *Universal Declaration of Human Rights*, embody the principle of subsidiarity by protecting the individual's right to participate in social and political life, and to belong to social and political institutions including 'marriage and family; nationality; religious affiliation, association and assembly; cultural life; organized labour; and education.'<sup>31</sup> Like subsidiarity, human rights discourse restricts the power of the State to interfere with certain civil liberties,<sup>32</sup> and recognises and celebrates the 'pluralism and diversity in society' through protecting the right of the individual to participate in various social and political relationships, such as the individual right to freedom of religion, for example.<sup>33</sup>

This is why Pope John Paul II, in his Encyclical Letter, *Centesimus Annus*, discussed above, denounced totalitarianism as a regime that denies the participation of the

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<sup>28</sup> Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church* (Libreria Editrice Vaticana, 2004) 96–97.

<sup>29</sup> Michael Longo, 'Subsidiarity and Local Environmental Governance: A Comparative and Reform Perspective' (1999) 18 *University of Tasmania Law Review* 225, 225.

<sup>30</sup> Paolo G Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 *The American Journal of International Law* 38, 46.

<sup>31</sup> Paolo G Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 *The American Journal of International Law* 38, 47.

<sup>32</sup> Paolo G Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 *The American Journal of International Law* 38, 48.

<sup>33</sup> Paolo G Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 *The American Journal of International Law* 38, 47.

individual in political life and governmental decision-making, imposes its own decisions on the individual and the family despite being far removed from them, and disempowers the individual by taking away fundamental rights in the interests of absolute centralised control of all aspects of social and political life. Shelton notes that although centralisation by itself does not automatically guarantee human rights violations, ‘the degree of possible democratic participation is inherently reduced as decision-making units become larger’.<sup>34</sup> She argues that decentralisation allows for increased ‘individual participation in self government’ which also assists in protecting the human rights of minorities against abuse by the national government because those minorities will have greater control over their own governance.<sup>35</sup> Shelton states:

In applying the principle of subsidiarity, concentrations of power are avoided both vertically (between different levels of government) and horizontally (between different branches of government at the same level). Further, all government action is limited if the matter in question can be resolved by individual action. This is not necessarily federalism, but it is the establishment of a pyramidal structure with a broad base of local action. Such a structure enhances individual liberty, democratic participation, and societal diversity. Moreover, for the resolution of many questions, it is likely to prove more efficient as well.<sup>36</sup>

Whilst, as outlined above, subsidiarity in a political sense ‘sets limits for state intervention’<sup>37</sup> by discouraging centralisation, the principle also provides ‘justification of central involvement in affairs that cannot adequately be handled at the local level.’<sup>38</sup> An example of this, again from Catholic social doctrine, can be

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<sup>34</sup> Dinah Shelton, ‘Subsidiarity, Democracy and Human Rights’ in Donna Gomien (ed) *Broadening the Frontiers of Human Rights: Essays in Honour of Asbjørn Eide* (Scandinavian University Press, 1993) 43, 54. It should be noted that Shelton’s argument is more qualified than I have represented here. For example, she states that while the centralised state may commit human rights violations, they also have a greater ability to protect against such violations through enforcement. She also states that whilst minorities may be protected from abuse from the national government through regional governance, they in turn, may abuse other minorities within their locality (54).

<sup>35</sup> Dinah Shelton, ‘Subsidiarity, Democracy and Human Rights’ in Donna Gomien (ed) *Broadening the Frontiers of Human Rights: Essays in Honour of Asbjørn Eide* (Scandinavian University Press, 1993) 43, 54.

<sup>36</sup> Dinah Shelton, ‘Subsidiarity, Democracy and Human Rights’ in Donna Gomien (ed) *Broadening the Frontiers of Human Rights: Essays in Honour of Asbjørn Eide* (Scandinavian University Press, 1993) 43, 54.

<sup>37</sup> Catechism of the Catholic Church (2000) para 1883 cited in Peter Widulski, ‘Bakke, Grutter, and the Principle of Subsidiarity’ (2005) 32 *Hastings Constitutional Law Quarterly* 847, 855.

<sup>38</sup> Daniel Halberstam, ‘Federal Powers and the Principle of Subsidiarity’ in Vikram David Amar and Mark V Tushnet (eds), *Global Perspectives on Constitutional Law* (Oxford University Press, 2009) 34, 35.

found in the Encyclical Letter of Pope John XXIII, entitled *Peace on Earth* and published on 11 April 1963. The Pontiff observed that due to advances in science and technology the world is becoming smaller, with more ‘cooperation and association’ required between countries. He proposed that there should be a ‘world-wide public authority’ established with the consent of all countries, to maintain the ‘universal common good’ which ‘must have as its fundamental objective the recognition, respect, safeguarding and promotion of the rights of the human person’.<sup>39</sup> He suggests that the existing United Nations organisation could aspire to become this world-wide public authority.<sup>40</sup> In defining the relationship between this body and individual countries and citizens, the Pontiff noted, in accordance with the principle of subsidiarity, that the world-wide body should be limited to performing only functions relevant to its function to promote the universal common good:

just as it is necessary in each state that relations which the public authority has with its citizens, families and intermediate associations be controlled and regulated by the principle of subsidiarity, it is equally necessary that the relationships which exist between the world-wide public authority and the public authorities of individual nations be governed by the same principle. This means that the world-wide public authority must tackle and solve problems of an economic, social, political or cultural character which are posed by the universal common good. For, because of the vastness, complexity and urgency of those problems, the public authorities of the individual states are not in a position to tackle them with any hope of a positive solution.<sup>41</sup>

Pope John XXIII continues by emphasising the autonomy of each level from the individual through to the world-wide public authority, and that the world-wide public authority is not intended to be superior, but to work in harmony to achieve the efficient functioning of each level:

The world-wide public authority is not intended to limit the sphere of action of the public authority of the individual state, much less take its place. On the contrary, its purpose is to create, on a world basis, an environment in which the public authorities of each state, its citizens and intermediate associations, can carry out their tasks, fulfill their duties and exercise their rights with greater security.<sup>42</sup>

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<sup>39</sup> John XXIII, *Encyclical Letter: Peace on Earth* (Pauline Books and Media, 1963) 35–36.

<sup>40</sup> John XXIII, *Encyclical Letter: Peace on Earth* (Pauline Books and Media, 1963) 37–38.

<sup>41</sup> John XXIII, *Encyclical Letter: Peace on Earth* (Pauline Books and Media, 1963) 37.

<sup>42</sup> John XXIII, *Encyclical Letter: Peace on Earth* (Pauline Books and Media, 1963) 37.

An analogy can be made here to the governance of the European Union, with the European Community representing the ‘world-wide public authority’ and the ‘individual state’ referring to the member states. Subsidiarity in the European Union is discussed in the following section.

In summary, the principle of subsidiarity is political in nature. It sets the parameters of the individual’s relationship with the various institutions in society and provides for greater participation of the individual in political life. The principle also enhances democracy and human rights by promoting the participation and dignity of the individual. It enhances the efficiency of the political system by ensuring that the most appropriate institutions resolve problems closest to the problem itself, allowing them to do so autonomously, and without interference or duplication from other institutions. The operation and meaning of the principle of subsidiarity as a political concept is also explored in the following section which looks at its application in the European Union.

### **III SUBSIDIARITY IN THE EUROPEAN UNION**

The European Union consists of 27 countries which have agreed to form ‘an economic trading bloc’.<sup>43</sup> Each of these separate countries is known as a ‘member state’ and retains its status as a separate and independent country with its own government, language and culture. In the European Union, subsidiarity is a key political and legislative concept.

#### ***A Defining Subsidiarity in European Union Law***

The principle of subsidiarity in the European Union can be seen as an adaption of the principle from Catholic social theory to European Union governance. Cooper explains this:

The essence of subsidiarity is the normative requirement that central authority governs in a manner that respects the autonomy of local authority. The basic philosophy of how higher authority should relate to lower authority remains the same, even though the identity of these

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<sup>43</sup> Gabriël A Moens and John Trone, *Commercial Law of the European Union* (Springer, 2010) 1.

authorities has changed: whereas originally subsidiarity had required the state to act in a manner that respects the autonomy of subnational groups, it now requires a supranational entity, the European Union, to act in a manner that respects the autonomy of states. In this context, subsidiarity retains the notion that collective autonomy has an inherent value that must be respected, not just as a matter of efficiency but of morality.<sup>44</sup>

Thus, the individual in Catholic social theory, whose autonomy must be respected, becomes the member state in European Union law. The principle of subsidiarity, as it was originally intended in European Union law, provides that if a matter does not fall within the exclusive competence of the relevant Community institutions ('the Community') and can be better resolved by the individual member states, the Community should *not* intervene, so that these matters can be resolved at a local level, by member states.<sup>45</sup> The basis of the principle, in the context of European Union law, is further summarised by Vause:

The principle of 'subsidiarity' in EU Law requires that action to accomplish a legitimate government objective should in principle be taken at the lowest level of government which is capable of effectively addressing the problem. In effect, subsidiarity is a guideline for contemporary power-sharing between the relatively new institutions of the EU and the constituent Member States that formed the Union.<sup>46</sup>

The philosophy of subsidiarity was of utmost importance to the member states who were wary of centralisation.<sup>47</sup> The current principle of subsidiarity is referred to on several occasions in the *Treaty on European Union* ('TEU'), which came into force

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<sup>44</sup> Ian Cooper, 'Subsidiarity and Autonomy in the European Union' in Louis W Pauly and William D Coleman (eds), *Global Ordering: Institutions and Autonomy in a Changing World* (UBC Press, 2008) 234, 236.

<sup>45</sup> Gabriël A Moens and John Trone, *Commercial Law of the European Union* (Springer, 2010) 27–28. For a discussion of 'exclusive competence' see Ronald van Ooik, 'The European Court of Justice and the Division of Competence in the European Union' in D Obradovic and N Lavranos, *Interface Between EU Law and National Law: Proceedings of the Annual Colloquium of the G K van Hogendorp Centre for European Cultural Studies* (Europa Law Publishing, 2007) 13, 14–19. Areas of exclusive competence include common commercial policy, establishing internal competition rules, monetary policy, customs and international agreements involving the Union: see Van Ooik, 14–15. For a discussion of the principle of subsidiarity in the context of European Union law see Ronald van Ooik, 'The European Court of Justice and the Division of Competence in the European Union' in D Obradovic and N Lavranos, *Interface Between EU Law and National Law: Proceedings of the Annual Colloquium of the G K van Hogendorp Centre for European Cultural Studies* (Europa Law Publishing, 2007) 13; Josephine Steiner and Lorna Woods, *EU Law* (Oxford University Press, 2009) 61–62.

<sup>46</sup> W Gary Vause, 'The Subsidiarity Principle in European Union Law — American Federalism Compared' (1995) 27 *Case Western Reserve Journal of International Law* 61, 62.

<sup>47</sup> W Gary Vause, 'The Subsidiarity Principle in European Union Law — American Federalism Compared' (1995) 27 *Case Western Reserve Journal of International Law* 61, 64–65.

on 1 December 2009,<sup>48</sup> specifically in the Resolutions section and in arts 5(1), 5(3), 5(4)<sup>49</sup> and 12(b). As these sections were originally drafted using general language, and without specific direction as to how the principle should be applied, the application of the principle was subsequently defined in instruments such as the *Protocol on the Application of the Principles of Subsidiarity and Proportionality*.<sup>50</sup> These will be outlined in detail below to provide an overview of the meaning and operation of subsidiarity in European Union law.

### **B Overview of European Union Institutions**

The European Union has a cumbersome governance structure consisting of the European Commission, the Council of the European Union, the European Parliament, the European Council and the European Court of Justice. There is also a European Central Bank, a European Ombudsman and many committees including a Committee of the Regions.<sup>51</sup> It is necessary to outline briefly these in order to understand the operation of the principle of subsidiarity in the European Union.

The Commission is the executive arm of government in the European Union.<sup>52</sup> Its members are called ‘Commissioners’ and are appointed for a five year term<sup>53</sup> by the Council, with suggestions for their appointments being made by member states.<sup>54</sup> The Commission is headed by a President elected by the European Parliament.<sup>55</sup> It oversees the treaties that govern the European Union and has the responsibility of implementing legislative measures by regulations and directives<sup>56</sup> made by the

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<sup>48</sup> *TEU* art 5(3) states: ‘Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at a central level or at a regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.’

<sup>49</sup> This article was formerly art 3(b) of the *TEU*.

<sup>50</sup> *Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality* [2010] OJ C 83/206 (‘*Protocol*’).

<sup>51</sup> For an overview of these institutions, see Gabriël A Moens and John Trone, *Commercial Law of the European Union* (Springer, 2010) 18–25.

<sup>52</sup> *TEU* art 17(1).

<sup>53</sup> *TEU* art 17(3).

<sup>54</sup> *TEU* art 17(7).

<sup>55</sup> *TEU* art 17(7).

<sup>56</sup> *TEU* art 17(1). In the European Union, the term ‘regulation’ is used instead of ‘Legislation’. In addition, a ‘Directive’ may also be made, which is a lesser form of regulation. Bridge defines a ‘Directive’ as follows: ‘The essence of a Directive is that it specifies a binding objective which is to be achieved but leaves the choice of form and methods for its implementation to the discretion of each Member State. By this means the Community will achieve its objective while its actual implementation will be at the lower political level of each Member State and by a form and method

European Parliament. The Commission also formulates policy for the European Union.<sup>57</sup> Due to its executive nature, the Commissioners are expected to act in the ‘general interests’ of the European Union, rather than those of their respective countries.<sup>58</sup>

Like the Commission, the Council is somewhat executive in nature, having a ‘policy-making and coordinating role.’<sup>59</sup> However, its Members represent the interests of their respective governments and act on their governments’ instructions.<sup>60</sup> The Council also has legislative and budgetary powers jointly with the European Parliament.<sup>61</sup> In order to be passed, a proposed law must receive a qualified majority, meaning 55% of the member states must support it, and those States must comprise 65% of the population of the European Union.<sup>62</sup>

Whereas the Council represents the governments of the European Union, the European Parliament represents the citizens of the European Union,<sup>63</sup> is directly elected by them, and is the political arm of governance in the European Union.<sup>64</sup> It has legislative power and drafts the annual budget.<sup>65</sup> It also makes the ultimate decision as to whether any new member states can join the European Union.<sup>66</sup> Proposed laws generally originate in the Commission, which submits the legislative proposal to Council and Parliament. This is called the ‘ordinary legislative

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appropriate to each’: See John W Bridge, ‘Constitutions, Powers and the Doctrine of Subsidiarity’ (1999) 31 *Bracton Law Journal* 49, 51–52. Therefore a Directive will often be more consistent with respecting the principle of subsidiarity.

<sup>57</sup> TEU art 17(1).

<sup>58</sup> TEU art 17(1). For a discussion of the role and functions of the Commission, see Gabriël A Moens and John Trone, *Commercial Law of the European Union* (Springer, 2010) 18–19. See also *Treaty on the Functioning of the European Union*, opened for signature 7 February 1992, [2009] OJ C 115/199 (entered into force 1 November 1993) (‘TFEU’), arts 244–250.

<sup>59</sup> Gabriël A Moens and John Trone, *Commercial Law of the European Union* (Springer, 2010) 20. See TEU art 16(1).

<sup>60</sup> TEU art 16(2).

<sup>61</sup> TEU arts 14(1) and 16(1).

<sup>62</sup> TEU art 16(4). For a discussion of the Council see Gabriël A Moens and John Trone, *Commercial Law of the European Union* (Springer, 2010) 20. See also TFEU arts 237–243.

<sup>63</sup> TEU art 10(2).

<sup>64</sup> TEU art 14(2).

<sup>65</sup> Gabriël A Moens and John Trone, *Commercial Law of the European Union* (Springer, 2010) 20–21. See TEU art 14(1).

<sup>66</sup> TEU art 49.

procedure'.<sup>67</sup> There is a process of communication between the Council and Parliament which may result in the adoption (that is, enactment) of the proposal. Parliament will inform the Council about its 'position' on the proposal. If Council agrees the proposal is adopted. Council may not agree, and may put forward its own position, which, if Parliament agrees, will result in the act being adopted.<sup>68</sup>

The heads of state and governments of the various countries that are members of the European Union form the European Council and make decisions by 'consensus'.<sup>69</sup> It is a political and policy-making body, as opposed to a legislative one.<sup>70</sup> The European Council is headed by a President, appointed for a two-and-a-half-year term, by a qualified majority vote of the European Council.<sup>71</sup>

The European Court of Justice comprises one Judge from each member state.<sup>72</sup> Judges are appointed for a six-year term, are amongst the highest judicial officers in their countries,<sup>73</sup> are independent,<sup>74</sup> and cannot be dismissed by their member states.<sup>75</sup> Court judgments are collective, which means that there are no dissenting judgments, and no one Judge is attributed authorship.<sup>76</sup> The Court is not bound to follow prior judgments, although it generally does so.<sup>77</sup> There are eight Advocates-General who independently advise the Court as to how it should decide cases, and who are not limited to arguments raised by the parties.<sup>78</sup> That is, they can consider issues not argued by the parties. The Court will scrutinise these opinions closely but

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<sup>67</sup> TFEU arts 289 and 294. See also Gabriël A Moens and John Trone, *Commercial Law of the European Union* (Springer, 2010) 21 for an outline of the 'ordinary legislative procedure' and for the legislative procedure when amendments are proposed and not accepted.

<sup>68</sup> TFEU arts 289 and 294. For an overview of the role of the Council see Gabriël A Moens and John Trone, *Commercial Law of the European Union* (Springer, 2010) 20.

<sup>69</sup> TEU art 15(4).

<sup>70</sup> TEU art 15(1).

<sup>71</sup> TEU art 15(2). For an overview of the role of the European Council see Gabriël A Moens and John Trone, *Commercial Law of the European Union* (Springer, 2010) 22. See also TFEU arts 235–236.

<sup>72</sup> TEU art 19(2).

<sup>73</sup> TFEU art 253.

<sup>74</sup> TFEU art 254.

<sup>75</sup> Protocol (No 3) on the Statute of the Court of Justice of the European Union [2010] OJ C 83/210 ('Statute of the Court of Justice'), arts 5 and 6. See also Gabriël A Moens and John Trone, *Commercial Law of the European Union* (Springer, 2010) 337–338.

<sup>76</sup> Statute of the Court of Justice arts 35 and 36. See also Gabriël A Moens and John Trone, *Commercial Law of the European Union* (Springer, 2010) 338.

<sup>77</sup> Gabriël A Moens and John Trone, *Commercial Law of the European Union* (Springer, 2010) 338–339.

<sup>78</sup> TFEU arts 252 and 253.

is not bound to follow them.<sup>79</sup> Moens and Trone summarise the jurisdiction of the Court as follows:

Broadly, the Court's jurisdiction is of four kinds; to give opinions on the compatibility of international agreements with the Treaties (Art 218(11) *TFEU*); to review the legality of the acts of EU institutions (Art 263 *TFEU*); to give preliminary rulings regarding the interpretation of the Treaties or the validity or interpretation of secondary law in respect of matters referred to it by national courts (Art 267 *TFEU*); and to hear appeals from the General Court on questions of law (Art 256(1) *TFEU*). Thus, it performs a number of functions which in the legal systems of the Member States are usually divided among the various branches of the judiciary.<sup>80</sup>

The final institution relevant to this chapter's discussion of subsidiarity is the Committee of the Regions. Moens and Trone describe the Committee as 'an advisory body representing the regional and local governments of the EU (Art 300(4) *TFEU*)'.<sup>81</sup> The Commission and Council must consult the Committee about 'issues with a regional or local impact (Art 307 *TFEU*)'.<sup>82</sup> The Committee has standing to bring an action before the European Court of Justice if, for example, it has not been consulted by the Commission and Council when required.<sup>83</sup>

### ***C Subsidiarity and Treaty Provisions***

The first reference to the principle of subsidiarity in the *TEU* is contained in the Resolutions which provide that states parties: 'Resolved to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity.' Following this, art 5(1) provides, 'The use of Union competences is governed by the principles of subsidiarity and proportionality.' Article 5(3) of the *TEU* provides further guidance about the meaning of the principle:

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<sup>79</sup> For a discussion of the role of Advocates-General, see Gabriël A Moens and John Trone, *Commercial Law of the European Union* (Springer, 2010) 338–339.

<sup>80</sup> Gabriël A Moens and John Trone, *Commercial Law of the European Union* (Springer, 2010) 346. As noted in this quotation, there is also a 'General Court' empowered to hear certain matters at first instance, for example, compensation for damage and disputes under arbitration clauses: See Moens and Trone, 341 for an outline of the 'General Court'. For a detailed overview of the role of the European Court of Justice see Moens and Trone, Chapter 11.

<sup>81</sup> Gabriël A Moens and John Trone, *Commercial Law of the European Union* (Springer, 2010) 24.

<sup>82</sup> Gabriël A Moens and John Trone, *Commercial Law of the European Union* (Springer, 2010) 24–25.

<sup>83</sup> See *TFEU* art 263 and Gabriël A Moens and John Trone, *Commercial Law of the European Union* (Springer, 2010) 25.

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at a central level or at a regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol ...

It should be noted at this point that the key focus of this chapter is the principle of subsidiarity. As a consequence, this thesis will not discuss the concept of 'proportionality' in any detail. Briefly, the principle of proportionality is dealt with in the last paragraph of art 5(3) which provides, 'Any action of the community shall not go beyond what is necessary to achieve the objectives of the Treaty.' Jean-Claude Piris as 'Legal Advisor to the Council of the European Union and Director-General of the Council's Legal Service' notes that proportionality applies to both exclusive and non-exclusive areas of competence and cites the test for proportionality, as interpreted in European Union case law.<sup>84</sup> This test requires that a law must use appropriate means to achieve its objective, and no more.<sup>85</sup> Piris gives the following example to illustrate the operation of the proportionality principle:

To give a typical example of the principle of proportionality, one might cite cases where, when the objective of a measure is to protect consumers, a decision might be taken that the composition of a product must be properly indicated on the labelling rather than requiring the details of its composition to be harmonised, which would be tantamount to banning certain kinds of production. Another example is that of certain very localised products, the production and sale of which are authorised in one or two Member States, but which others do not want to be sold in their territory. Rather than banning such products, it might be

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<sup>84</sup> Jean-Claude Piris, *Statement by Mr Piris to the Working Group on the Principle of Subsidiarity of the Convention on the Future of the Union* (Brussels, 26 June 2002), WD 04 WG I, 10.

<sup>85</sup> Case 56/86 OBEA [1987] ECR 1449, 28 cited in Jean-Claude Piris, *Statement by Mr Piris to the Working Group on the Principle of Subsidiarity of the Convention on the Future of the Union* (Brussels, 26 June 2002), WD 04 WG I, 10.

specified that they cannot be exported to the other Member States but are reserved for local consumption (eg. ‘snus’, chewing tobacco used in Sweden and Finland).<sup>86</sup>

The question of proportionality is determined after that of subsidiarity. Thus, as Piris explains, where there is shared competence, the first question is whether ‘the Treaty has granted the Community power to act’ in the first place; the second is whether ‘the objectives of the action can be better achieved at Community level’ (subsidiarity); and the third is ‘how and how intensively to act, limiting action to what is strictly necessary’ (proportionality).<sup>87</sup> Steyger also notes that proportionality requires that if the Treaty does not state the legal instrument to be used, a less binding action, such as a directive (which is binding only as to the result to be achieved, but not the form and method of achieving it),<sup>88</sup> should be used instead of a regulation.<sup>89</sup> Moussis further notes that less intrusive measures could include providing financial support, or a recommendation may suffice.<sup>90</sup>

With respect to ‘exclusive competence’, art 2 of the *Treaty on the Functioning of the European Union* (‘TFEU’) provides that member states cannot legislate or adopt legally binding acts in areas where relevant treaties give exclusive competence to the European Union. Article 3(1) specifies that the Union has exclusive competence over the areas of: ‘customs union’; ‘the establishing of the competition rules necessary for the functioning of the internal market’; ‘monetary policy for Member States whose currency is the Euro’; ‘the conservation of marine biological resources under the common fisheries policy’; and ‘common commercial policy’.<sup>91</sup> Article 3(2) provides that the Union has exclusive competence to conclude international agreements where they are required to do so by regulations, or where the agreement affects the internal functioning of the Union.

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<sup>86</sup> Jean-Claude Piris, *Statement by Mr Piris to the Working Group on the Principle of Subsidiarity of the Convention on the Future of the Union* (Brussels, 26 June 2002), WD 04 WG I, 10.

<sup>87</sup> Jean-Claude Piris, *Statement by Mr Piris to the Working Group on the Principle of Subsidiarity of the Convention on the Future of the Union* (Brussels, 26 June 2002), WD 04 WG I, 9.

<sup>88</sup> TFEU art 288.

<sup>89</sup> Elies Steyger, *Europe and its Members: A Constitutional Approach* (Dartmouth Publishing, 1995) 66–67.

<sup>90</sup> Nicholas Moussis, *Guide to European Policies* (European Study Service, 14<sup>th</sup> ed, 2008–2009) 30.

<sup>91</sup> TFEU art 3(1)(a)–(e).

The European Union and member states are also given ‘shared competence’ by art 4(2) of the *TFEU* over the areas of ‘internal market’; ‘social policy’; ‘economic, social and territorial cohesion’, ‘agriculture and fisheries, excluding conservation of marine biological resources’; ‘environment’; ‘consumer protection’; ‘transport’; ‘trans-European networks’; ‘energy’; the ‘area of freedom, security and justice’; and ‘common safety concerns in public health matters’.<sup>92</sup>

The Union and member states both have competence over aspects of ‘research, technological development and space’ where the Union can ‘define and implement programs’, according to art 4(3), and ‘development cooperation and humanitarian aid’ where the Union can ‘carry out activities and conduct a common policy’ in art 4(4). However, in both cases member states are not prevented from exercising their competence. Consequently, disputes between member states and the Union will arise in these latter two areas, where the community has ‘non-exclusive competence’.<sup>93</sup> That is, where there is shared competence, or where both have competence.

Article 12 also provides direction to national Parliaments whose countries are members of the European Union, to respect the principle of subsidiarity. It states:

National Parliaments contribute actively to the good functioning of the Union: ... (b) by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality ...

On 25 October 1993, the European Commission, Council and European Parliament made a declaration known as the *Interinstitutional Declaration on Democracy, Transparency and Subsidiarity*<sup>94</sup> in which they agreed to adopt an ‘Institutional Agreement on procedures for implementing the principle of subsidiarity’.<sup>95</sup> The Agreement was in part made in response to Denmark’s refusal, at a Referendum on 2

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<sup>92</sup> *TFEU* art 4(2)(a)–(k).

<sup>93</sup> Jean-Claude Piris, *Statement by Mr Piris to the Working Group on the Principle of Subsidiarity of the Convention on the Future of the Union* (Brussels, 26 June 2002), WD 04 WG I, 8.

<sup>94</sup> ‘Interinstitutional Declaration on Democracy, Transparency and Subsidiarity’ (1993) 10-1993 *Bulletin of European Communities* 118.

<sup>95</sup> ‘Interinstitutional Declaration on Democracy, Transparency and Subsidiarity’ (1993) 10-1993 *Bulletin of European Communities* 118, 119.

June 1992, to ratify the *TEU*. The refusal was generally regarded to be due to concerns about increased centralisation in the European Union.<sup>96</sup>

The Agreement, whilst brief, highlights the importance of the principle of subsidiarity in its general provisions.<sup>97</sup> It then outlines procedures to ensure the principle is observed.<sup>98</sup> For example, when exercising its right of initiative, the Commission must take the principle ‘into account’ and ‘show that it has been observed’. The European Parliament and Council are also required to take the principle into account when ‘exercising the powers conferred on them by Articles 138b and 152 respectively of the Treaty establishing the European Community’. More specifically, the Commission must include a statement about compliance with the principle in its explanatory memorandum. Also, a ‘justification’ of the principle must be given by the European Parliament or Council if they attempt to amend the ‘Commission’s text’ to include ‘more extensive or intensive intervention by the Community’. The final procedural statement in the Agreement is that the Commission, European Parliament and Council must adopt ‘internal procedures’ to check regularly that any action proposed to be taken by them complies with the principle of subsidiarity. The Agreement also provides that compliance with the principle of subsidiarity shall be regularly reviewed in accordance with ‘normal Community process’ and ‘the rules laid down in the Treaties’. It also provides for an annual report to be prepared detailing compliance with the principle, which shall be debated publicly.<sup>99</sup>

#### ***D Protocol on the Application of the Principles of Subsidiarity and Proportionality***

The *Protocol on the Application of the Principles of Subsidiarity and Proportionality* (‘the *Protocol*’), mentioned above in art 5(3) of the *TEU* was included in the *Treaty*

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<sup>96</sup> Gráinne de Búrca, ‘Reappraising Subsidiarity’s Significance After Amsterdam’ (Jean Monnet Working Paper 7/99, Harvard Law School, 2000) 25. See also Elies Steyger, *Europe and its Members: A Constitutional Approach* (Dartmouth Publishing, 1995) 63.

<sup>97</sup> ‘Interinstitutional Agreement between the European Parliament, the Council and the Commission on Procedures for Implementing the Principle of Subsidiarity’ (1993) 10-1993 *Bulletin of European Communities* 119, ‘General Provisions’.

<sup>98</sup> ‘Interinstitutional Agreement between the European Parliament, the Council and the Commission on Procedures for Implementing the Principle of Subsidiarity’ (1993) 10-1993 *Bulletin of European Communities* 119, ‘Procedures’.

<sup>99</sup> ‘Interinstitutional Agreement between the European Parliament, the Council and the Commission on Procedures for Implementing the Principle of Subsidiarity’ (1993) 10-1993 *Bulletin of European Communities* 119, ‘Review of Compliance with the Principle of Subsidiarity’.

of Lisbon, which was signed on 13 December 2007. The *Treaty of Lisbon* amends both the *TEU* and the *Treaty Establishing the European Community*, which it renamed as the *Treaty on the Functioning of the European Union* ('*TFEU*').<sup>100</sup>

The *Protocol* declares that the contracting parties are 'wishing to ensure that decisions are taken as closely as possible to the citizens of the Union'. It provides guidance and direction to each institution in the European Union, namely the European Commission, the Council and European Parliament to adhere to the principles of subsidiarity and proportionality when drafting regulations.<sup>101</sup> Importantly, the *Protocol* provides for an 'early warning system' in the form of a process where national Parliaments can comment on whether a regulation conforms with subsidiarity before it is enacted.<sup>102</sup> This process is outlined below.

Article 2 provides for wide consultation which must 'take into account the regional and local dimension of the action envisaged.' The requirement to consult is dispensed with, however, in 'cases of exceptional urgency'.<sup>103</sup> Draft regulations must be 'justified' as complying with the principles by containing 'a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality.'<sup>104</sup> National Parliaments are to be given eight weeks to give a 'reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity.'<sup>105</sup> National Parliaments are also directed to consult with regional Parliaments 'where appropriate.'<sup>106</sup>

Article 7(1) provides that these opinions must be taken into account by the body which has drafted the legislative act.<sup>107</sup> Article 7(1) also provides that the opinion of

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<sup>100</sup> See Gabriël A Moens and John Trone, *Commercial Law of the European Union* (Springer, 2010) 9.

<sup>101</sup> *Protocol* arts 3, 4, and 5.

<sup>102</sup> Peter Norman, *The Accidental Constitution: The Making of Europe's Constitutional Treaty* (EuroComment, 2005) 76.

<sup>103</sup> *Protocol* art 2 reads in full, 'Before proposing legislative acts, the Commission shall consult widely. Such consultations shall, where appropriate, take into account the regional and local dimension of the action envisaged. In cases of exceptional urgency, the Commission shall not conduct such consultations. It shall give reasons for its decision in its proposal.'

<sup>104</sup> *Protocol* art 5.

<sup>105</sup> *Protocol* art 6.

<sup>106</sup> *Protocol* art 6.

<sup>107</sup> *Protocol* art 7(1).

a national Parliament shall be equal to two votes, with one vote for each house of Parliament if the national Parliament is bicameral.<sup>108</sup>

Articles 7(2) and 7(3) specify procedures for reviewing the draft regulations, if the requisite number of national Parliaments give opinions to the effect that the principle has not been complied with. Under art 7(2), if these opinions with respect to a draft legislative act total one third of votes allocated to national Parliaments, then the draft legislative act ‘must be reviewed’.<sup>109</sup> However, the required number of votes is reduced to one quarter if the draft legislative act concerned ‘freedom, security and justice’ and was made under art 76 of the *TFEU*.<sup>110</sup> After this review the body drafting the regulation ‘may decide to maintain, amend or withdraw the draft’ and must provide reasons for their decision.<sup>111</sup>

In addition to this, art 7(3) provides that if ‘under ordinary legislative procedure’,<sup>112</sup> in which the proposal for a legislative act originates in the Commission, reasoned opinions are received on a ‘proposal for a legislative act’ that total a ‘simple majority’<sup>113</sup> the proposal also ‘must be reviewed’. Similarly, the Commission ‘may decide to maintain, amend or withdraw the proposal’.<sup>114</sup> If the Commission chooses to ‘maintain’, that is, proceed with the proposal, the Commission itself must give a reasoned opinion as to why the proposal complies with the principle of subsidiarity. This opinion must be submitted to the European Parliament and Council who must consider the proposal’s compatibility with the principle, as well as the reasoned opinions of the national Parliaments and Commission before the first reading.<sup>115</sup> The proposal ‘shall be given no further consideration’ if 55% of Council members, or a

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<sup>108</sup> *Protocol* art 7(1).

<sup>109</sup> *Protocol* art 7(2).

<sup>110</sup> *Protocol* art 7(2).

<sup>111</sup> *Protocol* art 7(2).

<sup>112</sup> See *TFEU* art 294, which provides that the ‘ordinary legislative procedure’ is based on ‘co-decision’, which is ‘based on the principle of parity and means that neither institution (European Parliament or Council) may adopt legislation without the other’s assent’: European Commission, *The Co-Decision or Ordinary Legislative Procedure* (31 January 2012) <[http://ec.europa.eu/codecision/procedure/index\\_en.htm](http://ec.europa.eu/codecision/procedure/index_en.htm)>. For an explanation of the process of the ‘ordinary legislative procedure’ see Gabriël A Moens and John Trone, *Commercial Law of the European Union* (Springer, 2010) 21. See also, *Joint Declaration on Practical Arrangements for the Co-Decision Procedure (Article 251 of the EC Treaty)*, [2007] OJ C 145/02, art 5.

<sup>113</sup> ‘Simple majority’ is more than 50% of the persons voting. See *TFEU* art 238 formerly *Treaty Establishing the European Community*, opened for signature 7 February 1992, [1992] OJ C 224/6 (entered into force 1 November 1993) (‘*EEC*’) art 205(1) and (2).

<sup>114</sup> *Protocol* art 7(3).

<sup>115</sup> *Protocol* art 7(3)(a).

majority of votes in the European Parliament find that the proposal is not compatible with the principle.<sup>116</sup>

Article 9 of the Protocol requires that the Commission prepare and submit an annual report to the European Parliament, Council and national Parliaments on the application of the principle of subsidiarity in art 3b of the *TEU*, now art 5 of the *TEU*.

In summary, the practical application of the principle of subsidiarity in the European Union is primarily as a process of legislative review, prior to regulations being proposed or enacted. Cooper suggests that this makes the success of the principle difficult to assess because it is difficult to measure when action is not taken.<sup>117</sup> However, if a regulation is enacted which a member state or states believes infringes the principle of subsidiarity, it can be challenged in the European Court of Justice. Therefore, decisions of the European Court of Justice make it possible to draw some conclusions about the meaning and effectiveness of the principle of subsidiarity in European Union law. These decisions will be considered in detail in Chapter 7 which will demonstrate that whilst subsidiarity has been successful as a procedural safeguard in the European Union, it has not been successful as a judicial one.

### ***E Subsidiarity and the European Court of Justice***

Article 19(3) of the *TEU* empowers the European Court of Justice to ‘rule on actions brought by Member States’. In addition, the second paragraph of art 263 of the *TFEU* gives the Court jurisdiction with respect to actions brought by a member state on the grounds of lack of competence, infringement of essential procedural requirements, infringement of treaties or any rule of law relating to treaties. This would empower the Court to hear and determine a matter commenced by a member state or states on the basis of subsidiarity. Article 8 of the *Protocol* specifically refers to subsidiarity, stating that the European Court of Justice is empowered to hear and determine an action commenced by a member state or by the Committee of the Regions alleging that a legislative act has infringed the principle of subsidiarity. The

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<sup>116</sup> *Protocol* art 7(3)(b).

<sup>117</sup> Ian Cooper, ‘Subsidiarity and Autonomy in the European Union’ in Louis W Pauly and William D Coleman, *Global Ordering: Institutions and Autonomy in a Changing World* (UBC Press, 2008) 234, 242.

European Court of Justice could annul regulations or directives that infringed the principle.

However, as will be seen in Chapter 7, the Court has been reluctant to employ the principle of subsidiarity to annul regulations. Tridimas suggests that this is because even though subsidiarity is a ‘legally binding rule’, whether or not it has been complied with involves a political and subjective judgment which the Court would rather leave to the relevant Community institutions to make.<sup>118</sup> Tridimas observes that subsidiarity is most often used as a peripheral or ‘supporting argument’ rather than the main ground of review itself.<sup>119</sup> In the words of Tridimas: ‘Subsidiarity has greater potential as a procedural ground than as a ground of substance’.<sup>120</sup>

### ***F A Legal, Political or Philosophical Concept?***

There is conflicting commentary as to the exact status of the principle of subsidiarity in the European Union. That is, is the principle of subsidiarity a binding legal principle, or a political or policy-based principle that is merely aspirational? Steyger argues that ‘its incorporation into the Treaty elevates it to a legal principle’, although she acknowledges the argument that it is also a political principle.<sup>121</sup> Carozza goes further, referring to it as one of the European Union’s ‘central constitutional principles’.<sup>122</sup> Alternately, Kiiver states that, ‘The principle is not strictly legal but bears political implications, and moreover it has distinct anti-federalist connotations.’<sup>123</sup> However, de Búrca describes the principle of subsidiarity as both political and legal, but at the same time acknowledges the principle as having a philosophical basis that denies categorisation:

The notion of subsidiarity is clearly a political and legal principle which was adopted and developed within the EU to address issues of competence and the exercise of power as between the Member States and the European institutions. But it can also be more broadly understood as part of a language which attempts to articulate and to mediate, albeit within

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<sup>118</sup> Takis Tridimas, *The General Principles of EU Law* (Oxford University Press, 2006) 185.

<sup>119</sup> Takis Tridimas, *The General Principles of EU Law* (Oxford University Press, 2006) 184.

<sup>120</sup> Takis Tridimas, *The General Principles of EU Law* (Oxford University Press, 2006) 185.

<sup>121</sup> Elies Steyger, *Europe and its Members: A Constitutional Approach* (Dartmouth Publishing, 1995) 64.

<sup>122</sup> Paolo G Carozza, ‘Subsidiarity as a Structural Principle of International Human Rights Law’ (2003) 97 *The American Journal of International Law* 38, 38.

<sup>123</sup> Philipp Kiiver, *The National Parliaments in the European Union: A Critical View on EU Constitution-Building* (Kluwer Law International, 2006) 157–158.

this particular geographical and political context, some of the fundamental questions of political authority, government and governance which arise in an increasingly interlocking and interdependent world. As Held has aptly commented, ‘the very process of governance seems to be “escaping the categories” of the nation state.’<sup>124</sup>

Thus, the principle, in the context of European Union law, is multifaceted. It can aptly be described as ‘all of the above’; namely legal, political (including policy-based) and philosophical. Jean-Claude Piris, commented that subsidiarity in the European Union context is ‘an essentially political and subjective principle’<sup>125</sup> due to the degree of discretion and restraint involved in the application of the principle. As Piris notes, this is because the central question to ask in cases of shared competence when deciding whether the Community will exercise the power, or whether individual member states should, involves a ‘value judgment’.<sup>126</sup> The question is whether ‘the objective [of the power] may be **better** achieved by the Community than by the Member States.’<sup>127</sup>

Perhaps, however, the true categorisation of the principle can be based on its limited effectiveness, which will be discussed in Chapter 7. As will also be discussed in Chapter 7, the application of the principle in the European Union has not succeeded as a legal principle, and is more of a political or policy-based theory that is aspired to, but difficult to enforce in reality.

#### IV CONCLUSION

The principle of subsidiarity has many facets. It is a principle of Catholic social theory, a political philosophy, and a fundamental principle in European Union law. In a social context, the principle supports individual autonomy and individual rights by mandating that decision-making and issues should be resolved by the individual, or at the very least, as close to the individual as possible. In a political sense, the

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<sup>124</sup> Gráinne de Búrca, ‘Reappraising Subsidiarity’s Significance After Amsterdam’ (Jean Monnet Working Paper 7/99, Harvard Law School, 2000) 3.

<sup>125</sup> Jean-Claude Piris, *Statement by Mr Piris to the Working Group on the Principle of Subsidiarity of the Convention on the Future of the Union* (Brussels, 26 June 2002), WD 04 WG I, 8.

<sup>126</sup> Jean-Claude Piris, *Statement by Mr Piris to the Working Group on the Principle of Subsidiarity of the Convention on the Future of the Union* (Brussels, 26 June 2002), WD 04 WG I, 8.

<sup>127</sup> Jean-Claude Piris, *Statement by Mr Piris to the Working Group on the Principle of Subsidiarity of the Convention on the Future of the Union* (Brussels, 26 June 2002), WD 04 WG I, 7. Emphasis in original.

principle promotes the empowerment and involvement of the individual in the political process, through participation in voting, political life and political organisations such as trade unions and political parties. The political and legal aspects of the principle can also be seen in the European Union where the governments of member states have the opportunity to provide opinions on whether a proposed regulation infringes the principle, and where the European Court of Justice can invalidate legislation that fails to comply. In a political sense the principle also claims to guard against duplication in governance because it advocates for the level of government closest to the problem to resolve it. In this sense, there is some comparability between subsidiarity and federalism which will be analysed in the following chapter. Specifically, the following chapter will outline the similarities and differences between subsidiarity and federalism, and will assess whether subsidiarity could potentially form the basis of reforms to the Australian federal system of government to better protect the federal balance.

## CHAPTER 4: A CONCEPTUAL COMPARISON OF FEDERAL THEORY AND SUBSIDIARITY

The previous chapter outlined the principle of subsidiarity in detail, concluding with the observation that there is some comparability between subsidiarity and federalism which would be explored further in this chapter. The following introductory comments are intended to situate this chapter within the broader context of this thesis.

The previous two chapters were primarily theory based. Specifically, Chapter 2 focused on devising an accurate definition of federalism, in its theoretical sense (Research Question 1), concluding with how that theory manifested itself in the actual provisions of the Australian *Constitution* (Research Question 2). Chapter 3 contained a similar analysis of the principle of subsidiarity. Its focus was primarily theoretical, but concluded with an analysis of how the principle operated in the European Union with reference to relevant treaty provisions<sup>1</sup> and the *Protocol on the Application of the Principles of Subsidiarity and Proportionality*<sup>2</sup> (Research Question 3).

This chapter proposes to start where Chapters 2 and 3 left off, by exploring the relationship between the two concepts in more detail as they were intended to operate at a textual and institutional level in Australia and the European Union (Research Question 4). The main focus of this chapter is to undertake a conceptual comparison through an examination of how the theories of federalism and subsidiarity are intended to operate with reference to specific treaty provisions, constitutional provisions and the role of the relevant governmental institutions in which federal powers are reposed, and through which subsidiarity is policed.

The structure of this chapter is as follows. The chapter will commence with an overview of academic literature which highlights the interconnectedness of the two concepts and a discussion of the general theoretical similarities between Australian

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<sup>1</sup> *TEU* art 5(3). Also, relevant provisions of the *TFEU* were discussed.

<sup>2</sup> *Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality* [2010] OJ C 83/206 ('*Protocol*').

federalism and subsidiarity in the European Union. The second part of the chapter will examine the fundamental differences between federation by way of a constitution and unification by virtue of a treaty, to assess whether both are capable of being federal in nature. The third part of this chapter will undertake a conceptual comparison of federalism and subsidiarity. That is, it will examine in further detail the provisions and nature of the formative documents that embody the two concepts, namely the *TEU* and the Commonwealth *Constitution*. Reference will be made to the institutions of Parliament, the Judiciary and the Executive/Administration.

Building on this analysis, this chapter will conclude by making some introductory observations as to whether it is possible for aspects of the principle of subsidiarity to be applied to enhance and reform Australian federalism (Research Question 7). The exact nature of the reforms that should be made will be explored in more detail in Chapter 7.

## **I THEORETICAL COMPARISON OF FEDERALISM AND SUBSIDIARITY IN ACADEMIC COMMENTARY**

A review of relevant academic commentary suggests that there is an overall compatibility between the two concepts of federalism and subsidiarity. For example, Halberstam notes the decentralising tendency of the two concepts: ‘Federal systems across the world are generally designed according to the principle of subsidiarity, which in one form or another holds that the central government should play only a supporting role in governance, acting if, and only if the constituent units of government are incapable of acting on their own.’<sup>3</sup>

On the other hand, Blank argues that whilst there are some similarities between federalism and subsidiarity in general ‘they also radically differ from one another’.<sup>4</sup> He notes that the similarities include the fact that both concepts concern the ‘relationship between different levels of government and different spheres of

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<sup>3</sup> Daniel Halberstam, ‘Federal Powers and the Principle of Subsidiarity’ in Vikram David Amar and Mark V Tushnet (eds), *Global Perspectives on Constitutional Law* (Oxford University Press, 2009) 34, 34.

<sup>4</sup> Yishai Blank, ‘Federalism, Subsidiarity, and the Role of Local Governments in an Age of Global Multilevel Governance’ (2010) 37 *Fordham Urban Law Journal* 510, 511.

political action and identification'.<sup>5</sup> However, he argues that federalism favours the central government over the regions, whereas subsidiarity presupposes no level of government as superior. In addition, Blank argues that whilst federalism protects the states from unwarranted intervention by the central government, subsidiarity concerns the relationships between all levels of government. The final difference noted by Blank, which is relevant to the discussion of subsidiarity in the European Union below, is that federalism is concerned with nationalism in the form of uniting regional areas as a nation, whereas subsidiarity is a more 'supra-national' concept that is 'friendlier to global governance schemes'.<sup>6</sup>

Similarly, Henkel argues that although 'many correlations exist between subsidiarity and federalism' resulting in the two concepts often being 'confused', they are in fact quite different.<sup>7</sup> The similarities, according to Henkel, emerge from the fact that in a European Union context, the principle of subsidiarity is a 'structural principle' which orders the distribution of powers between the Community and the member states.<sup>8</sup> Hence, as Henkel points out, this characteristic of dividing powers between different levels of government is an obvious analogy with federalism. Both also strive to promote 'individualism and unity as well as independence and community.'<sup>9</sup> However, Henkel argues that the 'goal' of each concept slightly differs:

The goal of subsidiarity is the definition of different levels of authority in state and society as well as the appropriate distribution of powers thereof. In contrast, the necessary connection of state and society is the aim of federalism. Thus on one hand federalism presupposes and follows subsidiarity. On the other, federalism provides the frame in which subsidiarity is exercised. In its broadest sense, federalism involves the linking of individuals, groups, and polities in a lasting but limited union in such a way as to provide for the energetic pursuit of common ends while maintaining the respective integrity of all parties.<sup>10</sup>

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<sup>5</sup> Yishai Blank, 'Federalism, Subsidiarity, and the Role of Local Governments in an Age of Global Multilevel Governance' (2010) 37 *Fordham Urban Law Journal* 510, 511.

<sup>6</sup> Yishai Blank, 'Federalism, Subsidiarity, and the Role of Local Governments in an Age of Global Multilevel Governance' (2010) 37 *Fordham Urban Law Journal* 510, 511.

<sup>7</sup> Christoph Henkel, 'The Allocation of Powers in the European Union: A Closer Look at the Principle of Subsidiarity' (2002) 20 *Berkley Journal of International Law* 359, 362.

<sup>8</sup> Christoph Henkel, 'The Allocation of Powers in the European Union: A Closer Look at the Principle of Subsidiarity' (2002) 20 *Berkley Journal of International Law* 359, 362.

<sup>9</sup> Christoph Henkel, 'The Allocation of Powers in the European Union: A Closer Look at the Principle of Subsidiarity' (2002) 20 *Berkley Journal of International Law* 359, 363.

<sup>10</sup> Christoph Henkel, 'The Allocation of Powers in the European Union: A Closer Look at the Principle of Subsidiarity' (2002) 20 *Berkley Journal of International Law* 359, 363.

Although expressed somewhat ambiguously, Henkel is saying that subsidiarity aims to define the levels of society and government as well as the division of powers between them, whereas federalism is more concerned with overall unity in the national interest. However, instead of emphasising the core differences between the concepts, the above quotation goes further in highlighting their interconnectedness — subsidiarity is needed for federalism to function effectively, but at the same time, federalism leads to the exercise of subsidiarity.

Vause, in his comparison between American federalism and subsidiarity in the European Union, states: ‘Although the analogy [between the two concepts] is justified, it is clear that subsidiarity does not have an exact counterpart in the American system of federalism’, but he continues by saying that ‘the underlying concern over the division of powers is essentially the same under both systems of government’.<sup>11</sup> For example, nowhere in the *United States Constitution* is the concept of subsidiarity mentioned. However, Vause notes the inclusion of the 10<sup>th</sup> Amendment in the American *Constitution* as a similar way of protecting states’ rights. He also notes that both concepts, whilst concerned with regionalism, have centralising tendencies, concluding that the European Union should clarify the meaning of subsidiarity to guard against ‘creeping federalism’. That is, Vause is saying that despite the United States having a federal system, the United States Supreme Court has been reluctant to impose any interpretation of the *Constitution* that may limit central power. He suggests that the European Union should learn from this experience to ensure that a similar trend towards centralisation does not continue.<sup>12</sup>

Halberstam, mentioned above, states that subsidiarity ‘corresponds to some of the basic tenets underlying federalism in the United States ...’<sup>13</sup> Widulski, citing Currie, states that ‘subsidiarity is the guiding principle of federalism in the United States’.<sup>14</sup>

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<sup>11</sup> W Gary Vause, ‘The Subsidiarity Principle in European Union Law — American Federalism Compared’ (1995) 27 *Case Western Reserve Journal of International Law* 61, 62.

<sup>12</sup> W Gary Vause, ‘The Subsidiarity Principle in European Union Law — American Federalism Compared’ (1995) 27 *Case Western Reserve Journal of International Law* 61, 78–81.

<sup>13</sup> Daniel Halberstam, ‘Federal Powers and the Principle of Subsidiarity’ in Vikram David Amar and Mark V Tushnet (eds), *Global Perspectives on Constitutional Law* (Oxford University Press, 2009) 34, 35.

<sup>14</sup> David P Currie, *Subsidiarity* (1998) 1 *Green Bag* 2d 359 cited in Peter Widulski, ‘Bakke, Grutter, and the Principle of Subsidiarity’ (2005) 32 *Hastings Constitutional Law Quarterly* 847, 849.

Widulski elaborates on Currie's comments further by explaining that that even though subsidiarity is not specifically mentioned in the *United States Constitution*, 'it is widely followed in practice.'<sup>15</sup> Widulski then draws on the work of commentators, such as Kennedy, who have argued that the opinions of several Supreme Court Justices show a philosophical application of the principle of subsidiarity.<sup>16</sup> In analysing two United States Supreme Court opinions, Widulski concludes that they 'reflect key subsidiarity concepts',<sup>17</sup> despite not mentioning the word 'subsidiarity' specifically.

In an analysis of the extent to which subsidiarity is present in the United States federal system, Bermann concludes that whilst the American system of government embodies federal principles, it does not take the concept of subsidiarity 'seriously' because neither the *Constitution*, federal legislation nor executive decree require that 'governmental measures will be taken at the federal level only when measures taken at a local level will not suffice.'<sup>18</sup> Bermann notes that the 10<sup>th</sup> Amendment to the *United States Constitution* goes some way toward protecting state powers: 'it does not express any particular view as to whether or how Federal legislative or executive powers, once acknowledged to be constitutionally present, should or should not be exercised.'<sup>19</sup> For example, Bermann notes that Congress does not consider whether the purpose of legislation could be better achieved by a lower level of government before enacting it.<sup>20</sup> He also notes that although the Supreme Court had recently started to interpret the 10<sup>th</sup> Amendment in a manner that is more respectful of federalism and states' rights, the Justices' opinions could not be described as advancing subsidiarity.<sup>21</sup> However, Bermann does give an example of the implementation of subsidiarity at an administrative level, through an executive order

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<sup>15</sup> David P Currie, *Subsidiarity* (1998) 1 *Green Bag* 2d 359 cited in Peter Widulski, 'Bakke, Grutter, and the Principle of Subsidiarity' (2005) 32 *Hastings Constitutional Law Quarterly* 847, 850.

<sup>16</sup> Peter Widulski, 'Bakke, Grutter, and the Principle of Subsidiarity' (2005) 32 *Hastings Constitutional Law Quarterly* 847, 851, 905–907.

<sup>17</sup> Peter Widulski, 'Bakke, Grutter, and the Principle of Subsidiarity' (2005) 32 *Hastings Constitutional Law Quarterly* 847, 851, 905–907.

<sup>18</sup> George A Bermann, 'Subsidiarity as a Principle of U.S. Constitutional Law' (1994) 42 *The American Journal of Comparative Law* 555, 566.

<sup>19</sup> George A Bermann, 'Subsidiarity as a Principle of U.S. Constitutional Law' (1994) 42 *The American Journal of Comparative Law* 555, 568.

<sup>20</sup> George A Bermann, 'Subsidiarity as a Principle of U.S. Constitutional Law' (1994) 42 *The American Journal of Comparative Law* 555, 561.

<sup>21</sup> George A Bermann, 'Subsidiarity as a Principle of U.S. Constitutional Law' (1994) 42 *The American Journal of Comparative Law* 555, 560.

given by President Bush in 1989, which required federal agencies, before making and implementing regulations, to consider whether policy action could be better taken by state agencies in order to achieve its objectives.<sup>22</sup>

In the context of the European Union, Bermann states that ‘subsidiarity’s affinity with federalism is clear’.<sup>23</sup> According to Bermann, the two concepts have similar characteristics and ‘virtues’. For example, both concepts favour ‘localism’ by ensuring that when ‘political entities unite’ (for example states, or countries, in the case of the European Union) they are empowered to make local decisions. Bermann also notes that some of the ‘virtues’ of subsidiarity echo those of United States federal theory, such as ‘self-determination’, ‘flexibility’, ‘preservation of local identities’ and ‘diversity’.<sup>24</sup> However, Bermann cautions that we should not absolutely ‘equate subsidiarity with federalism.’<sup>25</sup>

With respect to the European Union, Emiliou notes that the *TEU* shows evidence of the influence of federalism upon it, in particular, the division of powers between the Community and member states in terms of exclusive and concurrent areas of competence, and the operation of the principle of subsidiarity in concurrent areas.<sup>26</sup> He comments that ‘subsidiarity constitutes one of the main tenets of federalism’ because the basis for all federal systems is the distribution of powers between the centre and regions with the centre having powers given to them by a constitution or treaty and the member states or states having residual powers.<sup>27</sup> Emiliou notes that:

Federalism fosters the model of subsidiarity: that is, as many tasks as possible should be administered by small groups before making the next level responsible for them. In practical terms, this implies that local government should precede state administration, which, in turn,

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<sup>22</sup> George A Bermann, ‘Subsidiarity as a Principle of U.S. Constitutional Law’ (1994) 42 *The American Journal of Comparative Law* 555, 565.

<sup>23</sup> George A Bermann, ‘Subsidiarity and the European Community’ (1993) 17 *Hastings International and Comparative Law Review* 97, 98.

<sup>24</sup> George A Bermann, ‘Subsidiarity and the European Community’ (1993) 17 *Hastings International and Comparative Law Review* 97, 98.

<sup>25</sup> George A Bermann, ‘Subsidiarity and the European Community’ (1993) 17 *Hastings International and Comparative Law Review* 97, 98.

<sup>26</sup> Nicholas Emiliou, ‘Subsidiarity: Panacea or Fig Leaf?’ in David O’Keeffe and Patrick M Twomey (eds), *Legal Issues of the Maastricht Treaty* (Wiley Chancery Law, 1994) 65, 65.

<sup>27</sup> Nicholas Emiliou, ‘Subsidiarity: Panacea or Fig Leaf?’ in David O’Keeffe and Patrick M Twomey (eds), *Legal Issues of the Maastricht Treaty* (Wiley Chancery Law, 1994) 65, 67–68.

should precede federal government. Thus, subsidiarity can only be fully understood and defined within the context of federalism.<sup>28</sup>

Lenaerts considers whether the European Union can be said to be ‘federal’ and concludes that it has ‘several strands of federalism’.<sup>29</sup> That is, whilst the European Union is not federal in the strictest sense of the definition, the European Union has some undeniably ‘federal features’.<sup>30</sup> These include: the division of power between central and regional authorities,<sup>31</sup> a ‘balance of sovereignty’ between these branches in which the branches have sovereignty over specific areas,<sup>32</sup> and the use of a central authority to unite people to attain common values, whilst preserving their identities.<sup>33</sup> According to Lenaerts, the European Union could be regarded as a form of ‘integrative federalism’ where independent states or countries agree to create a new sovereign and central government, whilst retaining some of their existing sovereignty.<sup>34</sup>

On the other hand, Lenaerts notes several aspects of European Union governance and nationhood that are not federal. Firstly, Lenaerts notes that member states are individually subject to international law and undertake the Union’s ‘common foreign and security policy’.<sup>35</sup> Secondly, the central union does not levy taxes — this is the responsibility of the individual member states. Also, the Union’s policies are primarily enforced at a national level by the courts and national administrations of member states. Lastly, there is only one Court of Justice whose ‘main task’,

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<sup>28</sup> Nicholas Emiliou, ‘Subsidiarity: Panacea or Fig Leaf?’ in David O’Keeffe and Patrick M Twomey (eds), *Legal Issues of the Maastricht Treaty* (Wiley Chancery Law, 1994) 65, 82.

<sup>29</sup> Koen Lenaerts, ‘Federalism: Essential Concepts in Evolution — The Case of the European Union’ (1998) 21 *Fordham International Law Journal* 746, 797.

<sup>30</sup> Koen Lenaerts, ‘Federalism: Essential Concepts in Evolution — The Case of the European Union’ (1998) 21 *Fordham International Law Journal* 746, 747–748, 797–798.

<sup>31</sup> Koen Lenaerts, ‘Federalism: Essential Concepts in Evolution — The Case of the European Union’ (1998) 21 *Fordham International Law Journal* 746, 748.

<sup>32</sup> Koen Lenaerts, ‘Federalism: Essential Concepts in Evolution — The Case of the European Union’ (1998) 21 *Fordham International Law Journal* 746, 749, 753. See also John Pinder, ‘The New European Federalism: The Idea and the Achievements’ in Michael Burgess and Alain-G Gagnon (eds), *Comparative Federalism and Federation: Competing Traditions and Future Directions* (University of Toronto Press, 1993) 45, 47 who argues that ‘it is reasonable to regard the Community’s progress as a series of federal steps.’

<sup>33</sup> Koen Lenaerts, ‘Federalism: Essential Concepts in Evolution — The Case of the European Union’ (1998) 21 *Fordham International Law Journal* 746, 749.

<sup>34</sup> Koen Lenaerts, ‘Federalism: Essential Concepts in Evolution — The Case of the European Union’ (1998) 21 *Fordham International Law Journal* 746, 749.

<sup>35</sup> Koen Lenaerts, ‘Federalism: Essential Concepts in Evolution — The Case of the European Union’ (1998) 21 *Fordham International Law Journal* 746, 749.

according to Lenaerts, ‘is to co-operate with national courts so that the uniform interpretation and application of European Union law can be assured.’<sup>36</sup> The effect of this, according to Lenaerts, is that the European Union falls short of being a ‘nation-state’ with its own national identity.<sup>37</sup>

In an Australian context, several of the reports on federalism have referred to the compatibility of the two concepts and subsidiarity’s potential to enhance federalism. For example, Twomey and Withers have recommended a reconsideration of the distribution of Commonwealth–State powers in accordance with the principle of subsidiarity. They state:

The allocation of legislative power in the *Constitution*, which was undertaken in the 1890s, needs to be reconsidered today. It needs to take into account changes in the world, such as new developments in information technology and communication, as well as globalisation and the operation of modern economies. The most commonly used principle for making such an assessment in federations today is subsidiarity. Under this principle, functions should be undertaken by the States and Territories or their local governments, unless this is not practicable. Factors that will influence the allocation of a matter to the Commonwealth or the States include whether it is a matter of national interest, such as defence, or whether national standards are required as a measure of equity, such as social security support. Other important factors include whether significant spillovers into other jurisdictions are involved, whether significant economies of scale could be achieved and whether the harmonisation of policy is needed to increase efficiency. These factors are the core rationale for central government functions and should guide the distribution of powers. They should be respected, but not exceeded.<sup>38</sup>

In addition, in the Final Report to the Council for the Australian Federation, subsidiarity is cited as one of ‘the fundamental rationales of federalism’ and ‘a well documented driver of effective federations’.<sup>39</sup> The authors comment on the effectiveness of subsidiarity in enhancing federalism, regional governance and representative democracy:

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<sup>36</sup> Koen Lenaerts, ‘Federalism: Essential Concepts in Evolution — The Case of the European Union’ (1998) 21 *Fordham International Law Journal* 746, 747.

<sup>37</sup> Koen Lenaerts, ‘Federalism: Essential Concepts in Evolution — The Case of the European Union’ (1998) 21 *Fordham International Law Journal* 746, 747.

<sup>38</sup> Anne Twomey and Glen Withers, *Federalist Paper 1 Australia’s Federal Future: A Report for the Council for the Australian Federation* (2007) 46.

<sup>39</sup> John Wanna et al, Final Report to the Council for the Australian Federation, *Common Cause: Strengthening Australia’s Cooperative Federalism* (May 2009) 9.

The principle of subsidiarity is intrinsic to the efficient and effective allocation of responsibilities in a federal system. It is a means of ensuring that decision-making remains close to citizens and enables the system to be judged for whether it remains responsive to the needs of citizens. ... State and Territory governments, being closer to their communities, are best placed to represent those communities when engaging with the national level government and in consultations over national policy frameworks. The closer the proximity of government to the community, the more authentic the notion of representative democracy becomes.<sup>40</sup>

Aroney notes that the reports from the Productivity Commission, New South Wales Government and Business Council of Australia have referred to subsidiarity as a potentially relevant principle that may be usefully applied to the reform of the Australian federal system.<sup>41</sup>

Despite some minor differences between the two concepts, it is argued that federalism and subsidiarity have much in common at a theoretical level. For a start, both are difficult to define. It can be said that both have a similar underlying federal philosophy, including similar values such as decentralisation, regionalism, and the empowerment of individual citizens through ensuring greater democratic participation. Both concepts advocate for maintaining checks and balances on power by distributing it so that it is not held by one level of government only. In other words, both concepts mandate a balance, and a distribution of powers between two or more levels of government, with powers allocated to the level of government that is best able to exercise them. As will be seen later in this chapter, and in the following chapter, both are capable of being overlooked, or of being misinterpreted so as to justify centralisation instead of regionalism. Hence, the minor differences between federalism and subsidiarity are outweighed by the substantial similarities and consistencies between the two concepts. The operation of federalism and subsidiarity

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<sup>40</sup> John Wanna et al, Final Report to the Council for the Australian Federation, *Common Cause: Strengthening Australia's Cooperative Federalism* (May 2009) 9.

<sup>41</sup> These are: Productivity Commission, *Productive Reform in a Federal System* (Roundtable Proceedings, Canberra, 27–28 October 2005); Neil Warren, *Benchmarking Australia's Intergovernmental Fiscal Arrangements: Final Report* (New South Wales Government, 2006); and Business Council of Australia, *Reshaping Australia's Federation — a New Contract for Federal–State Relations* (Business Council of Australia, 2006) cited in Nicholas Aroney, 'Reflections on Subsidiarity: European Lessons for Australia's Federal Balance?' (2011) 39 *Federal Law Review* 31.

at a textual and institutional level will now be expanded upon below, with reference to federal government in Australia and subsidiarity in the European Union.

## II THE NATURE OF THE COMPACT: CONSTITUTION VERSUS TREATY

The Australian federal system was established by a constitution agreed to by the Australian colonies (which, after federation were called ‘states’) within the one geographic country, whereas the European Union was established by a treaty between nation states and can accordingly be described as ‘supra-national’. This section will examine whether a federal system of government can only be established by a constitution formed by the agreement of regions within the one country, or whether a treaty between separate countries can also be characterised as federal, notwithstanding its supra-national nature.

Lenaerts asserts that the fact that the European Union is established by a treaty instead of a constitution is not an impediment to the European Union being characterised as both constitutional and federal.<sup>42</sup> He quotes the European Court of Justice as referring to the Treaty as ‘the basic constitutional charter.’<sup>43</sup> The federal nature of the Treaty is evidenced, according to Lenaerts, by the European Court of Justice’s characterisation of the Treaty in a constitutional manner. For example, the European Union Court of Justice has expressly recognised the creation of a kind of constitutional order, or rather a balance of power, between the central Union and regional member states, and the empowerment of central federal institutions:

The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting States. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. Furthermore, it must be noted that the nationals of the States brought together in the Community are called upon to cooperate in the functioning of this Community

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<sup>42</sup> Koen Lenaerts, ‘Constitutionalism and the Many Faces of Federalism’ (1990) 38 *The American Journal of Comparative Law* 205, 207–208.

<sup>43</sup> *Parti écologiste ‘Les Verts’ v. European Parliament* (C-294/83) [1986] ECR 1339, 1365, para 23 cited in Koen Lenaerts, ‘Constitutionalism and the Many Faces of Federalism’ (1990) 38 *The American Journal of Comparative Law* 205, 210.

through the intermediary of the European Parliament and the Economic and Social Committee.

In addition, the task assigned to the Court of Justice under Article 177, the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the States have acknowledged that Community Law has an authority which can be invoked by their nationals before those courts and tribunals.<sup>44</sup>

In other words, the European Court of Justice is acknowledging here that the Treaty exceeds the mandate usually occupied by a treaty by seeking to regulate a greater field than a treaty ordinarily occupies. This is evident when one looks at the definition of a treaty, contrasted with the scope of the European Union Treaties. The *Encyclopaedic Australian Legal Dictionary* contains a general definition of a ‘treaty’ as follows:

An international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, and whatever its particular designation ...<sup>45</sup>

*Black’s Law Dictionary* contains a more comprehensive definition of a ‘treaty’ as:

A compact made between two or more independent nations with a view to the public welfare. ... An agreement, league, or contract between two or more nations or sovereigns, formally signed by commissioners properly authorised, and solemnly ratified by the several sovereigns or the supreme power of each state. ... A treaty is not only a law but also a contract between two nations and must, if possible, be so construed as to give full force and effect to all its parts...<sup>46</sup>

It can therefore be said that a treaty is an internationally enforceable agreement, or in other words, a contract, between two or more sovereign countries. However, what about the subject matter of a treaty? An examination of some specific examples of treaties sheds some light on this. For example, human rights issues are often the

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<sup>44</sup> *Van Gend & Loos* (C-26/62) [1963] ECR 10, 12 cited in Koen Lenaerts, ‘Constitutionalism and the Many Faces of Federalism’ (1990) 38 *The American Journal of Comparative Law* 205, 209, fn 16.

<sup>45</sup> *Encyclopaedic Australian Legal Dictionary* (LexisNexis, 2011) <<http://www.lexisnexis.com.au/en-au/products/encyclopaedic-australian-legal-dictionary-online.page>>.

<sup>46</sup> *Black’s Law Dictionary* (West Publishing Co, 6<sup>th</sup> ed, 1990) 1502. For a more technical discussion of the definition of a ‘treaty’ or ‘international agreement’, see Kelvin Widdows, ‘What is an Agreement in International Law?’ in Scott Davidson (ed), *The Law of Treaties* (Ashgate Dartmouth, 2004) 73.

subject of treaties such as the *Convention Relating to the Status of Refugees*<sup>47</sup> the *International Covenant on Civil and Political Rights*<sup>48</sup>, and the *Convention on the Elimination of All Forms of Discrimination Against Women*<sup>49</sup>. Extradition treaties may also be made between countries to co-operate in matters of criminal law.<sup>50</sup> Treaties may also concern trade agreements between countries such as the *United Nations Convention on the International Sale of Goods*<sup>51</sup> (1980), commonly referred to as the ‘*Vienna Convention*’.

From this brief overview, it can be observed that a treaty most often relates to a single issue or area of concern between nation states, such as a desire to eliminate discrimination, the mutual agreement that criminals should not escape trial or punishment by crossing international borders, or the enhancement of efficient trade and determination of trade disputes in the face of the internationalisation of trade. However, the *TEU* and the *TFEU* do considerably more than resolve one common issue. Instead, they create a federation of sovereign nations with a new central government and associated institutions with power divided between the two, along with a new supra-national community with its own citizenship and currency, whilst at the same time maintaining the sovereignty, culture and national identity of the sovereign nations. The compact also seeks to resolve more than one area of concern by establishing a common market for the purpose of trade and freedom of movement throughout the European Union, and establishing other fundamental human rights obligations. It is argued that, given the two-tier governmental structure it creates, together with its central institutions, currency, citizenship and Charter of Rights, the European Union compact can be said to be more of a federal constitutional compact than a treaty.

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<sup>47</sup> *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).

<sup>48</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>49</sup> *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981).

<sup>50</sup> For a list of Extradition Treaties entered into by Australia see: Attorney-General’s Department, *Australian Bilateral Extradition Agreements* (4 October 2011) Australian Government <<http://www.ag.gov.au/Extraditionandmutualassistance/Relationshipwithothercountries/Pages/Australianbilateralextraditionagreements.aspx>>.

<sup>51</sup> *United Nations Convention on the International Sale of Goods*, opened for signature 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988).

In support of this, there is considerable academic commentary discussing whether there should be a constitution for the European Union instead of a treaty.<sup>52</sup> This commentary suggests that the European Union Treaties do lend themselves to being categorised as constitution-like documents.<sup>53</sup> There have been several proposals put forward concerning the adoption of a European Union Constitution — specifically, in 1983, 1993 and 2003.<sup>54</sup> The most recent proposal was handed down by the European Constitutional Convention, appointed by the European Council, on 18 July 2003<sup>55</sup> and agreed to by heads of member states at an Intergovernmental Conference in October 2003.<sup>56</sup> An alternative proposal was suggested by the European Constitutional Group who described themselves as ‘an independent and interdisciplinary association of economists, lawyers, political philosophers, historians etc. who take an active interest in European constitutional analysis.’<sup>57</sup> This alternative model included an additional house of Parliament, a second court and a referendum procedure which the European Constitutional Group argued would, amongst other things, more effectively restrain central governmental power.<sup>58</sup>

Many arguments were advanced in favour of the introduction of a constitution to replace the existing European Union Treaties. The broader arguments include: firstly, the possibility that a written constitution would more adequately deal with the expansion of the European Union, with the admission of ten new member states with different economies and cultures.<sup>59</sup> Secondly, a ‘less articulated impetus’ was the

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<sup>52</sup> See for example, Gráinne de Búrca, ‘The Drafting of a Constitution for the European Union: Europe’s Madisonian Moment or a Moment of Madness?’ (2004) 61 *Washington & Lee Law Review* 555.

<sup>53</sup> See, for example, George A Bermann, ‘Constitutional Lessons from Europe’ (2006) 29 *Fordham International Law Journal* 601.

<sup>54</sup> Peter Bernholz et al, ‘An Alternative Constitutional Treaty for the European Union’ (2004) 118 *Public Choice* 451, 451.

<sup>55</sup> Peter Bernholz et al, ‘An Alternative Constitutional Treaty for the European Union’ (2004) 118 *Public Choice* 451, 451.

<sup>56</sup> Gráinne de Búrca, ‘The Drafting of a Constitution for the European Union: Europe’s Madisonian Moment or a Moment of Madness?’ (2004) 61 *Washington & Lee Law Review* 555, 560.

<sup>57</sup> Peter Bernholz et al, ‘An Alternative Constitutional Treaty for the European Union’ (2004) 118 *Public Choice* 451, 452.

<sup>58</sup> Peter Bernholz et al, ‘An Alternative Constitutional Treaty for the European Union’ (2004) 118 *Public Choice* 451, 451, 462–465.

<sup>59</sup> Elizabeth F Defeis, ‘A Constitution for the European Union? A Transatlantic Perspective’ (2005) 19 *Temple International & Comparative Law Journal* 351, 352.

desire to ‘counterbalance the enormous power and influence of the United States’, thus increasing its power and influence in the international community.<sup>60</sup>

Other arguments in favour of the enactment of the Constitution are summarised by de Búrca. These included ‘enhancing the legitimacy of the European Union’;<sup>61</sup> creating a greater sense of community amongst European Union citizens;<sup>62</sup> providing greater transparency and legitimacy by clearly articulating and clarifying the powers of the European Union and its member states;<sup>63</sup> stopping the central governance of the European Union from becoming too powerful and centralised, or in other words, a ‘super state’, and better defining the powers of the central government and the regions;<sup>64</sup> ‘mark[ing] the historic reuniting of Europe’<sup>65</sup>; and strengthening the international identity of the European Union and therefore its strength with respect to external relations, including security, defence and gaining an identity as a ‘global leader’.<sup>66</sup>

In contrast, it is argued that the European Union Treaties already go some way to achieving the benefits of enacting a constitution as outlined in the preceding two paragraphs. The Treaties amount to an historic unification of Europe and create a globally recognisable, and formidable, supra-national government. The Treaties create a sense of community by establishing European Union citizenship and giving the Union’s citizens protection through a Charter of Rights. They also articulate, and thereby attempt to limit, the powers of the European Union institutions, including through the addition of the principle of subsidiarity which aims to promote regional governance wherever possible.

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<sup>60</sup> Elizabeth F Defeis, ‘A Constitution for the European Union? A Transatlantic Perspective’ (2005) 19 *Temple International & Comparative Law Journal* 351, 352.

<sup>61</sup> Gráinne de Búrca, ‘The Drafting of a Constitution for the European Union: Europe’s Madisonian Moment or a Moment of Madness?’ (2004) 61 *Washington & Lee Law Review* 555, 561.

<sup>62</sup> Gráinne de Búrca, ‘The Drafting of a Constitution for the European Union: Europe’s Madisonian Moment or a Moment of Madness?’ (2004) 61 *Washington & Lee Law Review* 555, 563.

<sup>63</sup> Gráinne de Búrca, ‘The Drafting of a Constitution for the European Union: Europe’s Madisonian Moment or a Moment of Madness?’ (2004) 61 *Washington & Lee Law Review* 555, 564–565.

<sup>64</sup> Gráinne de Búrca, ‘The Drafting of a Constitution for the European Union: Europe’s Madisonian Moment or a Moment of Madness?’ (2004) 61 *Washington & Lee Law Review* 555, 566.

<sup>65</sup> Gráinne de Búrca, ‘The Drafting of a Constitution for the European Union: Europe’s Madisonian Moment or a Moment of Madness?’ (2004) 61 *Washington & Lee Law Review* 555, 567.

<sup>66</sup> Gráinne de Búrca, ‘The Drafting of a Constitution for the European Union: Europe’s Madisonian Moment or a Moment of Madness?’ (2004) 61 *Washington & Lee Law Review* 555, 568–570.

In summary, the European Union Treaties embody the ‘basic governance rules’ of a federal constitution identified by Bermann in his essay, ‘Constitutional Lessons from Europe’.<sup>67</sup> Bermann notes that a federal constitution sets out the competences of each level of government, including how to resolve disputes between the two in the case of concurrent powers. In addition, it also defines the conditions of membership to the federation, and representation of the members at the central level.<sup>68</sup> Bermann notes that these characteristics are present in the Convention for the Establishment of a Constitution for Europe.<sup>69</sup>

It is argued that these characteristics can also be found when one considers the European Union Treaties. For example, the *TFEU*, specifically arts 2 through to 6, defines the relationship between the Union and the member states, particularly with respect to exclusive and concurrent competences. Article 2 of the *TFEU* seeks to provide a resolution to any conflict between the Union and member states over concurrent powers. It provides that whilst both the Union and member states can legislate in a concurrent area, the member states can only exercise their competence in that area if the Union has not.

The *TFEU* also provides means of resolving disputes between the Union and the member states. For example, if a dispute arises concerning the legality of acts carried out by a member state or a Union institution, which would include a dispute over the exercise of concurrent competences, the European Court of Justice has jurisdiction to hear the dispute<sup>70</sup> and to declare any action to be void.<sup>71</sup> The Treaty even goes further than dispute resolution by seeking to pre-empt disputes before they occur. This is demonstrated by the *Protocol on the Application of the Principles of Subsidiarity and Proportionality* which provides a procedure by which national Parliaments can object to proposed legislation before it is passed, if it offends the principle of subsidiarity.<sup>72</sup>

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<sup>67</sup> George A Bermann, ‘Constitutional Lessons from Europe’ (2006) 29 *Fordham International Law Journal* 601.

<sup>68</sup> George A Bermann, ‘Constitutional Lessons from Europe’ (2006) 29 *Fordham International Law Journal* 601, 602–603.

<sup>69</sup> George A Bermann, ‘Constitutional Lessons from Europe’ (2006) 29 *Fordham International Law Journal* 601, 603.

<sup>70</sup> *TFEU* art 263.

<sup>71</sup> *TFEU* art 264.

<sup>72</sup> See *Protocol* arts 4–7.

The *TEU* also sets out the rules of membership to the European Union, with art 49 setting out the requirements and procedure for admission to the Union, including consultation with existing member states. There is also provision for a member state to withdraw from the European Union in art 50(2).

There are also provisions regarding the representation of citizens at a central level. Article 10(2) of the *TEU* provides that: ‘Citizens are directly represented at Union level in the European Parliament.’ The first sentence of art 10(3) states: ‘Every citizen shall have the right to participate in the democratic life of the Union.’

A possible point of difference between a treaty and a constitution that warrants further analysis is the ease with which, and manner by which each can be amended. It was noted in Chapter 2 that a key characteristic of a federal system of government is that it is most often created by a written constitution that is difficult to alter so that its institutions and powers cannot be easily interfered with. The Australian Commonwealth *Constitution* is a good example of this. For example, s 128 of the Australian Commonwealth *Constitution* sets out a detailed procedure that must be followed before the *Constitution* can be amended. Firstly, the proposed amendment must be passed through both houses of Parliament by an absolute majority.<sup>73</sup> Then, it must be put to the people in each state and territory and achieve a majority of votes in each state and territory, and also a majority of all electors voting. The law can then be presented to the Governor-General for his or her assent. This procedure makes constitutional amendment difficult to achieve, and this fact is evidenced by the propensity of the Australian people to vote ‘no’ at referenda.<sup>74</sup> Moens and Trone note that only eight out of 44 proposals to amend the *Constitution* have been successful (18%).<sup>75</sup> The last successful referendum was in 1977, which included amendments to provide for simultaneous elections for both houses of Parliament, the retirement age

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<sup>73</sup> Section 128 gives the Governor-General discretion to put the proposed amendment to the Australian people to vote on at a referendum, notwithstanding that one house has rejected it, or failed to agree to any amendments proposed by the other house. The Governor-General is given the discretion to submit the proposed bill to the people as originally introduced in one house or with any amendments proposed.

<sup>74</sup> See generally George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (University of New South Wales Press, 2010) who discuss the history of the referendum and the fact that strong bipartisan support is required for a referendum to succeed.

<sup>75</sup> Gabriel A Moens and John Trone, *Lumb and Moens’ The Constitution of the Commonwealth of Australia Annotated* (LexisNexis Butterworths, 7<sup>th</sup> ed, 2007) 448.

for federal Justices being set at 70 years instead of their terms being for life, and to include the territories in s 128 for the purpose of counting the national vote.<sup>76</sup>

Like Australia, the European Union is created by a written document in which individual countries (member states) have agreed to refer some of their powers to create a central government. However, the member states sealed this compact in the form of a treaty instead of a written constitution. When one examines the general rules regarding the amendment of treaties, namely art 39 in pt IV of the *Vienna Convention on the Law of Treaties*, ‘a Treaty may be amended by agreement between the parties.’ In the case of a ‘Multilateral Treaty’, that is a treaty between multiple states parties, all states parties must be notified of a proposed amendment to the treaty and have a ‘right’ to take part in negotiating, concluding and indeed, deciding whether or not the proposed amendment should proceed.<sup>77</sup> A state party to the treaty that does not want to be a party to any amendments will only be bound by the earlier treaty.<sup>78</sup> Hence, it is possible that when a treaty is amended, some states parties can ‘opt out’ of the amendments by not agreeing to them, so that the amendments apply to some parties and not others. This is not possible in the case of a Constitutional Referendum under s 128 of the Australian Commonwealth *Constitution*. If the amendment fails to achieve a majority of votes in a state, the amendment will fail despite its acceptance by the other states, and even despite its acceptance by a majority of all voters overall.

If one looks at what the European Union Treaties accomplish, the creation of the European Union, its powers and institutions would not work properly, and are too complex in nature to allow a state party to opt out of an amendment agreed to by the other states parties. Hence, any agreement essentially requires the agreement of all states parties. For example, an amendment to give the Union exclusive power over a particular area would fail to achieve its objective as an exclusive power if one or more member states failed to agree to it. It is argued that this is supported by the procedure for amending the European Union Treaties as set out in the *TEU*, which

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<sup>76</sup> For a table of the results of each referendum, see Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 4<sup>th</sup> ed, 2006) 1447–1452.

<sup>77</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) (‘*Vienna Convention*’) art 40(2).

<sup>78</sup> *Vienna Convention* arts 30(3), 30(4), 40(4).

essentially involves a democratic process and the agreement of all of the member states. This procedure will now be discussed.

Article 48 of the *TEU* outlines the procedure for amending the *TEU* and the *TFEU*. Article 48(1) provides that they may be amended by an ‘ordinary revision procedure’ or a ‘simplified revision procedure’.<sup>79</sup> Under the ordinary revision procedure, the government of a member state, the European Parliament or Commission may submit an amendment proposal to the Council. The Council must then send the amendment proposal to the European Council and advise the national Parliaments.<sup>80</sup> The type of amendment that can be made includes an amendment to increase or decrease the competences of the Union.<sup>81</sup>

The European Council must then consult with the European Parliament and the Commission, and if the European Council decides by a simple majority to examine the proposed amendments further, it shall convene a Convention ‘composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission’.<sup>82</sup> The Convention will examine the proposed amendments and adopt a recommendation by consensus to be presented to a conference of representatives of the governments of the member states.<sup>83</sup> The conference of representatives will then be convened by the President of the Council to determine ‘by common accord’ the exact amendments to be made to the Treaties.<sup>84</sup> The Convention can be circumvented, and the proposed amendment put directly to the conference of representatives if it is not ‘justified by the proposed extent of the amendments’.<sup>85</sup> The amendments come into force when they are ratified by all member states.<sup>86</sup> If four-fifths of member states have ratified the amendment, but one or more member states ‘have encountered difficulties in proceeding with ratification’, for two years after the states parties signed to agree to the amendments, it shall be referred to the European Council.<sup>87</sup>

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<sup>79</sup> *TEU* art 48(1).

<sup>80</sup> *TEU* art 48(2).

<sup>81</sup> *TEU* art 48(2).

<sup>82</sup> *TEU* art 48(3).

<sup>83</sup> *TEU* art 48(3).

<sup>84</sup> *TEU* art 48(4).

<sup>85</sup> *TEU* art 48(3).

<sup>86</sup> *TEU* art 48(4).

<sup>87</sup> *TEU* art 48(5).

Under the simplified revision procedure, the competences conferred on the Union generally cannot be increased. However, proposals can be made to amend pt 3 of the *TFEU*, titled ‘Union Policies and Internal Actions’.<sup>88</sup> A proposal to amend any of these provisions may be made by the government of a member state, the European Parliament or Commission. The European Council must consult with the European Parliament and Commission, and after doing so, can make a decision, which must be unanimous, to adopt all or part of the amendments. The decision will not come into force until it is ‘approved by all Member States in accordance with their respective constitutional requirements’.<sup>89</sup>

Hence, while the process of amendment in the European Union Treaties differs slightly from that set out in the Australian *Constitution*, there are similarities. For example, in both systems of government there is extensive consultation and state/member state agreement before any amendments can be adopted. In the European Union, the process of reform is not achieved by all of the citizens of the European Union voting. However, there is a process of scrutiny by European Union institutions before the approval of the governments of member states, representing their own citizens, is required.

It is argued that the European Union Treaties are difficult to amend, particularly in the case of the conferral of powers, allowing some analogy to be drawn to the Australian *Constitution*. As demonstrated in this section, the European Union Treaties do establish a kind of federation in a document that is difficult to amend, suggesting that the European Union is more of a federal compact than first appears from the label ‘treaty’.

### **III CONCEPTUAL COMPARISON OF FEDERALISM AND SUBSIDIARITY**

In Chapter 2, it was argued that a key characteristic of federalism was its embodiment in a written constitution that was difficult to alter. Consequently, a more detailed discussion of the formative documents that embody these concepts helps to

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<sup>88</sup> *TEU* art 48(6).

<sup>89</sup> *TEU* art 48(6).

extrapolate the similarities and differences in the operation of the two concepts in a practical context. This section will discuss the nature of Australia's Commonwealth *Constitution* when compared with the *Treaty on European Union* in which the principle of subsidiarity is embodied in art 5(3) and referred to in several other Articles.

### ***A Key Textual Provisions with Respect to Federalism***

The Commonwealth *Constitution* is expressly referred to as a federal document in the covering clauses of the British *Commonwealth of Australia Constitution Act 1900* (UK) in which the Commonwealth *Constitution* is contained in s 7. The first paragraph of the *Act* declares that 'the people of New South Wales, Victoria, South Australia, Queensland; and Tasmania ... have agreed to unite in one indissoluble Federal Commonwealth ...'. The *Constitution* itself primarily deals with establishing the new federal government, its institutions and powers (legislative, executive and judicial), and its limitations, such as specifically listing, and thereby limiting, the Commonwealth's legislative powers in s 51.

Chapter 2 outlined in some detail the sections of the *Constitution* that were fundamentally federal in nature. These included s 106 which provides for the continuance of state constitutions; s 107 which provides for the continuation of the powers of state Parliaments to the extent that those powers have not been referred to the Commonwealth; and s 108 which provides for the saving of state laws that have been referred to the new Federal Parliament until it enacts equivalent legislation. In terms of the relationship between the two levels of government (state and federal), s 109 provides a procedure for resolution where there is an inconsistency between the laws of the two levels of government.

The European Union is sometimes referred to as federal. Burgess states that, 'federalism in its historical and philosophical dimensions has been woven into the fabric of the European idea.'<sup>90</sup> It should be noted, however, that there is no specific mention of the word 'federal', nor 'federalism' in the *TEU*, nor in the *TFEU*. However, as noted in the previous section, the European Union has some distinctly

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<sup>90</sup> Michael Burgess, *Federalism and European Union: The Building of Europe, 1950–2000* (Routledge, 2000) 23.

federal features and provisions such as art 2 of the *TFEU*, which is the European Union's equivalent to s 109 of the Australian *Constitution*. Article 2 provides that competences are shared to the extent that the Union has not exercised its competence in that area. If so, the exercise of that competence becomes exclusive to the Union.

### ***B Key Textual Provisions with Respect to Subsidiarity***

With respect to the principle of subsidiarity, the European Union equivalent to states' rights in the Australian Federation is contained in art 5(3) of the *TEU* which provides that

in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at a central level or at a regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

Subsidiarity is also mentioned in the Preamble which provides that the states parties are 'creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity.' Additionally, the second paragraph of art 1 provides that: 'This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.' Also consistent with the principle of subsidiarity is art 10(3), the second sentence of which provides that: 'Decisions shall be taken as openly and as closely as possible to the citizen.'

The *TEU* like the Australian *Constitution*, is primarily concerned with establishing the European Union as a central governance body, and establishing its central institutions. Like the Australian federal system, two levels of governance are created — government at a central level by the Union, and regional governments in the form of member states. Also, like the Australian Federation, the member states have agreed to confer on the central Union competences that they previously held,<sup>91</sup> in order to create it, with competences not conferred remaining with the member

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<sup>91</sup> *TEU* art 1.

states.<sup>92</sup> Article 5(1) of the *TEU* is also significant in a discussion of conferral of powers by member states to create the central Union. It provides that: ‘The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.’

This is elaborated upon by art 5(2) which provides: ‘Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.’ This conferral of power by member states in order to create the European Union is similar to the creation of the federal government in Australia through the colonies agreeing to confer limited powers to create the new central government.

### *C Parliamentary Protection of Federalism and Subsidiarity*

In Chapter 2 it was noted that one of the characteristics of a federal system of government was that its constitution specifies, and thereby limits, the powers of the Commonwealth government, leaving the balance of ‘unwritten’ powers to the states.<sup>93</sup> The analysis below will show that this federal division of powers between a central and regional government is present in both the Australian Federation and the European Union. This chapter will now examine the nature of these powers, exclusive, concurrent, and residual, in the context of both Australian federalism and in the European Union, in order to draw further parallels between the two systems of government, and the two concepts of federalism and subsidiarity.

As noted in Chapter 2, the Australian *Constitution* grants both exclusive and concurrent powers to the Federal Parliament. Exclusive powers include, as the name suggests, powers that were withdrawn from the states at the time of federation, and reallocated to the new Federal Parliament so that the states were thereafter prohibited

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<sup>92</sup> *TEU* art 4(1).

<sup>93</sup> As noted in Chapter 2, see for example s 2(1) *Constitution Act 1889* (WA), which gives the Western Australian Legislative Council and Legislative Assembly the general power ‘to make laws for the peace, order, and good Government of the Colony of Western Australia...’ without being limited to specific subject areas.

from legislating on those topics. These include: bounties and excise;<sup>94</sup> defence;<sup>95</sup> and currency, coinage and legal tender.<sup>96</sup>

Exclusive powers also include new powers that were created specifically for the new federal government from federation. These new exclusive powers occupy 13 of the 40<sup>97</sup> powers given to the Federal Parliament by s 51 of the *Constitution*. They include matters of geographic externality and external affairs, such as borrowing money on the public credit of the Commonwealth;<sup>98</sup> fisheries in Australian waters beyond territorial limits;<sup>99</sup> external affairs;<sup>100</sup> and the relations of the Commonwealth with islands of the Pacific.<sup>101</sup>

The exclusive powers of the Commonwealth also include matters involving relations with the states and between states, such as service and execution throughout the Commonwealth of civil and criminal process;<sup>102</sup> recognition throughout the Commonwealth of the laws, public records and judicial proceedings of the states;<sup>103</sup> the acquisition of property on just terms from a state or person;<sup>104</sup> acquisition of any state railway with the consent of a state;<sup>105</sup> conciliation and arbitration for the settlement and prevention of industrial disputes between states;<sup>106</sup> matters referred to the Federal Parliament by the states;<sup>107</sup> and the exercise of any power, at the request or with the agreement of the states, that could only be exercised by the United Kingdom Parliament or Federal Council of Australasia at the time the *Constitution* was established.<sup>108</sup>

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<sup>94</sup> *Constitution* s 90.

<sup>95</sup> *Constitution* s 51(vi).

<sup>96</sup> *Constitution* s 51(xii). For a discussion see John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, first published 1901, 2002 ed) 934.

<sup>97</sup> Although the placita in s 51 finish at (xxxix), the addition of placitum (xxiiiA) after a referendum in 1946 brings the total number to 40.

<sup>98</sup> *Constitution* s 51(v).

<sup>99</sup> *Constitution* s 51(x).

<sup>100</sup> *Constitution* s 51(xxix).

<sup>101</sup> *Constitution* s 51(xxx).

<sup>102</sup> *Constitution* s 51(xxiv).

<sup>103</sup> *Constitution* s 51(xxv).

<sup>104</sup> *Constitution* s 51(xxxi).

<sup>105</sup> *Constitution* s 51(xxxiii).

<sup>106</sup> *Constitution* s 51(xxxv).

<sup>107</sup> *Constitution* s 51(xxxvii).

<sup>108</sup> *Constitution* s 51(xxxviii).

Finally, there are also exclusive ‘incidental’ powers. The first is contained in s 51(xxxvi) which gives the Federal Parliament the power to legislate where the *Constitution* states: ‘until Parliament otherwise provides’. The second is contained in s 51(xxxix) which allows the Federal Parliament to legislate about any matter incidental to the execution of any legislative, executive or judicial power vested in them by the *Constitution*.

Concurrent powers, as noted in Chapter 2, comprise the 23 remaining powers in s 51. Quick and Garran described them as powers that formerly belonged to the states, but now belong to both the state and Federal Parliaments.<sup>109</sup> The practical reality is that, due to the operation of s 109 which renders a state law inoperative to the extent of any inconsistency with a Commonwealth law, the states generally avoid legislating in concurrent areas.<sup>110</sup> Whilst the Commonwealth’s exclusive and concurrent powers above may at first appear extensive, there are a very large number of powers left in the exclusive domain of the states, where the Commonwealth has no exclusive or concurrent power. These are known as ‘residuary powers’ or ‘residual powers’ and include: agriculture, state banking, charities, state courts and government departments, education, state fisheries and forests, health, insurance, land, mines and mining, local government, police, prisons, railways, rivers, intra-state trade and commerce and public works, to name a few.<sup>111</sup>

Similarly, in the European Union, the central Union has exclusive powers conferred upon it, together with concurrent powers that are shared with member states. Article 2 of the *TFEU* provides some explanation of the interrelationship between areas of exclusive and shared competence in the European Union. In this context ‘exclusive competence’ means, as the name suggests, that only the Union can legislate in a particular area.<sup>112</sup> As mentioned earlier in this chapter, if a competence is shared, both the Union and member states may legislate on the area. However, member

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<sup>109</sup> John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, first published 1901, 2002 ed) 934.

<sup>110</sup> For a list of concurrent powers, see John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, first published 1901, 2002 ed) 934–935.

<sup>111</sup> For a more complete list of ‘residuary powers’ see John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, first published 1901, 2002 ed) 935–936.

<sup>112</sup> *TFEU* art 2(1).

states will lose their competence to the extent that the Union has legislated in that area.<sup>113</sup>

Article 3 of the *TFEU* lists the Union's areas of exclusive competence as:

- (a) customs union;
- (b) the establishing of the competition rules necessary for the functioning of the internal market;
- (c) monetary policy for the Member States whose currency is the euro;
- (d) the conservation of marine biological resources under the common fisheries policy;
- (e) common commercial policy.

These matters are expanded on in pt 3 of the *TFEU*. The Union also has an exclusive power to conclude international agreements that are provided for in Union legislation.<sup>114</sup> Again, this power is stated in pts 4 and 5 of the *TFEU*.

Further, art 2(4) of the *TFEU* states that the Union has the competence 'to define and implement a common foreign and security policy, including ... forming ... a common defence policy.' This is further stated in art 21 of the *TEU*, whereby the Union is given the exclusive responsibility for the common foreign and security policy of the Union. Essentially, this involves relations with other nations outside of the European Union, including the prevention of conflict.<sup>115</sup> Article 24(1) further outlines the Union's powers over common foreign and security policy, which the Union has the competence to 'conduct, define and implement'.<sup>116</sup>

Importantly, the European Union has similar treaty provisions to Australia's constitutional provisions in the area of freedom of internal trade and customs. The Australian *Constitution* contains a Commonwealth legislative power over customs,<sup>117</sup> trade and commerce with other countries and among the states,<sup>118</sup> and also guarantees freedom of interstate trade and movement.<sup>119</sup>

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<sup>113</sup> *TFEU* art 2(2).

<sup>114</sup> *TFEU* art 3(2).

<sup>115</sup> *TEU* art 21(2).

<sup>116</sup> *TEU* art 24(2).

<sup>117</sup> *Constitution* s 51(iii).

<sup>118</sup> *Constitution* s 51(i).

<sup>119</sup> *Constitution* s 92. Although this freedom is not absolute.

Similarly, the *TEU* establishes an ‘internal market’,<sup>120</sup> an ‘economic and monetary union’ with its own currency,<sup>121</sup> and a ‘customs union’,<sup>122</sup> in which there is a ‘common commercial policy’ providing for uniform customs and tariff rates to allow for more efficient trade between member states,<sup>123</sup> and citizens are guaranteed the freedom to move freely between member states.<sup>124</sup>

The areas of shared Union and member state competence are listed in art 4(2) as follows:

- (a) internal market;
- (b) social policy, for the aspects defined in this Treaty;
- (c) economic, social and territorial cohesion;
- (d) agriculture and fisheries, excluding the conservation of marine biological resources;
- (e) environment;
- (f) consumer protection;
- (g) transport;
- (h) trans-European networks;
- (i) energy;
- (j) area of freedom, security and justice;
- (k) common safety concerns in public health matters, for the aspects defined in this Treaty.

There is also a shared competence in the areas of ‘research, technological development and space’,<sup>125</sup> and ‘development cooperation and humanitarian aid’,<sup>126</sup> in which the Union plays more of a policy role which does not inhibit the member states from exercising their competence in these areas.

Further, the *TFEU* makes provision for some coordination between member states and the Union in arts 5 and 6, specifically, the coordination of economic policies;<sup>127</sup> employment policies;<sup>128</sup> and the coordination of social policies of member states.<sup>129</sup>

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<sup>120</sup> *TEU* art 3(3).

<sup>121</sup> *TEU* art 3(4).

<sup>122</sup> *TFEU* art 206.

<sup>123</sup> *TFEU* art 207(1).

<sup>124</sup> *TEU* art 20(2)(b).

<sup>125</sup> *TFEU* art 4(3).

<sup>126</sup> *TFEU* art 4(4).

<sup>127</sup> *TFEU* art 5(1).

<sup>128</sup> *TFEU* art 5(2).

Article 6 also provides for the Union to take a supporting role in certain areas allocated to the member states. These are listed in art 6 as follows:

- (a) protection and improvement of human health;
- (b) industry;
- (c) culture;
- (d) tourism;
- (e) education, vocational training, youth and sport;
- (f) civil protection;
- (g) administrative cooperation.

A point of difference from Australia is art 352 of the *TFEU*, which states: ‘If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining consent of the European Parliament, shall adopt the appropriate measures ...’ This is known as the ‘necessity principle’ and allows the Union to add to its matters of exclusive competence if ‘necessary’ to achieve a Community objective. Moens has argued that the necessity principle has increased the exclusive jurisdiction of the Union, which results in a corresponding decrease in the effectiveness of subsidiarity which only applies to concurrent powers.<sup>130</sup>

In conclusion, there are many similarities between the Australian federation, as provided for in the Commonwealth *Constitution*, and the European Union Treaties in the area of exclusive and concurrent powers. At a basic level, both the Commonwealth *Constitution* and European Union Treaties contemplate, firstly, a division of powers between two levels of government, and secondly, the classification of powers as exclusive or concurrent.

When the nature of these powers is examined, additional similarities may be found. In both jurisdictions there are similar exclusive powers such as currency, customs,

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<sup>129</sup> *TFEU* art 5(3).

<sup>130</sup> Gabriël A Moens, ‘The Subsidiarity Principle in European Union Law and the Irish Abortion Issue’ in Guenther Doeker-Mach and Klaus A Ziegert (eds), *Law, Legal Culture and Politics in the Twenty First Century* (Franz Steiner Verlag Stuttgart, 2004) 424, 426.

defence and external affairs. Similarities can also be found in the concurrent powers of the Union and the Australian Parliament, including agriculture, fisheries, consumer protection, transport, energy, the environment and justice, for example.

In addition, both jurisdictions allow for some coordination between the central and regional governments. For example, under *TEU* art 5(1), noted above, the member states must coordinate their economic policies, utilising guidelines from the Union. The Australian federation also allows for a similar degree of cooperation between the Commonwealth and the states in the form of intergovernmental agreements (for example, regarding the distribution of Goods and Services Tax<sup>131</sup> revenue) and specific purpose grants<sup>132</sup> from the Commonwealth to the states where the states accept money from the Commonwealth, subject to conditions.

Following this discussion of the allocation of powers between the two levels of government, it is also relevant to discuss the role of the Parliament, if any, in protecting federalism and subsidiarity respectively. In this respect, Australia and the European Union differ. In the European Union, national Parliaments are entrusted with the responsibility, in conjunction with other institutions, of ensuring compliance with the principle of subsidiarity. However, in practice, the Australian Federal Parliament plays no such role.

More specifically, in the European Union, the role of national Parliaments as guardians of subsidiarity is noted in art 12(a) and (b) of the *TEU*. The opening paragraph states that ‘National Parliaments contribute actively to the good functioning of the Union’. Paragraph (a) states that this is to be done through ‘having draft legislative acts of the Union forwarded to them in accordance with the Protocol ...’ Further, para (b) provides that national Parliaments are responsible for ‘seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol ...’

As discussed in Chapter 3, para 2 of art 5(3) of the *TEU* confirms that European Union institutions must apply the principle of subsidiarity set out in the *Protocol on*

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<sup>131</sup> Hereafter, ‘GST’.

<sup>132</sup> *Constitution* s 96.

*the Application of the Principles of Subsidiarity and Proportionality* (the ‘*Protocol*’). It then confirms the role of national Parliaments as guardians of the principle of subsidiarity, stating that: ‘National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that *Protocol*.’

According to art 4 of the *Protocol*, national Parliaments are generally the first to receive draft legislative acts originating from the Commission or the European Parliament. Any draft legislative acts must be first forwarded to national Parliaments so they can consult with their own regional parliaments and prepare reasoned opinions as to whether the draft complies with the principle of subsidiarity.<sup>133</sup>

These reasoned opinions from national Parliaments are persuasive because of the requirement for relevant European Union institutions, including the European Parliament, Council and Commission, to take the reasoned opinions into account.<sup>134</sup> As explained in Chapter 3, the reasoned opinions of national Parliaments are allocated votes which may result in the draft having to be reviewed, or even amended or withdrawn.<sup>135</sup> However, the ultimate decision is left to the Commission which may maintain the proposed legislation without amendment provided it gives its own reasoned opinion stating why the amendment does comply with the principle of subsidiarity.<sup>136</sup>

As shown above, national Parliaments in the European Union play an important role in ensuring Union legislation complies with the principle of subsidiarity before it is enacted. However, the Australian federal system of government offers no such procedural safeguard.

Section 1 of the Commonwealth *Constitution* provides that the legislative power of the Commonwealth is vested in the Federal Parliament, consisting of the Queen, Senate and House of Representatives. Section 7 provides for a Senate, comprised of six senators representing each state, directly chosen by the people of the states. Thus, each state has equal representation in the Senate to ensure that larger states do not

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<sup>133</sup> *Protocol* art 6.

<sup>134</sup> *Protocol* art 7(1).

<sup>135</sup> *Protocol* art 7(1) and (2).

<sup>136</sup> *Protocol* art 7(3).

have more of a voice than the smaller ones. This is explained in more detail in *Odgers' Senate Practice*:

The principle of equal representation of the States is vital to the architecture of Australian federalism. It was a necessary inclusion at the time of federation in order to secure popular support for the new Commonwealth in each state especially the smaller states. It ensures that a legislative majority in the Senate is geographically distributed across the Commonwealth and prevents a parliamentary majority being formed from the representatives of the two largest cities alone. In contemporary Australia it acknowledges that the states continue to be the basis of activity in the nation whether for political, commercial, cultural or sporting purposes.<sup>137</sup>

Senators are elected for a six-year term, with the Senate divided into two classes of Senators so that half of the Senate elections coincide with elections for the House of Representatives.<sup>138</sup> The number of Senators for each state is now 12 and there are two Senators for each territory.<sup>139</sup> The House of Representatives, being the house of government, is provided for in s 24, and its members are directly chosen by the people of the Commonwealth, and comprise double the number of Senators. Its members are chosen for a term of three years.<sup>140</sup>

It could be argued that the successful passage of legislation through the Senate is essentially an endorsement of the states' approval of it, but the political reality is that Senators vote along party lines, rather than as guardians of their states' interests. Hence, in an Australian context, there is no equivalent process to that in the *Protocol* to ensure the scrutiny of Commonwealth legislation, in terms of compliance with federalism and the federal balance, before it is enacted.

#### ***D Judicial Protection of Federalism and Subsidiarity***

In Chapter 2 one of the characteristics of a federal system of government identified was that its constitution establishes an independent High Court of appeal to act as an independent constitutional 'umpire' to ensure that constitutional powers are not

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<sup>137</sup> Harry Evans (ed), *Odgers' Australian Senate Practice* (Department of the Senate, 12<sup>th</sup> ed, 2008) 90.

<sup>138</sup> *Constitution* s 13. See Harry Evans (ed), *Odgers' Australian Senate Practice* (Department of the Senate, 12<sup>th</sup> ed, 2008) 89, 93.

<sup>139</sup> Harry Evans (ed), *Odgers' Australian Senate Practice* (Department of the Senate, 12<sup>th</sup> ed, 2008) 89–90, 93.

<sup>140</sup> *Constitution* s 28.

transgressed or eroded, to maintain the federal balance of power and to determine disputes between the two levels of government. This characteristic can be seen in the Commonwealth *Constitution*, in ch III which outlines the judicial power of the Commonwealth.

The first section in ch III of the Commonwealth *Constitution* is s 71 which vests the judicial power of the Commonwealth in the High Court of Australia, federal courts created by Parliament and other courts that it invests with federal jurisdiction. High Court Justices are appointed by the Governor-General in Council and have security of tenure until the age of 70 years.<sup>141</sup> The separation of powers doctrine mandates that only courts properly constituted as Chapter III courts may exercise the judicial power of the Commonwealth,<sup>142</sup> and that federal court Justices may only exercise judicial power, and no other powers, except to the extent that they are incidental to the exercise of judicial power.<sup>143</sup> Thus, federal Justices are meant to be completely independent from the governments that appoint them and cannot be easily removed due to the secure tenure they enjoy.<sup>144</sup>

Under s 75, the High Court has original jurisdiction in matters arising under treaties in which the Commonwealth is a party, affecting representatives of other countries, between states or state residents, and in which Mandamus or Prohibition is sought against an officer of the Commonwealth. Under s 76 of the Commonwealth *Constitution*, Parliament can make laws conferring original jurisdiction on the High Court with respect to several matters, including any matter ‘arising under this *Constitution*, or involving its interpretation’. Parliament has done this in s 30 of the *Judiciary Act 1903* (Cth) which says that in addition to the matters in s 75 in which original jurisdiction is conferred, the High Court has original jurisdiction ‘in all matters arising under the *Constitution*, or involving its interpretation’.

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<sup>141</sup> *Constitution* s 72.

<sup>142</sup> *New South Wales v Commonwealth* (1915) 20 CLR 54 (‘Wheat case’).

<sup>143</sup> *Waterside Workers’ Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 (‘Alexander case’) and *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254 (‘Boilermakers case’).

<sup>144</sup> A Federal Justice can only be removed by the Governor-General in Council on an address from both Houses of Parliament on the ground of ‘proved misbehaviour or incapacity’: see *Constitution* s 72(ii).

As discussed in the previous section of this chapter, unlike the European Union, there is no process of review of legislation in Australia with a view to issues of federalism or maintaining the federal balance prior to it being enacted, such as prior consultation with the states. As mentioned in the previous section, the only procedural safeguard built into the *Constitution* was to establish an upper house to represent the states, namely the Senate, which has largely failed to fulfil this role. Hence, any review of legislation with the federal balance in mind only occurs if legislation is challenged by a state or states after the Bill has become law. The result is that the ultimate decision as to whether legislation is within the power of the Federal Parliament is left to the High Court, after the legislation has been enacted. Such a challenge can be categorised as being on legal/substantive grounds, rather than procedural grounds.

However, the High Court of Australia has failed to act as a guardian of federalism. Instead of fulfilling this role, numerous High Court decisions have supported the increase in the legislative and financial powers of the Commonwealth to the detriment of the states, eroding the notion of a federal balance to the extent that it has been inverted in favour of centralisation. In the *Work Choices* decision, the majority stated, using the language of the majority in *Engineers*, that it was necessary to ‘construe the constitutional text ... with all the generality which the words used admit’.<sup>145</sup> Further, following *Engineers*, the majority also indicated their support for the supremacy of Parliament, giving Parliament the latitude to determine the limits of their own power: ‘if a sufficient connection with a head of power does exist, the justice and wisdom of the law, and the degree to which the means it adopts are necessary or desirable, are matters of legislative choice’.<sup>146</sup> The sum of this reasoning was that the majority would not limit the scope of the provision on the basis that a broad construction would ‘distort the federal balance.’<sup>147</sup>

The situation was not helped by the framers’ regard for the federal balance as being so obvious from the text and structure of the *Constitution* that it went without saying that the *Constitution* should be interpreted with the maintenance of the federal balance in mind. The result was that there is no guidance in the *Constitution* itself as

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<sup>145</sup> *Work Choices* (2006) 229 CLR 1, 103.

<sup>146</sup> *Work Choices* (2006) 229 CLR 1, 104.

<sup>147</sup> *Work Choices* (2006) 229 CLR 1, 116.

to whether it should be interpreted in order to maintain the federal balance. The next two chapters, Chapters 5 and 6, outline in substantial detail the decline of federalism due to the High Court's failure to fulfill its role as protector of the federal balance, and due to the lack of interpretive direction in the *Constitution*. However, for the purposes of this chapter, it is sufficient to say that the High Court has proven itself to be an inadequate protector of federalism in the Australian constitutional system of government. In addition, due to the failure of procedural and constitutional mechanisms to preserve it, federalism has been gravely compromised in the Australian federation.

As discussed in Chapter 3, the European Union also has an independent judiciary, comprised of one Judge from each member state.<sup>148</sup> However, instead of being appointed until the age of 70 like Australian High Court Justices, Judges are appointed for a six-year term.<sup>149</sup> The Judges of the European Court of Appeal are assisted by eight Advocates-General<sup>150</sup> who advise the Court on the decision it should reach, and who can take into consideration matters not raised by the parties to the litigation.<sup>151</sup> The *TFEU* emphasises the independence of members of the Court stating: 'The Judges and Advocates-General of the Court of Justice shall be chosen from persons whose independence is beyond doubt ...'

This system, at first glance, appears to have some advantages and disadvantages for protecting regionalism, when compared with the Australian judiciary in the context of Australian federalism. Whilst a six-year term could be argued to undermine the true independence of the Justices who may wish to serve another term, member states are equally represented in the Court, with one Justice for each member state.<sup>152</sup> The *TFEU* also notes that the Judges and Advocates-General of the European Court of Justice 'shall be appointed by common accord of the governments of the Member States ...'

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<sup>148</sup> *TEU* art 19(2).

<sup>149</sup> *TEU* art 19(2) and *TFEU* art 253.

<sup>150</sup> *TEU* art 19(2).

<sup>151</sup> *TFEU* art 252.

<sup>152</sup> *TEU* art 19(2).

There is, however, no equitable distribution of High Court appointments between the Australian states, as appointments are made at a Commonwealth level with little state consultation. The Governor-General in Council appoints High Court Justices, which, in reality are political appointments determined by the Commonwealth Government in the hope that the Justice might be sympathetic to the government's political views through his or her interpretation of the law whilst on the High Court bench. Although s 6 of the *High Court of Australia Act 1979* (Cth) requires that before making an appointment to the High Court, the Commonwealth Attorney-General must consult with the State Attorneys-General about the vacancy, there is no requirement for equity among the states in these appointments, and the word 'consult' itself leaves much flexibility as to how, and to what extent the consultation is done.<sup>153</sup>

Academic commentators such as Moens have suggested that the system of appointment of High Court Justices in Australia should be amended so that the Australian states have a greater role in approving each appointment. This is because in a federal system, where power is divided between the Commonwealth and the states, it is entirely appropriate for the states to have input into appointments to the constitutional court that will rule on the limits of both Commonwealth and state powers.<sup>154</sup> For example, Moens suggests that the 'most workable' way of involving the states in the appointment of High Court Justices is for Australia to adopt the model proposed by the Queensland government in the 1980s. This model involves the Commonwealth Attorney-General asking for nominations of possible appointments from the states' Attorneys-General, with the Commonwealth also being able to suggest potential candidates. An appointment could then only be made if the candidate was approved by the Commonwealth and at least three state governments.<sup>155</sup>

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<sup>153</sup> Gabriël A Moens, 'The Role of the States in High Court Appointments' (Paper presented at the Eighth Conference of The Samuel Griffith Society, University House, Canberra, 7–9 March 1997) 17, 20–21.

<sup>154</sup> Gabriël A Moens, 'The Role of the States in High Court Appointments' (Paper presented at the Eighth Conference of The Samuel Griffith Society, University House, Canberra, 7–9 March 1997) 17, 27–31.

<sup>155</sup> Gabriël A Moens, 'The Role of the States in High Court Appointments' (Paper presented at the Eighth Conference of The Samuel Griffith Society, University House, Canberra, 7–9 March 1997) 17, 27–28.

In summary, High Court appointments are political appointments made at the central level. Whilst the role of a Justice is independent, it would be naïve to assert that the governments who appoint them do not have at least some expectation that their appointee will have similar political views which will result in an interpretation of the law in a manner consistent with the government's ideology. If this is the case, it is arguable that the states' role in the appointment will potentially remind the appointee of the importance of federal considerations in constitutional interpretation and the significance of the High Court as the guardian of Australian federalism. Consultation with the states may also serve to remind the Commonwealth government of the importance of the states in the Australian federation. Given the Federal Parliament's tendency to enact laws that increasingly encroach on the legislative domain of the states, such a reminder may be one of many positive steps that can be taken to enhance Australian federalism.

The relevant treaty provisions regarding the European Court of Justice offer an improved potential for it to serve as a guardian of subsidiarity when compared to the protection of Australian federalism offered by the Commonwealth *Constitution*. As noted in Chapter 3, a failure to comply with the principle of subsidiarity is directly justiciable in the European Union. This means that the European Court of Justice could annul regulations or directives that infringe the principle. However, as also noted in Chapter 3, the Court has been reluctant to do so, preferring to leave the judgment about compliance with subsidiarity with the Union institutions themselves. The effect has been that, in the European Union, subsidiarity has been more effective in a procedural sense than as a substantive legal principle,<sup>156</sup> and has not been successful as a ground of legal challenge.<sup>157</sup> Chapter 7 will examine the reasoning in specific decisions of the European Court of Justice with respect to subsidiarity. It will do so in order to assess why subsidiarity has not been successful in a legal sense and how Australia may be able to improve on the protection of federalism through learning from the inadequacies of the European Union in this regard.

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<sup>156</sup> Takis Tridimas, *The General Principles of EU Law* (Oxford University Press, 2006) 185.

<sup>157</sup> Ian Cooper, 'Subsidiarity and Autonomy in the European Union' in Louis W Pauly and William D Coleman (eds), *Global Ordering: Institutions and Autonomy in a Changing World* (UBC Press, 2008) 234, 235.

### ***E Administrative Protection of Federalism and Subsidiarity***

The preceding two sections of this chapter have examined the similarities and differences between the parliamentary and judicial protections of federalism and subsidiarity in Australia and the European Union respectively. While there are some differences, there is also substantial common ground. It can be seen that there is consistency between both principles and that Australia could adopt some of the parliamentary and judicial protections in place in the European Union in order to enhance Australian federalism. This section continues with this analysis by examining whether there are any similarities in administrative protections of federalism and subsidiarity in both jurisdictions.

In Australia, several administrative enquiries have been initiated to examine the state of Australian federalism. These will be discussed below. Although discussion about the effectiveness of and possible reforms to the Australian federal system are encouraging, the resultant reports and discussion papers have not resulted in any meaningful administrative, or indeed constitutional, changes being initiated. For example, in their discussion paper, *Federalist Paper 1 Australia's Federal Future: Delivering Growth and Prosperity*, Twomey and Withers make recommendations for reforming the Australian federal system including: improving co-operation between the Commonwealth and state governments, such as ensuring that COAG meetings are not solely convened by the Commonwealth; financial reforms such as ensuring the states have a greater say in how they can use specific purpose grant monies from the Commonwealth; and some minor constitutional reforms such as a provision allowing for the referral of some Commonwealth powers to the states.<sup>158</sup> However, to date, not one of these reforms have been implemented, or even discussed further at a Commonwealth level.

Perhaps the lack of change could be explained by the fact that many of these reports have been commissioned by state and other industry bodies, rather than the federal Government itself. For example, Twomey and Withers' report was prepared for the Council for the Australian Federation, a body whose members comprise State Premiers and Territory Chief Ministers whose objectives include developing a

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<sup>158</sup> Anne Twomey and Glen Withers, *Federalist Paper 1 Australia's Federal Future: A Report for the Council for the Australian Federation* (2007) 46–49.

‘common understanding of the States’ and Territories’ positions in relation to policy issues involving the Commonwealth Government’ and ‘taking a leadership role on key national policy issues, including the Federation, that are not addressed by the Commonwealth Government’.<sup>159</sup>

Reports on reforming the Australian Federation have also been made by the New South Wales Government<sup>160</sup> and the Business Council of Australia,<sup>161</sup> a body whose membership is comprised of the CEOs of 100 of Australia’s top companies.<sup>162</sup> Roundtable Proceedings into reforming the Australian federal system were held by the Productivity Commission in Canberra on 27 and 28 October 2005.<sup>163</sup> Although the Productivity Commission is established by Commonwealth legislation, it acts as an independent advisor to the Commonwealth Government on issues of economic policy, so the Proceedings could not be said to be initiated as the result of the Commonwealth Government’s concern at the state of the Australian Federation.

However, a report called *Australia’s Federation: An Agenda for Reform* was handed down by the Senate Select Committee on the Reform of the Australian Federation in 2011.<sup>164</sup> This bipartisan report was compiled after submissions were received from interested parties and after public hearings were conducted in Sydney, Brisbane, Perth and Canberra. The report made 21 recommendations for reforming and strengthening the Australian federal system. These recommendations included establishing a Joint Standing Committee of the Federal Parliament to oversee and conduct its own inquiries in order to ‘assume a significant and integral role in helping to manage Australia’s modern federation’.<sup>165</sup> The Joint Standing Committee would also consider the High Court’s centralising tendency with a view to ‘formulating policy proposals’ that could be considered at a constitutional

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<sup>159</sup> Council for the Australian Federation, <<http://www.caf.gov.au/>>.

<sup>160</sup> Neil Warren, *Benchmarking Australia’s Intergovernmental Fiscal Arrangements: Final Report* (New South Wales Government, 2006).

<sup>161</sup> Business Council of Australia, *Reshaping Australia’s Federation — a New Contract for Federal–State Relations* (Business Council of Australia, 2006).

<sup>162</sup> Business Council of Australia, *Our Structure* (2012) <<http://www.bca.com.au/Content/100827.aspx>>.

<sup>163</sup> Productivity Commission, *Productive Reform in a Federal System* (Roundtable Proceedings, Canberra, 27–28 October 2005).

<sup>164</sup> Senate Select Committee on the Reform of the Australian Federation, Parliament of Australia, *Australia’s Federation: An Agenda for Reform* (2011).

<sup>165</sup> Senate Select Committee on the Reform of the Australian Federation, Parliament of Australia, *Australia’s Federation: An Agenda for Reform* (2011) xv, Recommendation 17.

convention.<sup>166</sup> Parliamentary Committees, and possibly the Joint Standing Committee should review drafts of legislation that may amount to a referral of power to the Commonwealth.<sup>167</sup> It was also recommended that the Joint Standing Committee should look into the fiscal imbalance between the Commonwealth and the states, including the distribution of GST revenue.<sup>168</sup> To date, these recommendations have not been adopted.

The European Union has a more formalised process of reporting on the effectiveness of subsidiarity. Unlike Australia, the European Union can be said to have executive safeguards to protect subsidiarity in this regard. As noted in Chapter 3, there is a formalised reporting procedure in the European Union to monitor the operation and effectiveness of the principle of subsidiarity.

Article 9 of the *Protocol on the Application of the Principle of Subsidiarity and Proportionality* of 1997 provides that the Commission must prepare and submit an annual report to the European Parliament, Council and national Parliaments on the application of the principle of subsidiarity in art 5(3) of *The TEU*. Article 9 further states that the report ‘shall also be forwarded to the Economic and Social Committee and the Committee of the Regions.’ Despite its codification in the *Protocol*, the annual reporting started in 1993 after a recommendation was made at the Edinburgh European Council held on 11 and 12 December 1992.<sup>169</sup> The aim of the annual report is to describe and give examples about how the principles of subsidiarity and proportionality have been applied over the preceding year.<sup>170</sup> The report is a detailed disclosure by a central authority (the Commission) of how the principles have been applied to all the European Union institutions. It is thus, in itself, a check and balance on the Commission, and a measure of the effectiveness of the principles by drawing

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<sup>166</sup> Senate Select Committee on the Reform of the Australian Federation, Parliament of Australia, *Australia's Federation: An Agenda for Reform* (2011) xiii, Recommendation 1.

<sup>167</sup> Senate Select Committee on the Reform of the Australian Federation, Parliament of Australia, *Australia's Federation: An Agenda for Reform* (2011) xiii, Recommendation 3.

<sup>168</sup> Senate Select Committee on the Reform of the Australian Federation, Parliament of Australia, *Australia's Federation: An Agenda for Reform* (2011) xiv, Recommendations 9 and 10.

<sup>169</sup> Commission of the European Communities, *Report from the Commission: Better Lawmaking 2002: Pursuant to Article 9 of the Protocol to the EC Treaty on the Application of the Principles of Subsidiarity and Proportionality* (Commission Report No COM(2002)715, 11 December 2002) 3.

<sup>170</sup> Commission of the European Communities, *Report from the Commission: Better Lawmaking 2001: Pursuant to Article 9 of the Protocol to the EC Treaty on the Application of the Principles of Subsidiarity and Proportionality* (Commission Report No COM(2001)726, 7 December 2001) 3.

attention to action taken in accordance with them. There is no similar annual or regular reporting requirement at a Commonwealth level in which the Commonwealth must assess how it has complied with federalism.

As noted above, one of the institutions that must receive the annual report on subsidiarity and proportionality, according to the *Protocol*, is the Committee of the Regions. The Committee of the Regions is an advisory committee, established in 1994 to assist the European Parliament, Council and the Commission,<sup>171</sup> and is ‘completely independent’<sup>172</sup> of the institutions it advises. It consists of representatives from elected regional or local bodies.<sup>173</sup> Members are nominated by each member state and hold office for a term of five years which can be renewed.<sup>174</sup> There can be no more than 350<sup>175</sup> members. The members elect a Chairman and officers for a two-and-a-half-year terms.<sup>176</sup> Given the number of members, the Commission has six ‘distinctive commissions’ to assist in the preparation of draft opinions on particular areas. These distinctive commissions are the: Commission for Territorial Cohesion Policy; Commission for Economic and Social Policy; Commission for Education, Youth and Research; Commission for Environment, Climate Change and Energy; Commission for Citizenship, Governance, Institutional and External Affairs; and Commission for Natural Resources.<sup>177</sup> Draft opinions are then sent to the Plenary Assembly to be adopted.<sup>178</sup>

Many of the members of the Committee are politicians with regional or local experience.<sup>179</sup> The Committee has its own rules of procedure<sup>180</sup> and can be convened by its own initiative or by request of the European Parliament, Council or the Commission.<sup>181</sup> The Committee will be consulted and asked to provide an advisory

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<sup>171</sup> TFEU art 300(1).

<sup>172</sup> TFEU art 300(4).

<sup>173</sup> TFEU art 300(3).

<sup>174</sup> TFEU art 305.

<sup>175</sup> TFEU art 305.

<sup>176</sup> TFEU art 306.

<sup>177</sup> Committee of the Regions, *Commissions* (2012) <<http://cor.europa.eu/en/activities/commissions/Pages/default.aspx>>.

<sup>178</sup> Committee of the Regions, *Commissions* (2012) <<http://cor.europa.eu/en/activities/commissions/Pages/default.aspx>>.

<sup>179</sup> Neill Nugent, *The Government and Politics of the European Union* (Macmillan Press, 4<sup>th</sup> ed, 1999) 288.

<sup>180</sup> TFEU art 306.

<sup>181</sup> TFEU art 306.

opinion where the Treaties provide and in issues of ‘cross-border cooperation’.<sup>182</sup> In doing so, the Parliament, Commission or Council may give the Committee a time limit of no less than a month in which to formulate an opinion.<sup>183</sup> The Committee can also give an opinion on its own initiative, for example, in cases ‘where it considers specific regional interests are involved.’<sup>184</sup> These areas are summarised on the official web page of the Committee of the Regions as follows:

Once the legislative proposal has been made by the Commission, consultation of the CoR is again obligatory if the proposal concerns one of the many policy areas that directly affect local and regional authorities. The Maastricht Treaty set out five such areas - economic and social cohesion, trans-European infrastructure networks, health, education and culture, while the Amsterdam Treaty added another five - employment policy, social policy, the environment, vocational training and transport. The Lisbon Treaty has extended the scope of the CoR’s involvement even further, adding civil protection, climate change, energy and services of general interest to the list of policy areas where the CoR must be consulted.<sup>185</sup>

When the Committee provides an opinion, the opinion and record of proceedings is sent to the European Parliament, Council and Commission.<sup>186</sup> It also has standing to challenge European Union legislation in the European Court of Justice in order to ‘protect ... [its] prerogatives’,<sup>187</sup> which would include a contravention of the principle of subsidiarity, or where mandatory consultation with the Committee was required but not conducted.<sup>188</sup> In fact, the Committee of the Regions’ has been described as a ‘subsidiarity watchdog’.<sup>189</sup>

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<sup>182</sup> TFEU art 307.

<sup>183</sup> TFEU art 307.

<sup>184</sup> TFEU art 307.

<sup>185</sup> This quotation is from Committee of the Regions, *PRESENTATION/role* <<http://cor.europa.eu/pages/CoRAtWorkTemplate.aspx?view=detail&id=88155bdb-4c1f-4725-a9df-c2309b2a2a96>>. However, at the time of editing this thesis the web site has been removed from the internet. For a current web page that describes the role, membership and structure of the Committee of the Regions, see Committee of the Regions, *About COR* <<http://cor.europa.eu/en/about/Pages/index.aspx>>.

<sup>186</sup> TFEU art 307.

<sup>187</sup> TFEU art 263.

<sup>188</sup> Protocol art 8.

<sup>189</sup> Committee of the Regions, ‘Lisbon Treaty Turns Committee of the Regions into Subsidiarity Watchdog’ (Press Release, COR/09/113, 4 December 2009) <<http://europa.eu/rapid/pressReleasesAction.do?reference=COR/09/113&format=HTML&aged=0&language=EN&guiLanguage=en>>.

Thus, the Committee allows for representation at a regional level of decisions and policies affecting them.<sup>190</sup> However, it is not without criticism. For example, it has been suggested that instead of being chosen by member states, the Committee's members should be chosen directly by the people of each region at the European elections.<sup>191</sup> Also, as noted above, the Committee need not be consulted about every legislative measure, with mandatory consulting only being required in specific areas. The Committee of the Regions plays a vital role in protecting regional and local interests in the European Union, including playing a key role in policing the principle of subsidiarity. This is evidenced in part by the number of opinions it gives. For example, between 2006 and 2010, 212 opinions were made and adopted by the Committee.<sup>192</sup>

The closest equivalent to the Committee of the Regions in Australia is the Council of Australian Governments ('COAG'). The Members of COAG are the Prime Minister, Premiers of the states, territory Chief Ministers and the Australian Local Government Association President.<sup>193</sup> Unlike the Committee of the Regions which is encoded in the *TFEU*, COAG was established in 1992 by agreement of the persons holding these offices at the time. Meetings are scheduled 'as needed', with the Prime Minister as the Chair and the Secretariat located at the Department of the Prime Minister and Cabinet, and with any formal agreement being reduced to a formal intergovernmental agreement. At the end of each meeting a communiqué is released detailing the results of the meeting.<sup>194</sup> The objectives of COAG are summarised on its web page as follows:

The role of COAG is to initiate, develop and monitor the implementation of policy reforms that are of national significance and which require cooperative action by Australian governments (for example, health, education and training, Indigenous reform, early childhood development, housing, microeconomic reform, climate change

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<sup>190</sup> Nicholas Moussis, *Guide to European Policies* (European Study Service, 14<sup>th</sup> ed, 2008–2009) 52.

<sup>191</sup> Nicholas Moussis, *Guide to European Policies* (European Study Service, 14<sup>th</sup> ed, 2008–2009) 59; Neill Nugent, *The Government and Politics of the European Union* (Macmillan Press, 4<sup>th</sup> ed, 1999) 286.

<sup>192</sup> Directorate for Consultative Work, 'Update of Opinions adopted by the Committee of the Regions (In Chronological Order) 4<sup>th</sup> Four-Year Term of Office (2006–2010)' (CDR 120/2006, Committee of the Regions, December 2009).

<sup>193</sup> Council of Australian Governments, (13 April 2012) <<http://www.coag.gov.au/>>.

<sup>194</sup> Council of Australian Governments, *About COAG* (18 February 2010) <[http://www.coag.gov.au/about\\_coag/index.cfm](http://www.coag.gov.au/about_coag/index.cfm)>.

and energy, water reform and natural disaster arrangements). Issues may arise from, among other things: Ministerial Council deliberations; international treaties which affect the States and Territories; or major initiatives of one government (particularly the Australian Government) which impact on other governments or require the cooperation of other governments.<sup>195</sup>

Hence COAG's discussions primarily focus on issues of policy requiring intergovernmental implementation, and not legislative reforms like the Committee of the Regions. There is also a COAG Reform Council<sup>196</sup> which reports to COAG and whose role is described by former Western Australian Premier Geoff Gallop as to 'drive the national reform agenda by strengthening accountability through independent and evidence based monitoring, assessment and public reporting on the performance of governments.'<sup>197</sup> A recent illustrative example of where COAG's role has enhanced cooperative federalism is the *Intergovernmental Agreement on Federal Financial Relations*<sup>198</sup> of 1 January 2009.<sup>199</sup> In this *Agreement*, the Commonwealth, states and territories agreed to continue GST grants to the states and territories on the basis of fiscal equalisation, to work more collaboratively and to simplify the process of Specific Purpose Payments (that is, s 96 grants) and other grants to the states and territories, in acknowledgment of the fact that the states and territories are largely responsible for the implementation of the reforms funded by these Commonwealth payments and grants. Gallop has noted that the Reform Council will have a key role in assisting to achieve the objectives of this agreement. In this context he stated: 'At the heart of the council's [COAG Reform Council's]

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<sup>195</sup> Council of Australian Governments, *About COAG* (18 February 2010) <[http://www.coag.gov.au/about\\_coag/index.cfm](http://www.coag.gov.au/about_coag/index.cfm)>.

<sup>196</sup> See generally COAG Reform Council, 'About US' <<http://www.coagreformcouncil.gov.au/about.cfm>>.

<sup>197</sup> Geoff Gallop, 'The COAG Reform Council: A View from the Inside' in Paul Kildea, Andrew Lynch and George Williams (eds), *Tomorrow's Federation: Reforming Australian Government* (Federation Press, 2012) 43, 45.

<sup>198</sup> Council of Australian Governments, *Intergovernmental Agreement (IGA) on Federal Financial Relations* (26 October 2011) <[http://www.coag.gov.au/intergov\\_agreements/federal\\_financial\\_relations/](http://www.coag.gov.au/intergov_agreements/federal_financial_relations/)>.

<sup>199</sup> For a background to the Agreement and associated legislation, see generally Bryan Pape, Supplementary Submission 15.1 to Joint Committee of Public Accounts and Audit, *Inquiry into National Funding Agreements* (8 August 2011) <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committee?url=jcpaa/natagree/subs/sub15.1.pdf](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committee?url=jcpaa/natagree/subs/sub15.1.pdf)>.

role is ... to enhance the accountability of governments through public monitoring and reporting.’<sup>200</sup>

This Agreement culminated in legislative reform in the form of the *COAG Reform Fund Act 2008* (Cth), which established a COAG Reform Fund as a Special Account under the Consolidated Revenue Fund<sup>201</sup> for grant monies paid by the Commonwealth to the states and territories,<sup>202</sup> and the *Federal Financial Relations Act 2009* (Cth), which sets out the calculation and distribution of GST revenue from the Commonwealth to the states and territories and the payment of general purpose grants, certain specific purpose payments (including healthcare, schools, skills and workforce development, disability services and housing services) into the COAG Reform Fund, including the amount of the payments and appropriations terms and conditions. This *Agreement* and associated legislation aim for increased cooperation and a more streamlined and transparent grants process. However, they are the result of a voluntary process and agreement, where there is no referral of fiscal powers from the Commonwealth to the states and territories. Interestingly, the *Agreement* acknowledges this in s 7 which states, ‘it is not the intention of the Parties to alter the Constitutional responsibility or accountability of the Commonwealth, States and Territories.’

At a more general level, there is certainly no obligation on the part of the Prime Minister to discuss proposed Commonwealth legislation with the other members of COAG. Whilst COAG and the Intergovernmental Agreements that have resulted are a good example of the operation of cooperative federalism, policing federalism against centralisation is not COAG’s primary role in the same way as the Committee of the Regions polices subsidiarity. COAG is more an opportunity for the states and territories to make the best of the inferior position in which they have found themselves given the dire state of Australian federalism, such as wrangling over the conditions of specific purpose grants in order to maximise the benefits of health law reform. In addition, given the location of its Secretariat in the Prime Minister’s

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<sup>200</sup> Geoff Gallop, ‘The COAG Reform Council: A View from the Inside’ in Paul Kildea, Andrew Lynch and George Williams (eds), *Tomorrow’s Federation: Reforming Australian Government* (Federation Press, 2012) 43, 46.

<sup>201</sup> *COAG Reform Fund Act 2008* (Cth) s 5.

<sup>202</sup> *COAG Reform Fund Act 2008* (Cth) s 5.

office, and its membership, COAG is not an independent advisory body in the same way that the Committee of the Regions is.

#### **IV CONCLUSION: LESSONS FOR AUSTRALIAN FEDERALISM TO LEARN FROM SUBSIDIARITY IN THE EUROPEAN UNION**

Subsidiarity in the European Union and federalism in an Australian context are theoretically and conceptually very similar. Both are concerned with decentralisation and limiting central power. Both are concerned with governance as close to citizens and regions wherever possible, the allocation of power between two levels of government, and providing checks and balances on that power in order to enhance democracy.

When one compares the Australian Commonwealth *Constitution* which embodies federal principles and the European Union Treaties, both embody the principles, but in slightly different ways. Subsidiarity is specifically mentioned in the European Union Treaties, whereas in the Australian *Constitution*, federalism is more implied by its text, structure and certain provisions, such as s 107. However, the two concepts are nevertheless critical to the systems of government in Australia and the European Union. Looking at the documents themselves, the European Union Treaties are analogous to the Australian *Constitution*, going far beyond the role of a normal treaty. That is, both set up a system of federal government and its institutions and relationship to regional governments. Whilst there are some differences between these institutions, an underlying federal structure is common to both.

This underlying commonality makes a comparison between the internal structure and workings of European Union and Australian institutions at a legislative, judicial and executive level particularly useful in determining whether Australia can adopt aspects of subsidiarity from the European Union to improve and enhance Australian federalism. Some of the reforms inspired by subsidiarity that Australia could adopt to enhance and improve federalism include:

- Adding an express statement in the *Constitution* on the principle of federalism similar to how the principle of subsidiarity is stated in art 5(3) of the *TEU*;

- Ensuring that draft federal legislation is sent to the states prior to enactment, with the opportunity for each state to provide an opinion on whether it is detrimental to the federal balance, for example, if it encroaches on a traditional area of state power;
- Establishing a Parliamentary Committee on federalism to comment on whether draft federal legislation is compatible with federalism before it is enacted;
- Requiring a federalism compatibility statement to be read by the relevant Minister when a Bill is introduced into Parliament;
- Ensuring that the states play more of a role in the selection of High Court Justices;
- Making ‘federalism’ a ground of judicial review as it is with subsidiarity in the European Union; and
- Establishing an independent body that is equivalent to the Committee of the Regions to act in an advisory role, but which can also give independent opinions on issues of federalism.

However, Australia must carefully formulate the above recommendations. This is because, despite the principle of subsidiarity in the European Union and the measures and institutions that support it, there has nevertheless been increased centralisation, largely caused by the disregard of the principle by the European Court of Justice. Chapter 7 will examine the reasons for subsidiarity’s lack of success at a judicial level, and how Australia might overcome these deficiencies when applying the recommendations made above. This is particularly important to resolve in an Australian context given the High Court’s tendency toward centralisation in its interpretation of the Commonwealth *Constitution*. The recommendations made in this chapter will also be expanded upon in Chapter 7.

This thesis will first examine in Chapters 5 and 6 why Australian federalism needs reform. It will look at exactly how the High Court has compromised the federal balance in order to illustrate why major reforms are required.

## **CHAPTER 5: WHY AUSTRALIAN FEDERALISM IS IN NEED OF REFORM (PART 1): AN OVERVIEW OF CONSTITUTIONAL INTERPRETATION BY THE HIGH COURT LEADING UP TO THE *ENGINEERS CASE***

[T]hose who wrote the *Constitution* envisaged a nation in which sprightly, independent states would discharge their functions in an equal or even slightly superior partnership with the Commonwealth. The burning historical question of Australian federalism is how the states declined from their intended position as roosters of the federation to today's increasingly bedraggled feather dusters ... the answer lies in the utter failure of the founders' plan to preserve the patrimony of the states, a plan based upon a protective Senate, limited commonwealth powers and an impartial High Court.<sup>1</sup>

Whilst somewhat jocular in nature, Craven's words provide an accurate synopsis of the reasons for the decline of the states in the Australian federal system. It was established in Chapter 2 that the general consensus of elected representatives who drafted the *Constitution* expected that the states would be powerful, independent and co-operative partners in the new federation. This was evidenced by the Convention Debates and the provisions and structure of the *Constitution* itself. Great care was taken by the founders to draft a fundamentally federal document that preserved the integrity, autonomy and sovereignty of the states. They took care to create a 'States' House', the Senate, to represent and protect states' interests, and carefully limited Commonwealth legislative powers, thus leaving the states with plenary powers over the matters not allocated to the Commonwealth.

Despite this, the Australian federation has become something less than a true federation that is in need of reform. This is primarily due to the way in which the High Court has interpreted the *Constitution*.<sup>2</sup> In order to provide a foundation for potential reforms to the Australian federal system, Chapter 3 provided an introduction to subsidiarity. Subsidiarity's compatibility with federalism was

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<sup>1</sup> Greg Craven, *Conversations with the Constitution: Not Just a Piece of Paper* (University of New South Wales Press, 2004) 77.

<sup>2</sup> In my view, the High Court has played a predominant role in sanctioning increased centralisation. However, I acknowledge the dual role that the Federal Parliament has played in initiating centralisation through legislation. For a discussion of this see Brian Galligan, 'The Australian High Court's Role in Institutional Maintenance and Development' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (Federation Press, 1996) 184, 191.

discussed in Chapter 4, which concluded with a summary of possible procedural, legislative and constitutional reforms that Australia could make, drawing upon the theoretical and practical operation of subsidiarity in the European Union. Before these reforms are discussed in further detail in Chapter 7, it is necessary to explain why Australian federalism is in need of reform. This will be discussed in this chapter, and the next chapter (Chapter 6).

This chapter will commence by outlining the various methods of constitutional interpretation used by the High Court, in order to put into context the progression from a states-centred federal system to an increasingly centralised system of government (Research Question 5). These methods are originalism, literalism and revisionism, and this chapter will evaluate the advantages and disadvantages of each. However, as will be evident from this chapter and the next, the High Court's interpretation of the *Constitution* has displaced the federal balance to such an extent that none of these existing methods of interpretation will suffice to restore it.

Additionally, in order to show how decisions of the High Court have compromised the federal balance (Research Question 6), it is necessary to examine how the early High Court *did* seek to fulfill its responsibility as the protector of federalism and the states. Consequently, this chapter will outline how the early High Court sought to give effect to the intentions of the framers and the federal nature of the *Constitution* through an originalist approach to constitutional interpretation which protected the federal balance and the powers of the states. This was done through the application of the state reserved powers doctrine and the doctrine of implied immunity of instrumentalities.

However, the federal landscape was irreparably altered by the High Court as a result of the *Engineers* case<sup>3</sup> in 1920, where the High Court rejected these doctrines in favour of an expansive, rather than restrictive, characterisation of federal powers. The *Engineers* case will be examined and critiqued at the conclusion of this chapter, to show the stark contrast between *Engineers* and the previous decisions of the early High Court, and the unsoundness of the High Court's reasoning.

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<sup>3</sup> *Engineers* (1920) 28 CLR 129.

## I UNCERTAINTY AND CONSTITUTIONAL INTERPRETATION

This section will examine the three main methods of constitutional interpretation that have been employed by the High Court, namely originalism (also known as ‘intentionalism’), literalism, and revisionism (also known as the ‘living Constitution’ approach).<sup>4</sup> It will outline these interpretive approaches, examining the main advantages and disadvantages of each, and will also examine academic and judicial commentary about these methods to show that the method employed is very much a matter of personal choice on the part of the individual High Court Judge and that there is no consensus as to which is to be the correct or preferred method. In addition, the *Constitution* does not provide any guidance as to how it should be interpreted, leaving considerable discretion to the High Court.

### *A Originalism*

This method of interpretation seeks to give effect to the intentions of those who drafted the *Constitution*, hence the name, ‘originalism’ or ‘intentionalism’.<sup>5</sup> If the wording of a constitutional provision is unclear, a Judge will look to the Constitutional Convention Debates, and the history of the provision (including previous drafts of it), in order to determine its meaning.

Two examples of originalism will be discussed below. These are the reserved powers doctrine and doctrine of implied intergovernmental immunities. Both of these doctrines were employed by the early High Court as part of its originalist approach. As will be discussed in the following section of this chapter, the early High Court Justices were involved in the drafting of the *Constitution*. Accordingly, they knew what the intentions were behind the drafting of each provision. A key part of their approach was to preserve the powers and autonomy of the states, which, as evidenced by the Constitutional Convention Debates, discussed in Chapter 2, was of

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<sup>4</sup> For a discussion of the various types of constitutional interpretation generally see James A Thomson, ‘Principles and Theories of Constitutional Interpretation and Adjudication: Some Preliminary Notes’ (1981–1982) 13 *Melbourne University Law Review* 597.

<sup>5</sup> For criticism of intentionalism/originalism, see Michael Kirby, ‘Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?’ (2000) 24 *Melbourne University Law Review* 1; For a more favourable approach to intentionalism/originalism, see Jeffrey Goldsworthy, ‘Originalism in Constitutional Interpretation’ (1997) 25 *Federal Law Review* 1.

utmost concern to the delegates. Consequently, their interpretation sought to preserve the federal balance of power between the Commonwealth and the states, as the democratically elected delegates had understood it to be when they debated the proposed provisions of the *Constitution*.<sup>6</sup>

Originalism has many advantages as a method of constitutional interpretation. It offers a way to find a ‘true’ or consistent meaning because it is based on tangible evidence,<sup>7</sup> namely the history surrounding the drafting of the *Constitution* and the Convention Debates. Thus, one can read the transcript of the various debates concerning a particular constitutional provision to ascertain the meaning of the provision as the framers intended it. It can also assist in resolving ambiguity.<sup>8</sup> The advantage of this is that originalism offers some consistency in constitutional interpretation, and in doing so, acts as a deterrent against judicial activism. Thus if a Judge must base his or her interpretation of a constitutional provision on the intentions of the framers from the Convention Debates, there is less likelihood of the Judge being able to let his or her own social or political views colour the interpretation of the provision. However, these comments should be considered in light of the following quotation from Kirk who noted:

A constitution cannot be applied without employing some theory of interpretation. An adequate theory — that is, a coherent method of approach — must address two fundamental, connected questions. In what sense are words in the text to be understood? How is ambiguity or uncertainty to be resolved?<sup>9</sup>

Originalism is able to answer the first question posed by Kirk, namely ‘in what sense are the words in the text to be understood?’ The answer is: as the framers would have

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<sup>6</sup> For a discussion of the founders’ intentions with respect to the High Court see Greg Craven, ‘The High Court and the States’ (Paper presented at the Sixth Conference of The Samuel Griffith Society, Townhouse Hotel, Carlton, 17–19 November, 1995) 65.

<sup>7</sup> For a discussion of the advantages and disadvantages of history in interpretation, see Bradley Selway, ‘The Use of History and Other Facts in the Reasoning of the High Court of Australia’ (2001) 20 *University of Tasmania Law Review* 129. Selway suggests that some caution should be exercised when using history as an argumentative and interpretive tool because ‘it is one of the conceits of the legal profession that its members are necessarily good historians’. See also, Rob McQueen, ‘Why High Court Judges Make Poor Historians: The Corporations Act Case and Early Attempts to Establish a National System of Company Regulation in Australia’ (1990) 19 *Federal Law Review* 245.

<sup>8</sup> Robert W Bennett, ‘Objectivity in Constitutional Law’ (1984) 132 *University of Pennsylvania Law Review* 445, 458. This article discusses originalism from an American perspective.

<sup>9</sup> Jeremy Kirk, ‘Constitutional Interpretation and a Theory of Evolutionary Originalism’ (1999) 27 *Federal Law Review* 323, 323.

understood those words. However, it provides little guidance from which to answer the second question regarding ambiguity or uncertainty. For example, what if the Convention Debates do not provide an accurate indication of how such uncertainty or ambiguity is to be resolved? Does one try to anticipate what the framers would have thought if they had contemplated the issue in question? And how accurate would such a choice be? This raises the criticism, made by Deane J in *Theophanous v Herald & Weekly Times Ltd* that such a guess is entirely inappropriate and outdated. Deane J was a member of the majority who not only recognised the existence of an implied freedom of political communication, but also that it could extend to shape the common law as a defence to a common law defamation action. Deane J, who advocated a revisionist approach, which will be discussed below, stated:

to construe the *Constitution* on the basis that the dead hands of those who framed it reached from their graves to negate or constrict the natural implications of its express provisions or fundamental doctrines would deprive what was intended to be a living instrument of its vitality and adaptability to serve succeeding generations.<sup>10</sup>

Originalism has also come under criticism as a method of constitutional interpretation because it is based on the intentions of the framers in the 1890s, which was a very different society to that of today. It has even been described as a form of ‘ancestor worship’.<sup>11</sup> Critics of originalism argue that, as time progresses, new social, political and legal issues necessarily arise that the framers could not possibly have considered.<sup>12</sup> The criticism is that ‘the framers’ intent — is either unintelligible or unascertainable’.<sup>13</sup> As noted above, this leaves the originalist with a difficult interpretive decision to make. Does he or she try to predict what the framers would have decided if faced with the same issue, or must some other method be employed, and if so, which one?

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<sup>10</sup> *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 171 (Deane J). For further background to the ‘dead hands’ vs ‘living tree’ interpretive methods, see Leslie Zines, ‘Dead Hands or Living Tree? Stability and Change in Constitutional Law’ (2004) 25 *Adelaide Law Review* 3.

<sup>11</sup> See Mirko Bagaric, ‘Originalism: Why Some Things Should Never Change — Or At Least Not Too Quickly’ (2000) 19 *University of Tasmania Law Review* 175, 176.

<sup>12</sup> For a critique of originalism see Chief Justice Murray Gleeson, ‘The Constitutional Decisions of the Founding Fathers’ (Inaugural Annual Lecture delivered at the University of Notre Dame Law School, Sydney, 27 March 2007).

<sup>13</sup> Mirko Bagaric, ‘Originalism: Why Some Things Should Never Change — Or At Least Not Too Quickly’ (2000) 19 *University of Tasmania Law Review* 175, 176.

A further merit of originalism is that it has its underlying foundations in democracy. This is explained by Craven as follows:

Were one to identify the underpinning rationale of intentionalism, it would undoubtedly be found to lie in a vision of democratic principle. The Australian intentionalist would argue that the *Constitution*, having been generated through a process which accorded with principles of representative democracy, and popularly ratified at referenda, is to be faithfully applied by the courts in fulfillment of the intentions of the representatives of the colonial populations who framed it. The High Court is, so far as possible, a mere conduit of meaning to the minds of the Founding Fathers, the persons in whom the democratic authority for constitution building was originally located.<sup>14</sup>

However, the democratic process occurred in the 1890s and was less representative of society than it is today. The framers were somewhat of a narrow group of society, consisting of mostly middle class, white, educated males, many of whom were born in the United Kingdom and pledged allegiance to the British monarch. It could therefore be argued that the intentions of such a group of persons have now lost relevance in contemporary Australia, which is a multicultural society in which women, as well as men, increasingly occupy central roles in politics and business.

### **B Literalism**

Literalism is the method of constitutional interpretation made famous by the *Engineers* case, in particular, the joint majority judgment of Knox CJ and Isaacs, Rich and Starke JJ which will be discussed in detail at the end of this chapter. As will be noted in this discussion, literalism regards the *Constitution* first and foremost as a Statute of the British Parliament and demands that it should be interpreted as such. Thus, the ordinary rules of statutory interpretation should be applied when interpreting the *Constitution*, and no regard should be had to the history or intention behind any of its provisions.

The literalist approach requires that the wording of the *Constitution* should be given its 'ordinary' or 'natural' meaning. This, in turn, was interpreted as the broadest possible 'ordinary' or 'natural' meaning. Accordingly, a literalist approach will only limit express words by reference to other express words in the *Constitution*. Regard

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<sup>14</sup> Greg Craven, 'After Literalism, What?' (1992) 18 *Melbourne University Law Review* 874, 882.

cannot be had to the document as whole, its structure, or implications derived from these, such as federalism. The result is that the federal nature of the *Constitution* will not be taken into account to limit any of the *Constitution*'s express provisions.

Through advocating an expansive interpretation of the *Constitution*'s provisions, and in particular, the Commonwealth's legislative powers, the literalist approach, as will be shown in Chapter 6, has assisted in increasing central powers, to the detriment of the states. A major flaw in literalism is that it ignores the fundamental nature of the *Constitution* as a federal document. This can be said regardless of whether one is an intentionalist or not. That is, leaving aside the framers' intentions that the federal balance should be maintained and that the states would retain the bulk of their powers and autonomy after federation, the overall structure of the constitutional document is premised upon the existence of the states, and their ability to, for example, autonomously exercise the powers that were not allocated to the Federal Parliament in s 51 after federation.

On the other hand, literalism can be said to provide an objective means by which the *Constitution* can be interpreted because its focus is on the words of the document itself, regardless of context.<sup>15</sup> Thus, if a Judge is limited to only being able to consider the ordinary meaning of the words, he or she has less opportunity to impose his or her own personal, social or political views upon his or her interpretation of the provision. However, as will be shown in the discussion of *Engineers* below, it must be noted that this is not always true of literalism, with *Engineers* being a case in

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<sup>15</sup> For a defence of literalism, see Chief Justice Murray Gleeson, 'The Constitutional Decisions of the Founding Fathers' (Inaugural Annual Lecture delivered at the University of Notre Dame Law School, Sydney, 27 March 2007). This speech met with strong criticism from federalist Greg Craven who was quoted as stating in response to Gleeson CJ's speech:

It [Gleeson's speech] is a very good illustration of why it is almost impossible to take the constitutional jurisprudence of the High Court seriously.

It is a very, very obvious attempted justification of the Work Choices decision — and a markedly unconvincing one at that.

It lays bare the current psychology of the High Court — they have no interest in the intentions behind the *Constitution*. It is the Humpty Dumpty version of constitutional interpretation — 'the words mean what I say they mean, neither more nor less'.

Chris Merritt, 'Gleeson Stirs Up Constitutional Debate' *The Australian* (Sydney), 28 March 2007 <<http://theaustralian.news.com.au/printpage/0,5942,21460130,00.html>>.

point. More specifically, literalism was used by the majority to achieve a centralist result under the guise of objective interpretation. The same can be said for other constitutional cases, such as the majority judgment in *Work Choices*, discussed in Chapter 6. Hence, literalism is in reality far less objective than it at first appears to be.

Furthermore, it is arguable that literalism, like originalism, fails to take into account and address changing social and political events. It could be argued that literalism separates the *Constitution* from contemporary meanings and reality, and because it cannot take them into account, fails to adequately address them. Literalism places the *Constitution* in a vacuum that is divorced from reality.

### **C Revisionism**

Revisionism, also referred to as the ‘living Constitution’ method of interpretation, permits Judges to adapt the meaning of the *Constitution* to apply to new social and political situations.<sup>16</sup> The *Constitution* is regarded as a ‘living’ document that grows and changes as Australian society grows and changes. This sentiment was expressed by Kirby J who stated, ‘a consistent application of the view that the *Constitution* was set free from its founders in 1901 is the rule that we should apply. ... Our *Constitution* belongs to the 21<sup>st</sup> century, not the 19<sup>th</sup>’.<sup>17</sup> The *Constitution* is therefore seen as a document that should be interpreted to reflect the social and political values of the Australian people. ‘Revisionism’ is a term used interchangeably with ‘progressivism’ which Craven has described as an interpretive method premised on the *Constitution* as an ‘ambiguous’ document that is ‘open to moulding’ in order to keep ‘up to date’ with ‘the current demands of a dynamically developing Australian society’.<sup>18</sup>

In theory, a revisionist approach is more likely to achieve a just and appropriate outcome. This is because it prevents outdated interpretations of constitutional

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<sup>16</sup> See Michael Kirby, ‘Living with Legal History in the Courts’ (2003) 7 *Australian Journal of Legal History* 17 in which he advocates the ‘living constitution’ approach over originalism.

<sup>17</sup> Michael Kirby, ‘Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?’ (2000) 24 *Melbourne University Law Review* 1, cited in Dan Meagher, ‘New Day Rising? Non-Originalism, Justice Kirby and Section 80 of the Constitution’ (2002) 24 *Sydney Law Review* 141, 141.

<sup>18</sup> Greg Craven, ‘After Literalism, What?’ (1992) 18 *Melbourne University Law Review* 874, 874–875.

provisions being applied to new social and political issues. The obvious danger of this method of interpretation is its subjectivity. It allows Judges to deviate from previously accepted interpretations of the constitution, and to modify them under the proviso that Australian society's changing needs require it to be given a new or altered meaning. This necessarily involves a subjective judicial assessment of what these new social and political issues are, and how best they should be resolved, which is arguably a political decision best left to Parliament. Carrigan discusses the arguments for and against Judges as law makers. On the one hand, speaking in defence of revisionist Justice Michael Kirby, he acknowledged that the judiciary is itself an instrument of the state, and therefore political in nature:

the role of the judiciary as a branch of the state sanctions its right to aid in governing society. The fact that the judiciary is a linchpin of a liberal democratic state — and that judicial power is incontrovertibly directed towards the reproduction of the extant social system — automatically ensures jurists play a political role even when apolitical adjudication is proclaimed.<sup>19</sup>

However, on the other hand, Carrigan notes some of the flaws in the argument that Judges are in touch with community values, and therefore appropriate to revise the law, because they see these values at play in the cases that come before them. He noted that:

in reality the courtroom and legal rules will never give a true reflection of Australia's social relations, values or conflict between interest groups ... The court is a part of the State apparatus and a discrete institution far removed from the places where work and struggle ensure the reproduction of society and shape the interior life and value systems of individuals. Only a narrow fragment of people's lives are interrogated in a courtroom.<sup>20</sup>

This observation, that the courtroom is not the best place from which to gain an accurate understanding of social values, is surely exacerbated in a constitutional context. The High Court is limited by the cases that come before it, which cannot be said with any certainty to provide an accurate cross-section from which to ascertain

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<sup>19</sup> Frank Carrigan, 'A Blast from the Past: The Resurgence of Legal Formalism' (2003) 27 *Melbourne University Law Review* 163, 178.

<sup>20</sup> Frank Carrigan, 'A Blast from the Past: The Resurgence of Legal Formalism' (2003) 27 *Melbourne University Law Review* 163, 179.

current Australian social and political values. Hence, it is argued that High Court Justices are not adequately equipped to assess prevailing community standards and prevailing social and political views.<sup>21</sup>

A revisionist approach can be criticised for failing to provide certainty, which in turn, can undermine confidence in judicial decision-making. This lack of certainty and predictability also increases the gamble of mounting a constitutional challenge, and taints pre-trial negotiations on the basis that it may be difficult to predict one's chances of success with a revisionist Judge.

Revisionism is a method of interpretation that has been strongly criticised as a type of judicial activism.<sup>22</sup> The problem it raises is whether unelected Judges should be altering the meaning of the *Constitution* when the *Constitution* sets out a very specific democratic process for constitutional amendment via referendum in s 128.<sup>23</sup>

In conclusion, each method of constitutional interpretation comes with both advantages and disadvantages. Given the lack of direction in the *Constitution* as to

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<sup>21</sup> It has been argued that an example of revisionism in which Judges have altered the meaning of the *Constitution* is the implication of the implied freedom of political communication in *Nationwide News v Wills* (1992) 177 CLR 1 and *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106. See James Allan, 'Implied Rights and Federalism: Inventing Intentions While Ignoring Them' (2009) 34 *University of Western Australia Law Review* 228, 233 who says of these implied rights cases, 'It ... elevates today's unelected judges into latter day redrafters, updaters and all-purpose fixers of the constitution. A less appealing prospect is hard to imagine.'

<sup>22</sup> See for example, John Forbes, 'Judicial Tidy-Up or Takeover? Centralism's Next Stage' (Paper presented at the Eleventh Conference of The Samuel Griffith Society, Rydges Carlton Hotel, Melbourne, 9–11 July 1999) 145, 149 who criticised the High Court's recognition of native title and implied rights as activist. Forbes strongly criticised the High Court's decision in the *Teoh* case (*Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273) in which the High Court held that in making a decision to deport a convicted drug dealer the decision-maker should have taken into account the effect of the deportation on children he had fathered in Australia because Australia had ratified the United Nations Convention on the Rights of the Child. Forbes stated, 'It is amazing how a small group of Judges can gaze into the *Constitution*, or a UN document — as witch doctors of old gazed into the entrails of a chicken — and find things there that are invisible to the rest of our tribe. We have the discovery of native title, implied rights and other divinations.' For a discussion of judicial activism see, Greg Craven 'Reflections on Judicial Activism: More in Sorrow than in Anger' (Paper presented at the Ninth Conference of The Samuel Griffith Society, Mercure Hotel, Perth, 24–26 October 1997) 187.

<sup>23</sup> See, for example, Greg Craven, 'Industrial Relations, the Constitution and Federalism: Facing the Avalanche' (2006) 29 *University of New South Wales Law Journal* 203, 206–207. Craven makes this point with respect to the Howard Government's *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) which sought to use an expanded interpretation of the corporations power in s 51(xx) upon which to centralise industrial relations in Australia. Craven comments that prior attempts by the Commonwealth to expand its industrial relations power were rejected by the Australian people at referenda in 1911, 1913, 1919, 1926, 1944 and 1946. The legislation was subsequently upheld by the High Court in *Work Choices* (2006) 229 CLR 1.

how it should be interpreted, and the lack of consensus as to which approach should be preferred,<sup>24</sup> it is unlikely that differences in judicial and academic opinion about how the *Constitution* should be interpreted are likely to be resolved with reference to these existing methods, unless one of them is elevated as the method to be applied by constitutional reform.

## II THE EARLY HIGH COURT AND STATES' RIGHTS

### *A Composition of the Early High Court*

The first Parliament, under the leadership of Edmund Barton as Prime Minister, enacted the *Judiciary Act 1903* (Cth), which received royal assent on 25 August 1903.<sup>25</sup> The *Judiciary Act* established the High Court of Australia, with a Chief Justice and two Justices.<sup>26</sup> The first Chief Justice was Sir Samuel Griffith, who was sworn in on 6 October 1903, followed by Edmund Barton and R E O'Connor on the same day as the remaining two Justices.<sup>27</sup>

These Justices were involved in the Convention Debates of the 1890s, which culminated in the drafting of the *Constitution*. For example, Griffith had previously been the Premier of Queensland and had drafted the *Federal Council of Australasia Act 1885* enacted by the British Parliament to establish the Federal Council of Australasia, of which he was an active participant.<sup>28</sup> Griffith had also represented

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<sup>24</sup> See Michael Coper, 'Concern About Judicial Method' (2006) 30 *Melbourne University Law Review* 554, 572–573. Coper noted that judges, as individuals, are likely to have different approaches, and make different interpretive choices in their decisions. He noted that whilst consensus about judicial method is unlikely, it is important that the 'choices' that judges make in their decisions should 'be made as openly, honestly, and transparently as possible' (573).

<sup>25</sup> Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 21.

<sup>26</sup> Section 71 of the Commonwealth *Constitution* vests the judicial power of the Commonwealth in the High Court of Australia and 'such other federal courts as the Parliament creates'. It also states that there shall be a Chief Justice of the High Court, and 'not less than two' other Justices 'as the Parliament prescribes'. Further, s 79 provides that Parliament may prescribe the number of Justices in federal courts.

<sup>27</sup> Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 21.

<sup>28</sup> For background to The Federal Council of Australasia, see John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, first published 1901, 2002 ed) 109–115; Geoffrey Sawer, *The Australian Constitution* (Australian Government Publishing Service, 1975) 16; John Williams, 'The Emergence of the Commonwealth Constitution' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 1, 10; Robin Sharwood, 'The Australasian Federation Conference of 1890' in Robin Sharwood (ed), *Official Record of the Proceedings and Debates of the Australasian Federation Conference 1890* (Legal Books, 1990) 465, 465–466; and J A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 3.

Queensland at the Australasian Federation Conference in 1890 and was also a delegate at the National Australasian Convention at Sydney in 1891 where he was Vice-President and also part of the drafting Committee which produced the first draft *Constitution*. Queensland did not participate in any of the three sessions of the 1897/8 Conventions due to political conflict that prohibited the passing of an

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According to Quick and Garran, the Federal Council of Australasia was established by an act of the British Parliament, the *Federal Council of Australasia Act* in 1885, and commenced on 14 August 1885. The idea of a Federal Australasian Council became a reality after an inter-colonial conference, which commenced in Sydney on 28 November 1883, convened primarily due to concerns over defence and French and German attempts at colonisation in the South Seas. The conference was attended by representatives from the six colonies, New Zealand and Fiji. The conference culminated in delegates unanimously agreeing to adopt the following resolution that was put forward by Samuel Griffith (then Premier of Queensland):

That it is desirable that a Federal Australasian Council should be created for the purpose of dealing with the following matters: -

1. The marine defences of Australasia, beyond territorial limits.
2. Matters affecting the relations of Australasia with the islands of the Pacific.
3. The prevention of the influx of criminals.
4. The regulation of quarantine.
5. Such other matters of general Australasian interest as may be referred to it by Her Majesty or by any of the Australian Legislatures.

Griffith drafted the Bill and was successful in securing its enactment by the British Parliament in the form of the *Federal Council of Australasia Act 1885*. After its enactment, five colonies (Western Australia, Fiji, Queensland, Tasmania and Victoria in that order) passed enabling acts and sent representatives to the Council's first meeting from 25 January to 5 February 1886 in Hobart.

The Council was a legislative body, with limited legislative powers, no Executive, no power to raise revenue and no funding. It was comprised of two members from each of the colonies and one member from Fiji however it was not compulsory for a colony to join it. Any legislation enacted by the Council had to be submitted to the Governor (of the colony in which the Council had met) for assent and also had to be approved in Britain.

The lack of effectiveness of the Council was contributed to by New South Wales' failure to participate, together with New Zealand. South Australia only had intermittent participation. Consequently, the participating members were Western Australia, Queensland, Tasmania and Victoria, with Fiji only attending the first meeting.

At its first meeting (from 25 January to 5 February 1885), Quick and Garran state that the Council passed Interpretation and Evidence Acts and 'Acts for the inter-colonial service of civil process and enforcement of judgments'. At its next meeting in January 1888 it passed Acts concerning the regulation of Queensland fisheries beyond territorial limits. At its third session it passed an Act concerning Western Australian fisheries: See John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, first published 1901, 2002 ed) 115.

Given the lack of participation by all the colonies, it is no surprise that the Council has been described as a 'failure'. Its life was relatively short, with the last meeting taking place in Melbourne in January 1899. The Federal Council was officially abolished from the time of federation by covering cl 7 of the Commonwealth *Constitution*: See Robin Sharwood, 'The Australasian Federation Conference of 1890' in Robin Sharwood (ed), *Official Record of the Proceedings and Debates of the Australasian Federation Conference 1890* (Legal Books, 1990) 465, 465.

enabling Act to provide for popular election of delegates from Queensland to attend the Convention.<sup>29</sup>

Edmund Barton, a New South Wales Member of Parliament, was a delegate at the National Australasian Convention in Sydney in 1891, where, with Sir Samuel Griffith, he was part of the drafting sub-Committee which formulated a first draft of the *Constitution*. Barton was also a delegate at the 1897/8 Australasian Federal Convention where he chaired the drafting Committee (of which O'Connor was also a member). A fierce advocate of federation, Barton, together with O'Connor, had also 'stormed out' of New South Wales Parliament in disgust at the Parliament's attempts to 'mutilate' the first draft of the *Constitution* from the Adelaide Session of the 1897/8 Convention.<sup>30</sup> Barton is most famous for being Australia's first Prime Minister, having been appointed after W J Lyne, appointed by Governor-General Lord Hopetown due to his position as the Premier of New South Wales (the original colony), failed to obtain support from those he approached to form the first government.<sup>31</sup> Barton did manage to obtain the necessary support to form government, appointing both Lyne and O'Connor as Ministers.<sup>32</sup>

O'Connor had attended the Australasian Federal Convention of 1897/8 as a representative of New South Wales. He was a Member of the Legislative Council for thirteen years.<sup>33</sup> As noted above, he was also part of the drafting Committee at the 1897/8 Convention. Also, O'Connor was part of Barton's first Ministry. He was one of the first senators representing New South Wales in the first Senate and was also appointed as Vice-President of the Executive Council.<sup>34</sup>

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<sup>29</sup> John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, first published 1901, 2002 ed) 162.

<sup>30</sup> J A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 162–163.

<sup>31</sup> Henry Giles Turner, *The First Decade of the Australian Commonwealth: A Chronicle of Contemporary Politics 1901–1910* (Heritage Publications, 1911) 12–13.

<sup>32</sup> Henry Giles Turner, *The First Decade of the Australian Commonwealth: A Chronicle of Contemporary Politics 1901–1910* (Heritage Publications, 1911) 14.

<sup>33</sup> Henry Giles Turner, *The First Decade of the Australian Commonwealth: A Chronicle of Contemporary Politics 1901–1910* (Heritage Publications, 1911) 14.

<sup>34</sup> Henry Giles Turner, *The First Decade of the Australian Commonwealth: A Chronicle of Contemporary Politics 1901–1910* (Heritage Publications, 1911) 14.

On 24 September 1903, it was announced in Parliament that Barton had resigned as Prime Minister and O'Connor had resigned as Vice-President of the Executive Council.<sup>35</sup> They were sworn in as the first Justices of the High Court of Australia, together with Sir Samuel Griffith as Chief Justice. Deakin was appointed Prime Minister, with Austin Chapman filling the place of Barton as a member of the House of Representatives and Thomas Playford as a senator.<sup>36</sup>

The enactment of the *Judiciary Amendment Act 1906* (Cth) in 1906 increased the number of High Court Justices from three to five. This resulted in Higgins and Isaacs JJ being appointed to the High Court Bench in October 1906. Both Isaacs and Higgins had strong centralist sympathies, having both been Commonwealth Attorney-Generals and having appeared as Counsel for the Commonwealth in the implied intergovernmental immunities cases.<sup>37</sup> They immediately became fervent dissenters against the implied intergovernmental immunities implication, resulting in a frequent 3:2 split, with Griffith CJ, Barton and O'Connor JJ in the majority and Isaacs and Higgins JJ in dissent. O'Connor J served on the High Court until his death in 1912, Griffith CJ until 1919 and Barton until 1920.

Griffith, Barton and O'Connor brought invaluable experience and knowledge to the High Court bench. They were lawyers, experienced politicians and founding fathers of the *Constitution*, centrally involved in its drafting. They had direct knowledge and experience of what the framers, a group to which they belonged, had intended, including the fundamentally federal nature of the *Constitution*. Their decisions sought to give effect to the federal nature of the *Constitution*, to maintain the federal balance, and to ensure that the position and rights of the states should be preserved. It is interesting to note that although Higgins and Isaacs JJ were present at the Australasian Federal Convention of 1897/8, they were not part of the ultimate drafting Committee.<sup>38</sup>

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<sup>35</sup> Henry Giles Turner, *The First Decade of the Australian Commonwealth: A Chronicle of Contemporary Politics 1901–1910* (Heritage Publications, 1911) 65–66.

<sup>36</sup> Henry Giles Turner, *The First Decade of the Australian Commonwealth: A Chronicle of Contemporary Politics 1901–1910* (Heritage Publications, 1911) 66.

<sup>37</sup> Charles Parkinson, 'The Early High Court and the Doctrine of Immunity of Instrumentalities' (2002) 13 *Public Law Review* 26, 43.

<sup>38</sup> Isaacs, representing Victoria was a member of the Constitutional Committee, and Higgins, also representing Victoria, was a member of the Judiciary Committee. However, the ultimate drafting Committee consisted of Barton, Sir John Downer and O'Connor: See John Quick and Robert

The federalist interpretation of the *Constitution* undertaken by the early High Court will be discussed in the following section of this chapter.

## ***B Protecting the Federal Balance***

### *1 Immunity of Instrumentalities Doctrine*

The ‘immunity of instrumentalities doctrine’, also known as the ‘implied intergovernmental immunities doctrine’, was an implication developed and applied by the early High Court, based on the federal nature of the *Constitution*. It recognised that the Commonwealth and state governments were independent entities, and consequently, could not legislate so as to interfere with the operation of each other’s affairs. This meant that both the Commonwealth and states were immune from the operation of each other’s legislation if that legislation impinged on the exercise of their legislative or executive powers. The doctrine can be seen as a necessary implication in order to preserve and protect the federal division of powers between the Commonwealth and the states. In the words of Lindell, ‘judicial implication is justified in this area because it can be viewed as fleshing out the detail that flows from embodying in the *Constitution* a federal system of government in Australia.’<sup>39</sup>

The doctrine emerged from the early High Court looking to United States authorities to assist in resolving a situation that the framers did not appear to have expressly considered. The situation in question was where state legislation sought to bind the Commonwealth, for example, by imposing a taxation liability on an officer of the Commonwealth. Given that the early High Court had no constitutional precedent of its own to look to, it is not surprising that they looked to United States authorities for guidance.<sup>40</sup> To add weight to this is the framers’ reliance on the workings of the United States federal system which they read about in Bryce’s *The American Commonwealth*. Justification for the reliance on United States constitutional authorities was also given by Griffith CJ in his judgment in *D’Emden v Pedder*

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Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, first published 1901, 2002 ed) 167–168.

<sup>39</sup> Geoffrey Lindell, ‘Advancing the Federal Principle through the Intergovernmental Immunity Doctrine’ in H P Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (Federation Press, 2009) 23, 26.

<sup>40</sup> Ronald Sackville, ‘The Doctrine of Immunity of Instrumentalities in the United States and Australia: A Comparative Analysis’ (1969) 7 *Melbourne University Law Review* 15, 36.

(discussed below), when he said, ‘as the *United States Constitution* and the *Constitution* of the Commonwealth are similar, the construction put upon the former by the Supreme Court of the United States may well be regarded by us in construing the *Constitution* of the Commonwealth, not as an infallible guide, but as a most welcome aid and assistance.’<sup>41</sup>

The origins of the doctrine are from the 10<sup>th</sup> Amendment to the *United States Constitution*, which the Griffith High Court regarded as equivalent to s 107 of the *Australian Constitution*, which provides for the saving of state powers after federation, except to the extent that they have been reallocated to the Commonwealth.<sup>42</sup> The 10<sup>th</sup> Amendment states: ‘The powers not delegated to the United States by the *Constitution*, nor prohibited to it by the States, are reserved to the States respectively, or to the people.’

The United States Supreme Court decision in *M’Culloch v Maryland*<sup>43</sup> has been described as ‘the foundation stone on which the doctrine of immunity of instrumentalities rests.’<sup>44</sup> The case concerned whether a state government could recover taxes imposed by state legislation on a federal bank. Marshall CJ, who delivered the Court’s judgment, held that the states did not have the constitutional power to impose taxation on an instrumentality of the federal government. This conclusion was based on the federal structure created by the *Constitution* and the necessity of maintaining the balance of power between the Commonwealth and the states. Marshall CJ stated that allowing the states to impose taxes on the federal government could result in the states destroying the federal government, saying, ‘the power to tax involves the power to destroy.’<sup>45</sup> The principle was applied in subsequent cases including *Weston v Charleston*,<sup>46</sup> where a state property tax was held to be invalid to the extent that it applied to federal bonds, and *Dobbins v*

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<sup>41</sup> See also *D’Emden v Pedder* (1904) 1 CLR 91, 116 (Griffith CJ).

<sup>42</sup> See *Deakin and Lyne v Webb* (1904) 1 CLR 585, 605 (Griffith CJ).

<sup>43</sup> *M’Culloch v Maryland*, (4 Wheat) 316 (1819) cited in Ronald Sackville, ‘The Doctrine of Immunity of Instrumentalities in the United States and Australia: A Comparative Analysis’ (1969) 7 *Melbourne University Law Review* 15, 19.

<sup>44</sup> Charles Parkinson, ‘The Early High Court and the Doctrine of Immunity of Instrumentalities’ (2002) 13 *Public Law Review* 26, 27.

<sup>45</sup> *M’Culloch v Maryland*, (4 Wheat) 316, 430–432 (1819) cited in Ronald Sackville, ‘The Doctrine of Immunity of Instrumentalities in the United States and Australia: A Comparative Analysis’ (1969) 7 *Melbourne University Law Review* 15, 19.

<sup>46</sup> *Weston v Charleston*, (2 Pet) 449 (1829).

*Commissioners of Erie County*,<sup>47</sup> where a general state tax was held to be invalid insofar as it applied to a federal officer. In *Collector v Day*,<sup>48</sup> which concerned the issue of whether a federal income tax could be imposed on a state Judge, the principle from *M'Culloch v Maryland* was extended to give the states immunity from interference by the federal government.<sup>49</sup> Like its counterpart in Australia, Parkinson notes that the doctrine was diminished by the United States Supreme Court in the 1930s.<sup>50</sup>

The development of the doctrine by the High Court of Australia progressed along similar lines to its United States counterpart. That is, the early manifestation of the doctrine in Australia was applied to prevent state laws from interfering with the affairs of the Commonwealth. This is demonstrated by the early case law in which the doctrine was applied.

The first of these cases was *D'Emden v Pedder*<sup>51</sup> in which the High Court considered whether Tasmanian legislation applied to the Commonwealth's Deputy Postmaster-General for Tasmania. The legislation in question was the *Stamp Duties Amendment Act 1902* (Tas) ('SDA'). The SDA imposed stamp duty on the written receipts that the *Audit Act 1901* (Cth) required Commonwealth public servants to sign to acknowledge receipt of their salary payments. This effectively meant that all Commonwealth public servants based in Tasmania had to pay stamp duty on their salary receipts. If the stamp duty was not paid, the SDA imposed a fine and imprisonment resulted if the fine was not paid.

D'Emden was charged by Tasmanian Police Superintendent Pedder with not having his salary receipt stamped. He was convicted by the Court of Petty Sessions in Hobart and was sentenced to a fine and, if he did not pay, imprisonment for seven days with hard labour. D'Emden appealed to the full Court of the Supreme Court of

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<sup>47</sup> *Dobbins v Commissioners of Erie County*, (16 Peters) 435 (1842).

<sup>48</sup> *Collector v Day*, (11 Wall) 113 (1870).

<sup>49</sup> For a general discussion of these United States authorities, see, Charles Parkinson, 'The Early High Court and the Doctrine of Immunity of Instrumentalities' (2002) 13 *Public Law Review* 26, 27 and Ronald Sackville, 'The Doctrine of Immunity of Instrumentalities in the United States and Australia: A Comparative Analysis' (1969) 7 *Melbourne University Law Review* 15, 19–24.

<sup>50</sup> Charles Parkinson, 'The Early High Court and the Doctrine of Immunity of Instrumentalities' (2002) 13 *Public Law Review* 26, 27.

<sup>51</sup> *D'Emden v Pedder* (1904) 1 CLR 91.

Tasmania which dismissed the appeal. He then appealed to the High Court, arguing that the *SDA* should not apply to him (and accordingly, that he should not have to pay the stamp duty) because it was an undue interference by the state of Tasmania with the public business of the Commonwealth.

Griffith CJ, who delivered the High Court's judgment, provided the following justification for following the United States decision in *M'Culloch v Maryland*:

We are not, of course, bound by the decisions of the Supreme Court of the United States. But we all think that it would need some courage for any Judge at the present day to decline to accept the interpretation placed upon the *United States Constitution* by so great a Judge so long ago as 1819, and followed up to the present day by the succession of great jurists who have since adorned the Bench of the Supreme Court at Washington. So far, therefore, as the *United States Constitution* and the *Constitution* of the Commonwealth are similar, the construction put upon the former by the Supreme Court of the United States may well be regarded by us in construing the *Constitution* of the Commonwealth, not as an infallible guide, but as a most welcome aid and assistance.<sup>52</sup>

Griffith CJ continued on to comment that as the framers looked to the *United States Constitution* when drafting the Australian federal *Constitution*, it was not unreasonable to infer that the framers intended that the Australian *Constitution* would be interpreted in a similar manner.<sup>53</sup>

The High Court recognised that the Commonwealth and the states were sovereign entities:

In considering the respective powers of the Commonwealth and of the States it is essential to bear in mind that each is, within the ambit of its authority, a sovereign State, subject only to the restrictions imposed by the Imperial connection and to the provisions of the *Constitution*, either expressed or necessarily implied.<sup>54</sup>

Accordingly, the High Court held that the *SDA* did not apply because Commonwealth officers and procedures were immune from state laws. Griffith CJ stated:

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<sup>52</sup> *D'Emden v Pedder* 112 (Griffith CJ).

<sup>53</sup> *D'Emden v Pedder* 113 (Griffith CJ).

<sup>54</sup> *D'Emden v Pedder* 109 (Griffith CJ).

when a State attempts to give to its legislative or executive authority an operation which, if valid, would fetter, control or interfere with the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorised by the *Constitution*, is to that extent invalid and inoperative.<sup>55</sup>

This principle was followed in the case of *Deakin and Lyne v Webb*<sup>56</sup> where the Griffith High Court considered whether two Commonwealth Ministers were liable to pay state income tax in Victoria. The Ministers were Alfred Deakin, who resided in Victoria, and Sir William John Lyne, a resident of New South Wales who travelled between New South Wales and Victoria.<sup>57</sup> The income tax was imposed by the *Income Tax Act 1895 (Vic)* which levied income tax on salaries earned in Victoria. The Supreme Court of Victoria held that they were liable to pay the income tax on any earnings made in Victoria. Deakin and Lyne appealed to the High Court, arguing that imposing a state income tax on a Commonwealth officer infringed the rule in *D'Emden v Pedder*.

The High Court accepted that United States Constitutional authorities were relevant when interpreting the Australian *Constitution*. They stated that 'it is a reasonable inference that it was intended by the framers of the Australian *Constitution*, when adopting similar language, that like provisions should receive like interpretation.'<sup>58</sup> They reaffirmed *D'Emden v Pedder*, holding that Deakin and Lyne were exempt from paying the state income tax. Griffith CJ, with whom Barton and O'Connor JJ agreed, said of the effect of the imposition of a state tax on Commonwealth officers:

State taxation of federal salaries is open then to two objections: (1) It in effect diminishes the recompense allotted by the Commonwealth to its officers, and so interferes with its agencies; and (2) It interferes with the freedom of action of the Commonwealth in the transfer of its officers from State to State, except at the risk of doing them an injustice by reducing their effective remuneration — an injustice only to be remedied by the appropriation of federal revenues for that purpose.<sup>59</sup>

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<sup>55</sup> *D'Emden v Pedder* 111 (Griffith CJ).

<sup>56</sup> *Deakin and Lyne v Webb* (1904) 1 CLR 585.

<sup>57</sup> After federation, the Federal Parliament was temporarily located in Melbourne, Victoria.

<sup>58</sup> *Deakin and Lyne v Webb* (1904) 1 CLR 585, 616 (Griffith CJ).

<sup>59</sup> *Deakin and Lyne v Webb* (1904) 1 CLR 585, 616 (Griffith CJ).

They went on to note the justification for such an implication was s 107 of the *Constitution*: ‘If ... the power of taxation under the State *Constitution* did, in point of law, extend to all persons whatever found within its boundaries, we think that the power, so far as its exercise would interfere with federal agencies, is a power withdrawn from the States by the *Constitution* within the meaning of sec. 107.’<sup>60</sup> Hence, even if the subject matter of a power falls within state legislative power, it will be invalid to the extent that it interferes with an ‘agency or instrumentality of the Commonwealth’.<sup>61</sup>

Before judgment was handed down in *Deakin and Lyne v Webb*, Counsel for the state of Victoria, Isaac Isaacs (who later became part of the majority in *Engineers*), argued a motion that the High Court should grant a s 74 certificate to remit the matter to the Privy Council for determination. This motion was supported by an affidavit from the Premier of Victoria stating that he had the support of all state Premiers (excepting Tasmania, who later indicated their support in a telegram, read at the Bar).<sup>62</sup> The application was dismissed by all three Justices with some consternation. Each was of the view that the plain words of s 74 of the *Constitution* made the High Court the final court of appeal in matters between the Commonwealth and a state, or between states.<sup>63</sup>

However, in the subsequent case of *Webb v Outtrim*, the state of Victoria appealed directly to the Privy Council from the Supreme Court of Victoria, thus dispensing with the need for a s 74 certificate which the High Court had clearly declared in *Deakin and Lyne v Webb* that it would not give.<sup>64</sup> The Privy Council came to the opposite conclusion, on facts similar to those in *Deakin and Lyne v Webb*, namely

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<sup>60</sup> *Deakin and Lyne v Webb* (1904) 1 CLR 585, 617–618 (Griffith CJ).

<sup>61</sup> *Deakin and Lyne v Webb* (1904) 1 CLR 585, 602 (Griffith CJ).

<sup>62</sup> *Deakin and Lyne v Webb* (1904) 1 CLR 585, 619.

<sup>63</sup> Section 74 states:

No appeal shall be permitted to the Queen-in-Council from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council. The High Court may so certify if satisfied that for any special reason the certificate should be granted.

<sup>64</sup> The Federal Parliament amended the *Judiciary Act 1903* (Cth) in 1907 so that constitutional cases could not be appealed directly from a State Supreme Court to the Privy Council. See Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 23–24.

that a Commonwealth officer was liable to pay Victorian income tax. The Privy Council stated that there was no basis for implying the doctrine in the *Constitution*. They stated that the framers' intentions were irrelevant and cited the express immunity in s 114<sup>65</sup> to suggest that no other immunity should be implied.<sup>66</sup> In addition, the Privy Council stated that the United States authorities, such as *M'Culloch v Maryland*, were incorrectly followed by the High Court. They stated that 'there is no such analogy between the two systems of jurisprudence as the learned Chief Justice suggests'.<sup>67</sup> In the subsequent case of *Baxter v Commissioner of Taxation (NSW)*,<sup>68</sup> the High Court rejected the Privy Council's decision in *Webb v Outtrim*, and affirmed the existence of the implied immunity of instrumentalities doctrine in Australia. *Baxter* is discussed in further detail below.

In *Commonwealth v New South Wales*<sup>69</sup> the immunity was extended to state taxes on property acquisition by the Commonwealth. The Commonwealth purchased land in Sydney from private individuals and a company, the Perpetual Trustee Company Ltd, for the purpose of establishing a post office. The Commonwealth was assessed as having to pay stamp duty under the *Stamp Duties Act 1898* (NSW), despite having asked the New South Wales Commissioner of Stamp Duties for an exemption. The Commonwealth paid the stamp duty 'under protest' because registration of the transfer would be refused under the *Real Property Act 1900* (NSW) if the transfer instrument was not stamped. The Commonwealth commenced an action to recover the monies.

The Griffith High Court, again, found the Commonwealth to be immune from having to pay stamp duty imposed by New South Wales legislation on a purchase of land in New South Wales. In addition to finding that the state legislation did not show a specific enough intent to apply to the Crown, the High Court also held that the Commonwealth was immune from the operation of the legislation, applying the principle in *D'Emden v Pedder*. Griffith CJ commented that if a state was able to

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<sup>65</sup> Section 114 of the *Constitution* provides that, 'A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State.'

<sup>66</sup> *Webb v Outtrim* (1906) 4 CLR 356, 360–361 (The Earl of Halsbury).

<sup>67</sup> *Webb v Outtrim* (1906) 4 CLR 356, 359 (The Earl of Halsbury).

<sup>68</sup> *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087 ('*Baxter*').

<sup>69</sup> *Commonwealth v New South Wales* (1906) 3 CLR 807.

impose a tax on the Commonwealth's dealings in land it would amount to an unconstitutional interference with the Commonwealth, stating that

the attaching by a State law of any condition to the discharge of a federal duty is an act of interference or control. So also is the attaching of a condition to the performance of any federal function. I am, therefore, of the opinion that, if the *Stamp Duties Act* 1898 were construed as in terms affecting the Commonwealth Government, it would be to that extent inconsistent with the law of the Commonwealth.<sup>70</sup>

In his judgment, Barton J expanded on the reasoning as to how state stamp duty on a Commonwealth property transaction would be an invalid interference with the Commonwealth:

A law passed by a State under which an instrument necessary for the acquisition of property by the Commonwealth for the purpose of carrying on the federal Government is sought to be taxed, would, one would think, beyond all need of argument, be interpreted as an interference with the functions or instrumentalities of the Commonwealth. Prima facie, it must be so. Because without land for post-offices, the business of that department cannot be carried on at all. If there is anything to which the expression 'instrumentality' could be applied it is the acquisition of land for the purposes of carrying on federal administration.<sup>71</sup>

Significantly, the *Railway Servants* case<sup>72</sup> was the first to consider the application of the doctrine with respect to interference by a law of the Commonwealth with a state. The New South Wales Railway Traffic Employees Association ('the Association') was an association with members who worked on the New South Wales railways. The Association applied for registration as an 'organisation' under the *Commonwealth Conciliation and Arbitration Act 1904* (Cth). The application was opposed by the Federated Amalgamated Government Railway & Tramway Service Association ('NSW Railways'), but was granted by the Registrar. NSW Railways appealed the registration decision to the President of the Arbitration Court, arguing that the Commonwealth Act could not regulate the employment conditions of state railway servants. The President referred the matter to the High Court pursuant to s 31(2) of the *Commonwealth Conciliation and Arbitration Act 1904* (Cth).

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<sup>70</sup> *Commonwealth v New South Wales* (1906) 3 CLR 807, 815 (Griffith CJ).

<sup>71</sup> *Commonwealth v New South Wales* (1906) 3 CLR 807, 820 (Barton J).

<sup>72</sup> *Federated Amalgamated Government Railway & Tramway Service Association v New South Wales Railway Traffic Employees Association* (1906) 4 CLR 488 ('*Railway Servants*' case').

In the *Railway Servants* case the High Court held that the rule in *D'Emden v Pedder* applied, and that it was not limited to taxation laws because taxation was simply one example of 'interference and control.'<sup>73</sup> It was also no impediment that the legislation in question was Commonwealth legislation that affected a state, instead of state legislation interfering with the Commonwealth. Griffith CJ, who delivered the Court's judgment, affirmed and applied the principle in *D'Emden v Pedder* stating: 'In that case the question was as to an attempted invasion of the ambit of Commonwealth authority by a State authority. The present case is the converse, but the doctrine is equally applicable.'<sup>74</sup>

The High Court held that the *Commonwealth Conciliation and Arbitration Act 1904* (Cth) was void to the extent that it bound state railways because it would amount to an interference with the state's control of its railways. As a consequence, the Association, whose members consisted solely of state railway employers, could not be registered under the Commonwealth legislation.

In *Baxter v Commissioner of Taxation (NSW)*<sup>75</sup> the Griffith High Court showed its commitment to the doctrine of implied intergovernmental immunity by rejecting the Privy Council's decision in *Webb v Outtrim*,<sup>76</sup> discussed above. Baxter was a Commonwealth Customs officer, who resided and worked in New South Wales. He was required, by virtue of the *Land and Income Tax Act 1895* (NSW) to pay state income tax on his salary. When he refused to pay, the New South Wales Commissioner of Taxation sued to recover the money in the District Court of New South Wales. The Court, applying *Webb v Outtrim*, held in favour of the Commissioner of Taxation. Baxter appealed to the High Court.

Griffith CJ, who delivered the judgment together with Barton and O'Connor JJ, rejected the Privy Council's decision in *Webb v Outtrim*,<sup>77</sup> holding that it was not

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<sup>73</sup> *Railway Servants Case* (1906) 4 CLR 488, 538 (Griffith CJ).

<sup>74</sup> *Railway Servants Case* (1906) 4 CLR 488, 537 (Griffith CJ).

<sup>75</sup> *Baxter* (1907) 4 CLR 1087.

<sup>76</sup> *Webb v Outtrim* (1906) 4 CLR 356.

<sup>77</sup> *Baxter* (1907) 4 CLR 1087, 1118(Griffith CJ).

bound to follow it and that *D'Emden v Pedder* was the applicable authority,<sup>78</sup> that reliance on United States jurisprudence was sound,<sup>79</sup> and that the High Court, not the Privy Council, was the ultimate arbiter of matters arising between states or the Commonwealth and states under the *Constitution*.<sup>80</sup> Griffith CJ reiterated the foundations of the doctrine, stating that:

The purpose of the *Constitution* was the creation of a new state, the Commonwealth. ... It is essential to the attribution of sovereignty to any government that it shall not be interfered with by any external power: The only interference, therefore, to be permitted, is that prescribed by the *Constitution* itself. A similar consequence follows with respect to the constituent States. In their case, however, the Commonwealth is empowered to interfere in certain prescribed cases. But under the scheme of the *Constitution* there is a large number of subjects upon which the legislative powers of both the Commonwealth and the State may be exercised. In such a state of things it is ... probable ... that questions will constantly arise as to the operation of laws which ... would, if literal effect were given to them, interfere with the exercise of the sovereign powers of the other of the two sovereign authorities concerned ... it follows that a grant of sovereign powers includes a grant of a right to disregard and treat as inoperative any attempt by any other authority to control their exercise.<sup>81</sup>

However, the Griffith High Court subsequently showed a willingness to apply the doctrine less strictly when the Commonwealth itself agreed that its officers could be bound by a state law, and where Commonwealth legislation was enacted under an exclusive power. The former situation arose in *Chaplin v Commissioner of Taxes for South Australia*.<sup>82</sup> In *Chaplin* the Commonwealth itself via the *Commonwealth Salaries Act 1907* (Cth) gave the states authority to tax the salaries of Commonwealth officers residing and working in a state. Chaplin was a telegraph operator who resided and worked in South Australia, but who was employed by a Commonwealth Department, the Department of Postmaster-General. He did not submit a state income tax return in 1908, so the Commissioner issued him with an income tax assessment which he did not pay. The Commissioner brought an action in the Local Court of Adelaide to recover the unpaid taxes. Chaplin argued that, as an officer of the Commonwealth, he should be exempt from paying state income tax,

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<sup>78</sup> *Baxter* (1907) 4 CLR 1087, 1133(Griffith CJ).

<sup>79</sup> *Baxter* (1907) 4 CLR 1087, 1125 (Griffith CJ).

<sup>80</sup> *Baxter* (1907) 4 CLR 1087, 1117 (Griffith CJ).

<sup>81</sup> *Baxter* (1907) 4 CLR 1087, 1121(Griffith CJ).

<sup>82</sup> *Chaplin v Commissioner of Taxes for South Australia* (1911) 12 CLR 375 ('*Chaplin*').

according to the principle in *D'Emden v Pedder*. Given that this was a constitutional issue, the matter was remitted to the High Court under s 40 of the *Judiciary Act 1903–1907* (Cth). Griffith CJ, with whom Barton and O'Connor JJ concurred, held that the *Act* was valid, and that the salaries of Commonwealth officers were not exempt from taxation by the State. Griffith CJ explained that the Commonwealth should be free to give a state permission to interfere. He stated:

The privilege is a privilege of the Federal Government that its instrumentalities may be impeded. If it grant a salary for the performance of duties, that is the same in principle as the grant of a franchise to an individual or to a company. The grant, if no more is said, is free from taxation by the State, but in making the grant the Commonwealth may say that the grant to the individual is subject to State taxation. It is impossible to say there is any interference with the free exercise of the federal power. It is unimportant in what form the right to a limited interference is granted. Provided that it is granted, it cannot be asserted with truth that there is any interference with the free exercise of the powers of the Commonwealth.<sup>83</sup>

In addition, some reservations about the doctrine started to emerge, with Isaacs J and Higgins J now being on the High Court and dissenting in *Baxter*. Whilst Isaacs J held that the High Court should be the final authority on constitutional questions and could decline to follow the Privy Council's decision in *Webb v Outtrim*,<sup>84</sup> he held that the *Land and Income Tax Act 1895* (NSW) did not infringe the rule in *D'Emden v Pedder*. Isaacs J explained:

These statutes [imposing state income tax] do not appear to infringe the doctrine of non-interference. They do not on the face of them, and they do not, I think, in their necessary and reasonable effect transcend the limits of any federal power. The income tax is demanded from all citizens alike; it is obviously not leveled at the federal authority, and I cannot persuade myself that by reason of the impost there is actually, or will probably be, any diminution or impairment of service rendered to the Commonwealth.<sup>85</sup>

Isaacs J continued, expressing the opinion that the state *Act* did not directly affect the Commonwealth officer either:

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<sup>83</sup> *Chaplin* (1911) 12 CLR 375, 380–381 (Griffith CJ).

<sup>84</sup> *Baxter* (1907) 4 CLR 1087, 1149, 1153–1154 and 1155 (Isaacs J).

<sup>85</sup> *Baxter* (1907) 4 CLR 1087, 1159 (Isaacs J).

the State Act touches no function of the officer, it intrudes its operations into no public act that he performs, it affixes no condition and imposes no qualification upon the discharge of his duties, it makes no demand upon his public time, and seeks no service at his hands; it merely requires of him his just share of the ordinary burden of his fellow citizens in return for the protection and benefits the State affords him.<sup>86</sup>

Higgins J agreed with Isaacs J that imposing state income tax on a federal officer in the same way as it was imposed on other citizens was ‘not an improper interference’.<sup>87</sup> However, he went further than Isaacs J with respect to the authority of the Privy Council which he described as being ‘on a higher platform than the High Court’,<sup>88</sup> deciding that the High Court was bound to follow the Privy Council’s decision in *Webb v Outtrim*.

The second example referred to above, where Commonwealth legislation was enacted under an exclusive power and therefore validly bound the states, is illustrated in the case of *R v Sutton*.<sup>89</sup> Sutton was employed by the state of New South Wales to import 1313 rolls of wire netting from England. The Collector of Customs (‘the Collector’) demanded that the state should pay customs duties on the import and that it should not be released until the duty was paid. However, Sutton, acting on the orders of the Premier of New South Wales, removed the wire netting from the Sydney wharf without the consent of Customs. The Collector sought to recover the monies under s 33 and 236 of the *Customs Act 1901* (Cth). The High Court held that the provisions of the *Customs Act* bound the New South Wales Crown, emphasising that the power to levy customs duties were in the exclusive domain of the Commonwealth, and therefore must extend to bind the states, otherwise the power would be frustrated. For example, Barton J stated in his judgment:

in the domain of exclusively national legislation there is no room for State Parliaments or Executives. They have great powers, which this Court has guarded, and will guard. But as far as the law of the *Constitution* is concerned, State Governments are supreme in their sphere and powerless beyond it. And this is also true of the Australian Government in its turn.<sup>90</sup>

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<sup>86</sup> *Baxter* (1907) 4 CLR 1087, 1161 (Isaacs J).

<sup>87</sup> *Baxter* (1907) 4 CLR 1087, 1165 (Higgins J).

<sup>88</sup> *Baxter* (1907) 4 CLR 1087, 1167 (Isaacs J).

<sup>89</sup> *R v Sutton* (1908) 5 CLR 789. See also *Attorney-General (NSW) v Collector of Customs* (1908) 5 CLR 818 which also held that the States were liable to pay Commonwealth Customs duties.

<sup>90</sup> *R v Sutton* (1908) 5 CLR 789, 802 (Barton J).

Barton J concluded by declaring that there must be ‘strict remembrance that in exclusively Commonwealth matters there are not seven Executive Governments, but only one, that of the Commonwealth itself’.<sup>91</sup> In his judgment, O’Connor J made a similar statement that ‘in the exercise of the exclusive powers of the Commonwealth, State boundaries disappear, and the whole of Australia becomes one territory.’<sup>92</sup>

A further erosion of the doctrine occurred with the qualification of the type of function and the type of agency that could be considered to be governmental. In *Federated Engine Drivers and Firemen’s Association of Australasia v The Broken Hill Proprietary Company Limited*<sup>93</sup> one of the issues for consideration by the High Court was whether certain state government instrumentalities could be subject to the *Commonwealth Conciliation and Arbitration Act 1904–1910* (Cth), and consequently the Commonwealth Arbitration Court. These were the Sydney Board of Water and Sewerage Supply (‘the Board’) and the Corporation of the Mayor, Aldermen, Councillors and Citizens of the City of Melbourne (‘Melbourne Corporation’). The Board was considered to be an ‘instrumentality of government’ because it was run as a government department with a responsible Minister, and its revenue was paid into the State’s Consolidated Revenue Fund.<sup>94</sup> Therefore, the immunity of instrumentalities doctrine applied and it was not subject to the *Act*. However, the Melbourne Corporation, a local government corporation, whilst carrying on the business of supplying electricity to consumers for a profit was not engaged in governmental functions. Rather, it was doing the same as a private company carrying on the same business would do, and should have been subject to the same laws.<sup>95</sup> Therefore, the immunity did not apply and it was subject to the *Act*. Interestingly, Higgins J decided not to fully answer the question, preferring to hear further submissions before doing so. However he stated his ‘scepticism as to the soundness of the doctrine.’<sup>96</sup>

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<sup>91</sup> *R v Sutton* (1908) 5 CLR 789, 803–804 (Barton J).

<sup>92</sup> *R v Sutton* (1908) 5 CLR 789, 807 (O’Connor J).

<sup>93</sup> *Federated Engine Drivers and Firemen’s Association of Australasia v The Broken Hill Proprietary Company Limited* (1911) 12 CLR 398 (‘*Federated Engine Drivers*’).

<sup>94</sup> See, for example, *Federated Engine Drivers* (1911) 12 CLR 398, 414–415 (Griffith CJ), 425 (Barton J), 451 (Isaacs J).

<sup>95</sup> *Federated Engine Drivers* (1911) 12 CLR 398, 415 (Griffith CJ), 426–427 (Barton J), 443 (O’Connor), 451–452 (Isaacs J).

<sup>96</sup> *Federated Engine Drivers* (1911) 12 CLR 398, 459 (Higgins J).

By 1919, the year preceding the *Engineers* case, the composition of the High Court had changed dramatically. When the issue of the doctrine of immunity of instrumentalities arose in the case of *Federated Municipal and Shire Council Employees Union of Australia v The Lord Mayor, Alderman, Councillors and Citizens of Melbourne and Others*<sup>97</sup> Griffith CJ and Barton J found themselves in the minority. O'Connor was no longer on the High Court bench, having died in 1912. The majority were Isaacs, Higgins, Gavan Duffy, Powers and Rich JJ who held that municipal authorities established under state legislation who conducted maintenance, control and lighting of public streets were not state government instrumentalities. Consequently, they were held to be subject to the *Commonwealth Conciliation and Arbitration Act 1904–1915* (Cth). In a joint judgment, Isaacs and Rich JJ argued that *D'Emden v Pedder* was really a decision based on s 109 of the *Constitution* and read down the concept of implied intergovernmental immunities.<sup>98</sup> They stated:

The *Constitution* preserves the most absolute freedom of action — legislative, executive, judicial — in every sphere, but subject to this qualification: that, wherever there would otherwise be a conflict if the two agencies met on the same field, there shall be no conflict, because, to the extent of interference with the operation of Commonwealth action, State law shall be invalid — which also invalidates everything dependent upon it. Municipal powers, which are the creation of State law, are not, as such, within the sphere of Commonwealth jurisdiction, and therefore, in the main, conflict is not possible. But the lines of municipal powers and action may at some points intersect Commonwealth powers, and, when they do, Commonwealth law must prevail.<sup>99</sup>

Therefore, in conformity with federal theory, and the federal nature of the *Constitution* set out in Chapter 2, the early High Court members sought to uphold the federal nature of the *Constitution* by recognising and preserving the sovereignty of both spheres of government and thus their ability to carry out their constitutional functions without interference. However, this approach gradually began to unravel as the composition of the High Court altered. This led to the complete and absolute

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<sup>97</sup> *Federated Municipal and Shire Council Employees Union of Australia v The Lord Mayor, Alderman, Councillors and Citizens of Melbourne and Others* (1918–1919) 26 CLR 508 ('*Federated Municipal Employees*').

<sup>98</sup> For a discussion of the High Court's reliance on s 109 in shifting the federal balance toward centralisation, see '6 *The Elevation of s 109*' later in this chapter.

<sup>99</sup> *Federated Municipal Employees* (1918–1919) 26 CLR 508, 533–534 (Isaacs and Rich JJ).

rejection of the doctrine in the *Engineers* case, which marked the beginning of the rise of centralism and the corresponding demise of the power of the states.

## 2 *Reserved State Powers Doctrine*

At the same time as they implied the doctrine of implied intergovernmental immunities, the High Court also implied the ‘reserved powers doctrine’ or ‘reserved state powers doctrine’, once again on the basis of the federal nature of the *Constitution*. As Aroney notes, the doctrine has been primarily associated with the judgments of Sir Samuel Griffith.<sup>100</sup> It provided that the legislative powers of the Commonwealth prescribed by the *Constitution* should be read narrowly so as not to detract from the power of the states ‘reserved’ by s 107 of the Commonwealth *Constitution*. Section 107 states:

Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this *Constitution* exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

The philosophy underpinning the doctrine has also been summarised by Blackshield and Williams:

The ‘reserved State powers’ doctrine was primarily directed to the interpretation of Commonwealth grants of legislative power. The idea was that the *Constitution* had impliedly ‘reserved’ to the States their traditional areas of law-making power; and hence that the grants of law-making power to the Commonwealth must be narrowly construed so as not to encroach on these traditional powers of the States.<sup>101</sup>

The role of s 107 is further explained by Saunders who notes that:

Utilising section 107 of the *Constitution*, which leaves the residue of legislative power to the states, the doctrine prescribed a more general approach to interpreting the federal division of power. The doctrine tended to interpret Commonwealth power so as to protect the state’s residual power in cases of ambiguity. It thus relied not only on an implication drawn from

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<sup>100</sup> Nicholas Aroney, ‘Constitutional Choices in the *Work Choices Case*, or what *Exactly* is Wrong with the Reserved Powers Doctrine? (2008) 32 *Melbourne University Law Review* 1, 4.

<sup>101</sup> Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 4<sup>th</sup> ed, 2006) 303.

federalism, but also an implication about the type of federal system that the *Constitution* was designed to establish.<sup>102</sup>

In summary, if a legislative power was not unmistakably granted to the Commonwealth by the *Constitution*, then it was treated as belonging to the states. With respect to concurrent powers, Douglas notes how the doctrine was applied to interpret these to the benefit of the states:

s 107 of the *Constitution* provided a limitation or restriction upon the legislative power of the Commonwealth in that it reserved certain powers to the States. Federal concurrent powers, which under s 51 were expressly made ‘subject to the *Constitution*’, could not be exercised so as to limit State powers continued by s 107.<sup>103</sup>

Hence the reserved powers doctrine was a doctrine which was aimed at giving effect to the intention of the framers that the states should retain the bulk of their powers after federation to the extent that they had not been reallocated to the federal government under the new *Constitution*.

As the reserved powers doctrine was applied by the High Court with respect to legislative powers generally, three significant cases will be examined to demonstrate its application and to provide an insight into the basis and philosophy behind the doctrine. These cases are *Peterswald v Bartley*,<sup>104</sup> *R v Barger*<sup>105</sup> and *Huddart, Parker & Co v Moorehead*.<sup>106</sup>

The reserved powers doctrine was first applied in the s 90 case of *Peterswald v Bartley*,<sup>107</sup> which was decided by Griffith CJ, Barton and O’Connor JJ. In *Peterswald*, the *Liquor Act 1898* (NSW) provided that brewers of beer had to have a licence to brew beer for eventual sale. Bartley was charged by the District Licensing Inspector, Sergeant Peterswald, with carrying on a brewing business without a

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<sup>102</sup> Cheryl Saunders, ‘Influences of Federalism on Constitutional Interpretation in Australia’ (1987) 20 *UC Davis Law Review* 353, 362–363.

<sup>103</sup> Neil Douglas, ‘“Federal” Implications in the Construction of Commonwealth Legislative Power: A Legal Analysis of their Use’ (1985) 16 *Western Australian Law Review* 105, 106.

<sup>104</sup> *Peterswald v Bartley* (1904) 1 CLR 497 (‘*Peterswald*’).

<sup>105</sup> *R and the Minister of State for the Commonwealth Administering the Customs v Barger; The Commonwealth and AW Smart, Collector of Customs v McKay* (1908) 6 CLR 41 (‘*R v Barger*’).

<sup>106</sup> *Huddart, Parker & Co v Moorehead* (1909) 8 CLR 330 (‘*Huddart*’).

<sup>107</sup> *Peterswald* (1904) 1 CLR 497.

licence. Bartley, however, held a licence under the *Beer Excise Act 1901* (Cth) and argued that *Liquor Act 1898* (NSW) was invalid because s 90 of the *Constitution* made the ability to levy excise duties exclusive to the Commonwealth. A Police Magistrate initially found in favour of Bartley, finding that the New South Wales *Act* imposed an excise duty. Peterswald appealed to the Supreme Court who sent the matter to the High Court. The High Court decided that the New South Wales legislation was valid, and Bartley should have been convicted with failing to have the New South Wales licence. This was because the provisions of the New South Wales *Act* did not meet the characteristics of an excise duty which they defined narrowly. That is, an excise duty was defined with reference to many criteria, making it less likely that the state tax would fall within the definition.<sup>108</sup> This narrow definition was derived from the application of what came to be known as the reserved powers doctrine. Griffith CJ gave some explanation of the federal basis for the doctrine in the following quotation:

In construing a *Constitution* like this it is necessary to have regard to its general provisions as well as to particular sections, and to ascertain from its whole purview whether the power to deal with such matters was intended to be withdrawn from the States, and conferred upon the Commonwealth. The *Constitution* contains no provisions for enabling the Commonwealth Parliament to interfere with the private or internal affairs of the States, or to restrict the power of the State to regulate the carrying on of any businesses or trades within their boundaries, or even, if they think fit, to prohibit them altogether. That is a very important matter to be borne in mind in considering whether this particular provision ought to be construed so as to interfere with the States' powers in that respect. If the majority of the Supreme Court were right, the *Constitution* will have given to the Commonwealth, and withdrawn from the States, the power to regulate their internal affairs in connection with nearly all trades and businesses carried on in the States. Such a construction is altogether contrary to the spirit of the *Constitution*, and will not be accepted by this Court unless the plain words of its provisions compel us to do so.<sup>109</sup>

In *R v Barger*<sup>110</sup> two manufacturers challenged the constitutional validity of the *Excise Tariff Act 1906* (Cth) which imposed an excise duty on the manufacture of agricultural implements. They challenged the legislation after the Commonwealth brought proceedings against them for failing to pay the excise duty. Section 2

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<sup>108</sup> *Peterswald* (1904) 1 CLR 497, 509 (Griffith CJ). Griffith CJ delivered the Court's judgment.

<sup>109</sup> *Peterswald* (1904) 1 CLR 497, 507 (Griffith CJ).

<sup>110</sup> *R v Barger* (1908) 6 CLR 41.

provided that manufacturers could claim an exemption, whereby they would not have to pay the duty if they paid their employees ‘fair and reasonable’ remuneration, and employed them under a federal industrial award or registered agreement.

The manufacturers argued that the *Act* was an invalid use of the Commonwealth’s taxation power in s 51(ii) because it sought to regulate employment remuneration, a power that belonged to the states. The High Court was divided 3:2, with Griffith CJ, Barton and O’Connor JJ in the majority and Isaacs and Higgins JJ in the minority. The majority upheld the challenge, agreeing that the tax was unconstitutional because it interfered with ‘the domestic affairs of the States’<sup>111</sup> and was ‘an Act to regulate the conditions of manufacture of agricultural implements, and not an exercise of the power of taxation’.<sup>112</sup>

In their joint judgment, Griffith CJ, Barton and O’Connor JJ characterised the Commonwealth’s taxation power narrowly so as not to take away from the states’ traditional plenary power to regulate matters of employment. In coming to this conclusion, they noted the federal nature of the *Constitution*:

The motive which actuates the legislature, and the ultimate end desired to be attained, are equally irrelevant. A statute is only a means to an end, and its validity depends upon whether the legislature is or is not authorised to enact the particular provisions in question, entirely without regard to their ultimate indirect consequences. The scheme of the Australian *Constitution*, like that of the United States of America is to confer certain definite powers upon the Commonwealth, and to reserve to the States, whose powers before the establishment of the Commonwealth were plenary, all powers not expressly conferred upon the Commonwealth. This is expressed by sec 107 of the *Constitution* ...<sup>113</sup>

They further stated that:

The grant of the power of taxation is a separate and independent grant ... In interpreting the grant it must be considered not only with reference to other separate and independent grants, such as the power to regulate external and interstate trade and commerce, but also with reference to the powers reserved to the States. It was not contested in argument that

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<sup>111</sup> *R v Barger* (1908) 6 CLR 41, 69 (Griffith CJ, Barton and O’Connor JJ).

<sup>112</sup> *R v Barger* (1908) 6 CLR 41, 76 (Griffith CJ, Barton and O’Connor JJ).

<sup>113</sup> *R v Barger* (1908) 6 CLR 41, 67 (Griffith CJ, Barton and O’Connor JJ).

regulation of the conditions of labour is a matter relating to the internal affairs of the States, and is therefore reserved to the States and denied to the Commonwealth, except so far as it can be brought within one of the thirty-nine powers enumerated in sec 51. ... We are thus led to the conclusion that the power of taxation, whatever it may include, was intended to be something entirely distinct from a power to directly regulate the domestic affairs of the States, which was denied to the Parliament.<sup>114</sup>

Whereas the majority took the view that, ‘in determining whether a particular law is or is not within the power of the Parliament, regard must be had to the substance of the legislation rather than its literal form’,<sup>115</sup> Isaacs and Higgins JJ had an entirely different view. In his dissenting judgment Isaacs J stated that the Commonwealth’s taxation power should be interpreted as broadly as possible:

There is no limitation to the powers of taxation but those expressly enacted. If the power be exercised, it may be exercised at the will of Parliament as fully and effectually as if it were the legislature of a unitary State. For purposes of federal taxation — whether Customs or other taxation — Australia is one indivisible country.<sup>116</sup>

Isaacs J adopted a broad view of ‘taxation’ and concluded that as the taxation power had been clearly given to the Commonwealth in the *Constitution*, and as state powers were ‘subject to the Federal *Constitution*’, no reserved powers of the states were encroached upon.<sup>117</sup> Isaacs J’s construction of the taxation power of the Commonwealth was that it should be construed as broadly as possible, and as a consequence, the *Excise Tariff Act* was valid. His reasoning foreshadows the broad literalist approach to Commonwealth legislative powers that he would apply in *Engineers*, as evidenced by the following statement:

The unlimited nature of the taxing power is therefore incontestable. Its exercise upon all persons, things and circumstances in Australia is, in my opinion, unchallengeable, by the Courts, unless ... a judicial tribunal finds it repugnant to some express limitation or restriction. ... Then why is the tax on implements not valid? On its face the Act is a taxing Act, and on precedent that is conclusive.<sup>118</sup>

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<sup>114</sup> *R v Barger* (1908) 6 CLR 41, 69 (Griffith CJ, Barton and O’Connor JJ).

<sup>115</sup> *R v Barger* (1908) 6 CLR 41, 65 (Griffith CJ, Barton and O’Connor JJ).

<sup>116</sup> *R v Barger* (1908) 6 CLR 41, 84–85 (Isaacs J).

<sup>117</sup> *R v Barger* (1908) 6 CLR 41, 83 (Isaacs J).

<sup>118</sup> *R v Barger* (1908) 6 CLR 41, 94–95 (Isaacs J).

Higgins J, whose reasoning was similar to that of Isaacs J also noted that, ‘the taxing power of the Federal Parliament is plenary and absolute; unlimited as to amount, as to subjects, as to objects, as to conditions, as to machinery.’<sup>119</sup> In the opinion of Isaacs and Higgins JJ, Commonwealth legislative powers should be construed broadly and without reference to any federal implications, such as the notion that certain powers were reserved to the states.

A further example of the application of the reserved powers doctrine can be seen in the case of *Huddart, Parker & Co Pty Ltd v Moorehead*.<sup>120</sup> In this case the High Court was required to consider whether the corporations power in s 51(xx) was broad enough to permit the Commonwealth to regulate intra-state trade practices. Specifically, could the Commonwealth use the corporations power to prohibit anti-competitive contracts that only related to trade and commerce within the one state? The legislation in question was the *Australian Industries Preservation Act 1906* (Cth). In this case, the Comptroller-General of Customs wrote to a Victorian Company, Huddart Parker, and its manager, William Appleton, stating that he believed they had committed offences against the *Australian Industries Preservation Act 1906* (Cth), and demanding that they answer specified questions. When Huddart Parker and Appleton refused to answer these questions, they were charged by a Customs officer, Moorehead, and were fined £5 each by the Melbourne Court of Petty Sessions. Huddart Parker and Appleton appealed, arguing that the relevant sections of the *Australian Industries Preservation Act* were invalid. The Commonwealth argued that the provisions could be supported by a broad characterisation of the corporations power in s 51(xx) which would extend to any dealings involving corporations, including those that were purely intra-state.

The majority consisted of Griffith CJ, Barton, O’Connor, and Higgins JJ, with Isaacs JJ in dissent. Griffith CJ, in a separate judgment, reasoned that the wording of the corporations power in s 51(xx) should not be considered in isolation, but in the light of the *Constitution* as a whole and taking into consideration any express or implied prohibitions.<sup>121</sup> Thus, he emphasised the sovereignty of the states against

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<sup>119</sup> *R v Barger* (1908) 6 CLR 41, 114 (Higgins J).

<sup>120</sup> *Huddart* (1909) 8 CLR 330.

<sup>121</sup> *Huddart* (1909) 8 CLR 330, 350 (Griffith CJ).

Commonwealth interference as relevant when determining the parameters of Commonwealth legislative power:

The *Constitution* contains no provision for enabling the Commonwealth Parliament to interfere with the private or internal affairs of the States, or to restrict the power of the State to regulate the carrying on of any businesses or trades within their boundaries, or even, if they think fit, to prohibit them altogether. That is a very important matter to be borne in mind in considering whether this particular provision ought to be construed so as to interfere with the States' powers in that respect.<sup>122</sup>

Consequently, Griffith CJ went on to give a restrictive characterisation of the corporations power in s 51(xx), whereby its scope would be limited by the federal balance, or more specifically, by reference to the notion of powers being reserved to the states:

In my judgment, the words of pl. xx. are not clear and unequivocal, but are open to two constructions, and, applying the principles which I have stated, I think that they ought not to be construed as authorising the Commonwealth to invade the field of State law as to domestic trade, the carrying on of which is within the capacity of trading and financial corporations formed under the laws of the State. In other words, I think that pl. xx. empowers the Commonwealth to prohibit a trading or financial corporation formed within the limits of the Commonwealth from entering into any field of operation, but does not empower the Commonwealth to control the operations of a corporation which lawfully enters upon a field of operation, the control of which is exclusively reserved to the States.<sup>123</sup>

Aroney's comments about the reserved powers doctrine can assist in analysing the reasoning of Griffith CJ in the quotation above. Aroney notes that the doctrine was not 'absolute', but was 'more in the nature of a rebuttable presumption'.<sup>124</sup> Thus, if a power could be characterised narrowly or widely, the narrow approach would be chosen if it were 'less intrusive' with respect to the powers of the states.<sup>125</sup> Hence the High Court was making a deliberate, and logical, interpretive choice in order to preserve the federal balance mandated by the *Constitution*.

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<sup>122</sup> *Huddart* (1909) 8 CLR 330, 353 (Griffith CJ).

<sup>123</sup> *Huddart* (1909) 8 CLR 330, 354 (Griffith CJ).

<sup>124</sup> Nicholas Aroney, 'Constitutional Choices in the *Work Choices Case*, or What *Exactly* is Wrong with the Reserved Powers Doctrine?' (2008) 32 *Melbourne University Law Review* 1, 15.

<sup>125</sup> Nicholas Aroney, 'Constitutional Choices in the *Work Choices Case*, or What *Exactly* is Wrong with the Reserved Powers Doctrine?' (2008) 32 *Melbourne University Law Review* 1, 15–16.

Isaacs J was alone in dissent. Although Higgins J stated that it was his ‘duty’ to interpret ‘the *Constitution* as we would construe an ordinary Act of Parliament’,<sup>126</sup> and disapproved of ‘rushing to American cases ... which, owing to the differences in the *Constitution*, are as often misleading as helpful’,<sup>127</sup> he concluded that the corporations power was not wide enough to regulate the contracts that corporations entered into.<sup>128</sup>

However, once again, Isaacs J, in dissent, criticised the characterisation of Commonwealth legislative powers on the basis of ‘the spirit of the document’, or in other words, the concept of federalism. He said the following about constitutional interpretation:

though we are to examine every part of the instrument we must be guided by its language alone as applied to the subject matter, and it is not permissible to wander at large upon a sea of speculation searching for a suitable intent by the misty and uncertain light of what is sometimes called the spirit of the document, for that is largely fashioned subjectively by the preconceptions of the individual observer.<sup>129</sup>

This sentiment can be seen clearly in the joint majority judgment in *Engineers*, discussed below. However, before discussing *Engineers*, it should be emphasised that the reserved powers doctrine rested on the most solid of foundations, which should not have been discarded so readily. These were the federal foundations of the *Constitution*, as intended by democratically elected framers, approved by the Australian people, and evident in the structure and provisions of the *Constitution* that they drafted. In the words of Aroney:

the reserved powers doctrine is founded upon a clear and defensible account of the political origins, underlying ideas, structural features and intended purposes of the *Constitution*; it entails a carefully articulated account of the grounds upon which the specific content of the powers reserved to the States can be identified; and involves a sophisticated recognition that constitutional interpretation inevitably requires choices to be made. Indeed, when understood in interpretive terms, it might be doubted whether the label ‘reserved powers’ is entirely

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<sup>126</sup> *Huddart* (1909) 8 CLR 330, 414 (Higgins J).

<sup>127</sup> *Huddart* (1909) 8 CLR 330, 416 (Higgins J).

<sup>128</sup> *Huddart* (1909) 8 CLR 330, 416 (Higgins J).

<sup>129</sup> *Huddart* (1909) 8 CLR 330, 388 (Isaacs J).

apposite. Behind the label is a method of reasoning that attends closely to the text and structure of the *Constitution*, reads the document as an integrated whole and pays close attention to its underlying principles and overarching purpose.<sup>130</sup>

## II THE *ENGINEERS* HIGH COURT — DISREGARDING THE FEDERAL BALANCE

### A *The Engineers Case*

The landmark decision in the *Engineers* case irreparably altered the balance of power between the Commonwealth and the states. In the words of Craven: ‘Since the decision in the *Engineers* case in the 1920s, the High Court has been strongly, institutionally, anti-federal.’<sup>131</sup> The composition and experience of the High Court had changed from the federalist Griffith High Court, with members of the Knox CJ High Court having little political experience, and no involvement in the drafting of the *Constitution*. This could perhaps explain part of the attraction of the adoption of a literal, and consequently centralist, approach.<sup>132</sup>

The *Engineers* judgment was handed down on 31 August 1920 in Melbourne. In *Engineers*, a 5-1 majority of the High Court rejected the immunity of instrumentalities doctrine, and in passing, also rejected the reserved powers doctrine. *Engineers* was, and remains, a controversial decision sparking considerable debate. This was primarily because it completely reversed the approach taken by the early High Court by endorsing an expansive interpretation of Commonwealth powers, and without limitation by any concept of a federal balance, unless expressly stated in the *Constitution*. The lack of logic and reasoning in the joint majority decision, attributed to the authorship of Isaacs J and delivered by him, was noted by Sawyer who stated, ‘The joint judgment is one of the worst written and organised in Australian judicial history. Isaacs was given to rhetoric and repetition, and here he gave these habits full

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<sup>130</sup> Nicholas Aroney, ‘Constitutional Choices in the *Work Choices Case*, or What *Exactly* is Wrong with the Reserved Powers Doctrine?’ (2008) 32 *Melbourne University Law Review* 1, 42.

<sup>131</sup> Greg Craven, ‘The High Court of Australia: A Study in the Abuse of Power’ (1999) 22 *University of New South Wales Law Journal* 216, 222.

<sup>132</sup> Haig Patapan, ‘Politics of Interpretation’ (2000) 22 *Sydney Law Review* 247, 250. See also, Jeffrey Goldsworthy, ‘Justice Windeyer on the *Engineers*’ Case’ (2009) 37 *Federal Law Review* 363, 364.

rein.<sup>133</sup> Despite this, *Engineers* has proved to be a lasting constitutional precedent that has even recently been used to justify centralisation.<sup>134</sup>

### 1 *The Facts*

The Amalgamated Society of Engineers ('the Union') was a Trade Union representing workers throughout Australia. The Union served a log of claims on 844 employers throughout Australia claiming improved wages and conditions for its members. When the Union's demands were not met, it commenced proceedings in the Commonwealth Arbitration Court. The *Conciliation and Arbitration Act 1904* (Cth) gave the Court jurisdiction to prevent and settle industrial disputes that extended beyond the limits of any one state. The types of disputes that the Court was empowered to resolve included those where the Commonwealth, state or any Commonwealth or state public authority was an employer.

Included in the list of 844 employers who were parties to the dispute were several public authorities of the state of Western Australia. These were the Western Australian Minister for Trading Concerns, the Western Australian State Implement and Engineering Works and the Western Australian State Sawmills. Western Australia argued that they should be exempt from the operation of the *Conciliation and Arbitration Act 1904* (Cth) on the basis of the immunity of instrumentalities doctrine. In other words, they argued that the conciliation and arbitration power in s 51(xxxv) of the *Constitution* should not allow the Commonwealth to legislate for the regulation of the states as employers. To do so, they argued, would fall foul of the immunity of instrumentalities doctrine. As this argument raised constitutional issues, the President of the Commonwealth Arbitration Court referred the case to the High Court, pursuant to s 18 of the *Judiciary Act 1903* (Cth).

### 2 *Summary of the Decision*

A 5-1 majority of the High Court held that the conciliation and arbitration power in s 51(xxxv) was wide enough to allow the Federal Parliament to make laws with respect to state government employers and employees. Additionally, the state was

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<sup>133</sup> Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 130.

<sup>134</sup> A recent example of the centralist ramifications of *Engineers* was *Work Choices* (2006) 229 CLR 1 where the majority used an *Engineers* based literalist approach.

not immune from interference by the Commonwealth on the basis of any immunity implied from the federal nature of the *Constitution*. The majority, consisting of Knox CJ, Isaacs, Rich and Starke JJ wrote a joint judgment ('the joint majority'). Higgins J, also in the majority, delivered a separate judgment which was consistent with that of the joint majority on its central arguments. Powers J, for unknown reasons did not sit to hear the case.<sup>135</sup>

### 3 *Willingness to Depart from Existing Authorities*

Such a result was somewhat unexpected when contrasted with the original argument put forward by Robert Menzies, Counsel for the Union. His initial argument was to distinguish the application of the implied intergovernmental immunities doctrine on the basis that Western Australian employees were engaged in 'trading activities', rather than 'governmental activities'.<sup>136</sup> However, after Starke J asserted that this line of argument was 'a lot of nonsense', Menzies asserted that he could put forward a 'sensible argument' if allowed to challenge the previous line of authorities which had affirmed and applied the implied intergovernmental immunities doctrine.<sup>137</sup>

Menzies' 'sensible argument' was enthusiastically accepted and endorsed in the joint majority judgment, and in the majority judgment of Higgins J. In fact, the joint majority judgment in *Engineers* commences with criticism of previous decisions of the High Court which it claims are inconsistent and based on 'personal opinion'.<sup>138</sup> This is then justified by the joint majority in a somewhat self-satisfying manner when they state that it was their 'manifest duty' to give 'earnest attention' to the interpretation of the *Constitution* in order 'to give true effect to the relevant constitutional provisions',<sup>139</sup> because this had not been done previously. The joint majority harshly criticised the previous line of federalist decisions, stating: 'The attempt to deduce any consistent rule from them has not only failed, but has disclosed an increasing entanglement and uncertainty, and a conflict both with the

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<sup>135</sup> James Douglas, 'Sir Charles Powers: His Contribution to the High Court' (Paper presented at the Supreme Court of Queensland Library Conference, 29 March 2003) 16 <<http://archive.sclqld.org.au/judgepub/2007/douglas290403.pdf>>.

<sup>136</sup> Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 129.

<sup>137</sup> Keven Booker and Arthur Glass, 'The *Engineers* Case' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 34, 39.

<sup>138</sup> *Engineers* (1920) 28 CLR 129, 141–142 (Knox CJ, Isaacs, Rich and Starke JJ).

<sup>139</sup> *Engineers* (1920) 28 CLR 129, 142 (Knox CJ, Isaacs, Rich and Starke JJ).

text of the *Constitution* and with distinct and clear declarations of law by the Privy Council.<sup>140</sup>

Again, this highly critical approach was echoed by Higgins J in his separate majority judgment, stating at the beginning of his judgment, ‘it is our duty to reconsider the subject, and to obey the *Constitution* and the Act rather than any decision of this Court, if the decision be shown to have been mistaken.’<sup>141</sup> The confidence in which these statements were made was arguably an attempt to mislead potential critics of the *Engineers* decision away from its activist nature by accusing previous justices of judicial activism when they upheld the federal nature of the *Constitution*. Further comment will be made in the following section about the arbitrariness of the literalist approach, despite its outward appearance of objectivity.

#### 4 A Literal, yet Expansive Approach

The *Engineers* majority advocated a new method of constitutional interpretation from the previous line of decisions which is known as ‘literalism’. The joint majority stated that the words of the *Constitution* must be interpreted in their ‘natural sense’<sup>142</sup> and by utilising ‘the ordinary lines of statutory construction’.<sup>143</sup> That is, the *Constitution* was to be interpreted as if it was a statute, with its words being given their literal and widest possible meaning. Quoting from the English authority of *Hodge v The Queen*,<sup>144</sup> the joint majority commented that grants of Commonwealth power should be construed as ‘plenary’ and ‘ample ... as the Imperial Parliament in the plenitude of its power possessed and could bestow’.<sup>145</sup> This method of interpretation was also adopted by Higgins J in his majority judgment:

The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result would be inconvenient or impolitic or improbable. Words limiting the power are not to be read into the statute if it can be construed without a limitation. ... The Parliament is given a power here to make any law which, as it thinks, may conduce to the peace, order and good

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<sup>140</sup> *Engineers* (1920) 28 CLR 129, 142 (Knox CJ, Isaacs, Rich and Starke JJ).

<sup>141</sup> *Engineers* (1920) 28 CLR 129, 161 (Higgins J).

<sup>142</sup> *Engineers* (1920) 28 CLR 129, 149 (Knox CJ, Isaacs, Rich and Starke JJ).

<sup>143</sup> *Engineers* (1920) 28 CLR 129, 150 (Knox CJ, Isaacs, Rich and Starke JJ).

<sup>144</sup> *Hodge v The Queen* 9 App. Cas. 117.

<sup>145</sup> *Hodge v The Queen* 9 App. Cas. 117, 132 cited in *Engineers* (1920) 28 CLR 129, 153 (Knox CJ, Isaacs, Rich and Starke JJ).

government of Australia on the subject of pl. xxxv., ‘subject to this *Constitution*.’ There is no limitation to the power in the words of the placitum; and unless the limitation can be found elsewhere in the *Constitution*, it does not exist at all.<sup>146</sup>

Like Higgins J, the joint majority also noted that enumerated Commonwealth powers were to be interpreted as extensively as possible unless they were limited by express provision in the *Constitution*. They stated:

It is undoubted that those who maintain the authority of the Commonwealth Parliament to pass a certain law should be able to point to some enumerated power containing the requisite authority. But we also hold that, where the affirmative terms of a stated power would justify an enactment, it rests upon those who rely on some limitation or restriction upon the power, to indicate it in the *Constitution*.<sup>147</sup>

Higgins J also noted the lack of express limitation on the legislative powers of the Federal Parliament in the conciliation and arbitration placitum,<sup>148</sup> concluding that the Federal Parliament could bind the states unless the express wording of the *Constitution* excluded it:

My view is that, on the true construction of sec 51, the State activities which are not distinctly excluded from the Federal powers by the *Constitution* are subject to the Federal laws, to the full extent of their meaning; and that there is no exemption from Federal Acts unless and until they pass beyond the limits of the Federal powers on their true construction.<sup>149</sup>

By characterising the conciliation and arbitration power generally and expansively, the majority sanctioned the enactment by the Federal Parliament of legislation that interfered with state government employers.<sup>150</sup>

One of the many problems with this new, supposedly value-neutral, literal approach to interpretation adopted by the *Engineers* majority was that it failed to achieve objectivity. Gageler notes:

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<sup>146</sup> *Engineers* (1920) 28 CLR 129, 162 (Higgins J).

<sup>147</sup> *Engineers* (1920) 28 CLR 129, 154 (Knox CJ, Isaacs, Rich and Starke JJ).

<sup>148</sup> *Engineers* (1920) 28 CLR 129, 162–163 (Higgins J).

<sup>149</sup> *Engineers* (1920) 28 CLR 129, 171 (Higgins J).

<sup>150</sup> *Engineers* (1920) 28 CLR 129, 154 (Knox CJ, Isaacs, Rich and Starke JJ).

The difficulty is that a purely judge-based interpretation of the wording of constitutional powers and restraints is necessarily open to the same criticism as was employed in the *Engineers'* case to consign the old doctrines to oblivion. That is not to suggest that legalism is a mere cloak for blatantly political action. ... It is simply to say that legalism is incapable of fulfilling its own agenda: that a neutrally based a priori approach to constitutional line drawing is in its own terms impossible and that the High Court's acknowledged readiness to depart from old doctrine where it considers it misconceived or inappropriate means that the choice between any number of reasonable alternative positions assumes an air of arbitrariness.<sup>151</sup>

However, Craven has suggested that literalism is, to use Gagler's words, 'a mere cloak for blatantly political action'. He argues that the High Court is best viewed not as a legal institution, but as a political institution attempting to 'acquire and exercise power' in a 'calculated' manner.<sup>152</sup> Thus, instead of fulfilling its intended role as a 'protector of federalism', the High Court has pursued its own 'progressivist', anti-federal, centralist agenda.<sup>153</sup>

The mechanics of the expansive literal approach adopted by the *Engineers* majority have been widely criticised by commentators such as Walker who noted that a 'literal meaning' means something very different from 'the widest literal meaning'<sup>154</sup> or 'the widest (that is, most centralist) meaning that the words can possibly bear.'<sup>155</sup> In addition, as Walker explains, the Court disregarded the fact that a broad reading of one power may make another power 'redundant or meaningless'.<sup>156</sup> Craven has also fiercely criticised the majority's literal approach in *Engineers* because it undermines the 'central character' of the *Constitution* as fundamentally federal, oversimplifying the *Constitution*, and ignoring the 'complex range of historic intentions' behind the

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<sup>151</sup> Stephen Gagler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17 *Federal Law Review* 162, 178.

<sup>152</sup> Greg Craven, 'The High Court: A Study in the Abuse of Power' (1999) 22(1) *University of New South Wales Law Journal* 216, 219–220.

<sup>153</sup> Greg Craven, 'The High Court: A Study in the Abuse of Power' (1999) 22(1) *University of New South Wales Law Journal* 216, 222.

<sup>154</sup> Geoffrey de Q Walker, 'The Seven Pillars of Centralism: Federalism and the *Engineers' Case*' (2002) 76 *The Australian Law Journal* 678, 684.

<sup>155</sup> Geoffrey de Q Walker, 'The Seven Pillars of Centralism: Federalism and the *Engineers' Case*' (2002) 76 *The Australian Law Journal* 678, 688.

<sup>156</sup> Geoffrey de Q Walker, 'The Seven Pillars of Centralism: Federalism and the *Engineers' Case*' (2002) 76 *The Australian Law Journal* 678, 689.

document as fundamentally and incontrovertibly federal.<sup>157</sup> Instead, Craven (perhaps rather cynically) points out that: ‘The essence of literalism is thus that the *Constitution* may be read in much the same way as a telephone directory or the instructions to a model aeroplane kit, with the assistance of a dictionary, but not much else.’<sup>158</sup>

### *5 Rejection of Implications Based on Federalism*

In adopting a broad and general interpretation of Commonwealth powers, the joint majority also rejected any implications from the constitutional text, and accordingly rejected the previously recognised immunity of the states from the application of Commonwealth laws that were otherwise within their power, and vice versa. The joint majority dismissed the relevance of looking at the federal intentions on which the *Constitution* was based, stating:

It is an interpretation of the *Constitution* depending on an implication which is formed on a vague, individual conception of the spirit of the compact, which is not the result of interpreting any specific language to be quoted, nor referable to any recognised principle of the common law of the *Constitution*, and which, when started, is rebuttable by an intention of exclusion equally not referable to any language of the instrument or acknowledged common law constitutional principle, but arrived at by the Court on the opinions of Judges as to hopes and expectations respecting vague external conditions.<sup>159</sup>

They went on to state that: ‘The doctrine of “implied prohibition” finds no place where the ordinary principles of construction are applied so as to discover in the actual terms of the instrument their expressed or necessarily implied meaning’.<sup>160</sup> Thus, instead of viewing the *Constitution* as a federal document, with corresponding immunities of each level of government from interference with one another, the majority treated the *Constitution* as a British statute and regarded the relevant question to be whether the *Constitution* could bind the Crown. They concluded that the Crown, consisting of both the state and federal executive, was indivisible and was

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<sup>157</sup> Greg Craven, ‘The *Engineers Case*: Time for a Change?’ (Paper presented at the Eighth Conference of the Samuel Griffith Society, University House, Canberra, 7–9 March 1997) 73, 75–79.

<sup>158</sup> Greg Craven, ‘The *Engineers Case*: Time for a Change?’ (Paper presented at the Eighth Conference of the Samuel Griffith Society, University House, Canberra, 7–9 March 1997) 73, 76.

<sup>159</sup> *Engineers* (1920) 28 CLR 129, 145 (Knox CJ, Isaacs, Rich and Starke JJ).

<sup>160</sup> *Engineers* (1920) 28 CLR 129, 155 (Knox CJ, Isaacs, Rich and Starke JJ).

subject to the *Constitution*, meaning that the states were subject to Commonwealth laws:

The first step in the examination of the *Constitution* is to emphasise the primary legal axiom that the Crown is ubiquitous and indivisible in the King's dominions. Though the Crown is one and indivisible throughout the Empire, its legislative, executive and judicial power is exercisable by different agents in different localities ... the Federal *Constitution* of Australia, being passed by the Imperial Parliament for the express purpose of regulating the royal exercise of legislative, executive and judicial power throughout Australia, is by its own inherent force binding on the Crown to the extent of its operation. ... The Commonwealth *Constitution* as it exists for the time being, dealing expressly with sovereign functions of the Crown in its relation to Commonwealth and to States, necessarily so far binds the Crown, and laws validly made by authority of the *Constitution*, bind, so far as they purport to do so, the people of every State considered as individuals or as political organisms called States — in other words, bind both Crown and subjects.<sup>161</sup>

According to the majority, limitations based on the federal nature of the *Constitution* were erroneously based on American authorities and the American federal system. Instead, they argued that English authorities, namely those of the Privy Council, should be followed. The joint majority stated:

American authorities, however illustrious the tribunals may be, are not a secure basis on which to build fundamentally with respect to our own *Constitution* ... they cannot ... be recognised as standards whereby to measure the respective rights of the Commonwealth and the States under the Australian *Constitution*. For the proper construction of the Australian *Constitution* it is essential to bear in mind two cardinal features of our political system which are interwoven in its texture and, notwithstanding considerable similarity of structural design, including the depository of residual powers, radically distinguish it from the American *Constitution*. Pervading the instrument, they must be taken into account in determining the meaning of its language. One is the common sovereignty of all parts of the British Empire; the other is the principle of responsible government.<sup>162</sup>

The English authorities advocated by the majority regarded parliamentary sovereignty as paramount to responsible government. This meant that it should be a political question for Parliament to determine the limits of its legislative power, rather than the Courts. Hence, parliamentary sovereignty gives a great deal of

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<sup>161</sup> *Engineers* (1920) 28 CLR 129, 153 (Knox CJ, Isaacs, Rich and Starke JJ).

<sup>162</sup> *Engineers* (1920) 28 CLR 129, 146 (Knox CJ, Isaacs, Rich and Starke JJ).

latitude to Parliament, without interference from the judiciary. Ratnapala notes that this notion of sovereignty supports centralism, defining ‘constitutional sovereignty’ as ‘a limitlessly empowered supreme authority within a national legal system.’<sup>163</sup> He further states that, ‘The driving sentiment behind sovereignty in the constitutional sense is the belief that governments, particularly those responsible to the electorate, must not be restrained in the pursuit of the public good.’<sup>164</sup> Ratnapala notes that the result of *Engineers* was a shift to this constitutional sovereignty model, even to the extent that the Commonwealth could ‘extend itself to matters over which it has no express constitutional authority’.<sup>165</sup>

It is interesting to note that although the majority rejected the reserved powers doctrine and implied intergovernmental immunities doctrines as unauthorised constitutional implications, they endorsed the British tradition of parliamentary sovereignty and the constitutional implication of responsible government. This selective approach has been criticised by Walker as contradictory.<sup>166</sup> Further, Craven argues that if any implication must be elevated above all others, it must be one of federalism, to which all other concepts, such as responsible government, play a supporting role. In fact, in discussing the intended role of the High Court he argues that federalism is much more than a mere implication:

The positive and fundamental role of the High Court was to protect federalism. In this connection, it goes without saying that the *Constitution* itself breathes federalism, not merely implicitly, but expressly in its very terms. If one had to pick the ‘great theme’ of the *Constitution*, it could only be federalism, upon the broad stage of which all other concepts play their crucial but undeniably supporting roles. The critical function of the Court in relation to federalism was to maintain the Commonwealth and the States within their respective spheres, and in particular to ensure that the Commonwealth kept within the ambit of its powers and did not invade the realms of the States.<sup>167</sup>

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<sup>163</sup> Suri Ratnapala, ‘Government Under the Law: The Ebb and Flow of Sovereignty in Australia’ (2001) 24(3) *University of New South Wales Law Journal* 670, 670.

<sup>164</sup> Suri Ratnapala, ‘Government Under the Law: The Ebb and Flow of Sovereignty in Australia’ (2001) 24(3) *University of New South Wales Law Journal* 670, 670.

<sup>165</sup> Suri Ratnapala, ‘Government Under the Law: The Ebb and Flow of Sovereignty in Australia’ (2001) 24(3) *University of New South Wales Law Journal* 670, 674.

<sup>166</sup> Geoffrey de Q Walker, ‘The Seven Pillars of Centralism: Federalism and the *Engineers’ Case*’ (2002) 76 *The Australian Law Journal* 678, 691.

<sup>167</sup> Greg Craven, ‘The High Court: A Study in the Abuse of Power’ (1999) 22(1) *University of New South Wales Law Journal* 216, 221.

The approach of the *Engineers* joint majority is also problematic because, as demonstrated in the previous chapter, the federal structure of Australia's system of government is obvious upon reading express provisions of the *Constitution*, and upon viewing the document as a whole. In fact, even Higgins J stated that a 'fundamental rule of interpretation' was 'that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole.'<sup>168</sup> Although Higgins J was referring to the language throughout the document, he acknowledged (albeit inadvertently) that the whole document was nevertheless relevant. The myopic view of the joint majority overlooked this, instead focusing on an expansive interpretation of individual words in the *Constitution*. They stated:

the legislative powers given to the Commonwealth Parliament are all prefaced with one general *express* limitation, namely, 'subject to this *Constitution*,' and consequently those words, which have to be applied *seriatim* to each placitum, require the Court to consider with respect to each separate placitum, over and beyond the general fundamental considerations applying to all the placita, whether there is anything in the *Constitution* which falls within the express limitation referred to in the governing words of sec. 51.<sup>169</sup>

One of the flaws of this literalist approach is that it fails to take into account the method of interpretation to be applied in the event of ambiguity in wording, and does not take into account how to interpret provisions that require historical background to be understood, such as the meaning of 'duties of customs and excise' in s 90.<sup>170</sup>

### 6 *The Elevation of s 109*

As well as being selective about what could be implied from the *Constitution* and what could not, the joint majority was selective about how to read the specific federal provisions of the *Constitution*. They read down s 107 (which saved state powers after federation), and elevated s 109 (inconsistency) as paramount in demonstrating the Commonwealth's supremacy over the states. The joint majority stated:

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<sup>168</sup> *Engineers* (1920) 28 CLR 129, 161–162 (Higgins J).

<sup>169</sup> *Engineers* (1920) 28 CLR 129, 144 (Knox CJ, Isaacs, Rich and Starke JJ).

<sup>170</sup> Greg Craven, 'The *Engineers Case*: Time for a Change?' (Paper presented at the Eighth Conference of the Samuel Griffith Society, University House, Canberra, 7–9 March 1997) 73, 86–91 cited in Geoffrey de Q Walker, 'The Seven Pillars of Centralism: Federalism and the *Engineers' Case*' (2002) 76 *The Australian Law Journal* 678, 687.

Sec. 107 continues the previously existing powers of every State Parliament to legislate with respect to (1) State exclusive powers and (2) State powers which are concurrent with Commonwealth powers. But it is a fundamental and fatal error to read sec. 107 as reserving any power from the Commonwealth that falls fairly within the explicit terms of an express grant in sec. 51, as that grant is reasonably construed, unless that reservation is as explicitly stated.<sup>171</sup>

The joint majority continued on to discuss ‘the supremacy ... established by express words of the *Constitution*’,<sup>172</sup> or rather s 109 specifically, which they declared illustrated Commonwealth supremacy:

That section, which says ‘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,’ gives supremacy, not to any particular class of Commonwealth Acts but to *every* Commonwealth Act, over not merely State Acts passed under concurrent powers but *all* State Acts, though passed under an exclusive power, if any provisions of the two conflict; as they may — if they do not, then *cadit quaestio*.<sup>173</sup>

They said that s 109 could be used to justify some of the previous decisions, concerning taxation laws, where the implied immunity of instrumentalities doctrine has been applied.<sup>174</sup> However, as is commonplace throughout this decision, little reasoning or justification is given for the elevation of s 109, contrary to early High Court authorities which regarded s 107 as the more crucial provision.

The *Engineers* majority irreparably altered the federal balance by rejecting any implication from the Constitutional text; eliminating the doctrine of immunity of instrumentalities and with it, the reserved powers doctrine, whilst at the same time expressly proclaiming the ‘supremacy’ of the Commonwealth over the states. Instead of the Commonwealth and the states being recognised as independent and autonomous in their own spheres, the *Engineers* majority endorsed Commonwealth interference in state matters, thus jeopardising their sovereignty as provided by the federal nature of the *Constitution*.<sup>175</sup>

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<sup>171</sup> *Engineers* (1920) 28 CLR 129, 155 (Knox CJ, Isaacs, Rich and Starke JJ).

<sup>172</sup> *Engineers* (1920) 28 CLR 129, 154–155 (Knox CJ, Isaacs, Rich and Starke JJ).

<sup>173</sup> *Engineers* (1920) 28 CLR 129, 155 (Knox CJ, Isaacs, Rich and Starke JJ).

<sup>174</sup> *Engineers* (1920) 28 CLR 129, 154 (Knox CJ, Isaacs, Rich and Starke JJ).

<sup>175</sup> *Engineers* (1920) 28 CLR 129, 155 (Knox CJ, Isaacs, Rich and Starke JJ).

### 7 *The Dissenting Judgment*

Gavan Duffy J was alone in dissent, and his dissent is very far from a valiant attempt to save the federal balance from its future demise. Discussion of Gavan Duffy J's dissent is largely omitted from academic commentary on the *Engineers* decision. This is perhaps because it is inherently weak in terms of its failure to address the matters raised in the majority judgments and its failure to consider and address thoroughly the earlier line of cases that the High Court was being asked to reconsider. This point is noted by Booker and Glass, who also comment that 'Gavan Duffy J's dissent has been forgotten and for good reason.'<sup>176</sup>

Gavan Duffy J commented on the importance of the states in the federal compact and the intent of the framers of the *Constitution*:

The existence of the States as a polity is as essential to the *Constitution* as the existence of the Commonwealth. The fundamental conception of the Federation as set out in the *Constitution* is that the people of Australia, who had theretofore existed in several distinct communities under distinct polities, should thenceforward unite for certain specific purposes in one Federal Commonwealth, but for all other purposes should remain precisely as they had been before Federation.<sup>177</sup>

He also remarked upon the operation of ss 106 and 107, which he noted evidenced the intention of the colonies prior to federation to preserve state sovereignty after federation had occurred:

secs. 106 and 107 preserve the *Constitution* of each State as it existed at the establishment of the Commonwealth, and every power of a State Parliament unless it is by the *Constitution* exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State. In this case it is not disputed that the industrial operations conducted by the Crown in Western Australia are within the *Constitution* of that State. They are authorised under its legislative power and conducted under its executive power, and therefore free from the authority conferred upon the Federal Parliament by sec. 51.<sup>178</sup>

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<sup>176</sup> Keven Booker and Arthur Glass, 'The *Engineers* Case' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 34, 41.

<sup>177</sup> *Engineers* (1920) 28 CLR 129, 174 (Gavan Duffy J).

<sup>178</sup> *Engineers* (1920) 28 CLR 129, 174 (Gavan Duffy J).

However, these comments were made in the context of Gavan Duffy J's argument that any laws made by the Federal Parliament were required by the *Constitution* to be 'subject to this *Constitution*'.<sup>179</sup> As a result, the question for Gavan Duffy J then became whether a law made pursuant to s 51 could bind the Western Australian Crown. This reasoning was premised on the common law rule that the Crown was not bound by a statute unless the Statute itself purported to bind the Crown — so like the majority, Gavan Duffy J treated the *Constitution* as if it was a British statute. He concluded that as s 51 (xxxv) was not expressed to bind the Crown it did not bind the Western Australian government Crown.

The result of *Engineers* was a series of subsequent High Court decisions in which Commonwealth powers continued to be interpreted expansively.<sup>180</sup> In fact, Craven described the success of the Commonwealth in these decisions as one which 'must rival any win-loss ratio in the history of either professional sport or dubious umpiring.'<sup>181</sup> The following chapter will discuss these 'legal triumphs' using excise duties and the corporations power as case studies. In doing so, it will show how the High Court's interpretation of the *Constitution*, post-*Engineers*, has resulted in the federal balance of power between the Commonwealth and the states being displaced to such an extent that major reforms, of the nature suggested in Chapter 4, and outlined in detail in Chapter 7, are warranted.

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<sup>179</sup> *Engineers* (1920) 28 CLR 129, 173–174 (Gavan Duffy J).

<sup>180</sup> For example, the corporations power in *Constitution* s 51(xx) which will be discussed in the following chapter.

<sup>181</sup> Greg Craven, *Conversations with the Constitution: Not Just a Piece of Paper* (University of New South Wales Press, 2004) 78.

## CHAPTER 6: WHY AUSTRALIAN FEDERALISM IS IN NEED OF REFORM (PART 2): THE DEMISE OF STATE FINANCIAL AND LEGISLATIVE POWERS AFTER THE *ENGINEERS* CASE

The previous chapter, Chapter 5, outlined early High Court decisions in which the doctrines of implied intergovernmental immunities and state reserved powers were applied to uphold the federal balance of power between the Commonwealth and the states. It concluded with a discussion of the landmark decision in *Engineers*, which was a turning point from federalism to incremental centralisation because it advocated a literal interpretation of the words of the *Constitution*, devoid from any implications such as federalism or a federal balance.

This chapter continues from the previous chapter and provides an overview of federalism after *Engineers* in order to illustrate that the federal balance has been so compromised that major reforms are required (Research Question 6). Firstly, given the contrast between *Engineers* and earlier decisions of the High Court, this chapter will commence with a discussion about the role of precedent in the High Court. It will discuss how the High Court's rejection of originalism in favour of the literalist approach in *Engineers* was an enduring alteration to the federal landscape, instead of a mistake that should have been rectified by subsequent decisions.

A study of the interpretation of the corporations power subsequent to *Engineers*, and also of excise duties,<sup>1</sup> will then be undertaken in this chapter in order to demonstrate the pivotal role that *Engineers* played in steering the federal balance toward centralism. The notable decisions in *Ha*<sup>2</sup> and *Work Choices*<sup>3</sup> will be discussed as examples of the demise of state financial powers and autonomy, and the demise of state legislative powers respectively (Research Question 6). *Ha* resulted in a revenue loss to the states of \$5 billion per annum,<sup>4</sup> and *Work Choices* resulted in the Commonwealth effectively taking the power to regulate employment away from the

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<sup>1</sup> It is acknowledged that post-*Engineers*, the s 51 legislative powers of the Commonwealth have been interpreted more and more expansively. Notable examples include the external affairs power (s 51(xxix)) and the taxation power (s 51(i)). Given the number of powers that have been interpreted expansively, corporations and excise have been selected as case studies for this chapter.

<sup>2</sup> *Ha v New South Wales* (1997) 189 CLR 465 ('*Ha*').

<sup>3</sup> *Work Choices* (2006) 229 CLR 1.

<sup>4</sup> Anne Twomey and Glen Withers, *Federalist Paper 1 Australia's Federal Future: A Report for the Council for the Australian Federation* (2007) 34.

states, with 85% of employees now being brought under the federal jurisdiction.<sup>5</sup> These case studies demonstrate that the High Court, through its adoption of a literalist approach, has shifted the federal balance from one that protects the position and rights of the states to one that promotes, and indeed that has resulted in, centralisation.

Finally, this chapter will discuss the *Melbourne Corporation* principle<sup>6</sup> which attempted to reverse some of the detriment to the states resulting from *Engineers*, together with its application in subsequent cases. However, it will be shown that the principle has been diluted to such an extent that it is of little benefit to the states to remedy their loss of power. In short, nothing short of major reforms, including procedural, legislative and constitutional reforms, will suffice to correct the incremental damage caused to the states through centralisation.

### **I ENGINEERS: A RADICAL DEPARTURE FROM PRECEDENT**

In the words of Geoffrey de Q Walker, the *Engineers* decision ‘switched the entire enterprise of Australian federalism onto a diverging track that carried it to destinations far removed from those intended by the generation that had brought the federation into being.’<sup>7</sup> In order to examine why this may have occurred, and why the High Court was so willing in *Engineers* to deviate from precedent, this section will discuss the role of precedent, specifically, *stare decisis*, in the High Court. It will also seek to examine why the High Court was so readily able to part with it in *Engineers*, yet felt so bound to follow *Engineers* in subsequent cases. In fact, some commentators have suggested that the way *Engineers* treated precedent is nothing short of alarming and was therefore tantamount to judicial activism. Geoffrey de Q Walker, quoting Dr Colin Hughes, notes, ‘After nearly twenty years’ experience the ruling criterion for the construction of the *Constitution* was rejected and a new one put in its place.’<sup>8</sup> He also notes that despite the fact that the dismissal of the reserved

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<sup>5</sup> *Work Choices* (2006) 229 CLR 1, 69 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>6</sup> From *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 (*‘Melbourne Corporation’*).

<sup>7</sup> Geoffrey de Q Walker, ‘The Seven Pillars of Centralism: Federalism and the *Engineers’ Case*’ (2002) 76 *The Australian Law Journal* 678, 678.

<sup>8</sup> Geoffrey de Q Walker, ‘The Seven Pillars of Centralism: Federalism and the *Engineers’ Case*’ (2002) 76 *The Australian Law Journal* 678, 682 (no source cited for Dr Hughes).

powers doctrine was obiter dicta, and never formally overruled, its dismissal has subsequently been taken as binding precedent.<sup>9</sup>

The starting point of this discussion should be to define the terms ‘precedent’ and ‘*stare decisis*’. The terms are often used interchangeably. However, sometimes ‘precedent’ is defined in a broader sense, for example, as ‘a broad class of practices employed in rendering judicial decisions’.<sup>10</sup> At a general level, Duxbury notes that: ‘A precedent is a past event — in law the event is nearly always a decision — which serves as a guide for present action.’<sup>11</sup> Precedent requires that the ‘ratio decidendi’ from prior cases of the same or higher courts must be followed to ensure consistency, and some degree of predictability in judicial decision-making.<sup>12</sup> ‘Ratio decidendi’ means the ‘reason for deciding’.<sup>13</sup> This does not refer to all of the Judge’s reasoning, some of which could be incidental to the outcome or not directly related to the facts in issue. This reasoning is known as ‘obiter dicta’, which translates as ‘saying by the way’.<sup>14</sup>

The doctrine of precedent and *stare decisis* originated in medieval England<sup>15</sup> and was developed further during the eighteenth century, when William Blackstone stated, ‘it is an established rule to abide by former precedents, where the same points come again in litigation’, and in the nineteenth century.<sup>16</sup> In an American context, its importance was even noted by Alexander Hamilton in *Federalist Paper* number 78.<sup>17</sup>

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<sup>9</sup> Geoffrey de Q Walker, ‘The Seven Pillars of Centralism: Federalism and the *Engineers’ Case*’ (2002) 76 *The Australian Law Journal* 678, 682.

<sup>10</sup> Lewis A Kornhauser, ‘An Economic Perspective on *Stare Decisis*’ (1989) 65 *Chicago-Kent Law Review* 63, 66.

<sup>11</sup> Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press, 2008) 1.

<sup>12</sup> Michael Kirby, ‘Precedent Law, Practice and Trends in Australia’ (2007) 28 *Australian Bar Review* 243, 243 and 245.

<sup>13</sup> Peter Butt (ed), *Butterworths Concise Australian Legal Dictionary* (Lexis Nexis Butterworths, 3<sup>rd</sup> ed, 2004) 363.

<sup>14</sup> Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press, 2008) 67–68.

<sup>15</sup> Mei-Fei Kuo and Kai Wang, ‘When is an Innovation in Order?: Justice Bader Ruth Ginsberg and *Stare Decisis*’ (1998) 20 *University of Hawai’i Law Review* 835, 839.

<sup>16</sup> Robert Barnhart, ‘Principled Pragmatic *Stare Decisis* in Constitutional Cases’ (2005) 80 *Notre Dame Law Review* 1911, 1912. For a discussion of the development of the doctrine of precedent in the eighteenth and nineteenth century, see Jim Evans, ‘Change in the Doctrine of Precedent During the Nineteenth Century’ in Laurence Goldstein (ed), *Precedent in Law* (Clarendon Press Oxford, 1987) 35.

<sup>17</sup> Mei-Fei Kuo and Kai Wang, ‘When is an Innovation in Order?: Justice Bader Ruth Ginsberg and *Stare Decisis*’ (1998) 20 *University of Hawai’i Law Review* 835, 839.

The term '*stare decisis*' refers to the binding nature of precedent. That is, where a legal rule has been applied in a particular way in a previous decision, it must be applied again if the same issues come before the court again.<sup>18</sup> It provides that a court should follow prior decisions, except in exceptional circumstances.<sup>19</sup> Despite this, a departure from precedent can be readily found in constitutional cases,<sup>20</sup> perhaps due to the High Court's primary role as the guardian of the *Constitution* and the lack of any direction in the *Constitution* as to how it must interpret it.<sup>21</sup> In addition, the High Court has held that it is not bound by its own previous decisions<sup>22</sup> but nevertheless should be reluctant to overturn them. As an example of this reluctance, Moens and Trone cite *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* where the High Court refused to reconsider two prior decisions because government had acted in reliance on them, to maintain certainty, and because they had been applied by the High Court in numerous preceding decisions.<sup>23</sup>

In contrast, as Kirby points out, there is a willingness on the part of some High Court Justices to overrule past decisions because, in their opinion, they are, to use the words from High Court judgments that have done so, 'manifestly wrong', 'fundamentally wrong' or 'plainly erroneous'.<sup>24</sup> As we saw in the discussion of *Engineers* in the previous chapter, the majority and joint majority made statements like these. For example, Higgins J stated: 'I fully accept the view that it is fitting *stare decisis* unless the decision, to our minds, is manifestly wrong.'<sup>25</sup> The joint

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<sup>18</sup> Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press, 2008) 12.

<sup>19</sup> The full latin maxim has been translated as, '*stare decisis et non quieta movere*' translated as 'stand by the thing decided and do not disturb the calm': See Gian Boeddu and Richard Haigh, 'Terms of Convenience: Examining Constitutional Overrulings by the High Court' (2003) 31 *Federal Law Review* 167, 167. Duxbury translates the maxim as, 'abide by earlier decisions and do not disturb settled points': Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press, 2008) 12.

<sup>20</sup> R C Springall, 'Stare Decisis as Applied by the High Court to its Previous Decisions' (1978) 9 *Federal Law Review* 483, 488–489.

<sup>21</sup> Michael Kirby, 'Precedent Law, Practice and Trends in Australia' (2007) 28 *Australian Bar Review* 243, 247.

<sup>22</sup> *Nguyen v Nguyen* (1990) 169 CLR 245, 269 cited in Gabriël A Moens and John Trone, *Lumb and Moens' The Constitution of the Commonwealth of Australia Annotated* (LexisNexis Butterworths, 7<sup>th</sup> ed, 2007) 34.

<sup>23</sup> *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561 ('*Capital Duplicators*'), 592–593 cited in Gabriël A Moens and John Trone, *Lumb and Moens' The Constitution of the Commonwealth of Australia Annotated* (LexisNexis Butterworths, 7<sup>th</sup> ed, 2007) 34.

<sup>24</sup> Michael Kirby, 'Precedent Law, Practice and Trends in Australia' (2007) 28 *Australian Bar Review* 243, 247. See also R C Springall, 'Stare Decisis as Applied by the High Court in its Previous Decisions' (1978) 9 *Federal Law Review* 483, 483.

<sup>25</sup> *Engineers* (1920) 28 CLR 129, 170 (Higgins J).

majority provided another justification for overruling the implied intergovernmental immunities and reserved powers doctrines, asserting that, ‘the utmost confusion and uncertainty exist as the decisions now stand.’<sup>26</sup>

However, as Boeddu and Haigh suggest, the very nature of constitutional decision-making, including the very serious effects of overturning precedent, and the fact that a decision of the High Court cannot be overruled or corrected by Parliament, suggest that Justices in constitutional cases should be reluctant to overrule previous constitutional precedent.<sup>27</sup> In this context, the decision in *Engineers* can be seen as somewhat radical and activist in nature because it was a complete reversal from precedent.

The ‘diametrically opposed approaches’ in the attitude of the High Court to the issue of overruling precedent are also highlighted by Moens and Trone.<sup>28</sup> On the one hand, Moens and Trone cite Gibbs J in *Queensland v Commonwealth*, who espoused a cautious approach to overruling precedent:

No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court. ... It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his own opinion in preference to an earlier decision of the Court.<sup>29</sup>

In contrast, Moens and Trone cite Isaacs J in *Australian Agricultural Co Ltd v Federated Engine Drivers and Firemen’s Association of Australasia*, as an example of the readiness of some Justices to depart from established precedent:

Our sworn loyalty is to the law itself, and to the organic law of the *Constitution* first of all. If, then, we find the law to be plainly in conflict with what we or any of our predecessors

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<sup>26</sup> *Engineers* (1920) 28 CLR 129, 159 (Knox CJ, Isaacs, Rich, Starke JJ).

<sup>27</sup> Gian Boeddu and Richard Haigh, ‘Terms of Convenience: Examining Constitutional Overrulings by the High Court’ (2003) 31 *Federal Law Review* 167, 167–168.

<sup>28</sup> Gabriël A Moens and John Trone, *Lumb and Moens’ The Constitution of the Commonwealth of Australia Annotated* (LexisNexis Butterworths, 7<sup>th</sup> ed, 2007) 28.

<sup>29</sup> *Queensland v Commonwealth* (1977) 139 CLR 585, 599 (Gibbs J) cited in Gabriël A Moens and John Trone, *Lumb and Moens’ The Constitution of the Commonwealth of Australia Annotated* (LexisNexis Butterworths, 7<sup>th</sup> ed, 2007) 28.

erroneously thought it to be, we have, as I conceive, no right to choose between giving effect to the law, and maintaining an incorrect interpretation. It is not, in my opinion, better that the Court should be persistently wrong than it should be ultimately right.<sup>30</sup>

Given Isaacs J's leading role in the fundamental departure from precedent in the majority's decision in *Engineers*, these comments are quite appropriate and show a marked determination to pursue his own interpretive agenda. Perhaps these comments can be attributable to the fact that the doctrine of *stare decisis* is a 'self imposed legal duty'<sup>31</sup> that is viewed as a policy or guideline,<sup>32</sup> rather than a binding interpretive method.

In fact, Craven has openly accused the High Court of deliberately pursuing a centralist agenda, and in fact, of a 'centralist revolution' by its furtherance of *Engineers*-inspired literalism.<sup>33</sup> Craven suggests that the easiest way to make sense of the demise of the federal balance is to view the High Court as a political, rather than an impartial institution. It was perhaps the self-assuredness of the correctness of the majority judgments in *Engineers*, and the fact that Isaacs and Higgins JJ remained on the bench until 1931 and 1929 respectively (some eleven and nine years after *Engineers*), that they were able to consolidate their centralist agenda, helping to ensure that *Engineers* became binding precedent, and not simply a mistaken departure from established precedent that would have been corrected in subsequent decisions.

The increased centralist agenda of the High Court may also have been encouraged by changing social and political conditions and their own growing sense of nationalism after the First World War.<sup>34</sup> To expand on the possible motivations for this centralist agenda, Walker's comments about the possible sources of centralist ideology are

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<sup>30</sup> *Australian Agricultural Co Ltd v Federated Engine Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261, 278 (Isaacs J) cited in Gabriël A Moens and John Trone, *Lumb and Moens' The Constitution of the Commonwealth of Australia Annotated* (LexisNexis Butterworths, 7<sup>th</sup> ed, 2007) 28.

<sup>31</sup> James Hardisty, 'Reflections on Stare Decisis' (1979) 55 *Indiana Law Journal* 41, 48.

<sup>32</sup> Michael Stokes Paulsen, 'Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis' (2008) 86 *North Carolina Law Review* 1165, 1170.

<sup>33</sup> Greg Craven, 'The High Court of Australia: A Study in the Abuse of Power' (1999) 22(1) *University of New South Wales Law Journal* 216, 223.

<sup>34</sup> Jeffrey Goldsworthy, 'Justice Windeyer on the *Engineers*' Case' (2009) 37 *Federal Law Review* 363, 363–365; Haig Patapan, 'Politics of Interpretation' (2000) 2 *Sydney Law Review* 247, 253.

relevant. Walker stated the first of these to be the anti-federalist writings from communists such as Marx, Lenin and Harold Laski. According to Walker, Marx, who disapproved of federal constitutions and approved of large unitary governments, became well-regarded in 'Australian intellectual circles'.<sup>35</sup> Secondly, Walker noted the importance of the work of A V Dicey who advocated the plenary power of the unitary British Parliament and was a 'violent opponent of federalism'.<sup>36</sup> He stated that Dicey's 'anti-federalist message was taught to generations of Australian law students with no pro-federalist material to balance it.'<sup>37</sup> Walker noted that this was coupled with Australia being allied with Britain in the First World War, whose government was presented as the 'ideal'.<sup>38</sup> Thirdly, with the effect of the world becoming 'smaller' due to the advent of new technologies and globalisation, there was a growing perception that power could be more efficiently concentrated in a centralised government.<sup>39</sup>

Whatever the reasons behind the centralist agenda of the High Court in *Engineers*, it became binding precedent from which Justices in subsequent judgments were unwilling to depart. The following section of this chapter will note how *Engineers* provided the justification for the pursuit of a centralist agenda that has continued up until the present time. The following section of this chapter will give an example of how the Commonwealth's financial powers have been expanded, with reference to the High Court's interpretation of the definition of excise duties in s 90. It will also provide an example of the expansion of the Commonwealth's legislative powers with reference to the corporations power in s 51(xx).

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<sup>35</sup> Geoffrey de Q Walker, 'The Seven Pillars of Centralism: Federalism and the *Engineers' Case*' (2002) 76 *The Australian Law Journal* 678, 684.

<sup>36</sup> Geoffrey de Q Walker, 'The Seven Pillars of Centralism: Federalism and the *Engineers' Case*' (2002) 76 *The Australian Law Journal* 678, 685.

<sup>37</sup> Geoffrey de Q Walker, 'The Seven Pillars of Centralism: Federalism and the *Engineers' Case*' (2002) 76 *The Australian Law Journal* 678, 685.

<sup>38</sup> Geoffrey de Q Walker, 'The Seven Pillars of Centralism: Federalism and the *Engineers' Case*' (2002) 76 *The Australian Law Journal* 678, 685.

<sup>39</sup> Geoffrey de Q Walker, 'The Seven Pillars of Centralism: Federalism and the *Engineers' Case*' (2002) 76 *The Australian Law Journal* 678, 685.

## II THE DEMISE OF STATE FINANCIAL POWER: EXCISE DUTIES

Section 90 of the *Constitution* provides that the ability to levy duties of excise is ‘exclusive’ to the Commonwealth. Any state legislation that is held to impose an excise duty will be struck down as invalid by the High Court. Consequently, the way that the High Court interprets s 90 has serious implications for the states and their ability to raise their own revenue. In the landmark decision of *Ha v NSW*,<sup>40</sup> the High Court adopted a broad definition of ‘excise duties’, making it more likely that state taxes would fall within the definition. Coupled with the Court’s rejection of an exception that allowed the states to retain much-needed revenue (the criterion of liability test), as noted above, the decision resulted in a \$5 billion per annum loss of revenue for the states.<sup>41</sup> The decision and its implications for the states will be discussed in more detail below.

This section will trace the gradual evolution of the definition of ‘excise duty’ which was progressively interpreted more broadly by the High Court so that almost any state tax on tobacco, alcohol or petrol could fall within it. In the previous chapter’s discussion of the reserved state powers doctrine, the excise case of *Peterswald v Bartley*<sup>42</sup> was discussed. It was noted that the High Court, in particular Griffith CJ, characterised the definition of ‘excise’ narrowly, so that it would be less likely that a state tax would be invalid on the basis that it was an excise duty. He stated that an excise duty was imposed ‘on goods produced or manufactured in the States’ and that it is

analogous to a customs duty imposed upon goods either in relation to quantity or value when produced or manufactured, and not in the sense of a direct tax or personal tax. Reading the *Constitution* alone, that seems to be the proper construction to be put upon the term.<sup>43</sup>

Therefore, according to Griffith CJ, an ‘excise duty’ is an inland tax on locally produced goods, imposed at the point of manufacture or production, and calculated by reference to the quantity or value of the goods that are produced or manufactured.

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<sup>40</sup> *Ha* (1997) 189 CLR 465.

<sup>41</sup> Anne Twomey and Glen Withers, *Federalist Paper 1 Australia’s Federal Future: A Report for the Council for the Australian Federation* (2007) 34.

<sup>42</sup> *Peterswald* (1904) 1 CLR 497.

<sup>43</sup> *Peterswald* (1904) 1 CLR 497, 509 (Griffith CJ).

Despite this narrow definition, Griffith CJ's elements of an excise duty from *Peterswald* were gradually eliminated, post-*Engineers*. In *Matthews v Chicory Marketing Board (Victoria)*,<sup>44</sup> a majority of the High Court (Rich, Starke and Dixon JJ) held that a fee imposed by Victorian legislation, the *Marketing of Primary Products Act 1935* (Vic), which was calculated not on the quantity or value of chicory produced, but instead on each acre of chicory planted, was an excise duty, rendering the legislation invalid. The majority Justices reasoned that there was still a general correlation between the amount planted per acre and the eventual amount produced. For example, Dixon J stated, 'the basis adopted for the levy has a natural, although not a necessary, relation to the quantity of the commodity produced.'<sup>45</sup> Latham CJ, in dissent (with whom McTiernan J agreed), approved the approach to defining the term excise from *Peterswald v Bartley* where the Court looked at the use of the term immediately prior to federation.<sup>46</sup> He concluded that the tax was not an excise duty because there was not enough of a correlation between the levy and the quantity or value of the chicory produced.<sup>47</sup>

In *Parton v Milk Board (Victoria)*,<sup>48</sup> the majority relaxed yet another of Griffith CJ's elements of an excise duty from *Peterswald*, thus making it easier for a state tax to be characterised as an invalid excise duty. In *Parton*, the majority, consisting of Rich, Dixon and Williams JJ, once again held that Victorian legislation, the *Milk Board Act 1933* (Vic) was invalid because it imposed a duty of excise. One of the purposes of the *Act* was to establish a Milk Board to regulate the trade of milk in Victoria. This included fixing the price of milk, licensing dairies, promoting milk consumption, and regulating the quality of the milk supply in Victoria. The fee was charged on the basis of the quantity of milk sold or distributed. The Partons were milk distributors who were liable to pay the levy to the Milk Board. They challenged the legislation on the basis that it imposed an excise duty. In response, the Milk Board argued that the fee was not an excise duty because it was not a tax. Rather, they argued, it was a payment for services rendered. The majority disagreed with this argument, holding that the fee was not a fee for services, but rather an excise duty, because the fee did

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<sup>44</sup> *Matthews v Chicory Marketing Board (Victoria)* (1938) 60 CLR 263 ('*Matthews*').

<sup>45</sup> *Matthews* (1938) 60 CLR 263, 303 (Dixon J). See also *Matthews* (1938) 60 CLR 263, 281 (Rich J), 286 (Starke J).

<sup>46</sup> *Matthews* (1938) 60 CLR 263, 277 (Latham CJ).

<sup>47</sup> *Matthews* (1938) 60 CLR 263, 279 (Latham CJ).

<sup>48</sup> *Parton v Milk Board (Victoria)* (1949) 80 CLR 229 ('*Parton*').

not recover the cost of a specific service provided to the taxpayer. In reaching this conclusion, the majority also broadened the definition of an excise duty to include a tax imposed *after* the point of manufacture or production, at any stage before the goods reached the consumer.<sup>49</sup> It is relevant that this definition omitted the requirement for goods to be produced locally. Again, this was a significant detriment to the states because it meant that a broader range of taxes on goods could be classified as excise duties.

In the 1960s, there were attempts by the High Court to correct some of the potential financial damage to the states by recognising an exemption that would save some state taxes from being considered excise duties. Unfortunately, the means employed by the majority Justices was not to return to Griffith CJ's narrow definition of an excise duty. Rather, the High Court developed a test known as the 'criterion of liability' which was used to determine whether a tax was a tax on goods based on the quantity or value of goods produced or sold, or a licence fee for the carrying on of a particular business. This test was first applied in the case of *Dennis Hotels Proprietary Limited v Victoria*<sup>50</sup> and subsequently in cases including *Bolton v Madsen*<sup>51</sup> and *Dickenson's Arcade Pty Limited v Tasmania*.<sup>52</sup> Essentially, the criterion of liability permitted the states to use backdated licence fees, known as 'franchise fees', to avoid a fee being characterised as an excise duty. It is argued with the 'benefit of hindsight' that this attempt to save state finances was misdirected, unnecessarily complicated and bound to unravel. It is further argued that an approach that had its origins in the federal nature of the *Constitution*, such as a reserved state powers approach to the characterisation of excise duties, would have been preferable. Instead, the 'criterion of liability' was a contrived attempt to restore the federal balance by reference to semantics rather than the underlying federal structure of the *Constitution*.

In *Dennis Hotels*, the High Court had to consider whether two licence fees imposed by the *Licensing Act 1958* (Vic) were excise duties, or rather fees for carrying on the business of selling alcohol. The licence fees in question were a 'victualler's licence'

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<sup>49</sup> *Parton* (1949) 80 CLR 229, 260 (Dixon J), 252 (Rich and Williams JJ).

<sup>50</sup> *Dennis Hotels Proprietary Limited v Victoria* (1960) 104 CLR 529 ('*Dennis Hotels*').

<sup>51</sup> *Bolton v Madsen* (1963) 110 CLR 264.

<sup>52</sup> *Dickenson's Arcade Pty Limited v Tasmania* (1974) 130 CLR 177 ('*Dickenson's Arcade*').

to sell alcohol at their hotel and a number of ‘temporary licences’ to sell alcohol at sporting events and agricultural shows. The victualler’s licence fee was calculated as 6% of the cost of all alcohol purchased for the hotel during the twelve month period ending 30 June preceding the licence application. The temporary licence fee was calculated at one pound per day, plus 6% of the cost of all liquor purchased for sale under the licence. Dennis Hotels challenged these licence fees, arguing they were excise duties, and therefore invalid.

Fullager, Kitto, Taylor and Menzies JJ held that the hotel licence did not impose a duty of excise, applying the criterion of liability test. The operation of the criterion of liability was summarised by Kitto J as follows:

a tax is not a duty of excise unless the criterion of liability is the taking of a step in a process of bringing goods into existence or to a consumable state, or passing them down the line which reaches from the earliest stage in production to the point of receipt by the consumer.<sup>53</sup>

Hence, the criterion of liability, or in other words, the basis for the tax, was not directly premised upon the goods sold, but rather the criterion was whether the seller wanted to carry on the particular business of selling alcohol. However, with respect to the temporary licences, Dixon CJ, McTiernan, Menzies and Windeyer JJ held that the licence fee did amount to a duty of excise, and was therefore invalid. This was because there was a more direct relationship between the total amount of liquor sold under the temporary licence and the amount of the licence fee.<sup>54</sup>

A similar ‘franchise fee’ scenario arose in *Dickenson’s Arcade* with respect to tobacco, in which a five to one majority of the High Court followed the criterion of liability test from *Dennis Hotels*. Like *Dennis Hotels*, there were two licence fees at issue. The first was a ‘consumption tax’ imposed under s 3 of pt II of the *Tobacco Act 1972* (Tas), which was calculated as 7.5% of the retail value of tobacco sold. The *Act* defined ‘consumption’ to include ‘the smoking and chewing of tobacco by any person’ and regulations made under the *Act* provided that the consumption tax was to be collected by the retailer at the time of purchase. The second fee was imposed under pt III of the *Act* which said that a person could not carry on the business of

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<sup>53</sup> *Dennis Hotels* (1960) 104 CLR 529, 559 (Kitto J).

<sup>54</sup> See for example, *Dennis Hotels* (1960) 104 CLR 529, 591 (Menzies J).

selling tobacco by retail without a licence. The licence fee was calculated in a similar way to the *Dennis Hotels* formula, being based on the retail value of tobacco sold by the retailer during the six month period prior to the commencement of the licence period. If the average value of tobacco sold during the prior period was less than \$500, the fee was two dollars. However, an ad valorem fee applied if the value of the tobacco sold was higher than this amount, calculated on a sliding scale of up to 30% of the value of tobacco sold. Dickenson's Arcade was a tobacco retailer who challenged these taxes on the basis that they were excise duties.

Both taxes were held not to be excise duties, although the consumption tax was invalid because it was practically unworkable. With respect to the consumption tax, the majority held that the nature of a consumption tax was that it must be imposed after the goods reached the consumer. Hence, this consumption tax was unworkable because the regulations imposed it at an earlier stage, and the liability only arose after consumption. In fact, Barwick CJ commented that a taxpayer was unlikely to remember to pay the consumption tax after consumption.<sup>55</sup> Although the consumption tax was invalid in this case, it was recognised as an exception that may save a tax from being an excise duty.

With respect to the licence fee, the majority held, following *Dennis Hotels* and applying the criterion of liability test, that it was not a duty of excise. Barwick CJ, for example, considered the licensing regime was so similar to *Dennis Hotels* that he was bound to follow it, despite having some reservations.<sup>56</sup> Menzies J similarly felt bound to follow *Dennis Hotels*, but was less hesitant, stating that he would not reconsider it because: 'It is an important decision upon the faith of which states have ordered their affairs for some thirteen years.'<sup>57</sup> Gibbs J also accepted the criterion of liability as 'an authoritative expression of principle.'<sup>58</sup>

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<sup>55</sup> *Dickenson's Arcade* (1974) 130 CLR 177, 191–192 (Barwick CJ).

<sup>56</sup> *Dickenson's Arcade* (1974) 130 CLR 177, 189 (Barwick CJ).

<sup>57</sup> *Dickenson's Arcade* (1974) 130 CLR 177, 212 (Menzies J).

<sup>58</sup> *Dickenson's Arcade* (1974) 130 CLR 177, 223 (Gibbs J). See also 236–237 (Stephen J), 240 (Mason J), who stated, 'The decision has been accepted as authoritative in later cases. The narrowness of the majority and the manner in which it was composed are not enough to warrant a reconsideration of the decision.'

Whilst the criterion of liability saved many state taxes from being held to be invalid excise duties, some doubt began to be expressed about whether it was the correct approach in subsequent cases. These cases included *Hematite Petroleum Pty Ltd v Victoria*,<sup>59</sup> *Philip Morris Limited v Commissioner of Business Franchises (Victoria)*,<sup>60</sup> and *Capital Duplicators Pty Limited v Australian Capital Territory [No 2]*.<sup>61</sup> This allowed for the eventual rejection of the criterion of liability test in favour of a substance over form approach, which together with the continued broadening of the definition of ‘excise’ proved to be financially disastrous for the states.

For example, in *Philip Morris*, a tobacco company (Philip Morris) challenged the validity of licence fees under the *Business Franchise (Tobacco) Act 1974 (Vic)*, which required it to have a wholesaler’s licence to supply cigarettes and tobacco to retailers. The licences were monthly and the licence fee was calculated using a backdated licence fee, based on the *Dennis Hotels* formula, consisting of a flat fee of \$50, plus an ad valorem fee of 25% of the value of tobacco sold in the previous month, but one. The result of these monthly licence fees for Philip Morris was that they paid millions of dollars of licence fees per annum. For example, the licence fee for December 1987 was nearly \$2 million. Philip Morris challenged the *Act*, arguing that the licence fees were excise duties. In doing so, they asked the High Court to reconsider *Dennis Hotels* and *Dickenson’s Arcade*. Although a five to two majority held that the licence fee was valid, concerns were expressed by some of the Justices about the criterion of liability test. For example, Mason CJ and Deane J, in a joint judgment, upheld the licence fee on the basis of *Dennis Hotels* and *Dickenson’s Arcade*, stating that these two cases should not be overruled, but should only be followed in identical scenarios:

in argument in this case the Court decided not to reopen the three earlier cases. There are powerful considerations against overruling the actual decisions in those cases. Financial arrangements which are of great importance to the governments of the States and perhaps to the economy of the nation have been made for a long time past on the faith of these decisions. The power of this Court to overrule its previous decisions would not be properly exercised to disturb those arrangements unless, in the light of later insights into the true

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<sup>59</sup> *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 (‘*Hematite*’).

<sup>60</sup> *Philip Morris Limited v Commissioner of Business Franchises (Victoria)* (1989) 167 CLR 399 (‘*Philip Morris*’).

<sup>61</sup> *Capital Duplicators* (1993) 178 CLR 561.

meaning of the *Constitution*, obedience to its terms or the interests of certainty in those arrangements clearly demanded that those decisions be reconsidered. That cannot be said of at least the first two of the trilogy of cases. *Dennis Hotels* and *Dickenson's Arcade* can be rationalised by reference to traditional considerations relating to the licensing of dealings in alcohol and tobacco and to the particular characteristics of those items of personal consumption.<sup>62</sup>

In separate dissenting judgments Brennan and McHugh JJ went further than Mason CJ and Deane J by limiting the precedent value of *Dennis Hotels* and *Dickenson's Arcade* to only apply to cases with identical facts. Brennan J stated that there should not be a special exception for alcohol or tobacco as the *Constitution* makes no distinction between different commodities.<sup>63</sup> He stated that it was the substance, and not the form, of the tax that should determine whether it was an excise duty or not:

Once it is accepted that a licence fee calculated by reference to the value of a commodity in which transactions took place in a previous period may be a duty of excise and that the character of the fee is to be determined by reference to its actual effect (if any) on a step in production or distribution and not merely by reference to the statutory criterion of liability, the franchise cases cannot stand as a source of inconsistent principle. The tension between general principle and the applicability of cases as precedents when they cannot be satisfactorily reconciled with general principle must be resolved by restricting the applicability of the cases to circumstances which are substantially the same. This imposes a strict limitation on the applicability of each of the franchise cases ...<sup>64</sup>

McHugh J also noted that state financial planning was not an appropriate reason for failing to reconsider the 'franchise cases'.<sup>65</sup> He said that the criterion of liability was simply one of the many factors that should be considered when assessing whether a tax is an excise and that 'Regard must be had to the substance of the operation of the statute.'<sup>66</sup> For example, the monthly nature of the fee, according to McHugh J, suggested that the fee was more than just a fee for carrying on a business.<sup>67</sup> He reasoned that *Dickenson's Arcade* and *Dennis Hotels* only had very slight precedent

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<sup>62</sup> *Philip Morris* (1989) 167 CLR 399, 438 (Mason CJ and Deane J). The third case in the 'trilogy of cases' referred to by Mason CJ and Deane J was *HC Sleigh Ltd v South Australia* (1977) 136 CLR 475.

<sup>63</sup> *Philip Morris* (1989) 167 CLR 399, 459 (Brennan J).

<sup>64</sup> *Philip Morris* (1989) 167 CLR 399, 460 (Brennan J).

<sup>65</sup> *Philip Morris* (1989) 167 CLR 399, 487 (McHugh J).

<sup>66</sup> *Philip Morris* (1989) 167 CLR 399, 492 (McHugh J).

<sup>67</sup> *Philip Morris* (1989) 167 CLR 399, 494 (McHugh J).

value<sup>68</sup> and that this case involved an entirely different licensing scenario.<sup>69</sup> Using this substance not form approach, McHugh J concluded:

The proximity of the calculation period to the licence period, the shortness of the duration of each period, the size of the tax, and the indication that it is to be collected but once in the chain of distribution overwhelmingly indicate that what is being directly taxed by s. 10 is the step of selling tobacco in the course of the business. The licence fee in the present case, therefore, is not an exaction for the privilege of carrying on a business but a tax on the sale of tobacco.<sup>70</sup>

Given their comments in *Philip Morris*, it is of little surprise that Mason CJ, Deane, Brennan and McHugh JJ formed the majority in *Capital Duplicators*. The case involved a challenge to the *Business Franchise ('X' Videos) Act 1990* (ACT) which required wholesalers and retailers of X-rated videos to have a wholesale or retail licence. The licence fee was calculated monthly and was \$50, plus 40% of the wholesale value of videos sold in the month occurring two months prior to the licence period. A wholesaler and retailer challenged the Act, arguing that the licence fees amounted to excise duties. In a joint judgment the majority refused to overrule, but limited *Dickenson's Arcade* and *Dennis Hotels* to identical scenarios. They rejected the criterion of liability test in favour of an examination of the 'substantive effect' of the legislation to determine whether it imposed an excise duty:

Subsequent cases have rejected both this application of criterion of liability ... and ... the proposition that it is the exclusive determinant of the question whether an exaction is an excise. Instead, in determining whether an exaction is an excise, the Court has regard to matters of substance rather than form. That approach, which looks to the practical or substantial operation of the statute as well as to its legal operation, requires that a variety of factors be taken into account. The rejection of the criterion of liability as an exclusive test has not disturbed general acceptance of the proposition that a tax in respect of goods at any step in the production or distribution to the point of consumption is an excise.<sup>71</sup>

By looking at the overall substance of the legislation, including factors such as the size of the fee and the proximity of the licence period to past sales, they concluded

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<sup>68</sup> *Philip Morris* (1989) 167 CLR 399, 497–498 (McHugh J).

<sup>69</sup> *Philip Morris* (1989) 167 CLR 399, 500 (McHugh J).

<sup>70</sup> *Philip Morris* (1989) 167 CLR 399, 501 (McHugh J).

<sup>71</sup> *Capital Duplicators* (1993) 178 CLR 561, 583 (Mason CJ, Brennan, Deane and McHugh JJ).

that the statutory regime as a whole was a ‘substantial’ revenue-raising exercise, rather than regulating the carrying on of a particular business.<sup>72</sup>

In *Ha*, the High Court held that the *Business Franchise Licenses (Tobacco) Act 1987* (NSW) was invalid on the basis that it imposed an excise duty. The *Act* prohibited the wholesale or retail sale of tobacco unless a seller or wholesaler had a licence under the *Act*. The licence fee was calculated by reference to a percentage of the value of tobacco sold in the month beginning two months before the month in which the licence period expired. The percentage had increased exponentially. For example, it was 30% in 1989, and was eventually increased to 75% in 1992 to 1995, and 100% from 1995 to 1997. Two retailers (*Ha* and *Lim*) challenged the *Act*, arguing that the licence fee was not merely a fee for the carrying on of the business of selling tobacco, but a revenue-raising excise duty, and thus invalid due to the operation of s 90.

In holding that the licence fee was an excise duty, the majority (Brennan CJ, McHugh, Gummow and Kirby JJ) adopted the following broad definition of ‘excise duty’. The difference from Griffith’s original definition is significant. The requirement for the goods to be local was removed, together with the requirement for the fee to have a direct relationship with the proportion, quantity or value of the goods, as well as the point of taxation being expanded from the point of manufacture or production until right up to the point that the goods reach the consumer:

we reaffirm that duties of excise are taxes on the production, manufacture, sale or distribution of goods, whether of foreign or domestic origin. Duties of excise are inland taxes in contradistinction from duties or customs which are taxes on the importation of goods. Both are taxes on goods, that is to say, they are taxes on some step taken in dealing with goods.<sup>73</sup>

As well as adopting a broad definition of ‘excise’, the majority (Brennan CJ, McHugh, Gummow and Kirby JJ, in a joint judgment) also rejected the criterion of liability test. They stated that the ‘practical operation ... as well as its [the legislation’s] terms’<sup>74</sup> must be examined to determine whether a tax is an excise duty

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<sup>72</sup> *Capital Duplicators* (1993) 178 CLR 561, 596–597 (Mason CJ, Brennan, Deane and McHugh JJ).

<sup>73</sup> *Ha* (1997) 189 CLR 465, 499 (Brennan CJ, McHugh, Gummow and Kirby JJ).

<sup>74</sup> *Ha* (1997) 189 CLR 465, 498 (Brennan CJ, McHugh, Gummow and Kirby JJ).

or a licence fee to carry on a business. Factors such as the high licence fee indicated it was revenue-raising (that is, an excise duty), rather than regulatory (in the form of a licence fee to conduct a particular business). Also, the short period of the licence (one month) suggested it was a revenue-raising tax, as did the close proximity of the licence period to the past sales on which the licence was based (the rationale being that immediate past sales are a reliable forecast of sales during the licence period).<sup>75</sup> The majority further stated that the *Dennis Hotels* formula could not save state taxes that were clearly for the purpose of revenue-raising, rather than being regulatory.<sup>76</sup> They refused to overrule *Dennis Hotels* and *Dickenson's Arcade*, but rendered them of no practical value to the states, stating that, 'They may stand as authorities for the validity of the imposts therein considered.'<sup>77</sup>

The financial consequences of *Ha* proved to be disastrous for the states — something that the majority in *Ha* recognised in their judgment, but rationalised due to the large percentages applied in the calculation of the licence fee:

We are conscious that this judgment has the most serious implications for the revenues of the States and Territories. But, in the light of the significantly increasing tax rates imposed by State and Territory laws under the insubstantial cloak of the *Dennis Hotels* formula, the Court is faced with stark alternatives: either to uphold the validity of a State tax on the sale of goods provided it is imposed in the form of licence fees or to hold invalid any such tax, which, in operation and effect, is not merely a fee for the privilege of selling the goods.<sup>78</sup>

In holding that backdated licence fees on the sale of tobacco, utilised by the states since the 1960s to raise essential revenue, were now invalid excise duties, as noted above, the result was that the states lost \$5 billion revenue per annum, having to rely on GST revenue and s 96 grants for essential funding.<sup>79</sup> As Twomey and Withers have noted, although the states undertake 40% of Australia's public spending, the

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<sup>75</sup> *Ha* (1997) 189 CLR 465, 501–502 (Brennan CJ, McHugh, Gummow and Kirby JJ).

<sup>76</sup> *Ha* (1997) 189 CLR 465, 503 (Brennan CJ, McHugh, Gummow and Kirby JJ).

<sup>77</sup> *Ha* (1997) 189 CLR 465, 504 (Brennan CJ, McHugh, Gummow and Kirby JJ).

<sup>78</sup> *Ha* (1997) 189 CLR 465, 503 (Brennan CJ, McHugh, Gummow and Kirby JJ).

<sup>79</sup> Anne Twomey and Glen Withers, *Federalist Paper 1 Australia's Federal Future: A Report for the Council for the Australian Federation* (2007) 36.

result of *Ha* was that they are only able to raise 19% of their own revenue, making them increasingly reliant on the Commonwealth government.<sup>80</sup>

To exacerbate matters for the states, as well as not being able to utilise a backdated licence fee structure to avoid licence fees from being characterised as excise duties, the subsequent case of *British American Tobacco Australia Ltd v Western Australia*<sup>81</sup> held that the states were required to repay the monies that they had levied under invalid legislation under principles of restitution and unjust enrichment.

In summary, an examination of the High Court's interpretation of duties of excise has shown its gradual expansion to the detriment of the states. Thus, the definition of an excise duty today is vastly different from Griffith CJ's original definition in *Peterswald v Bartley*. Despite an attempt to save state taxes from being held to be invalid in the franchise cases, the High Court's interpretation of duties of excise has proved to be financially damaging to the states, diminishing their financial autonomy. The following section examines how the High Court's interpretation of the corporations power has led to the diminution of the legislative powers of the states.

### **III THE DEMISE OF STATE LEGISLATIVE POWER: CORPORATIONS**

In *Work Choices*, the majority confirmed that the literalist approach from *Engineers* should be applied when interpreting the powers of the Commonwealth, resulting in the corporations power in s 51(xx) being construed more broadly than ever before.<sup>82</sup> Significantly, the majority in *Work Choices* also commented that the federal balance was not relevant, and would not limit the Federal Parliament's powers with reference to any notion of federalism. This section will trace the development of the corporations power from its narrow definition in *Huddart, Parker & Co Pty Ltd v Moorehead*,<sup>83</sup> to its expansive definition in *Work Choices* as an example of how the

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<sup>80</sup> Anne Twomey and Glen Withers, *Federalist Paper 1 Australia's Federal Future: A Report for the Council for the Australian Federation* (2007) 36.

<sup>81</sup> *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30.

<sup>82</sup> *Work Choices* (2006) 229 CLR 1, 103 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>83</sup> *Huddart* (1909) 8 CLR 330.

High Court has compromised the federal balance in pursuit of a centralist philosophy.

The 1909 decision in *Huddart, Parker & Co Pty Ltd v Moorehead* was discussed in the previous chapter as an example of the application of the reserved state powers doctrine. In that discussion, it was noted that Griffith CJ characterised the corporations power narrowly, so as not to interfere with state residual powers. Essentially, its scope was limited with reference to the federal balance and the plenary nature of state powers. Consequently, the corporations power could not be used to regulate and control the business of corporations, such as their entry into contracts, (or the employment of their employees for that matter), because those are state matters.<sup>84</sup> Instead, the power was limited to prohibiting foreign, trading or financial corporations from engaging in trade or commerce, or to impose the conditions under which they might engage in trade or commerce. In order to illustrate this distinction, Griffith CJ explained that the Commonwealth could legislate to prevent a corporation entering into a particular type of contract, but the terms of the contract itself (that is, those relating to domestic trade within a state) was a state matter.<sup>85</sup> With respect to the wording of s 51(xx), Griffith CJ stated:

I think that they [the words of s51 (xx)] ought not to be construed as authorising the Commonwealth to invade the field of State law as to domestic trade, the carrying on of which is within the capacity of trading and financial corporations formed under the laws of the State. In other words, I think that pl. xx. empowers the Commonwealth to prohibit a trading or financial corporation formed within the Commonwealth from entering into any field of operation, but it does not empower the Commonwealth to control the operations of a corporation which lawfully enters upon a field of operation, the control of which is exclusively reserved to the States.<sup>86</sup>

O'Connor J's view of the scope of the corporations power was narrower than Griffith CJ's, which he regarded as allowing the Commonwealth to regulate the conditions under which corporations would be recognised throughout Australia as legal entities. He stated that the Federal Parliament:

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<sup>84</sup> *Huddart* (1909) 8 CLR 330, 352 (Griffith CJ).

<sup>85</sup> *Huddart* (1909) 8 CLR 330, 353–354 (Griffith CJ).

<sup>86</sup> *Huddart* (1909) 8 CLR 330, 354 (Griffith CJ). See also *Huddart* (1909) 8 CLR 330, 364 (Barton J) who stated, 'the primary object of the legislation must be, not the interference with the forbidden subject of State trade, but the control of the corporations the subject of the grant'.

is empowered to enact any law it deems necessary for regulating the recognition throughout Australia of the corporations described in the section, and may, as part of such law, impose any conditions it thinks fit, so long as those laws and the conditions embodied in them have relation only to the circumstances under which the corporation will be granted recognition as a legal entity in Australia.<sup>87</sup>

Significantly, the necessity to limit the scope of the corporations power, or indeed any grant of Commonwealth legislative power, with reference to the federal nature of the *Constitution* was noted by O'Connor in his majority judgment:

Before entering upon an examination of the subsection [s 51 (xx)], it will be well to bear in mind the principle now firmly established in this Court that the *Constitution*, like any other instrument, must be considered as a whole. Where it confers a power in terms equally capable of a wide and of a restricted meaning, that meaning will be adopted which will best give effect to the system of distribution of powers between State and Commonwealth which the *Constitution* has adopted, and which is most in harmony with the general scheme of its structure.<sup>88</sup>

In summary, consideration of the role and powers of the states, and the federal nature of the *Constitution* was germane to the early High Court's interpretation of the corporations power.

As evident from the respective discussions of the reserved state powers doctrine and the *Engineers* case in the previous chapter, the majority's reasoning and method of interpreting the *Constitution* in *Huddart* was at odds with the approach of the majority in *Engineers*. In *Huddart*, the federal balance was a necessary consideration, and consequently limitation, when interpreting the Commonwealth's legislative powers. This approach therefore lent itself to a very narrow definition of the corporations power. Conversely, in *Engineers*, the importance of the federal nature of the *Constitution* was discarded in favour of an expansive approach to the interpretation of Commonwealth powers. Given the expansive view of Commonwealth powers adopted in *Engineers*, the gradual expansion of the corporations power was inevitable. However, somewhat surprisingly, the expansion

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<sup>87</sup> *Huddart* (1909) 8 CLR 330, 373(O'Connor J).

<sup>88</sup> *Huddart* (1909) 8 CLR 330, 369 (O'Connor J).

did not commence in earnest until 1971 when the High Court, in *Strickland v Rocla Concrete Pipes Limited*,<sup>89</sup> held that *Huddart* had been incorrectly decided.<sup>90</sup>

The *Trade Practices Act 1965–1969* (Cth) made certain types of contracts between business competitors examinable by the Commissioner for Trade Practices. Specifically, a contract would be ‘examinable’ if one or more of the parties to the contract accepted trade restrictions that might hamper competition. Failure to submit these contracts for examination was an offence. The *Act* defined examinable agreements to include those where one or more of the parties was a constitutional corporation. Rocla Concrete Pipes Limited (‘Rocla’) and two other companies had entered into an examinable agreement that was allegedly designed to reduce competition between manufacturers of concrete pipes in Queensland, but had failed to submit it for examination. The agreement was a purely intra-state agreement. The three companies were charged with committing an offence under the *Act*, and in response, challenged the *Act* on the basis that it was outside the scope of the Commonwealth’s corporations power.

As noted above, *Strickland* held that *Huddart* was wrongly decided.<sup>91</sup> For example, Barwick CJ accepted the interpretive approach of the majority in *Engineers*, stating that the Court in *Huddart* had incorrectly limited the corporations power with reference to the reserved powers doctrine. As the reserved powers doctrine had been ‘exploded and unambiguously rejected’ in *Engineers*, Barwick CJ reasoned that a more expansive definition of the scope of the corporations power was appropriate.<sup>92</sup> He therefore concluded that the legislation in question in *Huddart* should have been held to be constitutionally valid because:

They were clearly laws regulating and controlling amongst other things the trading activities of foreign corporations and trading and financial corporations formed within the limits of the Commonwealth. In my opinion such laws were laws with respect to such corporations. They dealt with the very heart of the purpose for which the corporation was formed, for whether a

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<sup>89</sup> *Strickland v Rocla Concrete Pipes Limited* (1971) 124 CLR 468 (‘*Strickland*’).

<sup>90</sup> This was noted by the majority in *Work Choices* (2006) 229 CLR 1, 71 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>91</sup> *Strickland* (1971) 124 CLR 468, 484 (Barwick CJ). *Huddart* was also overruled at 499 (McTiernan J), 510–511 (Menzies J), 512 (Windeyer J), 513 (Owen J), 515 (Walsh J) and 522 (Gibbs J).

<sup>92</sup> *Strickland* (1971) 124 CLR 468, 485–489 (Barwick CJ).

trading or financial corporation, by assumption, its purpose is to trade, trade for constitutional purposes not being limited to dealings in goods.<sup>93</sup>

Thus, Barwick CJ concluded that the Federal Parliament could use the corporations power to regulate the trading activities of constitutional corporations, including the contracts and terms of contracts that a constitutional corporation enters into (such as contracts that may restrict trade). McTiernan J stated that he agreed with Barwick CJ's formulation of the scope of the corporations power.<sup>94</sup> Menzies J similarly concluded that a law governing the scope of a constitutional corporation's business would be within power.<sup>95</sup> Gibbs J, although reluctant to define the precise scope of the power, stated that Parliament could 'govern and regulate the trading activities of [constitutional] corporations' including those 'for the purpose of preserving competition in trade.'<sup>96</sup> However, despite the consensus that the corporations power should be interpreted more broadly than in *Huddart*, the overall result of *Strickland* was that the provisions concerning examinable agreements were wholly invalid, and not severable, because the Federal Parliament had drafted the legislation too broadly to include parties that were not constitutional corporations.

The case of *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd*<sup>97</sup> extended the scope of the corporations power further, recognising that it could be used to regulate the conduct of third parties toward corporations that may harm the corporations' business. The case arose from a dispute between a film company, Fontana Films, and a trade union, Actors and Announcer's Equity, representing the interests of actors and announcers. Actors Equity demanded that Fontana Films only employ actors who were members of the union. When they refused, Actors Equity arranged a boycott so that no member of the union would work for Fontana Films, and as part of this, they put pressure on theatrical agents not to supply any actors to Fontana Films.

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<sup>93</sup> *Strickland* (1971) 124 CLR 468, 489 (Barwick CJ).

<sup>94</sup> *Strickland* (1971) 124 CLR 468, 499 (McTiernan J).

<sup>95</sup> *Strickland* (1971) 124 CLR 468, 511 (Menzies J).

<sup>96</sup> *Strickland* (1971) 124 CLR 468, 525 (Gibbs J).

<sup>97</sup> *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1981) 150 CLR 169 ('Actors Equity').

Fontana Films applied to the Federal Court for an injunction, restraining the union from preventing the supply of actors under the secondary boycott provisions of the *Trade Practices Act 1974* (Cth). In summary, the relevant provision, s 45D(1)(b)(i), provided that a person must not conspire with another person to prevent the supply of goods or services by a third person to a constitutional corporation if that conduct would cause substantial loss or damage to the corporation. The union argued that these provisions were unconstitutional and were too broad to fall within the scope of the corporations power. All Justices of the High Court (Gibbs CJ, Stephen, Mason, Murphy, Aickin, Wilson and Brennan JJ) upheld the validity of the secondary boycott section, thus approving the use of the corporations power to protect corporations, as well as just regulating their trading activities. For example, this approach was explained by Gibbs CJ who stated:

Of course, the law in the present case does not regulate or govern the activities of trading corporations; it regulates the conduct of others. But the conduct to which the law is directed is conduct designed to cause, and likely to cause, substantial loss or damage to the business of a trading corporation formed within the limits of the Commonwealth. I can see no reason in principle why such a law should necessarily fall outside the scope of s 51 (xx). A law may be one with respect to a trading corporation, although it casts obligations upon a person other than a trading corporation.<sup>98</sup>

Further, in *Fencott v Muller*<sup>99</sup> the corporations power was recognised as broad enough to allow Parliament to legislate to impose duties on natural persons. In *Fencott*, Muller sought damages for misleading or deceptive conduct under the *Trade Practices Act 1974* (Cth). Muller had allegedly been induced to purchase a restaurant business from Fencott as a result of certain statements about profit, and expenses associated with the business during negotiations which were allegedly false. When Fencott had run the business, he did so under a company called Scrid Nominees Pty Ltd. However, in preparation for the business to be transferred to Muller, Fencott incorporated another company to take over where Scrid Nominees had left off. This company was Oakland Nominees Pty Ltd. At the time of the litigation, Oakland was a shelf company that had not yet started trading. In his claim, Muller joined Oakland as one of the parties to the proceedings. The issue therefore became whether Oakland

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<sup>98</sup> *Actors Equity* (1981) 150 CLR 169, 183 (Gibbs CJ).

<sup>99</sup> *Fencott v Muller* (1982) 152 CLR 570 ('*Fencott*').

was a constitutional corporation. If not, the *Trade Practices Act* would not apply. This was because it was enacted using the trade and commerce and corporations powers, so could only apply to a constitutional corporation in the course of trade or commerce. The High Court held that even though Oakland had not started trading yet, it was nevertheless a constitutional corporation.<sup>100</sup> In reaching this decision, the majority accepted that Parliament, in legislation such as the *Trade Practices Act*, could use the corporations power to impose duties on natural persons through whom the corporation acts, such as directors. In a joint judgment, Mason CJ, Murphy, Brennan and Deane JJ confirmed this:

Once it is accepted, as it now is, that the corporations power extends to the regulation of the trading activities of trading corporations, it necessarily follows that, in some circumstances at least, the power must extend to the imposition of duties on natural persons. Two considerations combine to sustain this conclusion. The first is that corporations act through natural persons. The second ... is that, in order to be effective, a regulation of the activities of corporations calls for the imposition of duties on those natural persons who would, or might, in the ordinary course of events, participate in corporate activities, the subject of intended regulation.<sup>101</sup>

Whilst *Strickland* recognised that the corporations power could be used to regulate the trading activities of constitutional corporations, the *Tasmanian Dam Case*<sup>102</sup> extended the scope of the corporations power further to allow the Federal Parliament to regulate activities of the constitutional corporation that were preparatory to trade.

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<sup>100</sup> The focus of this section is the scope of the corporations power and its expansion. Hence, the tests for determining whether a company is a constitutional corporation within the meaning of s 51(xx) have not been discussed. In summary, a 'foreign corporation' is a corporation established outside Australia's borders: *New South Wales v Commonwealth* (1990) 169 CLR 482 ('the *Incorporation case*'). The current test for determining whether a corporation is a 'trading or financial corporation' is the 'substantial or significant activities test'. This test looks at the current activities of the corporation and whether the trading or financial activities of the corporation could be said to be 'substantial or significant': *R v Judges of the Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 ('*Adamson's case*'). 'Substantial or significant' does not mean that trading or finance have to form a majority of the company's activities. For example, in *E v Australian Red Cross Society* (1991) 27 FCR 310, Wilcox J held that a hospital was a 'trading corporation' even though its income from trading activities was approximately \$18 million per annum, compared to \$112 million per annum from non-trading activities (primarily government funding); \$18 million was nevertheless substantial. In *Quickenden v O'Connor* (2001) 109 FCR 243 the University of Western Australia was held to be a trading corporation with approximately 28% of its income being derived from trading activities. In contrast, the Aboriginal Legal Service of Western Australia was held by the Industrial Appeal Court of Western Australia not to be a trading corporation because of its role as a not-for-profit, benevolent institution: see *Aboriginal Legal Service of Western Australia v Lawrence [No 2]* [2008] WASCA 2008.

<sup>101</sup> *Fencott* (1982) 152 CLR 570, 598–599 (Mason CJ, Murphy, Brennan and Deane JJ).

<sup>102</sup> *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*').

In this case, the validity of the *World Heritage Properties Conservation Act 1983* (Cth) was challenged by the state of Tasmania, which had established a statutory corporation, the Hydro-Electric Commission, to build a dam on the Franklin River to generate electricity to eventually sell. In order to stop the building of the dam, the *Act* prohibited ‘foreign and trading corporations’ from damaging World Heritage-listed land, if those activities were undertaken for the purpose of trading activities.

It was held by Murphy, Brennan, Deane and Mason JJ that the Hydro-Electric Commission was a trading corporation, hence within the scope of the legislation. Although he did not consider the Hydro-Electric Commission to be a trading corporation, Gibbs CJ joined with Murphy, Brennan, Deane and Mason JJ to agree that the scope of the corporations power extended to allowing the Federal Parliament to regulate the pre-trading activities of the corporation. Mason J, for example, stated that there was, ‘no sound reason for denying that the power should extend to the regulation of acts undertaken by corporations for the purpose of engaging in their trading activities.’<sup>103</sup> He went on to say that the corporations power was a ‘plenary power’<sup>104</sup> and could be validly used by the Federal Parliament to prohibit corporations from doing certain acts, as well as regulating their activities:

A law which prohibits trading and foreign corporations from doing an act is a law about trading and foreign corporations, notwithstanding that it is also a law about the act which is prohibited. It is a law which imposes obligations on such corporations enforceable by injunctions. Consequently, it is simply impossible to say that the law has no substantial connection with trading and foreign corporations.<sup>105</sup>

Mason J’s broad view of the corporations power was shared by Murphy and Deane JJ. Similarly, Murphy J put forward an expansive view of the corporations power, stating that:

Section 51(xx) must be read with all the generality which the words of s 51(xx) admit. ... It enables Parliament to make laws covering all internal and external relations of all or any foreign corporations and trading or financial corporations; to enact a civil and criminal code dealing with the property and affairs of such corporations, or a law dealing with any aspect of

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<sup>103</sup> *Tasmanian Dam Case* (1983) 158 CLR 1, 148 (Mason J).

<sup>104</sup> *Tasmanian Dam Case* (1983) 158 CLR 1, 149 (Mason J).

<sup>105</sup> *Tasmanian Dam Case* (1983) 158 CLR 1, 153 (Mason J).

the affairs of any such corporation or corporations. ... The power ... extends to any command affecting the behaviour of a foreign corporation or a trading or financial corporation and is not restricted to commands about the trading activities of trading corporations or about the financial activities of financial corporations. The Act in so far as it regulates the conduct of such corporations is valid.<sup>106</sup>

Deane J also stated: ‘In my view, the legislative power conferred by s 51(xx) is not restricted to laws with respect to trading corporations in relation to their trading activities.’<sup>107</sup>

Whether the corporations power could be extended even further to regulate not only the trading activities, or activities preparatory to trade, but also activities more remotely connected with the trading activities of a constitutional corporation was considered, but not entirely resolved, in the case of *Re Dingjan; Ex parte Wagner*.<sup>108</sup> The *Industrial Relations Act 1988* (Cth) provided that the Industrial Relations Commission could examine contracts, and could set them aside or vary their terms if the contract was deemed to be harsh or unreasonable. A ‘contract’ included contracts involving independent contractors. The legislation applied to a contract to which a constitutional corporation was a party, or a contract that related to the business of a constitutional corporation.

Tasmanian Pulp & Forest Holdings Ltd had contracted the Wagners to transport wood for them for pulping. The Wagners had, in turn, subcontracted to the Dingjans and the Ryans to transport the wood. When a dispute arose between the Wagners and their subcontractors, the subcontractor’s union sought review of their subcontract in the Industrial Relations Commission. The Wagners then terminated the contracts with the Dingjans and the Ryans. The Commission reinstated and varied the subcontracts, including ordering the Wagners to pay the Dingjans \$25,000. The Wagners applied for writs of prohibition and certiorari which were granted against the Commission, subcontractors and union by Dawson J. These were later considered by the Full Court of the High Court.

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<sup>106</sup> *Tasmanian Dam Case* (1983) 158 CLR 1, 179 (Murphy J).

<sup>107</sup> *Tasmanian Dam Case* (1983) 158 CLR 1, 270 (Deane J).

<sup>108</sup> *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 (‘*Re Dingjan*’).

The issue for the High Court was whether the relevant provisions of the *Industrial Relations Act* fell within the scope of the corporations power. Specifically, was the connection between a subcontract and the business of the corporation sufficient, or too remote to fall within the power. A four to three majority held that the provision of the *Industrial Relations Act* which allowed examination and variation of a contract that related to the business of a constitutional corporation was beyond the scope of the corporations power. The approach taken by the majority (Toohey, McHugh, Dawson and Brennan JJ) and minority (Mason CJ, Gaudron and Deane JJ) foreshadows the future expansion of the power in subsequent cases. For example, McHugh J, in the majority, held that there was not a sufficient ‘relevance to or connection with’ the corporation, and hence the provision was invalid. He stated:

Where a law purports to be ‘with respect to’ a s 51(xx) corporation, it is difficult to see how it can have any connection with such a corporation unless, in its legal or practical operation, it has significance for the corporation. That means that it must have some significance for the activities, functions, relationships or business of the corporation. If a law regulates the activities, functions, relationships or business of a s 51(xx) corporation, no more is needed to bring the law within s 51(xx). That is because the law, by regulating the activities, etc, is regulating the conduct of the corporation or those who deal with it. Further, if, by reference to the activities or functions of s 51(xx) corporations, a law regulates the conduct of those who control, work for, or hold shares or office in those corporations, it is unlikely that any further test will be needed to bring the law within the reach of s 51(xx). It is not enough, however, to attract the operation of s 51 (xx) that the law merely refers to or operates upon the existence of a corporate function or relationship or a category of corporate behaviour. The activities, functions, relationships and business of s 51(xx) corporations are not the constitutional switches that throw open the stream of power conferred by s 51(xx).<sup>109</sup>

On the other hand, the minority took a broad view of the power, holding that less than a ‘direct legal relationship’ between the corporation and activity regulated may nevertheless be sufficient.<sup>110</sup> For example, Mason CJ defined the scope of the corporations power broadly as follows:

the corporations power is not confined in its application to the trading activities of trading corporations and the financial activities of financial corporations. The power must be construed as a plenary power with respect to the categories of corporations mentioned in

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<sup>109</sup> *Re Dingjan* (1995) 183 CLR 323, 369 (McHugh J).

<sup>110</sup> See, for example, *Re Dingjan* (1995) 183 CLR 323, 334–335 (Mason CJ).

s 51(xx) of the *Constitution*. On this view, the power is not limited to the regulation of the functions, activities and relationships of constitutional corporations, using that term in the sense in which it is used in the *Industrial Relations Act 1988* (Cth) (the Act), which can be described as business functions, activities and relationships. Further, in my view, the power extends to the enactment of laws dealing with activities undertaken for the purposes of the business of a constitutional corporation.<sup>111</sup>

Gaudron J, with whom Deane J agreed, thought that the power should not only extend to the ‘trading or financial activities’ of constitutional corporations, but also their ‘business activities’, which she acknowledged were ‘more extensive’ than trading or financial activities.<sup>112</sup> Gaudron J stated:

Once it is accepted that s 51(xx) extends to the business functions, activities and relationships of constitutional corporations, it follows that it also extends to the persons by and through whom they carry out those functions and activities and with whom they enter into those relationships. And when regard is had to ... a contract for the performance of work by an independent contractor, it is clear that ‘a contract relating to the business of a constitutional corporation’ ... will inevitably have as its other party a person who performs the business functions or carries out the business activities of a constitutional corporation or a person who is in a business relationship with that corporation. That other party is within the reach of the legislative power conferred by s 51(xx) of the *Constitution*, at least to the extent of those functions and activities or that business relationship.<sup>113</sup>

Gaudron J’s wide view of the corporations power was enthusiastically accepted by a majority of the High Court, namely Gleeson CJ, Gummow, Hayne, Heydon and Crennan J, in their joint judgment in *New South Wales v Commonwealth* (‘*Work Choices*’).<sup>114</sup> The Howard government enacted the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) to amend the *Workplace Relations Act 1996* (Cth). The government sought to bring approximately 85% of employers under the federal system by increasing the reach of the legislation through an expansive use of the corporations power. They did so by inserting into the definition of an ‘employer’ in s 6(1), ‘a constitutional corporation, so far as it employs, or usually employs, an individual’. In fact, the Commonwealth, in s 16 of the *Act*, stated its intention that the

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<sup>111</sup> *Re Dingjan* (1995) 183 CLR 323, 334 (Mason CJ).

<sup>112</sup> *Re Dingjan* (1995) 183 CLR 323, 364–365 (Gaudron J).

<sup>113</sup> *Re Dingjan* (1995) 183 CLR 323, 365–366 (Gaudron J).

<sup>114</sup> *Work Choices* (2006) 229 CLR 1.

Commonwealth legislation should exclude state and territory laws that would otherwise have applied. Thus, the intention of the Commonwealth to take the power to regulate workplace relations away from the states was clear and unequivocal. The legislation was challenged by the states of New South Wales, Victoria, Queensland, South Australia and Western Australia, and the Australian Workers' Union and Unions New South Wales. A key aspect of the challenge was the extremely broad way in which the government had used the corporations power. Specifically, the government was relying on a greatly expanded characterisation of the corporations power, extending it beyond regulating the trading activities of corporations to regulating their activities with others that did not involve trade, but rather industrial relations. The majority approved Gaudron J's reasoning in *Re Dingjan*, and endorsed the following quotation from her dissenting judgment in *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union*<sup>115</sup> as the correct view of the scope of the corporations power:

I have no doubt that the power conferred by s 51 (xx) of the *Constitution* extends to the regulation of the activities, functions, relationships and the business of a corporation described in that sub-section, the creation of rights, and privileges belonging to such a corporation, the imposition of obligations on it and, in respect of those matters, to the regulation of the conduct of those through whom it acts, its employees and shareholders and, in respect of those matters, to the regulation of the conduct of those through whom it acts, its employees and shareholders and, also, the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or businesses.<sup>116</sup>

In response to the argument that the corporations power must be limited in order to maintain the federal balance, the majority noted that none of the parties sought to challenge 'the approach to constitutional construction' from *Engineers* and that *Engineers* had rejected implications premised upon the federal balance, namely the doctrine of implied intergovernmental immunities and the reserved powers doctrine. They criticised the argument that the characterisation of s 51(xx) should be made with reference to the federal balance, stating that 'the proposition should be criticised

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<sup>115</sup> *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346 ('*Re Pacific Coal*').

<sup>116</sup> *Work Choices* (2006) 229 CLR 1, 114 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

as being more a political proposition than a legal proposition.’<sup>117</sup> Instead, they advocated an *Engineers* literalist approach to constitutional interpretation stating:

The general principles to be applied in determining whether a law is with respect to a head of legislative power are well settled. It is necessary, always, to construe the constitutional text and to do that ‘with all the generality which the words used admit’. The character of the law must then be determined by reference to the rights, powers, liabilities, duties and privileges which it creates. The practical as well as the legal operation of the law must be examined. If a law fairly answers the description of being a law with respect to two subject-matters, one a subject matter within s 51 and the other not, it is valid notwithstanding there is no independent connection between the two subject matters. Finally ... ‘if a sufficient connection with the head of power does exist, the justice and wisdom of the law, and the degree to which the means it adopts are necessary or desirable, are matters of legislative choice’.<sup>118</sup>

Kirby J and Callinan J dissented, and expressed concern about the expansive characterisation of the corporations power by the majority and their dismissal of the federal balance as an irrelevant ghost of the past. Although Kirby and Callinan JJ were both concerned with the relevance and maintenance of the federal balance, their approaches differed. Kirby J, whose decisions have often adopted a living constitution approach to interpretation, was careful to structure his decision so as not to appear intentionalist.<sup>119</sup> On the other hand, Callinan J adopted a more originalist view, referring to history and the Convention Debates as part of his analysis. The decisions of Kirby and Callinan JJ will be discussed because they shed light on the importance of federalism in constitutional interpretation, and highlight the majority’s centralist agenda and their failure as the ultimate guardians of the *Constitution* and the Australian federal system.

In his judgment, Kirby J noted the reluctance of the Australian people to give the Federal Parliament increased powers over industrial relations by voting ‘no’ in several referenda. For Kirby J, an advocate of the living constitution approach to interpretation, this was relevant in characterising the corporations power. He stated:

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<sup>117</sup> *Work Choices* (2006) 229 CLR 1, 121 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>118</sup> *Work Choices* (2006) 229 CLR 1, 103–104 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>119</sup> See for example, *Work Choices* (2006) 229 CLR 1, 200 (Kirby J).

If we acknowledge that the ultimate foundation of the legitimacy of the *Constitution* is now derived from the Australian people, the continued refusal of the Australian electors to approve the creation of a general power of industrial relations by constitutional amendment, while obviously not decisive of the outcome in these proceedings, remains a relevant factor to be considered when construing the contemporary meaning of the constitutional text and structure, including the interaction between s 51(xx) and 51(xxxv). If amendments that are agreed to are relevant to the meaning of the *Constitution*, those that have been repeatedly rejected should not be so lightly cast aside as irrelevant.<sup>120</sup>

For Kirby J, the federal nature of the *Constitution*, and the dire effect upon the states if it was ignored, was a relevant consideration in limiting the corporations power and indeed, s 51 powers generally.<sup>121</sup> He noted many areas that the states have traditionally regulated, that might be lost as a result of an expansive interpretation of the corporations power, including universities, educational colleges, hospitals, pathology providers, former state government departments that have become privatised under a corporate form, and Aboriginal incorporated bodies, to name a few.<sup>122</sup>

Kirby J criticised this broad approach to the corporations power as creating ‘a shift in constitutional realities from the present mixed federal arrangements to a kind of optional or “opportunistic federalism”.’<sup>123</sup> He criticised the majority for failing to discharge their role as protectors of the *Constitution*.

The present majority of this Court may uphold such a radical shift in the constitutional arrangements of the nation. But it should at least do so with eyes open to the results of its reasoning. Even those, like myself, who accept the need to which Windeyer J referred to in the *Payroll Tax Case* for gradual accretions of some legislative powers to the Commonwealth to reflect ‘developments that had occurred outside the law courts’, must balk at the dysfunctional potential of the Commonwealth’s central proposition in these proceedings. It is that potential that demands from this Court, which is the guardian of the *Constitution*, a response protective of the text and structure of the document. If this Court does not fulfil its protective role under the *Constitution*, what other governmental institution will do so? What other institution has the power and the will to do so?<sup>124</sup>

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<sup>120</sup> *Work Choices* (2006) 229 CLR 1, 200–201 (Kirby J).

<sup>121</sup> *Work Choices* (2006) 229 CLR 1, 200–222 (Kirby J).

<sup>122</sup> *Work Choices* (2006) 229 CLR 1, 224 (Kirby J).

<sup>123</sup> *Work Choices* (2006) 229 CLR 1, 225 (Kirby J).

<sup>124</sup> *Work Choices* (2006) 229 CLR 1, 225 (Kirby J).

With respect to the literalist approach from *Engineers*, Kirby J stated that it was not ‘absolute’ and could not be used to ‘destroy the States’ whose central role and importance was undoubtedly expressed throughout the *Constitution*.<sup>125</sup> He stressed the importance of the federal nature of the *Constitution* and its necessary effect as a limiting principle on federal powers:

it would be completely contrary to the text, structure and design of the *Constitution* for the States to be reduced, in effect, to service agencies of the Commonwealth, by a sleight of hand deployed in the interpretation by this Court of specified legislative powers of the Federal Parliament. Specifically, this could be done by the deployment of a near universal power to regulate the ‘corporations’ mentioned in s 51(xx). Such an outcome would be so alien to the place envisaged for the States by the *Constitution* that the rational mind will reject it as lying outside the true construction of the constitutional provisions, read as a whole, as they were intended to operate in harmony with one another and consistently with a basic law that creates a federal system of government for Australia.<sup>126</sup>

In his dissenting judgment, Callinan J sought to clarify the statement, ‘with all the generality which the words used admit’,<sup>127</sup> stating that such an approach was not an ‘unqualified principle’ and that ‘generality must make way to context and other limiting provisions in the *Constitution*’ such as ‘a respect for federalism’.<sup>128</sup> As part of this respect for federalism, his Honour endorsed the perspective of O’Connor J in *Huddart* who stated:

Where [the *Constitution*] confers a power in terms equally capable of a wide and of a restrictive meaning, that meaning will be adopted which will best give effect to the system of distribution of powers between State and Commonwealth which the *Constitution* has adopted, and which is most in harmony with the general scheme of its structure.<sup>129</sup>

Following this, Callinan J strongly criticised the centralist approach of the majority:

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<sup>125</sup> *Work Choices* (2006) 229 CLR 1, 226 (Kirby J).

<sup>126</sup> *Work Choices* (2006) 229 CLR 1, 227 (Kirby J).

<sup>127</sup> *Work Choices* (2006) 229 CLR 1, 316 (Callinan J).

<sup>128</sup> *Work Choices* (2006) 229 CLR 1, 317 (Callinan J).

<sup>129</sup> *Huddart* (1909) 8 CLR 330, 369 (O’Connor J) cited in *Work Choices* (2006) 229 CLR 1, 317 (Callinan J).

It is difficult to avoid the impression that in preferring, as it so often has, central power to State power, this Court has regarded its constitutional role as no different from the role of an umpire of a cricket match, who, by the rules of that game, is obliged to give the batsman, at the expense of the bowler, the 'benefit of the doubt'. I am neither bound nor prepared to take that stance.<sup>130</sup>

Later, in his judgment, Callinan J, like Kirby J, expressed strong reservations as to the impact of the federal balance on the states. He stated: 'The reach of the corporations power, as validated by the majority, has the capacity to obliterate the powers of the State hitherto unquestioned. This Act is an act of Constitutional spoliation'.<sup>131</sup> Callinan J further stated that:

The *Constitution* mandates a federal balance. That this is so should be closely and carefully kept in mind when construing the *Constitution*. That the federal balance exists, and that it must continue to exist, and that the States must continue to exist and exercise political power and function independently both in form and substance, until people otherwise decide in a referendum under s128 of the *Constitution*, are matters that necessarily inform and influence the proper construction of the *Constitution*. The Act here seeks to distort that federal balance by intruding into industrial and commercial affairs of the States.<sup>132</sup>

The *Work Choices* case was a turning point in Australian federalism. If there was any doubt as to whether the literalist approach in *Engineers* had been eroded through the passing of time, that doubt was swiftly stamped out by the majority's decision. As well as confirming the correctness of *Engineers* and the rejection of the doctrines of reserved powers and implied intergovernmental immunities, the majority ignored the federal structure of the *Constitution* and decisively rejected the federal balance as having any limitation whatsoever on the legislative powers of the Commonwealth. They endorsed an almost unlimited view of the corporations power with the result that simply mentioning a corporation is likely to bring a Commonwealth law within the scope of the power.

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<sup>130</sup> *Work Choices* (2006) 229 CLR 1, 318 (Callinan J).

<sup>131</sup> *Work Choices* (2006) 229 CLR 1, 332 (Callinan J).

<sup>132</sup> *Work Choices* (2006) 229 CLR 1, 333 (Callinan J).

#### IV ATTEMPTING TO RESTORE THE FEDERAL BALANCE: THE *MELBOURNE CORPORATION PRINCIPLE*

The *Melbourne Corporation* principle can be described as an attempt to undo some of the potential damage to the states anticipated to result from the decision in *Engineers*. It has been described as a ‘revamped version’ of the immunity of instrumentalities doctrine,<sup>133</sup> which is not reciprocal. That is, it only applies to Commonwealth legislative interference with the states and not vice versa.

This section will outline the case of *Melbourne Corporation v Commonwealth*<sup>134</sup> which first recognised the principle, and will outline how it has been defined, applied and developed in subsequent cases. This analysis will show that although the principle started out as a potentially promising doctrine which would give recourse to the states against unwarranted Commonwealth interference, it has been diluted to such an extent that it is of little practical use to the states to prevent Commonwealth interference. The acknowledgment and existence of the principle does, however, give some recognition to the federal nature of the *Constitution*. Its development highlights flaws in the majority reasoning in *Engineers*, and the fact that the federal nature of the *Constitution*, and the role of the states is so fundamental to the *Constitution* that it cannot be easily dismissed.

The *Melbourne Corporation* case concerned the validity of the *Banking Act 1945* (Cth) which had been enacted by the federal government during the Second World War. The legislation was a wartime measure designed to give the Commonwealth increased control over private banks and control over the supply of money and credit. The legislation attempted to nationalise the banking industry by compelling the states to bank their funds exclusively with the Commonwealth Bank, which was ultimately controlled by the Treasurer. The relevant sections of the *Banking Act* included s 48(1) which provided: ‘Except with the consent in writing of the Treasurer, a bank shall not conduct any banking business for a State or any other authority of a State, including a local government authority. Penalty: One thousand pounds.’ Section 4 of

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<sup>133</sup> Neil Douglas, ‘“Federal” Implications in the Construction of Commonwealth Legislative Power: A Legal Analysis of their Use’ (1985) 16 *Western Australian Law Review* 105, 114.

<sup>134</sup> *Melbourne Corporation* (1947) 74 CLR 31.

the *Act* defined a 'Bank' to include all the private banks operating in Australia. Section 48(3) of the *Act* stated that s 48(1) would only apply when the Treasurer issued the state with a notice in writing, stating that it would apply.

In accordance with s 48(3), the Treasurer wrote to the Melbourne City Council ('Melbourne Corporation') in May 1947. He advised Melbourne Corporation that, as of August 1947, it could no longer bank with a private bank, the National Bank of Australasia, and had to bank with the Commonwealth Bank. Melbourne Corporation commenced an action in the High Court seeking a declaration that s 48 of the *Commonwealth Banking Act* was invalid because it was beyond the legislative power of the Commonwealth. Specifically, Melbourne Corporation argued that s 48 discriminated against the states because the legislation was trying to limit or interfere with the states' capacity to function.

If the High Court had followed the *Engineers* literalist approach to judicial determination the decision would have undoubtedly been decided in favour of the Commonwealth on a broad interpretation of the banking power in s 51(xiii). However, a majority of the High Court (consisting of Latham CJ, Dixon, Rich, Starke and Williams JJ), with McTiernan J dissenting, decided in favour of Melbourne Corporation, holding that the banking power did not extend so as to allow the Commonwealth to enact legislation directed at controlling or hindering state government functions. In reaching this conclusion, the majority implied a limitation from the federal structure of the *Constitution*, namely that the Commonwealth could not impose burdens or disabilities on a state or states that would destroy or curtail their continued existence or capacity to function. This section commences with an examination of the judgment of Dixon J, as it was his judgment that proved to be most influential in subsequent cases.

Dixon J pointed out that the prima facie rule (or implication) of the *Engineers* case was that as long as the law was within power, the Federal Parliament could make a law that 'affect[s] the operations of the states and their agencies.'<sup>135</sup> So generally speaking, Dixon J acknowledged that if a law is within a field of Commonwealth

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<sup>135</sup> *Melbourne Corporation* (1947) 74 CLR 31, 78 (Dixon J).

legislative power, it will be valid.<sup>136</sup> Dixon J noted that the specific listing of the legislative powers of the Federal Parliament in s 51 indicated that these powers were ‘affirmatively granted’ to the Commonwealth, and hence that: ‘The position of the Federal government is necessarily stronger than the States’,<sup>137</sup> who were only granted residual powers. He reasoned that in the same way that this leads to the conclusion that the Commonwealth must be free from interference from the states, it also led to the converse conclusion that the Commonwealth must not interfere with the control of state powers. Dixon J stated that:

the considerations upon which the States’ title to protection from Commonwealth control depends arise not from the character of the powers retained by the States but from their position as separate governments in the system exercising independent functions. But, to my mind, the efficacy of the system logically demands that, unless a given legislative power appears from its content, context or subject matter so to intend, it should not be understood as authorising the Commonwealth to make a law aimed at the restriction or control of a State in the exercise of its executive authority. In whatever way it may be expressed an intention of this sort is, in my opinion, to be plainly seen in the very frame of the *Constitution*.<sup>138</sup>

Dixon J, in this statement, appeared to be making a diplomatic attempt to safeguard the states from interference by the Commonwealth. Specifically Dixon J acknowledged, in accordance with *Engineers*, that s 107 is not to be held out as definitively asserting certain grants of legislative powers to the states, but at the same time is affirming the role of the states as autonomous entities in the Australian federal system.

In his judgment Rich J, like Dixon J, stated that there was no general implication in the *Constitution* that would prevent the Commonwealth exercising its enumerated powers in a manner that would affect the states.<sup>139</sup> However, he said that this was subject to the other express provisions of the *Constitution*, such as the provision made for the states in the *Constitution* which ‘expressly provides for the continued existence of the States.’<sup>140</sup> He reasoned that any legislation that would threaten the

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<sup>136</sup> *Melbourne Corporation* (1947) 74 CLR 31, 78 (Dixon J).

<sup>137</sup> *Melbourne Corporation* (1947) 74 CLR 31, 82–83 (Dixon J).

<sup>138</sup> *Melbourne Corporation* (1947) 74 CLR 31, 83 (Dixon J).

<sup>139</sup> *Melbourne Corporation* (1947) 74 CLR 31, 66 (Rich J).

<sup>140</sup> *Melbourne Corporation* (1947) 74 CLR 31, 66 (Rich J).

existence of a state, or that would prevent it from continuing to exist and function, would be unconstitutional:

The *Constitution* expressly provides for the continued existence of the States. Any action on the part of the Commonwealth, in purported exercise of its constitutional powers, which would prevent a State from continuing to exist and function as such is necessarily invalid because inconsistent with the express provisions of the *Constitution*, and it is to be noted that all the powers conferred by s 51 are conferred 'subject to this *Constitution*'.<sup>141</sup>

Rich J went on to identify 'two classes of case' where Commonwealth legislation that interferes with the states would be invalid. He stated:

where the Commonwealth singles out the States or agencies to which they have delegated some of the normal and essential functions of government, and imposes on them restrictions which prevent them from performing those functions or impede them in doing so; another, where, although the States or their essential agencies are not singled out, they are subjected to some provision of general application, which, in its application to them, would so prevent or impede them.<sup>142</sup>

In a similar manner, Starke J held that it was implied from the Federal structure created by the Commonwealth *Constitution* that: 'neither federal nor State governments may destroy the other nor curtail in any substantial manner the exercise of its powers or obviously interfere with one another's operations.'<sup>143</sup> He went on to say that:

It is a practical question, whether legislation or executive action thereunder on the part of a Commonwealth or of a State destroys, curtails or interferes with the operations of the other, depending upon the character and operation of the legislation and executive action thereunder. No doubt the nature and extent of the activity affected must be considered and also whether the interference is or is not discriminatory but in the end the question must be whether the legislation or the executive action curtails or interferes in a substantial manner with the exercise of constitutional power by the other.<sup>144</sup>

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<sup>141</sup> *Melbourne Corporation* (1947) 74 CLR 31, 66 (Rich J).

<sup>142</sup> *Melbourne Corporation* (1947) 74 CLR 31, 66 (Rich J).

<sup>143</sup> *Melbourne Corporation* (1947) 74 CLR 31, 74 (Starke J).

<sup>144</sup> *Melbourne Corporation* (1947) 74 CLR 31, 75 (Starke J).

Latham CJ had a similar view to Dixon, Rich and Starke JJ about the Commonwealth being prevented from certain types of interference with state legislatures and executives. However, he thought that the terminology, ‘discrimination’ was imprecise.<sup>145</sup> He clarified this terminology as follows:

In my opinion the reason why such legislation is invalid is that what is called ‘discrimination’ shows that the legislation is really legislation by the Commonwealth with respect to a State or State functions as such and not with respect to the subject in respect of which it is sought to bind the State — or, in the case of a State law specifically with and seeking to control Commonwealth functions, that the State Parliament is really endeavouring to make laws with respect to the Commonwealth or Commonwealth functions as such. The Commonwealth Parliament has no power to make laws with respect to State governmental functions as such, and the State Parliaments have no power to make laws with respect to Commonwealth governmental functions as such ... federal legislation which, though referring to a subject of federal power, is really legislation about what is clearly a State governmental function, may be said to ‘unduly interfere’ with that function and therefore be invalid.<sup>146</sup>

Latham CJ noted that ‘unduly interfere’ was somewhat difficult to define, however the central determinant would be that the Commonwealth law could not be characterised as such: ‘In my opinion the invalidity of a federal law which seeks to control a State governmental function is brought about by the fact that it is in substance a law with respect to a subject as to which the Commonwealth Parliament has no power to make laws’.<sup>147</sup>

Like Latham CJ, Williams J also said that the question to ask was whether the law was a law under s 51, or whether it was a law that interfered with the essential governmental functions of the states: ‘a federal law that purports to bind the States must be examined to ascertain whether it is really a law for the peace, order and good government of the Commonwealth with respect to one of the enumerated subjects, or a law which, under colour of such purpose, is really a law the purpose of which is to interfere with such functions’.<sup>148</sup> So, from Williams J’s perspective, if the law interfered with the ‘executive, legislative or judicial governmental functions’ of the state, ‘it is not a law for the peace, order and good government of the

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<sup>145</sup> *Melbourne Corporation* (1947) 74 CLR 31, 60–61 (Latham CJ).

<sup>146</sup> *Melbourne Corporation* (1947) 74 CLR 31, 61–62 (Latham CJ).

<sup>147</sup> *Melbourne Corporation* (1947) 74 CLR 31, 62 (Latham CJ).

<sup>148</sup> *Melbourne Corporation* (1947) 74 CLR 31, 99 (Williams J).

Commonwealth, but an unlawful intervention in the constitutional affairs of the States'.<sup>149</sup>

By way of summary, the majority Justices in *Melbourne Corporation* essentially came to the same conclusion, via two different types of reasoning, that, in accordance with *Engineers*, the Commonwealth could enact a law that impacted on the states, however the law would be invalid if it interfered with the state government's ability to function. Dixon, Starke and Rich JJ, based their reasoning on the federal nature of the *Constitution*, whereas Latham CJ and Williams J took a characterisation approach.

The precedent value of *Melbourne Corporation* was that three possible scenarios could result in Commonwealth legislation being invalid. Firstly, if it threatened the continued existence of a state or states; secondly, if the legislation discriminated against a state by singling it out by imposing a burden such as taxation, or some other control; or, thirdly, if it otherwise 'unduly' interfered with the legislative or executive functions of the state.

However, as is evident from the examination of the judgments above, the *Melbourne Corporation* case provided very little guidance about exactly what kind of interference by Commonwealth legislation with the states would render Commonwealth legislation invalid. Subsequent cases explored the circumstances in which Commonwealth legislation would fall foul of the principle. However, the principle was off to a slow start. Whilst the *Melbourne Corporation* decision was delivered in 1947, it took until 1985 for the principle to be successfully applied.

An example of the principle not being infringed can be seen in the case of *Victoria v Commonwealth*.<sup>150</sup> In this case the *Payroll Tax Act 1941* (Cth) was challenged on the basis that it infringed the *Melbourne Corporation* principle. The *Act* imposed a 2.5% tax on all wages paid by employers. Section 3 of the *Payroll Tax Assessment Act 1941* (Cth) defined 'employer' to include the state governments, local government bodies and state government bodies incorporated under legislation. In summary, a

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<sup>149</sup> *Melbourne Corporation* (1947) 74 CLR 31, 99–100 (Williams J).

<sup>150</sup> *Victoria v Commonwealth* (1971) 122 CLR 353 ('*Payroll Tax Case*').

Commonwealth enactment was imposing a tax liability on state governments and state government agencies as employers. All seven Justices affirmed the existence of the *Melbourne Corporation* principle, but none of them would apply it to invalidate the payroll tax legislation. The case did, however, provide some guidance about the basis for the *Melbourne Corporation* principle; that is, whether an implication approach, or a characterisation approach formed the basis of the principle. Gibbs, Menzies, Windeyer and Walsh JJ said that the *Melbourne Corporation* principle came from an implication from the federal structure created by the *Constitution*. Windeyer, for example stated, ‘implications arising from the existence of the States as parts of the Commonwealth and as constituents of the federation may restrict the manner in which the Parliament can lawfully exercise its power to make laws with respect to a particular subject matter’.<sup>151</sup> Whereas Barwick CJ and Owen J said it was a matter of characterisation, rather than implication. For example, Barwick CJ stated that it was

clear that the *Constitution* in providing for the States did not give the Commonwealth legislative power over them, or their powers and functions of government, as subject matters of legislation. That the government cannot ‘aim’ its legislation against a State, its powers or functions of government is both true and fundamental to our constitutional arrangements. But, in my opinion, this does not derive from any implied limitation upon any legislative power granted to the Commonwealth. It is true simply because the topics of legislation allotted to the Commonwealth by the *Constitution* do not include the States themselves nor their governmental powers or functions as a subject matter of legislative power.<sup>152</sup>

However, as mentioned above, despite the acknowledgment of the *Melbourne Corporation* principle, the legislation was nevertheless valid because of what the Justices regarded as only a slight interference. For example, Gibbs J stated that it was necessary to ‘draw a distinction between essential and inessential functions of government ...’<sup>153</sup> He thought that the legislation did not interfere with the state government’s essential functions, or continued ability to exist as a state government:

Although in some cases it may be possible to show that the nature of a tax on a particular activity, such as the employment of servants, renders the continuance of that activity

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<sup>151</sup> *Payroll Tax Case* (1971) 122 CLR 353, 403 (Windeyer J).

<sup>152</sup> *Payroll Tax Case* (1971) 122 CLR 353, 372 (Barwick CJ).

<sup>153</sup> *Payroll Tax Case* (1971) 122 CLR 353, 424 (Gibbs J).

practically impossible, it has not been shown that the tax in the present case prevents States from employing civil servants or operates as a substantial impediment to their employment. The tax has been imposed upon and paid by the States for nearly thirty years, and it has not been shown to have prevented the States from discharging their functions or to have impeded them in so doing. They may have less money available for public purposes because they have to pay the tax, but that could be said in every case in which a tax is imposed on the States, and in itself it cannot amount to an impediment against State activity sufficient to invalidate the tax.<sup>154</sup>

In the *Tasmanian Dam Case*,<sup>155</sup> Mason, Deane and Brennan JJ discussed and clarified the *Melbourne Corporation* principle, but ultimately, that was not the basis on which the case was decided. The facts of the case were discussed earlier in this chapter in the section on corporations, so will not be repeated. One of the arguments raised by the state of Tasmania was that the Commonwealth enactment was a direct interference with the state's hydro-electric program, and accordingly was an undue interference with a state government body. However, once again, this argument was rejected on the basis that it was not a substantial enough interference so as to offend the *Melbourne Corporation* principle.

In his judgment, by way of example, Mason J asserted that the *Melbourne Corporation* principle was an implication from the federal structure of the *Constitution*. Although he noted that 'the precise limits of the prohibition have not been formulated',<sup>156</sup> he gave the following overview of the principle, identifying two limbs to it (discrimination and impairment):

The only relevant implication that can be gleaned from the *Constitution* ... is that the Commonwealth cannot, in the exercise of its legislative powers, enact a law which discriminates against, or 'singles out' a State or imposes some special burden or disability upon a State or inhibits or impairs the continued existence of a State or its capacity to function.<sup>157</sup>

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<sup>154</sup> *Payroll Tax Case* (1971) 122 CLR 353, 425 (Gibbs J).

<sup>155</sup> *Tasmanian Dam Case* (1983) 158 CLR 1.

<sup>156</sup> *Tasmanian Dam Case* (1983) 158 CLR 1, 129 (Mason J).

<sup>157</sup> *Tasmanian Dam Case* (1983) 158 CLR 1, 128 (Mason J).

However, Mason J continued on to state that the Commonwealth's interference with Tasmania's hydro-electric program was not of a sufficient enough nature to be invalid, applying the principle that:

To fall foul of the prohibition ... it is not enough that Commonwealth law adversely affects the State in the exercise of some governmental function as, for instance, by affecting the State in the exercise of a prerogative. Instead, it must emerge that there is a substantial interference with the State's capacity to govern, an interference which will threaten or endanger the continued functioning of the State as an essential constituent element in the federal system.<sup>158</sup>

Brennan J and Deane J<sup>159</sup> made similar comments. For example, Brennan J stated:

The Commonwealth measures diminish the powers of the executive government but they do not impede the processes by which its powers are exercised. ... A restriction upon the doing of specified acts in the exercise of an executive power to use and to control the use of waste lands is no invalid intrusion upon the exercise of that power.<sup>160</sup>

It was not until the case of *Queensland Electricity Commission v Commonwealth*<sup>161</sup> in 1985 that the discrimination limb of the *Melbourne Corporation* principle was applied to invalidate legislation. In this case, s 9 of the *Electricity Act 1976* (Qld) established the Queensland Electricity Commission as a state government agency. It was responsible for generating power and distributing power through seven government controlled Electricity Boards, who were also state government instrumentalities. During 1984, the Commission, Boards and their employees, who were employed under state government legislation and industrial awards, became involved in a dispute over working conditions with the Electrical Trades Union of Australia. The Union was also involved in industrial disputes with electrical authorities in other states. The dispute was particularly volatile in Queensland, particularly when the Queensland government passed legislation preventing strikes by electricity workers and curtailing trade union rights. On 19 April 1985, over 30

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<sup>158</sup> *Tasmanian Dam Case* (1983) 158 CLR 1, 139 (Mason J).

<sup>159</sup> *Tasmanian Dam Case* (1983) 158 CLR 1, 281 (Deane J).

<sup>160</sup> *Tasmanian Dam Case* (1983) 158 CLR 1, 214–215 (Brennan J).

<sup>161</sup> *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 193 ('*Queensland Electricity*').

trade unions imposed a 24-hour land, sea and air blockade on Queensland to protest about the legislation.

In order to help resolve the dispute, the Commonwealth Government enacted the *Conciliation and Arbitration (Electricity Industry) Act 1985* (Cth) to bring the existing dispute, and any future disputes, within the jurisdiction of the federal Conciliation and Arbitration Commission. Hence the *Act* specifically sought to interfere with the industrial dispute to which the Queensland Electricity Commission was a party by seeking to compel the Queensland Commission, Board and Union to submit to arbitration to resolve the dispute. The Queensland Electricity Commission and Boards challenged the legislation on the basis of the *Melbourne Corporation* anti-discrimination principle.

A majority of the High Court (Gibbs CJ, Mason, Wilson and Dawson JJ) held that the *Conciliation and Arbitration (Electricity Industry) Act 1985* (Cth) was invalid because it discriminated against the Queensland Electricity Commission and Boards as state government instrumentalities. Mason J noted that the principle was not limited to state governments and could be used to invalidate laws that applied to ‘agencies of a state’.<sup>162</sup> The majority held that the legislation did so by imposing a special burden upon them, and therefore discriminated against them. For example, Mason J explained how the Commission and Boards had been singled out for different treatment by the Federal Parliament:

There can be no objection to an exercise of the conciliation and arbitration power which establishes a particular tribunal or a particular procedure for the settlement of disputes in one industry, say the electricity industry. In relation to the industry Parliament might, if it saw fit, require that, in the interests of expedition, the jurisdiction of the Commission be exercised by a Full Bench. It might even provide that disputes in that industry be not referred to a State industrial authority but be determined by the Commission itself. Such a law would apply to all without differentiation. But when the Parliament singles out disputes in the electricity industry to which agencies of the State of Queensland are parties and subjects them to special procedures which differ from those applying under the principal Act to the prevention and settlement of industrial disputes generally, and of industrial disputes in the electricity

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<sup>162</sup> *Queensland Electricity* (1985) 159 CLR 193, 218 (Mason J).

industry in particular, it discriminates against the agencies of the State by subjecting them to a special disability in isolating them from the general law contained in the principal Act ...<sup>163</sup>

*Re Australian Education Union; Ex parte Victoria*<sup>164</sup> concerned a dispute between various unions and states, including the Australian Education Union and the states of Victoria and Tasmania; The Australian Nursing Federation and the states of Victoria, Queensland and Tasmania; The Health Services Union and the states of Victoria, Western Australia and Tasmania; and the Australian Liquor, Hospitality and Miscellaneous Workers Union and the states of Victoria and other states. The disputes were of a similar nature with the Unions serving logs of claims on the states concerning wages and conditions, and the Unions seeking orders before the Commission when the states refused to comply.

An example of one of these disputes occurred as a result of the state of Victoria embarking on a process of cost cutting which included funding cuts to the public service. This involved reducing the amount of wages and the amount of public service employees by offering voluntary redundancies. The Union sought orders from the Commonwealth Industrial Relations Commission ('the Commission') with respect to a log of claims it had served on Victoria and Tasmania. The Commission proceeded to make orders to settle the dispute. Victoria and Tasmania sought writs of prohibition and certiorari to prohibit further proceedings and determinations before the Commission and to quash orders already made. They argued that the industrial relations power in s 51(xxxv) did not extend to allowing the Commission to determine disputes and make binding orders between states and their employees. That is, there was an implied limitation based on the federal structure of the *Constitution* that the Commonwealth could not interfere with the exercise of a state's essential governmental functions.

A six to one majority (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ, with Dawson J dissenting) held that the Commission did have jurisdiction to hear and determine disputes between states and their employees, but only at a certain level. More specifically, the Commission could make industrial awards that governed

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<sup>163</sup> *Queensland Electricity* (1985) 159 CLR 193, 219 (Mason J).

<sup>164</sup> *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 ('*Re Australian Education Union*').

the wages and working conditions of state employees. However, they could only do so for employees in the lower levels of the public service, and not for the ‘higher levels’ including Ministers, Members of Parliament, Ministerial Staff, Heads of Government Departments and Judges. Also, any employment decisions made by a state which involved policy considerations were immune from the Commission’s reach because these types of decisions and considerations belonged to the state executive. The joint majority explained that the following factors were ‘critical to its [a state’s] capacity to function as a government’ including decisions about:

the government’s right to determine the number and identity of the persons whom it wishes to employ, the term of appointment of such persons, and, as well, the number and identity of the persons whom it wishes to dismiss with or without notice from its employment on redundancy grounds. An impairment of a State’s rights in these respects would, in our view, constitute an infringement of the implied limitation. On this view, the prescription by a federal award of minimum wages and working conditions would not infringe the implied limitation, at least if it takes appropriate account of any special functions or responsibilities which attach to the employees in question.<sup>165</sup>

As noted above, the majority stated that the Commission could not make orders with respect to the ‘higher levels’ of government because to do so would be interfering with the state’s executive functions. So any award that purported to extend to these levels of government would be invalid:

In our view, also critical to a State’s capacity to function as a government is its ability, not only to determine the number and identity of those whom it wishes to engage at the higher levels of government, but also to determine the terms and conditions on which those persons shall be engaged. Hence, Ministers, ministerial assistants and advisors, heads of government and high level statutory office holders, parliamentary officers and judges would clearly fall within this group. The implied limitation would protect the States from the exercise by the Commission of power to fix minimum wages and working conditions in respect of such persons and possibly others as well. And, in any event, Ministers and judges are not employees of a State.<sup>166</sup>

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<sup>165</sup> *Re Australian Education Union* (1995) 184 CLR 188, 232 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

<sup>166</sup> *Re Australian Education Union* (1995) 184 CLR 188, 233 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

In reaching this decision, the joint majority of Mason CJ, Brennan, Deane, Toohey, Gaudron, and McHugh JJ proceeded on the basis that there were two limbs to the *Melbourne Corporation* principle, although they stated that, ‘whether there are two implied limitations, two elements or branches of one limitation, or simply one limitation is a question which does not need to be decided in this case.’<sup>167</sup> However, further on in their joint judgment, the majority summarised what the ‘elements’ were:

The limitation consists of two elements: (1) the prohibition against discrimination which involves the placing on the States of special burdens or disabilities (‘the limitation against discrimination’) and (2) the prohibition against laws of general application which operate to destroy or curtail the continued existence of the States or their capacity to function as governments.<sup>168</sup>

Of relevance is the joint majority’s view of the principle as premised on the federal structure of the *Constitution*. As such, according to the majority, implied limitations based on the federal structure, such as the *Melbourne Corporation* principle could be used to limit the *Constitution*’s express provisions. They affirmed that this was the ‘correct approach’ as set out in the judgment of Brennan J in the *SPSF Case*:<sup>169</sup>

It is clear that any implications derived from the general structure of the *Constitution* may qualify express provisions conferring legislative power. Thus in *Queensland Electricity Commission v The Commonwealth*, it was held that a law enacted under the power conferred by s 51(xxxv) was invalid for conflict with an implied limitation. The proposition that ‘implied limitations must be read subject to the express provisions of the *Constitution*’ does not in terms acknowledge that the construction of a head of legislative power is itself ascertained by reference to the entire context of the *Constitution* and that its scope may be limited by implication. ... The construction of s 51(xxxv) or, for that matter, the construction of any other legislative power in s 51, calls for a consideration of the text of the power, its subject matter and the general constitutional context. None of these factors can be considered in isolation, nor is there a sequence to be followed in considering one factor before another.<sup>170</sup>

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<sup>167</sup> *Re Australian Education Union* (1995) 184 CLR 188, 227 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

<sup>168</sup> *Re Australian Education Union* (1995) 184 CLR 188, 231 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

<sup>169</sup> *Re State Public Service Federation; Ex parte Attorney General (Western Australia)* (1993) 178 CLR 148 (‘*SPSF Case*’).

<sup>170</sup> *SPSF Case* (1993) 178 CLR 148, 184 (Brennan J) cited in *Re Australian Education Union* (1995) 184 CLR 188, 225–226 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

In fact, even Dawson J, in dissent, recognised that the *Melbourne Corporation* principle was based on an implication drawn from the federal structure of the *Constitution*.<sup>171</sup> However, Dawson J did not think that there was a sufficient interstate element to this dispute, so as to bring it within the federal jurisdiction. Rather, he saw the disputes as separate disputes between individual states and their employees. The fact that the Union had served a log of claims on more than one state, was not in itself sufficient to satisfy the ‘interstate’ element.<sup>172</sup> Dawson J also pointed out that an assessment of whether a Commonwealth law prevented a state from functioning as an independent unit was a difficult one because it required the drawing of a line by the Court:

Difficulty is inevitably encountered in attempting to identify the point at which a law, particularly a law of general application, may prevent a State from functioning as an independent unit. The difficulty may be less in the case of a discriminatory law. In the light of the *Engineers’* case, it is necessary to start with the proposition that a law under s 51(xxxv) may bind a State and its instrumentalities, but having regard to the nature and scope of State employment, there is no readily discernable line between those aspects of the relationship between a State and its employees which may be externally regulated without interference with the capacity of the State to function independently and those which may not. If the determination of the number and identity of persons to be employed is critical to the functioning of a State, then so too will be the wages and conditions of employment, for the former cannot be determined in isolation from the latter, if only because of the budgetary considerations which constrain any government. It is obvious that if, for example, a State is required to pay a substantial increase in wages to its teachers (who are employed in significantly large numbers), it may have as much impact on the State’s budget and the implementation of its policies as an award prohibiting redundancies in that workforce.<sup>173</sup>

Dawson J continued on to state that the majority’s distinction between ‘high level’ and ‘low level’ public service employment was also problematic because it too required a somewhat subjective assessment:

It is similarly artificial to draw a line between those employed at the higher levels of government and those employed at the lower levels. To do so is merely to revive the distinction between industrial and non-industrial functions which is of little relevance in the

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<sup>171</sup> *Re Australian Education Union* (1995) 184 CLR 188, 250 (Dawson J).

<sup>172</sup> *Re Australian Education Union* (1995) 184 CLR 188, 250–251 (Dawson J).

<sup>173</sup> *Re Australian Education Union* (1995) 184 CLR 188, 249–250 (Dawson J).

context of industrial disputes as they are now viewed. A State can function only through those whom it employs, whatever the level of employment, and the external regulation of the terms and conditions of employment of those employed at the lower levels may, if for no other reason than their numbers, be as destructive of the capacity of a State to function as an independent unit as the regulation of the terms and conditions of those employed at the higher levels.<sup>174</sup>

In the later case of *Austin v Commonwealth*<sup>175</sup> the High Court reconsidered the formulation of the *Melbourne Corporation* principle. The Commonwealth enacted the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Imposition Act 1997* and the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997* ('the Acts'). The Acts imposed a superannuation contributions surcharge on members of a 'constitutionally protected superannuation fund'. This was defined to include certain funds under state legislation including those that established the superannuation entitlements of state Judges, and other judicial officers such as Masters. The effect of this legislation was that, even though they were paid from the Consolidated Revenue Funds of their states, when a Judge or Master retired, they would owe a significant sum of money as a personal debt to the Commonwealth. That is, they would be taxed as if they had made regular superannuation contributions themselves.

Robert Austin, a New South Wales Supreme Court Judge, and Kathryn Kings, a Master of the Supreme Court of Victoria, filed writs in the High Court to test whether they were required to pay the tax, and whether the Acts were nevertheless constitutionally invalid insofar as they applied to state judicial officers. So for example, if Austin retired at age 62, as soon as he was eligible for a pension, he would owe over \$300,000 to the Commonwealth. However, the amount of the surcharge increased each year so if he retired at age 72, he would owe over \$550,000 as a debt to the Commonwealth.

A five to one majority of the High Court (Callinan J did not sit and Kirby J dissented), held that in its application to state Judicial officers, the legislation

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<sup>174</sup> *Re Australian Education Union* (1995) 184 CLR 188, 250 (Dawson J).

<sup>175</sup> *Austin v Commonwealth* (2003) 215 CLR 185.

interfered with the *Melbourne Corporation* principle and was invalid to that extent. That is, it amounted to a significant interference with the state's functions with respect to the appointment and remuneration of state judicial officers. Therefore the law placed a disability or burden on the state's operations and activities. For example, McHugh J stated:

Here the federal law discriminates against State judicial officers in a way that interferes in a significant respect with the States' relationship with their judges. It interferes with the financial arrangements that govern the terms of their offices, not as an incidence of a general tax applicable to all but as a special measure designed to single them out and place a financial burden on them that no one else in the community incurs. The Commonwealth does not dispute that the relevant federal legislation treats the first plaintiff and other State judicial officers differently from the way federal laws concerned with the superannuation contributions surcharge deal with other 'high income earners'. Private 'high income earners' do not have the surcharge imposed on them. In their case, the surcharge is imposed on their superannuation provider. The Federal legislation assumes — no doubt with good reason — that the surcharge will be passed on to the high income earner in his or her capacity as a member of the superannuation scheme in the form of reduced benefits. But in so far as the federal legislation deals with these private 'high income earners', it does not impose any surcharge on them personally. It does not make them liable to pay a debt of hundreds of thousands of dollars, as these federal laws make State judicial officers liable to pay.<sup>176</sup>

Kirby J in his dissenting judgment said that whilst the legislation interfered with the relationship between the states and their judges, it did not impair the states' capacity to function as governments. However, Kirby J agreed with the majority's (Gaudron, Gummow and Hayne JJ's) reformulation of the *Melbourne Corporation* principle, namely that discrimination alone is no longer enough to invalidate Commonwealth legislation. Hence, the two limbs of the *Melbourne Corporation* principle are now one. For example, in their joint judgment, Gaudron, Gummow and Hayne JJ stated, 'It may be conceded ... that, though differential treatment may be indicative of infringement of the limitation upon legislative power with which the doctrine is concerned, it is not, of itself, sufficient to imperil validity.'<sup>177</sup> Even Kirby J, in dissent, agreed that discrimination was now subsumed:

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<sup>176</sup> *Austin v Commonwealth* (2003) 215 CLR 185, 284 (McHugh J).

<sup>177</sup> *Austin v Commonwealth* (2003) 215 CLR 185, 264 (Gaudron, Gummow and Hayne JJ).

I agree ... that the two aspects of the implied limitation upon federal legislative power, noted in past decisions, are essentially manifestations of the one constitutional implication. Both are referable to the underlying conception concerning the nature of the Australian federation. I share the view that each identified defect is to be determined by reference to the effect of the impugned legislation on the continuing existence of the States, and whether there is an impermissible degree of impairment of the State's constitutional functions. The presence of discrimination against a State may be an indication of an attempted impairment of its functions as the *Constitution* envisaged them. But any discrimination against States must be measured against that underlying criterion. It affords the touchstone of the implied limitation explained in the Court's decision in *Melbourne Corporation* ...<sup>178</sup>

A similar situation to that in *Austin v Commonwealth* arose in *Clarke v Federal Commissioner of Taxation*<sup>179</sup> but this time, with respect to the superannuation of state Members of Parliament. Once again, the legislation in issue was the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Imposition Act 1997* (Cth) and the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997* (Cth) ('the Acts'). Clarke was a Member of the House of Assembly of the South Australian Parliament from 1993 to 2002. He was a member of three parliamentary superannuation schemes established by South Australian legislation. These schemes fell within the definition of a 'constitutionally protected superannuation fund' and therefore were liable for the superannuation contribution surcharge when they exceeded a threshold amount. When the Commissioner issued superannuation contribution surcharge assessments to Clarke with respect to his entitlements under these superannuation funds, he challenged their applicability to state Members of Parliament on the basis of the *Melbourne Corporation* principle. The High Court unanimously held that the Acts were invalid in their application to state Members of Parliament, applying the *Melbourne Corporation* principle, and following the decision in *Austin v Commonwealth*. For example, in his judgment Hayne J explained how the Acts contravened the *Melbourne Corporation* principle:

What is important is that the laws now in issue, by their effect on how States may choose to remunerate their parliamentarians, place a special disability or burden upon the exercise of

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<sup>178</sup> *Austin v Commonwealth* (2003) 215 CLR 185, 301 (Kirby J). However, see also 281 (McHugh J) who stated that there were still two limbs.

<sup>179</sup> *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272 ('Clarke').

powers and the fulfilment of functions of the States. It is for a State to decide how and in what amount its parliamentarians are to be remunerated. Is it to be by salary, with or without funded or unfunded retirement benefits, or other forms of benefit? Are some or all of those benefits to be provided with or without contribution by the beneficiary? Are any or all of the benefits to be defined or are they to be an accumulation of whatever is contributed with interest? Are benefits to be paid by pension or in a lump sum? The legislation imposing the surcharge in issue in this matter impairs the capacity of a State to choose between these various forms of remuneration of its parliamentarians in one particular but important respect: the State has no real choice but to adopt a method of providing retirement benefits that will enable parliamentarians to meet the tax liability specifically imposed on them.<sup>180</sup>

In reaching this conclusion, Gummow, Heydon, Kiefel and Bell JJ, in a joint judgment, affirmed that the *Melbourne Corporation* principle was comprised of only one limb, with discrimination being subsumed under the limb that prevents the Commonwealth from weakening or interfering with the states' constitutional capacity to function.<sup>181</sup> In his judgment, French CJ advocated a 'multifactorial assessment'. He listed the following 'relevant' factors to be 'weighed together with the effects of such a law on their [a state or states'] capacities and functions':

1. Whether the law in question singles out one or more of the States and imposes a special burden or disability on them which is not imposed on persons generally.
2. Whether the operation of a law of general application imposes a particular burden or disability on the States.
3. The effect of the law upon the capacity of the States to exercise their constitutional powers.
4. The effect of the law upon the exercise of their functions by the States.
5. The nature or capacity of the functions affected.
6. The subject matter of the law affecting the State or States and in particular the extent to which the constitutional head of power under which the law is made authorises its discriminatory application.<sup>182</sup>

French CJ also noted the role of the states in the federal system as independent entities, and explained that an implied limitation, such as the *Melbourne Corporation* principle, may be necessary to preserve the role and powers of the states:

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<sup>180</sup> *Clarke* (2009) 240 CLR 272, 315 (Hayne J).

<sup>181</sup> *Clarke* (2009) 240 CLR 272, 307 (Gummow, Heydon, Kiefel and Bell JJ).

<sup>182</sup> *Clarke* (2009) 240 CLR 272, 299 (French CJ).

the Commonwealth cannot, by the exercise of its legislative power, significantly impair, curtail or weaken the capacity of the States to exercise their constitutional powers and functions (be they legislative, executive or judicial) or significantly impair, curtail or weaken the actual exercise of those powers or functions. The *Constitution* assumes the existence of the States as 'independent entities'. This implies recognition of the importance of their status as components of the federation. The 'significance' of a Commonwealth law affecting the States' functions is not solely to be determined by reference to its practical effects on those functions. This is not a return to any generalised concept of inter-governmental immunity. It simply recognises that there may be some species of Commonwealth laws which would represent such an intrusion upon the functions or powers of the States as to be inconsistent with the constitutional assumption about their status as independent entities.<sup>183</sup>

Whilst the *Melbourne Corporation* principle at first offered a promising reprieve for the states after the decision in *Engineers* that was potentially so damaging to them, it has failed to live up to its initial expectations. Although the latter decisions applying the principle, at times, acknowledged the federal nature of the *Constitution* and confirmed the principle's foundations as necessarily implied from these federal foundations, the parameters of the principle and, more specifically, exactly when it will apply to invalidate Commonwealth legislation remains unclear, despite the number of decisions in which it has been discussed. Perhaps some conclusions can, however, be drawn. For example, it appears that Commonwealth legislation that imposes a taxation liability, such as a superannuation surcharge on senior members of the state Executive or judiciary like state Judges and Members of state Parliaments, will be invalid to the extent that it interferes with their salary or superannuation entitlements. However, there is a question mark as to whether other types of interference through Commonwealth legislation will be able to be successfully challenged by the states. It is argued that such an interference or discrimination would have to be an extreme one. This is especially given the continued acknowledgment throughout the cases discussed in this section that the principles in *Engineers* still apply — namely that the Commonwealth can legislate to affect the states provided that the Commonwealth legislation falls within one or more of the Commonwealth's enumerated powers, which will be construed broadly. It appears that whilst *Engineers* remains as binding precedent, despite the *Melbourne Corporation* principle, the states can do little to ward off Commonwealth

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<sup>183</sup> Clarke (2009) 240 CLR 272, 298 (French CJ).

interference. With the benefit of hindsight, it is unfortunate that the *Melbourne Corporation* case, which can be seen as a polite attempt to undo some of the damage to the states caused by *Engineers*, did not overrule it entirely.

## V CONCLUSION

Some concluding comments will now be made concerning three questions raised during the course of this chapter, and the preceding one. These are firstly, whether the High Court has fulfilled its role as a guardian and protector of the Australian *Constitution*, and in particular as the protector of the federal nature and balance required by the *Constitution*; secondly, whether existing theories of constitutional interpretation are adequate to restore this balance; and thirdly, whether there is a need for the Australian federal system of government to be reformed.

The protector of the Australian *Constitution*, the High Court, has failed to achieve its constitutional mandate. Regardless of the method of interpretation that one advocates, as established in Chapter 2 the *Constitution* is fundamentally federal in nature and mandates a balance of power between the Commonwealth and the states. The equality and autonomy of the states has been gradually eroded by a High Court that has increasingly pursued a centralist agenda. This is evident from an examination of the broadening of the definition of an excise duty and the definition of a constitutional corporation that is now so expansive that the mere mention of a corporation will probably be enough to bring it within the legislative power of the Commonwealth. The gradual centralisation achieved by the High Court since *Engineers* has been aided by the lack of direction given to it by the *Constitution* as to the method of constitutional interpretation to be employed. This suggests that constitutional reforms are required to clarify the way that the *Constitution* should be interpreted to prevent further centralisation.

It is acknowledged that judicial reasoning is certainly a complex and unquantifiable undertaking. As noted by Zines in his examination of judicial review by the High Court between 1951 and 1976, “legal reasoning” is a highly complex notion in which problems of meaning, history, social values, intuitive understandings and

judicial tradition all play a part.’<sup>184</sup> However, what we have ended up with is the constitutionally unauthorised dominance of literalism with a mix of originalism and revisionism thrown into the quagmire. In fact, different methods of interpretation have had brief resurgences. For example, Goldsworthy notes that in the 1988 case of *Cole v Whitfield*,<sup>185</sup> concerning s 92 of the *Constitution*, there was a revival of an historical approach to the characterisation of the provision. Specifically, in *Cole v Whitfield* the Court looked to ‘historical evidence of the founders’ intentions’ including the Convention Debates, but with a view to finding a ‘contemporary meaning’ of s 92.<sup>186</sup> This appears to be an originalist approach with hint of revisionism thrown in.

When one considers the divergent views of Judges and academics since federation, the lack of agreement as to which should be the preferred method of constitutional interpretation is plain. In *Work Choices*, for example, all three methods of interpretation were used. The majority reached their decision using the literalist method of interpretation. The dissenting judgment of Kirby J used the revisionist method with originalist sympathies. However, Callinan J, also in dissent, employed a largely originalist approach. Hence, the method of interpretation that a Justice of the High Court should utilise appears to be very much a matter of their personal choosing and can very much alter the outcome of the case. If Judges are centralist, they will prefer literalism; if they are concerned about protecting states’ rights, they will prefer originalism; and if they are progressive and concerned that the *Constitution* should address social justice issues, they will prefer the revisionist method of interpretation.

There seems to be little doubt that the existing theories of constitutional interpretation have failed to achieve certainty, and have also failed to protect the federal nature of the *Constitution*. The following chapter will explore the principle of subsidiarity and its links with federalism in order to determine whether constitutional, legislative and other reforms based on subsidiarity could help to restore the federal balance.

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<sup>184</sup> Leslie Zines, ‘The Australian Constitution 1951–1976’ (1976) 7 *Federal Law Review* 89, 144.

<sup>185</sup> *Cole v Whitfield* (1988) 165 CLR 360.

<sup>186</sup> Jeffrey Goldsworthy, ‘Originalism in Constitutional Interpretation’ (1997) 25 *Federal Law Review* 1, 15.

## **CHAPTER 7: HOW CAN THE PRINCIPLE OF SUBSIDIARITY BE IMPLEMENTED TO ENHANCE AUSTRALIAN FEDERALISM?**

Chapter 4 examined the compatibility of federalism and subsidiarity at a theoretical and contextual level and suggested that there were aspects of subsidiarity that Australia could adopt, particularly from the procedural operation of subsidiarity in the European Union, in order to enhance Australian federalism. This was followed by Chapters 5 and 6 which demonstrated the need for a new theory of Australian federalism in the face of increased centralisation permitted by the High Court through an expansive interpretation of Commonwealth powers post-*Engineers*. In addition, the confusion among Judges and academics as to which method of constitutional interpretation should be preferred supports the conclusion that a resolution is required.

However, before a definite conclusion can be reached about the exact reforms that are required and how they should be implemented (Research Question 7), consideration must be given to the perception that there has been increased centralisation in the European Union despite the principle of subsidiarity (Research Question 8). If this is indeed the case, and if Australia was to utilise aspects of subsidiarity to reform and restore Australian federalism, these concerns must be addressed so that Australia does not follow this centralising trend.

This chapter will commence by examining and evaluating the academic commentary as to whether centralisation has increased in the European Union despite the principle of subsidiarity. A factor identified by many of the commentators is the application and interpretation of the principle by the European Court of Justice.

To ascertain whether these criticisms are founded, this chapter will then give an overview of the key European Union cases in which legislation has been challenged on the basis of subsidiarity. This overview will show that the European Court of Justice has treated the principle as political rather than legal and as a result, has been reluctant to invalidate laws that do not comply with the principle. The Court could be said to regard the principle as involving a political judgment that is best made by central Union law makers. It can also be argued that this approach sanctions

subsidiarity as a centralising principle which justifies regulations, directions and decisions being better made and implemented at a central level.

This chapter will suggest how subsidiarity could be implemented in Australia so as to be maintained permanently and not overlooked in favour of centralisation (Research Question 8). The conclusion of this chapter will make specific recommendations as to how reforms based upon subsidiarity can be implemented through legislative and procedural reforms and constitutional amendment.

## **I THE FAILURE OF SUBSIDIARITY AS A JUDICIAL PRINCIPLE IN THE EUROPEAN UNION**

Chapters 3 and 4 illustrated that in the European Union, subsidiarity works more effectively as a procedural safeguard imposed upon the European Parliament and Council during the legislative process, rather than as a legal principle. For example, Cooper has commented that the principle had served to change the ‘legislative culture’ of the European Union by reducing its ‘legislative output’ since the principle was introduced in the *Maastricht Treaty*.<sup>1</sup> Also, Cooper noted compliance with the principle is evidenced by the increased use of directives rather than regulations, which leaves greater discretion and control to the member states over their implementation.<sup>2</sup> However, despite its success as a political principle, the European Court of Justice has failed to hold any legislative act invalid for failing to comply with subsidiarity. This suggests that there are many procedural safeguards that Australia could adopt to protect the federal balance. However, caution must be applied when considering judicial review in order to make the High Court a more effective protector of the federal balance.

The fact that the European Court of Justice has not invalidated any directives or regulations for failing to comply with the principle of subsidiarity is perhaps

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<sup>1</sup> Ian Cooper, ‘Subsidiarity and Autonomy in the European Union’ in Louis W Pauly and William D Coleman (eds), *Global Ordering: Institutions and Autonomy in a Changing World* (UBC Press, 2008) 234, 244–253. Cooper (242) does, however, note the difficulty in measuring the success of subsidiarity in this regard because it involves a measure of action that is not taken.

<sup>2</sup> Ian Cooper, ‘Subsidiarity and Autonomy in the European Union’ in Louis W Pauly and William D Coleman (eds), *Global Ordering: Institutions and Autonomy in a Changing World* (UBC Press, 2008) 234, 253.

understandably due to the evaluative process that the Court must undertake in conducting a substantive review of subsidiarity. This is evident from the wording of art 5(3) of the *TEU* which excludes matters of exclusive competence from the application of the principle of subsidiarity. If, for example, the European Court of Justice concluded that a regulation was within an exclusive competence, no question of subsidiarity would arise. Article 5(3) further provides that when competences are shared, matters should be regulated locally except where the scale or objectives could be better achieved at a Union level. Hence, if the Union is able to provide adequate justification for taking action, the Court seems unlikely to question it. In addition, as noted in Chapter 4, the necessity principle in art 352 of the *TFEU* also diminishes the effectiveness of subsidiarity by providing justification for the Union to act to achieve Community objectives in cases where the Treaties have not allocated the necessary powers.<sup>3</sup> The result is that, according to art 2(2) of the *TFEU*, once the Union has acted, the matter becomes exclusive to it.

It is likely that the Court's reluctance to annul Union directives and regulations on the basis of subsidiarity, as has been previously mentioned, is to some extent due to the evaluation being political in nature. Bermann notes the political nature of an assessment as to whether a legislative act complies with subsidiarity and notes the wide degree of political discretion required:

Given the profoundly discretionary character of this judgment — which once again entails at a minimum measuring the 'adequacy' of state action, assessing the likelihood of such action across the states, and comparing its efficacy with that of the proposed Community measure — the Court will almost invariably consider it deserving of an extremely high level of deference.<sup>4</sup>

This highlights the inadequacy of subsidiarity as a substantive legal principle.<sup>5</sup> Further, in the European Commission's 2010 *Report from the Commission on*

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<sup>3</sup> As noted in Chapter 4, see Gabriël A Moens, 'The Subsidiarity Principle in European Union Law and the Irish Abortion Issue' in Guenther Doeker-Mach and Klaus A Ziegert (eds), *Law, Legal Culture and Politics in the Twenty First Century* (Franz Steiner Verlag Stuttgart, 2004) 424, 426.

<sup>4</sup> George A Bermann, 'Subsidiarity and the European Community' (1993) 17 *Hastings International and Comparative Law Review* 97, 107.

<sup>5</sup> Ian Cooper, 'Subsidiarity and Autonomy in the European Union' in Louis W Pauly and William D Coleman (eds), *Global Ordering: Institutions and Autonomy in a Changing World* (UBC Press, 2008) 234, 237.

*Subsidiarity and Proportionality*, raised the importance of subsidiarity as both a procedural and legal safeguard and the failure of the European Court of Justice to annul directives or regulations on the basis of it. The Report stated:

A fair political judgment at the **pre-legislative phase is important** to ensure that proposals get the subsidiarity issues right from the beginning. At the post-legislative stage, the Court of Justice could be called on to check the legality of adopted legislation. The Court has yet to annul a measure for breach of subsidiarity.<sup>6</sup>

The lack of European Court of Justice decisions in which subsidiarity has been a successful ground of appeal is particularly poignant when one considers the advantages of judicial review of the principle of subsidiarity as a supplement to effective safeguards in the legislative process. As Steiner argues, the European Court of Justice is the ideal institution to consider and apply the principle of subsidiarity because of its status as a kind of ‘constitutional court’, its independence from political pressure, and its ability to consider the law impartially. In addition, it is part of the role of such a court to consider areas of law that have a ‘lack of precision’, that may be complex, and where underlying political motivations have resulted in the judicial challenge in the first place.<sup>7</sup>

Substantive judicial review of subsidiarity would serve to enhance the political operation of the principle. In the words of Timmermans, ‘For subsidiarity to be taken seriously, the possibility of judicial review of compliance with this principle is essential.’<sup>8</sup> Similarly, Bermann states:

Despite the practical limitations of judicial review, it is highly desirable that subsidiarity be considered a justiciable principle. Justiciability should promote subsidiarity’s being taken seriously by the political branches. It will also enable the Court to intervene in the truly exceptional case in which those branches in fact egregiously ignore subsidiarity as a procedural or substantive mandate. Overall, however, judicial review cannot be heavily counted on as the mechanism for making subsidiarity work. We thus return to the hope that

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<sup>6</sup> European Commission, *Report from the Commission on Subsidiarity and Proportionality (18<sup>th</sup> Report on Better Lawmaking Covering the Year 2010)* (Commission Report No COM(2011)344, 10 June 2011) 2 (emphasis in original).

<sup>7</sup> Josephine Steiner, ‘Subsidiarity under the Maastricht Treaty’ in David O’Keefe and Patrick M Twomey (eds), *Legal Issues of the Maastricht Treaty* (1995, Wiley Chancery Law) 49, 62.

<sup>8</sup> Christian Timmermans, ‘Subsidiarity and Transparency’ (1999) 22 *Fordham International Law Journal* 106, 114.

the political institutions will in fact genuinely ask the questions that subsidiarity raises and that they will genuinely act in the legislative process upon the conclusions to which their inquiries and analyses lead them.<sup>9</sup>

Consequently, a more holistic application of the principle is required in order for subsidiarity to work effectively. The political application of the principle is enhanced by the presence of judicial safeguards because judicial safeguards would operate to motivate the political institutions to comply with the principle, or risk their legislative action being overruled.

As noted in the previous chapter, despite the advantages of judicial review of subsidiarity, and despite the introduction of the *Protocol on the Application of the Principles of Subsidiarity and Proportionality*,<sup>10</sup> judicial review of subsidiarity by the European Court of Justice has been, at least from the perspective of the member states, largely ineffective in guarding against encroaching centralisation. This is despite the fact that, in addition to the *Protocol* clarifying the procedural aspects of subsidiarity,<sup>11</sup> the *Protocol* also confirms the existing status of the principle as a legal and justiciable concept.<sup>12</sup> Sander suggests that this is ultimately due to the characterisation of the principle as a political concept and notes that ‘EU constitutional efforts in strengthening a judicial enforcement of subsidiarity fail to remedy effectively the political nature of subsidiarity obligations and ultimately prove unable to avoid essentially political subsidiarity decisions, exercised and exclusively accounted for by the EU legislature.’<sup>13</sup> The reluctance of the European Court of Justice to treat the principle of subsidiarity as a legal, rather than a political principle will also be explored in the analysis of case law below.

However, at this point in the chapter, the centralising effect of this judicial reluctance must be noted. Specifically, scholars such as Moens have argued that the principle

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<sup>9</sup> George A Bermann, ‘Subsidiarity and the European Community’ (1993) 17 *Hastings International and Comparative Law Review* 97, 108.

<sup>10</sup> *Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality* [2010] OJ C 83/206 (‘*Protocol*’).

<sup>11</sup> *Protocol* arts 4–7.

<sup>12</sup> *Protocol* art 8.

<sup>13</sup> Florian Sander, ‘Subsidiarity Infringements before the European Court of Justice: Futile Interference with Politics or a Substantial Step Towards EU Federalism?’ (2006) 12 *Columbia Journal of European Law* 517, 521.

has in fact been used to justify, rather than guard against, centralisation.<sup>14</sup> Therefore, as mentioned above, when the European Court of Justice fails to invalidate a legislative act on subsidiarity grounds, they effectively endorse the European Union's decision that the matter would be better dealt with at a Union level, rather than at a regional level. This appears contrary to the underlying philosophy of subsidiarity as a decentralising principle and has significantly compromised its effectiveness at a judicial level.

Some scholars argue that the European Court of Justice should have taken a more active role as a guardian of subsidiarity. For example, Swaine argues that the concept of 'judicial subsidiarity' should apply in the European Union. He reasons that because the relevant treaty provisions provide that 'Each institution shall act within the limits of its powers conferred on it in the Treaties...'<sup>15</sup> and because the European Court of Justice is one of these institutions,<sup>16</sup> 'subsidiarity should constrain its decisions'.<sup>17</sup>

However, the contrary position is discussed by de Búrca, who argues that subsidiarity's failure at a judicial level is contributed to by the principle being solely directed at the Community's legislative institutions.<sup>18</sup> In de Búrca's opinion, the Court of Justice is 'beyond the scope of application of the subsidiarity principle insofar as its interpretive function is concerned.'<sup>19</sup> She notes that although the treaty provisions speak of 'each institution' being subject to the principle, the provisions of the *Protocol* demonstrate otherwise by stating that 'the principle of subsidiarity does not call into question the powers conferred on the European Community by the Treaty, as interpreted by the Court of Justice'.<sup>20</sup> She concludes that the result of these

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<sup>14</sup> Gabriël A Moens, 'The Subsidiarity Principle and E.C. Directive 93/104' (1997) 34 *Australia and World Affairs* 51.

<sup>15</sup> *TEU* art 13(2).

<sup>16</sup> *TEU* art 13(1).

<sup>17</sup> Edward T Swaine, 'Subsidiarity and Self-Interest: Federalism at the European Court of Justice' (2000) 41(1) *Harvard International Law Journal* 60–61.

<sup>18</sup> Gráinne de Búrca, 'Reappraising Subsidiarity's Significance After Amsterdam' (Jean Monnet Working Paper 7/99, Harvard Law School, 2000) 38–39.

<sup>19</sup> Gráinne de Búrca, 'Reappraising Subsidiarity's Significance After Amsterdam' (Jean Monnet Working Paper 7/99, Harvard Law School, 2000) 38–39.

<sup>20</sup> Gráinne de Búrca, 'Reappraising Subsidiarity's Significance After Amsterdam' (Jean Monnet Working Paper 7/99, Harvard Law School, 2000) 39.

words is that the Court is not obliged to act in accordance with the principle itself by applying it as an interpretive principle.<sup>21</sup>

What these alternative viewpoints have in common, is that they both suggest that clarification and reform are required as to whether the Court is bound by subsidiarity and therefore obliged to give effect to it in its decisions. Schütze makes two such suggestions in order to enhance subsidiarity as a ‘judicial safeguard’.<sup>22</sup> Borrowing from American federalism, he suggests as a ‘soft constitutional solution’ that the Court could require an ‘express pre-emption’ in legislation. That is, the Court could require an express statement in the legislation itself that it intended to cover the field before concluding that it did.<sup>23</sup> He also suggests that the Court could ‘develop a judicial presumption against pre-emption in sensitive policy areas.’<sup>24</sup> This suggestion is certainly not far-fetched because, as noted by Henkel, the *TFEU* provides that: ‘Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties’, a requirement known as the ‘sufficient grounds standard’.<sup>25</sup> However, the European Court of Justice has not strictly applied this requirement, stating that ‘explicit reference is indispensable where, in its absence, the parties concerned and the Court are left uncertain as to precise legal basis.’<sup>26</sup> Arguably, to require an express pre-emption would be consistent with this treaty provision and would help to enhance subsidiarity as a judicial safeguard.

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<sup>21</sup> Gráinne de Búrca, ‘Reappraising Subsidiarity’s Significance After Amsterdam’ (Jean Monnet Working Paper 7/99, Harvard Law School, 2000) 39.

<sup>22</sup> Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press, 2009) 264–265.

<sup>23</sup> Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press, 2009), 264–265.

<sup>24</sup> Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press, 2009) 265.

<sup>25</sup> Christoph Henkel, ‘The Allocation of Powers in the European Union: A Closer Look at the Principle of Subsidiarity’ (2002) 20 *Berkley Journal of International Law* 359, 378–379. I have quoted here from the current Treaty provision, *TFEU* art 296. However, Henkel’s article refers to the former Treaty provisions, art 253 (formerly art 190), which has slightly different wording: ‘regulations, directives and decisions adopted by the European Parliament and the Council, and such acts adopted by the Council or Commission, shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to the Treaty’.

<sup>26</sup> *Commission of the European Communities v Council of the European Communities* (C-48/86) [1987] ECR 1493, 1519–20 cited in Christoph Henkel, ‘The Allocation of Powers in the European Union: A Closer Look at the Principle of Subsidiarity’ (2002) 20 *Berkley Journal of International Law* 359, 379.

However, Schütze further argues that a more preferable option is the ‘hard constitutional solution’ of discarding ‘its manifest-error standard in relation to the question of subsidiarity’ by becoming ‘involved in fundamental political and social questions’ which is something that any constitutional court should be required to do.<sup>27</sup> In other words, the Court should directly apply the principle in its interpretation of European Union regulations, instead of treating it as a political principle that is best applied by the legislature.

However, in the absence of amendment to the *Protocol* or treaty provisions, the Court’s position is unlikely to change. In fact, given the Court’s reluctance to invalidate regulations on the basis of subsidiarity, and perhaps due to the political nature of the determination, the Court has been said to be ‘so biased toward integration and centralisation that it cannot be entrusted with such an inquiry.’<sup>28</sup> Simply put, it can be and has been argued that the Court has set the precedent of deferring to centralisation, and it would now be very difficult for the Court to retreat from it. These issues will be elaborated upon below with reference to specific decisions in which the principle of subsidiarity has been raised.

At this point, it should be noted that whilst the effectiveness of the principle of subsidiarity at a judicial level in the European Union (that is, as a substantive legal principle) is discouraging, the latter part of this chapter will suggest ways to implement aspects of subsidiarity in an Australian context so that the High Court does not have the discretion to mirror the European Union experience by proceeding down a similar centralist path.

## II CASE LAW FROM THE EUROPEAN COURT OF JUSTICE

As mentioned above, this section will review case law from the European Court of Justice where the principle of subsidiarity has been a ground of challenge to European Union directives or regulations, or where it has been otherwise considered. This analysis will be undertaken through examining the progression of case law

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<sup>27</sup> Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press, 2009) 265.

<sup>28</sup> Edward T Swaine, ‘Subsidiarity and Self-Interest: Federalism at the European Court of Justice’ (2000) 41(1) *Harvard International Law Journal* 62.

concerning subsidiarity. It will help to provide some specific examples of the problems with the way that the European Court of Justice has utilised (or rather, has failed to utilise) the principle. As noted above, this analysis will help to shed light on how any Australian reforms based on subsidiarity can be made so as to prevent the High Court from choosing a centralist path despite reforms to federalism based on aspects of subsidiarity.

The case law can be divided into two categories. In what I have described as ‘Category 1’, subsidiarity was not directly pleaded as a ground by which Community directives should be annulled. Instead, it was indirectly pleaded as peripheral to other grounds of review. In ‘Category 2’, subsidiarity was pleaded directly as a ground of review. However, none of these challenges on the ground of failing to comply with subsidiarity was successful. In ‘Category 3’, subsidiary considerations were referred to the European Court of Justice by national Courts, but again, any breach of subsidiarity was not found.

### ***A Category 1: Subsidiarity as an Indirect Consideration***

In the cases discussed in this section the principle of subsidiarity was raised indirectly, as part of other pleas made to the Court. To explain in detail how subsidiarity was considered in these cases, they will each be discussed in detail in this section.

The first case in which subsidiarity was raised as part of another substantive plea was the case of *United Kingdom v Council* (‘the *Working Time Case*’).<sup>29</sup> In this case, the United Kingdom of Britain and Northern Ireland (‘the UK and Ireland’) challenged a Council Directive, 93/104/EC, made pursuant to art 118a of the *Treaty Establishing the European Community* (‘EC’)<sup>30</sup> (now art 154 of the *TFEU*). Article 118a read as follows:

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<sup>29</sup> *United Kingdom v Council* (C-84/94) [1996] ECR I-5793. For a discussion of this case see Gabriël A Moens, ‘The Subsidiarity Principle and E.C. Directive 93/104’ (1997) 34 *Australia and World Affairs* 51.

<sup>30</sup> *Treaty Establishing the European Community*, opened for signature 7 February 1992, [1992] OJ C 224/6 (entered into force 1 November 1993) (‘EC’).

1. Member States shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers, and shall set as their objective the harmonisation of conditions in this area, while maintaining the improvements made.

2. In order to help achieve the objective laid down in the first paragraph, the Council, acting in accordance with the procedure referred to in Article 189c and after consulting the Economic and Social Committee, shall adopt by means of directives minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States.

Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium sized undertakings.

3. The provisions adopted pursuant to this article shall not prevent any Member State from maintaining or introducing more stringent measures for the protection of working conditions compatible with this Treaty.

The Directive in question provided for ‘minimum health and safety requirements for the organisation of working time’<sup>31</sup> including making it the responsibility of member states to ensure ‘minimum periods of daily rest, weekly rest and annual leave, as well as rest breaks and maximum weekly working time’.<sup>32</sup> The UK and Ireland argued that the Directive should be annulled because art 118a only supported health and safety in the actual work place (that is, physical working conditions at work) and not broader employment entitlements such as leave and working hours. There were four grounds of challenge. These were that the legal basis for the Directive was defective, that there had been a breach of proportionality, misuse of powers and that the Directive infringed procedural requirements (specifically, the requirement to disclose the Council’s reasoning behind its adoption).

Although subsidiarity was not one of these grounds, a subsidiarity argument was part of the challenge that the legal basis for the Directive was defective. Specifically, the

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<sup>31</sup> *United Kingdom v Council* (C-84/94) [1996] ECR I-5793, I-5796.

<sup>32</sup> *United Kingdom v Council* (C-84/94) [1996] ECR I-5793, I-5796.

UK and Ireland argued that art 118a should be interpreted in light of the principle of subsidiarity. They argued that art 118a, under which the Directive was made, did not allow for the ‘adoption of a directive in such wide and prescriptive terms as the contested directive, given that the extent and nature of legislative regulation of working time vary very widely between Member States.’<sup>33</sup> In deciding that the principle of subsidiarity had not been contravened, the Court reasoned as follows:

it should be noted that it is the responsibility of the Council, under Article 118a, to adopt minimum requirements so as to contribute, through harmonisation, to achieving the objective of raising the level of health and safety protection of workers which, in terms of Article 118a(1), is primarily the responsibility of the Member States. Once the Council has found that it is necessary to improve the existing level of protection as regards the health and safety of workers and to harmonise the conditions in this area while maintaining the improvements made, achievement of that objective through the imposition of minimum requirements necessarily presupposes Community-wide action, which otherwise, as in this case, leaves the enactment of detailed implementing provisions required largely to the Member States.<sup>34</sup>

In summary, the Court was saying that art 118a contemplated action at a Community level, with the implementation being left to member states and that the Directive was consistent with this.<sup>35</sup>

The Court’s attitude toward subsidiarity was displayed in its reasoning elsewhere in the judgment. For example, when considering the scope of art 118a, the Court adopted a broad interpretation, reminiscent of the centralist literal approach taken by the Australian High Court in the *Engineers* case.<sup>36</sup> This is evident from the following statement, made early in the decision, which set the scene for the Court’s dismissal of subsidiarity considerations later in the judgment:

There is nothing in the wording of Article 118a to indicate that the concepts of ‘working environment’, ‘safety’ and ‘health’ as used in that provision should, in the absence of other indications, be interpreted restrictively, and not as embracing all factors, physical or otherwise, capable of affecting the health and safety of the worker in his working environment, including in particular certain aspects of the organisation of working time. On

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<sup>33</sup> *United Kingdom v Council* (C-84/94) [1996] ECR I-5793, I-5808.

<sup>34</sup> *United Kingdom v Council* (C-84/94) [1996] ECR I-5793, I-5808–I-5809.

<sup>35</sup> *United Kingdom v Council* (C-84/94) [1996] ECR I-5793, I-5809.

<sup>36</sup> *Engineers* (1920) 28 CLR 129.

the contrary, the words ‘especially in the working environment’ militate in favour of a broad interpretation of the powers which Article 118a confers upon the Council for the protection of the health and safety of workers. Moreover, such an interpretation of the words ‘safety’ and ‘health’ derives support in particular from the preamble to the *Constitution* of the World Health Organisation to which all the Member States belong. Health is there defined as a state of complete physical, mental and social well-being that does not consist only in the absence of illness or infirmity.<sup>37</sup>

In summary, the Court is saying that the words of the *EC*, and therefore the powers of the Council, should be interpreted as broadly as possible, and should only be restricted by the express wording of art 118a. However, unlike *Engineers*, where the High Court rejected the use of extrinsic evidence such as the framers’ intentions as an interpretive tool, the European Court of Justice looked to external sources, namely the World Health Organization’s *Constitution*, to support this broad interpretation of the Council’s powers. Interestingly, the statement is followed by another statement two pages later, which is again reminiscent of *Engineers* literalism and specifically, the High Court’s elevation of the supremacy of Parliament. The Court stated that: ‘it is to be remembered that it is not the function of the Court to review the expediency of measures adopted by the legislature.’<sup>38</sup> Hence, the Court is showing a reluctance to question the judgment of the Council when enacting legislation.

The principle of subsidiarity was also considered by the European Court of Justice in the case of *Germany v Parliament and Council* (‘*Deposit Guarantee* case’).<sup>39</sup> Like the *Working Time* case, subsidiarity was not one of the grounds of challenge, but was discussed by the Court in its judgment. The German government challenged Directive 94/19/EC of the European Parliament and Council concerning deposit-guarantee schemes. The Directive required member states to implement official deposit guarantee schemes to protect those making a deposit at a credit institution, including those institutions that had their head offices based in other member states. Germany argued that the Directive should be annulled because it was adopted on the wrong legal basis and that the requirement to state reasons had been infringed. Alternately, Germany argued that parts of the Directive should be annulled, on several grounds, including proportionality.

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<sup>37</sup> *United Kingdom v Council* (C-84/94) [1996] ECR I-5793, I-5800.

<sup>38</sup> *United Kingdom v Council* (C-84/94) [1996] ECR I-5793, I-5802.

<sup>39</sup> *Germany v Parliament and Council* (C-233/94) [1997] ECR I-2405.

The first ground of challenge by the German government was that the Directive was adopted on the wrong legal basis. That is, that the treaty provision on which it was based, art 57(2) *EC* (now art 53 *TFEU*) which permitted the central regulation of banking, was not broad enough to justify the Directive which went beyond banking regulation into the realm of ‘increased protection for depositors’.<sup>40</sup> The German government argued that the Directive should have been based on another Article, art 235 of the *EC* (now art 352 *TFEU*), which required a unanimous vote in order to be adopted. Hence, as Germany had argued against the adoption of the Directive, it argued that the Directive had not been properly adopted. This ground was rejected by the Court which concluded that art 57(2) was the correct basis for the Directive.

Germany’s second argument was that the Directive should be annulled on the basis that it failed to state, in accordance with art 190 of the *EC* (now art 296 *TFEU*), the reasons on which it was based. It argued that as part of this requirement to state reasons, the reasons in the Directive should also state how it complied with the principle of subsidiarity and why the matter should be addressed at a Community level, rather than at a member state level. Importantly, and as noted above, subsidiarity was not a direct ground of challenge. The Court explained that ‘the German Government is not claiming that the Directive infringed the principle of subsidiarity, but only that the Community legislature did not set out the grounds to substantiate the compatibility of its actions with that principle.’<sup>41</sup> Whilst the Court found that there was the requirement for a ‘statement of reasons’, explaining why the measure was adopted, it was of the view that such a statement had already been given in the Directive. The Court stated:

In the present case, the Parliament and the Council stated in the second recital in the preamble to the Directive that ‘consideration should be given to the situation which might arise if deposits in a credit institution that has branches in other Member States became unavailable’ and that it was ‘indispensable to ensure a harmonised minimum level of deposit protection wherever deposits are located in the Community.’ This shows that, in the Community legislature’s view, the aim of its action could, because of the dimensions of the intended action, be best achieved at Community level. The same reasoning appears in the

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<sup>40</sup> *Germany v Parliament and Council* (C-233/94) [1997] ECR I-2405, I-2448.

<sup>41</sup> *Germany v Parliament and Council* (C-233/94) [1997] ECR I-2405, I-2452.

third recital, from which it is clear that the decision regarding the guarantee scheme which is competent in the event of the insolvency of a branch situated in a Member State other than that in which the credit institution has its head office has repercussions which are felt outside the borders of each Member State.

Furthermore, in the fifth recital the Parliament and the Council stated that the action taken by the Member States in response to the Commission's Recommendation has not fully achieved the desired result. The Community legislature therefore found that the objective of its action could not be sufficiently achieved by Member States.<sup>42</sup>

This general and non-specific reasoning by the Court shows its willingness to give latitude to the Parliament and Council. That is, the Court was willing to dispense with a direct statement of reasons, and to instead substitute the recitals for more specific reasons. As is evident from the final paragraph from the above quotation from the Court's judgment, with respect to subsidiarity, the requirement for a specific statement of reasons was dispensed with and compliance was instead implied by the Court. This suggests a perception by the Court that subsidiarity is a political principle best left to the Parliament and Council to decide upon, and a willingness to assume that they had done so.

An analysis of the case of *Germany v Commission*<sup>43</sup> also allows for some informative observations to be made about the operation of subsidiarity, or rather, the lack of effectiveness of subsidiarity as a substantive legal principle. In this case, Germany successfully challenged Directive 2003/87/EC which established a greenhouse emissions trading scheme in the European Union as a result of the European Union's implementation of its obligations under the Kyoto Protocol. The scheme required member states to obtain a permit before being able to emit greenhouse gases and each member state had to develop its own national allocation plan ('NAP') detailing their proposed emissions usage, in accordance with criteria set out in the Directive. If not used, these allowances could be traded to another member state with higher emissions which would otherwise exceed its allowance. Germany notified the Commission of its NAP. However, the Commission rejected Germany's NAP in Commission Decision C(2004) 2515/2, alleging that it was inconsistent with two of

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<sup>42</sup> *Germany v Parliament and Council* (C-233/94) [1997] ECR I-2405, I-2452–I-2453.

<sup>43</sup> *Germany v Commission* (Case T-374/04) [2007] ECR II-4431.

the criteria set out in the Directive and directing Germany to amend it. Germany challenged these aspects of the Commission's Decision.

One of Germany's arguments was that its NAP was not inconsistent with the criteria set out in the Directive, and that accordingly, the Commission's Decision amounted to an interference with Germany's ability as a member state to implement the Directive. The Court noted, in paragraph 78 of the judgment, that the third paragraph of art 249 *EC* (now the third paragraph of art 288 *TFEU*) provided that 'a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.'<sup>44</sup> The Court went on to state that where a directive does not specifically provide the 'form and methods' for achieving a particular result, the member states have the freedom to decide how best to implement it.<sup>45</sup> The Court then commented how the member states' freedom to implement directives at a national level was essential to ensuring that the principle of subsidiarity is respected. It stated:

It should be added that it is only by applying those principles that compliance with the principle of subsidiarity enshrined in the second paragraph of Article 5 EC can be ensured, a principle which binds the Community institutions in the exercise of their legislative functions and which is deemed to have been complied with in respect of the adoption of Directive 2003/87 ... According to that principle, in areas which do not fall within its exclusive competence the Community is to take action only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Accordingly, in a field, such as that of the environment, governed by Articles 174 EC to 176 EC, where the Community and the Member States share competence, the Community, that is to say the Commission in the present case, has the burden of proving the extent to which the powers of the Member State and, therefore, its freedom of action, are limited in light of the conditions set out in paragraph 78 above.<sup>46</sup>

As a starting point, the Court reasoned that the first question that should be considered was whether the Commission's Decision, that Germany had not complied with the Directive, was lawful.<sup>47</sup> After an extensive analysis of the Directive and

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<sup>44</sup> *Germany v Commission* (Case T-374/04) [2007] ECR II-4431, [78].

<sup>45</sup> *Germany v Commission* (Case T-374/04) [2007] ECR II-4431, [78].

<sup>46</sup> *Germany v Commission* (Case T-374/04) [2007] ECR II-4431, [79].

<sup>47</sup> *Germany v Commission* (Case T-374/04) [2007] ECR II-4431, [82].

Decision, using ‘literal, historical, contextual and teleological interpretation’, the Court concluded that the Commission had made an error of law when it decided that specific criterion in the Directive ‘reduced the Member States’ freedom of action as to the forms and methods for transposing the directive into national law...’.<sup>48</sup> Hence, subsidiarity was not a direct ground of appeal, nor was it considered in detail by the Court. Instead, the central question became whether the Commission had made an error of law. If the Commission had not made such an error, its Decision would have been valid, with any subsidiarity considerations being irrelevant. If the Commission had made an error of law, for example, by misinterpreting the Directive’s criterion when making the Decision, the Decision would have been unlawful on that basis, without reference to the principle of subsidiarity.

### ***B Category 2: Subsidiarity as a Substantive Legal Plea***

The next category of European Union case law saw subsidiarity escalate to a substantive legal plea in its own right, albeit unsuccessfully in each case. The first of these cases was *Germany v Parliament and Council* (‘*Tobacco Advertising case*’).<sup>49</sup> In this case, the principle of subsidiarity was pleaded, but not considered by the Court. In this case, Germany (with France, Finland and the United Kingdom intervening) brought an action to annul Directive 98/43/EC which sought to ban advertising and sponsorship of tobacco products in the European Union. There were seven grounds of appeal put forward by Germany, with one of these being a breach of proportionality and subsidiarity. However, the Court held in favour of Germany, deciding that the Directive should be annulled in its entirety on the basis that the Articles on which the Directive was based, arts 100a, 57(2) and 66 *EC*, (now arts 114, 53 and 62 *TFEU*) were not an appropriate legal basis for the Directive. As a consequence, the Court decided that it was unnecessary to consider the remaining grounds of appeal, including subsidiarity. However, when discussing art 100a, the Court made the following observation:

the measures referred to in Article 100a(1) of the Treaty are intended to improve the conditions for the establishing and functioning of the internal market. To construe that article as meaning that it vests in the Community legislature a general power to regulate the internal market would not only be contrary to the express wording of the provisions cited above but

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<sup>48</sup> *Germany v Commission* (Case T-374/04) [2007] ECR II-4431, [149].

<sup>49</sup> *Germany v Parliament and Council* (C-376/98) [2000] ECR I-8419.

would also be incompatible with the principle embodied in Article 3(b) of the EC Treaty (now Article 5 EC) that the powers of the Community are limited to those specifically conferred on it.<sup>50</sup>

Interestingly, this statement indicates an appreciation of the principle of subsidiarity and the importance of maintaining the delineation of power between the Community and member states.

Similarly to the *Tobacco Advertising* case, in *Netherlands v Parliament and Council* ('*Biotech Directive* case')<sup>51</sup> subsidiarity was one of many (specifically, six) grounds of appeal. However, in this case the Court specifically considered the ground of subsidiarity. Netherlands sought an annulment of Directive 98/44/EC which required member states to use their own patent laws to protect biotechnological inventions through patent laws. The Netherlands challenged the Directive because it was opposed to 'genetic manipulation involving animals and plants'.<sup>52</sup> It was supported by Italy and Norway who intervened in the proceedings.

One of the grounds of appeal raised by the Netherlands was that the Directive breached the principle of subsidiarity. Alternately, they argued that the reasons stated in the Directive did not adequately address subsidiarity.<sup>53</sup> The Court readily found that the Directive complied with the principle of subsidiarity, devoting only five paragraphs of the judgment to the issue. The Court stated:

The objective pursued by the Directive, to ensure smooth operation of the internal market by preventing or eliminating differences between the legislation and practice of the various Member States in the area of the protection of biotechnological inventions, could not be achieved by action taken by the Member States alone. As the scope of that protection has immediate effects on trade, and, accordingly, on intra-Community trade, it is clear that, given the scale and effects of the proposed action, the objective in question could be better achieved by the Community.<sup>54</sup>

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<sup>50</sup> *Germany v Parliament and Council* (C-376/98) [2000] ECR I-8419, I-8524.

<sup>51</sup> *Netherlands v Parliament and Council* (C-377/98) [2001] ECR I-7079.

<sup>52</sup> *Netherlands v Parliament and Council* (C-377/98) [2001] ECR I-7079, I-7152.

<sup>53</sup> *Netherlands v Parliament and Council* (C-377/98) [2001] ECR I-7079, I-7152, I-7159.

<sup>54</sup> *Netherlands v Parliament and Council* (C-377/98) [2001] ECR I-7079, I-7152, I-7159.

The Court went on to state that it was ‘implicit’ in the recitals of the Directive that subsidiarity had been complied with.<sup>55</sup> The Netherlands was similarly unsuccessful with its other pleas.

The principle of subsidiarity as a substantive plea was also considered by the Court of First Instance (Second Chamber) in *Chafiq Ayadi v Council*.<sup>56</sup> In this case, the applicant, Ayadi, argued that Council Regulation 881/2002, which resulted in Ireland (where he resided) and the United Kingdom freezing his bank accounts on the basis that he was ‘a person associated with Usama bin Laden’,<sup>57</sup> should be annulled. The Council had made the Regulation in order to implement several United Nations Resolutions.

One of the substantive pleas raised by Ayadi was that the Regulation infringed the principle of subsidiarity. This was because, he argued, the Charter of the United Nations gives sovereignty to its member states to decide whether to implement United Nations Security Council Resolutions,<sup>58</sup> whereas the Council Regulation made it mandatory for member states of the European Community to implement it. He argued that it should be left to the individual member states to decide whether or not, and exactly how to respond to a United Nations Security Council Resolution.<sup>59</sup>

The Court rejected this argument, stating that the relevant articles, 60 *EC* and 301 *EC* (now arts 75 and 215 *TFEU*) gave the Community the power to decide whether action at a Community level was required. The Court concluded that this would exclude the right of an individual to challenge the lawfulness of Community action on the basis of subsidiarity.<sup>60</sup>

In the alternative, the Court went on to state that even if the principle of subsidiarity did apply, ‘it is plain that the uniform implementation in the Member States of Security Council resolutions, which are binding on all members of the United Nations without distinction, can be better achieved at a Community level than at

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<sup>55</sup> *Netherlands v Parliament and Council* (C-377/98) [2001] ECR I-7079, I-7152, I-7160.

<sup>56</sup> *Chafiq Ayadi v Council* (Case T-253/02) [2006] ECR II-2139.

<sup>57</sup> *Chafiq Ayadi v Council* (Case T-253/02) [2006] ECR II-2139, [60].

<sup>58</sup> *Chafiq Ayadi v Council* (Case T-253/02) [2006] ECR II-2139, [93–94].

<sup>59</sup> *Chafiq Ayadi v Council* (Case T-253/02) [2006] ECR II-2139, [105].

<sup>60</sup> *Chafiq Ayadi v Council* (Case T-253/02) [2006] ECR II-2139, [110].

national level.’<sup>61</sup> Furthermore, as the Council had adopted ‘Common position 1999/727/CFSP concerning restrictive measures against the Taliban’,<sup>62</sup> which referred to the freezing of Taliban funds and financial resources in other countries, prior to making the Regulation, member states of the European Union had already shown an intention to comply with the United Nations Resolution.<sup>63</sup>

A substantially similar fact scenario arose in the case of *Leonid Minin v Commission*<sup>64</sup> in which an Israeli citizen, resident in Italy, challenged the freezing of his financial assets by the Italian authorities. His assets were frozen pursuant to the same articles, arts 60 *EC* and 301 *EC*, (now arts 75 and 215 *TFEU*) as in the case of *Chafiq Ayadi*, because he had previously been implicated in arms trafficking. The applicant, Minin, raised infringement of the principle of subsidiarity as a substantive plea, arguing that it was ‘central to this dispute.’<sup>65</sup> In rejecting this plea, which the Court noted was ‘a substantially identical plea’ to that made by Mr Ayadi,<sup>66</sup> the Court stated that, ‘even assuming that the principle finds application in circumstances such as those of this case, it is plain that the uniform implementation in the Member States of Security Council resolutions, which are binding on all members of the United Nations without distinction, can be better achieved at Community level than at national level.’<sup>67</sup>

Once again, subsidiarity was raised unsuccessfully as a substantive legal plea in *GlaxoSmithKline Services v Commission of the European Communities*.<sup>68</sup> In this case, GlaxoSmithKline, a large pharmaceutical company, challenged Decision 2001/791/EC adopted by the Commission, which declared it to have infringed art 81(1) *EC* (now art 101(1) *TFEU*). This Article prohibited any agreements that might be anti-competitive and therefore inhibit the common market. GlaxoSmithKline was deemed in the Decision to have infringed this provision by entering into an agreement with Spanish wholesalers which permitted two different pricing structures for pharmaceutical products. This was comprised of a lower price for pharmaceutical

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<sup>61</sup> *Chafiq Ayadi v Council* (Case T-253/02) [2006] ECR II-2139, [112].

<sup>62</sup> *Chafiq Ayadi v Council* (Case T-253/02) [2006] ECR II-2139, [13].

<sup>63</sup> *Chafiq Ayadi v Council* (Case T-253/02) [2006] ECR II-2139, [113].

<sup>64</sup> *Leonid Minin v Commission* (Case T-362/04) [2007] ECR II-2003.

<sup>65</sup> *Leonid Minin v Commission* (Case T-362/04) [2007] ECR II-2003, [84].

<sup>66</sup> *Leonid Minin v Commission* (Case T-362/04) [2007] ECR II-2003, [89].

<sup>67</sup> *Leonid Minin v Commission* (Case T-362/04) [2007] ECR II-2003, [89].

<sup>68</sup> *GlaxoSmithKline Services v Commission* (Case T-168/01) [2006] ECR II-2969.

products financed through the Spanish Health system, and a higher price for products where Spanish law did not regulate the prices. The Decision was adopted by the Commission after legal action was commenced by two Spanish trading associations and after complaints about the agreements were lodged with the Commission.

GlaxoSmithKline sought to annul the Decision. One of its legal pleas alleged a breach of the principle of subsidiarity. It argued that the inability to set two different pricing structures effectively meant that other member states would be forced to apply the Spanish prices, the result being an infringement of the principle of subsidiarity. However, the Court found that the principle of subsidiarity had not been infringed. The Court stated that:

where a series of objective factors of law or fact makes it possible to foresee with a sufficient degree of probability that such conduct may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, that conduct must be regarded as capable of affecting trade between Member States ... so that it is appropriate for the Community to take action, by reason of the scale and the effects of its action ...<sup>69</sup>

In summary, the Court decided that the Commission had acted properly in making the Decision because the agreement could affect trade between member states, and therefore, was best carried out at a Commission level, rather than a member state level. Therefore, the principle of subsidiarity had been complied with.

### ***C Category 3: Subsidiary Matters Referred by National Courts***

This final category of European Union case law concerns subsidiarity questions being referred to the European Court of Justice by a member state. Article 267 of the *TFEU* (formerly art 234 *EC*) provides that if a question arises in a court or tribunal of a member state regarding ‘the interpretation of Treaties’ or ‘the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union’ which it cannot give judgment without resolving, the questions may be referred to the European Court of Justice by the court or tribunal of the member state.

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<sup>69</sup> *GlaxoSmithKline Services v Commission* (Case T-168/01) [2006] ECR II-2969, [201].

In the joined case of *Hilmar Kellinghusen v Amt für Land-und Wasserwirtschaft Kiel* ('*Hilmar Kellinghusen case*')<sup>70</sup> the Court was asked to answer several questions referred to it by the German Verwaltungsgericht. This was in response to proceedings being commenced by two beef farmers, Kellinghusen and Ketelsen, who contested the German Office for Agriculture and Water deduction of administrative fees for processing their applications for subsidies. The subsidies were paid pursuant to art 15(3) of Council Regulation No 1765/92 to support specific agricultural producers and art 30a of Council Regulation 2066/92 which established premiums paid to producers of beef and veal. One of the main questions referred to the Court was whether the Articles allowed member states to charge administrative fees, and if so, whether, inter alia, this practice infringed the principle of subsidiarity. Although the Court held that the Articles did not allow for member states to charge administrative fees because their wording required the subsidies to be paid 'in full' and 'in their entirety', it found that the principle of subsidiarity had not been infringed because 'the second paragraph of Article 3b of the Treaty was not yet in force when Regulations No 1765/92 and No 2066/92 were adopted and that provision cannot have retroactive effect.'<sup>71</sup> More detail about the principle of subsidiarity is given in the *Opinion of Mr Advocate-General Jacobs*, relied upon by the Court in reaching its decision, who stated that:

The Council and the Commission argue that the principle of subsidiarity is inapplicable since the Regulations were adopted in 1992 and their validity can thus not be affected by subsequent modifications to the Treaty (since Article 3b took effect on 1 November 1993 by virtue of the entry into force of the Treaty on European Union). They also contend that the principle of subsidiarity does not apply in this area, in which, they argue, the Community has exclusive competence. In my view it is not even necessary to consider those arguments since it is clear that the Regulations are in any event in accordance with the principle of subsidiarity. As the German government emphasises, the Community has broad competences in the field of agriculture, the Regulations were adopted in the framework and within the limits of those competences, and the objective of the prohibition of charging administrative fees, which is to ensure the uniform implementation of the system of compensatory payments, cannot be achieved by action at national level.<sup>72</sup>

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<sup>70</sup> *Hilmar Kellinghusen v Amt für Land-und Wasserwirtschaft Kiel* (Joined cases C-36 & 37/97) [1998] ECR I-6-337.

<sup>71</sup> *Hilmar Kellinghusen v Amt für Land-und Wasserwirtschaft Kiel* (Joined cases C-36 & 37/97) [1998] ECR I-6-337, [35]. Article 3(b) is now TEU art 5(3).

<sup>72</sup> *Opinion of Mr Advocate-General Jacobs* [1998] ECR I-06337 (28 May 1998), [27].

This statement from the Advocate-General's opinion provides a useful insight into the ineffectiveness of the principle of subsidiarity as a legal principle. It highlights that the main question is whether there is an exclusive Community competence, or one that has been exercised at a Community level in the case of a shared competence. If this is the case, then subsidiarity is deemed to have been satisfied.

Compliance with the principle of subsidiarity was also considered in *The Queen v Secretary of State for Health, Ex parte British American Tobacco Investments Ltd and Imperial Tobacco Ltd* ('the *Second Tobacco case*').<sup>73</sup> In this case two tobacco companies brought proceedings in the Queen's Bench Division of the High Court of Justice (England and Wales) ('Queen's Bench'), who referred the matter to the European Court of Justice. The Court was asked to determine 'two questions on the validity and interpretation of Directive 2001/37/E of the European Parliament and of the Council',<sup>74</sup> specifically, "'the intention and/or obligation" of the United Kingdom Government to transpose the Directive into national law.'<sup>75</sup> It is relevant to note that national courts of member states generally are given jurisdiction under art 267 of the *TFEU* (art 234 *EC* at the time of this case) to make 'preliminary rulings' about 'the interpretation of treaties' and 'the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.'<sup>76</sup> If the national court thinks it is required in order for them to give judgment, or if there is no judicial remedy under national law, they must refer the matter to the European Court of Justice 'without delay'.<sup>77</sup>

The Directive sought to amend two previous Directives regarding the 'manufacture, presentation and sale of tobacco products which impede the functioning of the internal market'.<sup>78</sup> In other words, it sought to achieve consistency throughout the

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<sup>73</sup> *The Queen v Secretary of State for Health, Ex parte British American Tobacco Investments Ltd and Imperial Tobacco Ltd* (C-491/01) [2002] ECR I-11453.

<sup>74</sup> *The Queen v Secretary of State for Health, Ex parte British American Tobacco Investments Ltd and Imperial Tobacco Ltd* (C-491/01) [2002] ECR I-11453, I-11554.

<sup>75</sup> *The Queen v Secretary of State for Health, Ex parte British American Tobacco Investments Ltd and Imperial Tobacco Ltd* (C-491/01) [2002] ECR I-11453, I-11555.

<sup>76</sup> *TFEU* art 267.

<sup>77</sup> *TFEU* art 267.

<sup>78</sup> *The Queen v Secretary of State for Health, Ex parte British American Tobacco Investments Ltd and Imperial Tobacco Ltd* (C-491/01) [2002] ECR I-11453, I-11556.

various member states in areas such as tobacco labelling, warnings and levels of tar, monoxide and nicotine.

One of the questions that the Court was asked to consider was whether the Directive was invalid because the principle of subsidiarity had been infringed. In its consideration of this ground of appeal, the Court pointed out that the principle did not apply to areas of exclusive competence, such as the internal market.<sup>79</sup> The Court noted here that aspects of this competence were not exclusive, and the exclusive competence was limited to ‘improving the conditions for its [the internal market’s] establishment and functioning, by eliminating barriers to the free movement of goods and the freedom to provide services or by removing distortions of competition’.<sup>80</sup> Thus, as the competence was not entirely exclusive, the Court went on to consider ‘whether the objective of the proposed action could be better achieved at Community level.’<sup>81</sup> The Court readily concluded (in five short paragraphs), that the objective of the Directive, ‘to eliminate the barriers raised by the differences which still exist between the member states’ laws, regulations and administrative provisions on the manufacture, presentation and sale of tobacco products, while ensuring a high level of health protection...’<sup>82</sup> was best achieved by regulation at a Community level. They stated that this was best illustrated by the variations in national laws across the various member states.<sup>83</sup>

Subsidiarity as a substantive plea was also made in the *Roaming Regulation* case.<sup>84</sup> The proceedings were commenced in the High Court of Justice of England and Wales, who referred the matter to the European Court of Justice. The initial challenge was commenced by several telecommunications companies, including Vodafone, which had telecommunications networks throughout the European Union.

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<sup>79</sup> *The Queen v Secretary of State for Health, Ex parte British American Tobacco Investments Ltd and Imperial Tobacco Ltd* (C-491/01) [2002] ECR I-11453, I-11604.

<sup>80</sup> *The Queen v Secretary of State for Health, Ex parte British American Tobacco Investments Ltd and Imperial Tobacco Ltd* (C-491/01) [2002] ECR I-11453, I-11606.

<sup>81</sup> *The Queen v Secretary of State for Health, Ex parte British American Tobacco Investments Ltd and Imperial Tobacco Ltd* (C-491/01) [2002] ECR I-11453, I-11606.

<sup>82</sup> *The Queen v Secretary of State for Health, Ex parte British American Tobacco Investments Ltd and Imperial Tobacco Ltd* (C-491/01) [2002] ECR I-11453, I-11606.

<sup>83</sup> *The Queen v Secretary of State for Health, Ex parte British American Tobacco Investments Ltd and Imperial Tobacco Ltd* (C-491/01) [2002] ECR I-11453, I-11606.

<sup>84</sup> *Vodafone Ltd, Telefónica O2 Europe plc, T-Mobile International AG, Orange Personal Communication Services Ltd v Secretary of State for Business, Enterprise and Regulatory Reform* (Case C-58/08) [2010] ECR I-04999 (‘*Roaming Regulation* case’).

They contested the validity of the *Mobile Roaming (European Communities) Regulations 2007* (UK), which sought to implement European Union Regulation 717/2007 ('the Regulation'). The Regulation concerned roaming on mobile telephone networks throughout the European Union and capped the charges that telecommunications companies could charge for roaming services between member states.

The Regulation was part of a 'Regulatory Framework' adopted by the European Union in accordance with art 95 *TEU*<sup>85</sup> which states, 'In the case of transport within the Union, discrimination which takes the form of carriers charging different rates and imposing different conditions for the carriage of the same goods over the same transport links on grounds of the country of origin or of destination of the goods in question shall be prohibited'. The Court noted that it had previously held that subsidiarity applies to art 95 only to the extent that the Community is not given exclusive competence to regulate the internal market.<sup>86</sup> They reasoned that the Community had adopted the Regulation in order to achieve 'a common approach, in order in particular to contribute to the smooth functioning of the internal market, allowing those operators to act within a single coherent regulatory framework'.<sup>87</sup> It was therefore necessary for there to be regulation at a Community level in order to achieve these objectives:

As is clear from recital 14 in the preamble to the regulation, the interdependence of retail and wholesale charges for roaming services is considerable, so that any measure seeking to reduce retail charges alone without affecting the level of costs for the wholesale supply of Community-wide roaming services would have been liable to disrupt the smooth functioning of the Community-wide roaming market. For that reason, the Community legislature decided that any action would require a joint approach at the level of both wholesale charges and

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<sup>85</sup> *Vodafone Ltd, Telefónica O2 Europe plc, T-Mobile International AG, Orange Personal Communication Services Ltd v Secretary of State for Business, Enterprise and Regulatory Reform* (Case C-58/08) [2010] ECR I-04999, [3].

<sup>86</sup> *Vodafone Ltd, Telefónica O2 Europe plc, T-Mobile International AG, Orange Personal Communication Services Ltd v Secretary of State for Business, Enterprise and Regulatory Reform* (Case C-58/08) [2010] ECR I-04999, [75].

<sup>87</sup> *Vodafone Ltd, Telefónica O2 Europe plc, T-Mobile International AG, Orange Personal Communication Services Ltd v Secretary of State for Business, Enterprise and Regulatory Reform* (Case C-58/08) [2010] ECR I-04999, [76].

retail charges, in order to contribute to the smooth functioning of the internal market in those services.<sup>88</sup>

The Court went on to conclude that the Community had made the correct decision, and in other words had complied with the principle of subsidiarity, by regulating the matter at a central level:

That interdependence means that the Community legislature could legitimately take the view that it had to intervene at the level of retail charges as well. Thus, by reason of the effects of the common approach laid down in Regulation No 71/2007, the objective pursued by that regulation could be best achieved at Community level.<sup>89</sup>

This reasoning marks a significant progression from the previous case law in that the Court has indicated a willingness to make the somewhat political assessment as to whether the matter is best resolved at a central or local level. It is plausible that the reasoning required to reach this conclusion was not complex — in other words, the nature of the dispute readily suggested that central regulation was the most logical way to give effect to art 95. However, it still shows that a Court is entirely capable of making such an assessment, notwithstanding having to take into account commercial and political considerations.

A contemplation of the above case law, and of the procedural aspects of subsidiarity outlined in the previous chapters, reveals that the main success of subsidiarity in the European Union is as a procedural principle, rather than as a legal one. Although subsidiarity has not had success at a judicial level, it would seem to be the ‘icing on the cake’ with most subsidiarity issues being resolved at a pre-legislative and legislative level. Even though the recent *Roaming Regulation* case indicates that the Court is becoming more willing to undertake such an analysis, there is certainly some need for reform of the principle at a European Court of Justice level, even if this is to clarify that it is appropriate and sufficiently ‘judicial’ for the Court to balance competing interests that can sometimes be viewed as political in nature.

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<sup>88</sup> *Vodafone Ltd, Telefónica O2 Europe plc, T-Mobile International AG, Orange Personal Communication Services Ltd v Secretary of State for Business, Enterprise and Regulatory Reform* (Case C-58/08) [2010] ECR I-04999, [77].

<sup>89</sup> *Vodafone Ltd, Telefónica O2 Europe plc, T-Mobile International AG, Orange Personal Communication Services Ltd v Secretary of State for Business, Enterprise and Regulatory Reform* (Case C-58/08) [2010] ECR I-04999, [78].

It follows that, in a consideration of whether subsidiarity can enhance Australian federalism, there are some logical changes that Australia can make on the basis of the European Union's experience of subsidiarity to restore the federal balance. Given the Australian High Court's propensity toward centralisation, procedural safeguards to protect the federal balance prior to legislation being enacted could be effectively employed in Australia, thus ensuring that the federal balance was not solely in the hands of the High Court. However, given the importance of the High Court in the Australian constitutional system, it is also necessary to consider reforms that safeguard against its propensity to centralisation. These will be outlined in the following section.

### **III IMPLEMENTING SUBSIDIARITY IN AUSTRALIA TO ENHANCE FEDERALISM**

This part of the chapter will bring together recommendations based on the analysis of European Union case law in this chapter, as well as recommendations based on the procedural operation of subsidiarity in the European Union discussed in Chapters 3 and 4, in order to recommend how the principle of subsidiarity could assist in restoring the federal balance in Australia.

This part will commence with a discussion of suggested legal reforms, including constitutional reforms and reforms to the process of appointment of High Court Justices. In doing so, the lack of effectiveness of subsidiarity as a judicial safeguard in the European Union, as demonstrated by the cases discussed earlier in this chapter, will be taken into account, and accordingly, reforms will be suggested in order to make federalism translate to a more effective legal principle in Australia.

Finally, this part of the chapter will conclude by suggesting procedural reforms that Australia could adopt, based on the European Union model. It will be argued that Australia could adopt procedural safeguards similar to those that protect subsidiarity in the European Union. These would be consistent with the spirit of co-operative federalism and are substantially easier to implement than the legal reforms because they can be made without a referendum.

Overall, it will be argued that Australia needs to re-introduce federalism as a central constitutional principle. Respect and regard for federalism must be promoted and entrenched by making it both a procedural and a substantive legal (constitutional) concept.

### *A Constitutional Reforms*

This section will outline constitutional reforms, followed by procedural reforms that are recommended to promote and restore the federal balance.

At the outset, it should be noted that constitutional reform can only be undertaken following a referendum process, pursuant to s 128 of the Commonwealth *Constitution*. The referendum procedure to amend the Australian *Constitution* was discussed in some detail in Chapter 4. However, it is noted again here because it raises challenges for any proposed reforms that aim to restore power to the states.

This is firstly because s 128 provides that any constitutional change must be initiated in the Federal Parliament in the form of a Bill that must be passed by an absolute majority of both houses of the Federal Parliament. This precludes a state or a group such as COAG from initiating the process of reform. In addition, it is unlikely that the Federal Parliament would wish to give away the powers that it has gradually won from the states since *Engineers* by initiating the process of reform itself.

Secondly, the Act proposing the constitutional reform must then be put to the Australian people at a referendum.<sup>90</sup> It must be approved by a majority of states and a majority of voters overall (in both states and territories). As mentioned in Chapter 7, the Australian people have a tendency to vote ‘no’ to any constitutional reforms with only eight proposals out of 44 having been approved by the Australian people.<sup>91</sup>

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<sup>90</sup> For a discussion of the exclusion of the states from the referenda process, see Sarah Murray, ‘State Initiation of Section 128 Referenda’ in Paul Kildea, Andrew Lynch and George Williams (eds), *Tomorrow’s Federation: Reforming Australian Government* (Federation Press, 2012) 332.

<sup>91</sup> Gabriel A Moens and John Trone, *Lumb and Moens’ The Constitution of the Commonwealth of Australia Annotated* (LexisNexis Butterworths, 7<sup>th</sup> ed, 2007) 448.

These are significant obstacles to overcome before any constitutional change can be effected.<sup>92</sup>

### *1 Federalism as an Express Constitutional Principle*

As demonstrated in Chapter 2, Australia's *Constitution* is a federal document in the true sense of the word. That is, when one looks at federal theory and the *Constitution* as drafted, the states play an equal, if not prevailing, role in the federation. If one looks at the intention of the framers, centralisation was most certainly *not* the order of the day. Unfortunately a states-centred federalism was so obvious to the framers that they did not include a definitive statement about it in the *Constitution*, and no reference was made to Commonwealth powers, having to be interpreted with a view to maintaining the federal balance or to the reserved powers, or the implied intergovernmental immunities doctrines recognised and applied by the early High Court. This left too much interpretive discretion in the hands of the High Court, particularly as the decades since federation passed and as those High Court Justices involved in the drafting of the *Constitution* were gradually replaced by new Justices who were not involved in its drafting, nor committed to its federal ideals. As demonstrated in Chapter 5, the High Court's interpretation of the *Constitution* has gradually shifted in favour of centralisation. This raises the question as to exactly how the importance of federalism and its centrality to Australia's constitutional system of government should be acknowledged in the *Constitution*.

It is argued that an express statement in the *Constitution* is required to restore the federal balance and in order to cement and reinforce federalism's importance as a constitutional principle. This express statement could be adapted from the wording of art 5(3) of the *TEU*. The advantage of such a statement, based on art 5(3), is that it would reinforce key characteristics of federalism such as decentralisation, the limitation of central powers, the autonomy of the states, a federal balance between state and federal levels of governance and consequently, greater empowerment of the individual and regional governance closer to the individual wherever possible.

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<sup>92</sup> As noted in Chapter 4, see generally George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (University of New South Wales Press, 2010) who discuss the history of the referendum and the fact that strong bipartisan support is required for a referendum to succeed.

It is therefore suggested that a principle of federalism could be reinforced in the Commonwealth *Constitution* by inserting the following provision, based closely upon art 5(3):

Under the principle of *federalism*, in areas which do not fall within its exclusive *powers*, the *Commonwealth* shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the *States*, but can rather, by reason of the scale or effects of the proposed action, be better achieved at *the Commonwealth* level.

The institutions of the *Commonwealth* including the *High Court of Australia*, the *Federal Court*, such other Courts that *Parliament* creates and invests with federal jurisdiction shall apply the principle of *federalism* as laid down in *this Constitution*.<sup>93</sup>

As well as emphasising the key characteristics of federalism, such a provision would emphasise the importance of restraint by the Commonwealth government, and yet provide justification for central action to be taken when necessary. By imposing a corresponding responsibility on the states to ensure compliance with federalism, the statement would encourage dialogue between the various levels of government and therefore would serve to promote and enhance co-operative federalism.

Importantly, the above provision expressly notes the role of the High Court of Australia and other federal courts as being responsible for, and subject to, federalism. This is an essential part of ensuring that federalism is regarded as a legal and interpretive principle that the High Court must apply and adhere to. This would be in contrast to the political principle that subsidiarity has become in the hands of the European Court of Justice, rendering it an ineffective means of judicial review. The

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<sup>93</sup> I have added emphasis to indicate where I have changed the wording of *TEU* art 5(3). The original wording of this Article is as follows:

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

need for further clear and specific direction to the High Court and other federal courts is discussed in the next section of this chapter.

## *2 Specific Direction to the High Court Regarding Federalism and Constitutional Interpretation*

As noted in the preceding section, given that there is no direction in the *Constitution* as to how it should be interpreted, the *Constitution* should be amended to include a direction to the High Court about its role with respect to federalism and with specific direction about how the *Constitution* should be interpreted. Therefore, in addition to the amended version of art 5(3) suggested above, further express clarification is required to direct the High Court and other federal courts to apply federalism as a principle of constitutional interpretation and limitation.

For example, s 71 of the *Constitution*, which vests the judicial power of the Commonwealth, could be amended to confirm the High Court's role as the guardian of the federal balance. The proposed s 71, with the suggested amendment highlighted, would read as follows:

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes. *The High Court shall be the guardian of federalism, and is responsible for maintaining the equality of the federal balance of power between the Commonwealth and the States.*

Further direction should be given to the High Court in ch III of the *Constitution* to apply federalism as an interpretive principle to limit federal power. It is suggested that a further provision could be inserted after the provisions in ch III that define the jurisdiction of the High Court, specifically after s 78. The suggested provision could read as follows:

78B The High Court of Australia must interpret this *Constitution* in a manner that is consistent with its role as the guardian of Australian federalism, and must consider and apply the following relevant considerations:

- (i) The intentions of the framers of the *Constitution*;

- (ii) The powers reserved to the States pursuant to section 107;
- (iii) The maintenance of fiscal and legislative equality between the Commonwealth and the States;
- (iv) The autonomy and sovereignty of the States;
- (v) If a constitutional provision has two or more interpretations, the interpretation that is the most consistent with maintaining the equality of the federal balance of power between the Commonwealth and the States must be applied.

Such a provision would cement the principle of federalism as a legal principle, and would therefore prevail over any judicial reluctance to apply it, such as that demonstrated by the European Court of Justice with respect to the principle of subsidiarity.

### *3 Advocate-General to the High Court of Australia*

Another measure that would serve to enhance Australian federalism would be for the *Constitution* to create the role of an independent and politically neutral Advocate-General to provide opinions to the High Court, on issues of federalism or the federal balance in each constitutional case that the Court hears.

Article 252 of the *TFEU* provides for up to eight Advocates-General to ‘assist’ the European Court of Justice. It provides that the Advocate-General can make ‘reasoned submissions’ in open court proceedings, ‘acting with complete impartiality and independence.’<sup>94</sup> Unlike Justices in the High Court of Australia, Judges and Advocates-General do not have life tenure, and are appointed for a three-year term.<sup>95</sup>

Although there is no specific reference in the European Union Treaties to the Advocate-Generals acting as guardians of subsidiarity, it is certainly a consideration that Advocates-General would make submissions on, if relevant to the case. The Advocate-General is not restricted or limited by the parties’ submissions and can address the court on any issues he or she considers relevant to the case, regardless of whether they have been raised by the parties. This could include subsidiarity.

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<sup>94</sup> *TFEU* art 252.

<sup>95</sup> *TFEU* art 253.

Like the European Court of Justice, which is assisted by eight Advocates-General, it is recommended that six Advocates-General, one for each state, could be appointed to the High Court, thus ensuring equality throughout the states of the appointments. In addition, like the European Union, only one Advocate-General would make submissions in any one case. However, unlike the European Union where the Advocate-General has a broad mandate to make submissions on the case as a whole, the role of the Australian Advocates-General could be limited to making submissions on issues of federalism and the federal balance arising from constitutional cases before the High Court. The submissions of the Advocate-General could have their basis in those set out in s 78B above, perhaps by inserting a new s 78C, based upon art 252 of the *TFEU* as follows:

78C The High Court of Australia shall be assisted by six Advocates-General. Each State Executive shall recommend the appointment of an Advocate-General from its State. If the appointment is approved by no less than two other States, the Advocate-General shall be appointed by the Governor-General for a term of five years.

It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions with respect to issues of federalism and the federal balance of power between the Commonwealth and the States in cases arising under this *Constitution* or involving its interpretation.

In making reasoned submissions, the Advocate-General must address the considerations set out in section 78B(i)-(v).

An additional paragraph should also be added to s 78B to require the High Court to take into account the Advocate-General's submissions in their deliberations. Section 78B could therefore be redrafted to add an additional paragraph as follows:

78B The High Court of Australia must interpret this *Constitution* in a manner that is consistent with its role as the guardian of Australian federalism, and must consider and apply the following relevant considerations:

- (i) The intentions of the framers of the *Constitution*;
- (ii) The powers reserved to the States pursuant to section 107;
- (iii) The maintenance of fiscal and legislative equality between the Commonwealth and the States;
- (iv) The autonomy and sovereignty of the States;

- (v) The opinion of the Advocate-General in the matter under consideration;
- (vi) If a section or placitum of this *Constitution* has two or more interpretations, the interpretation that is the most consistent with maintaining the equality of the federal balance of power between the Commonwealth and the States must be applied.

An Advocate-General, empowered to make submissions on issues of federalism, would serve to further emphasise and highlight to the High Court any federal issues and implications for the balance of power between the state and federal governments that it should take into consideration in its interpretation of the *Constitution*, and further emphasise the importance of federalism as a limiting principle on the power of the Commonwealth.

It is acknowledged that, instead of taking the form of a constitutional amendment, it would be possible for the position of Advocate-General to be created in the *High Court of Australia Act 1979* (Cth). However, constitutional amendment has been recommended because it provides a number of advantages. Firstly, embodying the role in the *Constitution* means that a Commonwealth government that is hostile to any federal reforms cannot amend it. Secondly, embodying the reforms in the *Constitution* is the only effective means to ensure that the High Court takes the Advocate-General's opinion into account, whereas it is not obliged to take into account a direction from Parliament as to how it should interpret the *Constitution* in the form of legislation. Thirdly, making provision for an Advocate-General in the *Constitution* is a further acknowledgment of the importance of federalism as a constitutional principle.

#### *4 Redistribution of the Federal Balance*

Constitutional reforms are also required in order to redistribute the current fiscal federal imbalance, for example, by way of the Commonwealth transferring some of its taxing powers to the states.

In the European Union, despite the existence of a common currency (the Euro) in the Eurozone,<sup>96</sup> the member states are responsible for raising their own taxes, and accordingly, taxation is not included in the list of either shared or concurrent Union

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<sup>96</sup> The 'Eurozone' refers to the 17 Member States that have adopted the Euro as their currency.

competences.<sup>97</sup> However, in the Australian federation, taxation is a concurrent power,<sup>98</sup> with the exception of excise duties and bounties which s 90 of the Commonwealth *Constitution* makes exclusive to the Commonwealth. Until World War II, Australians paid income tax to their state governments, who distributed the proceeds between both the state and the Commonwealth. However, in 1942 the Commonwealth passed several pieces of legislation, under the guise of being for defence purposes, which centralised the collection and distribution of income tax.<sup>99</sup> This centralised regime withstood two High Court challenges from states in the *First* and *Second Uniform Tax* cases,<sup>100</sup> thus cementing the centralisation of income tax and ensuring the states' reliance on grants from the Commonwealth. Blackshield and Williams cite Alfred Deakin who foretold future detriment to the states when he said that they would be 'legally free, but financially bound to the chariot wheels of Central Government'.<sup>101</sup>

It was also noted by the Commonwealth Grants Commission in its *Report on GST Revenue Sharing Relativities — 2011 Update* that at the time of federation customs and excise duties were the largest source of revenue and were therefore made exclusive to the Commonwealth in the *Constitution*.<sup>102</sup> However, post-*Engineers*, the Commonwealth has gradually encroached on the revenue-raising capacity of the states, resulting in all major taxes now being levied by the Commonwealth including individual and company income tax, sales taxes including the Goods and Services Tax, as well as customs and excise duties.<sup>103</sup> In 1901–1902 the Commonwealth collected 41% of the nation's revenue and the states collected 59%, whereas in

<sup>97</sup> See *TFEU* art 3 and 4.

<sup>98</sup> See *Constitution* s 51(ii).

<sup>99</sup> *Income Tax Act 1942* (Cth), *States Grants (Income Tax Reimbursement) Act 1942* (Cth), *Income Tax (War-time Arrangements) Act 1942* (Cth) and the *Income Tax Assessment Act 1942* (Cth). For a discussion of the centralisation of income tax in the Australian Federation, see Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 4<sup>th</sup> ed, 2006) 1122–1123.

<sup>100</sup> *South Australia v Commonwealth* (1942) 65 CLR 373 ('*First Uniform Tax case*') and *Victoria v Commonwealth* (1957) 99 CLR 575.

<sup>101</sup> Alfred Deakin, *Federated Australia: Selections from Letters to the Morning Post 1900–1910* (J A La Nauze (ed), Melbourne University Press, 1968) cited in Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 4<sup>th</sup> ed, 2006) 1122.

<sup>102</sup> Commonwealth Grants Commission, *Report on GST Revenue Sharing Relativities — 2011 Update* (2011) <[http://www.cgc.gov.au/data/assets/pdf\\_file/0005/21758/2011\\_Update\\_final\\_report.pdf](http://www.cgc.gov.au/data/assets/pdf_file/0005/21758/2011_Update_final_report.pdf)> 25.

<sup>103</sup> Commonwealth Grants Commission, *Report on GST Revenue Sharing Relativities — 2011 Update* (2011) <[http://www.cgc.gov.au/data/assets/pdf\\_file/0005/21758/2011\\_Update\\_final\\_report.pdf](http://www.cgc.gov.au/data/assets/pdf_file/0005/21758/2011_Update_final_report.pdf)> 25.

2009–2010, the states collected 25% and the Commonwealth 75% of the nation’s revenue.<sup>104</sup>

This gradual encroachment has resulted in an increased reliance by the states on revenue from the Commonwealth in order to survive. In 2009–10 approximately 55% of these payments were in the form of specific purpose grants with conditions, and the remaining 45% were ‘general revenue funds’ without conditions.<sup>105</sup> Given that more than half of the funding the states receive comes with conditions attached which are dictated by the Commonwealth, a referral of some taxation powers from the Commonwealth to the states would be more consistent with the autonomy and sovereignty of the states. This was previously done in 1971–1972 when the Commonwealth referred its ability to levy payroll tax to the states.<sup>106</sup>

It should be noted that at the time of writing this thesis, the GST Distribution Review Panel, comprised of The Hon Nick Greiner, The Hon John Brumby and Mr Bruce Carter, has not handed down its final report (due August to September 2012).<sup>107</sup> In short, the Panel is meant to consider whether the horizontal fiscal equalisation method of distributing GST revenue between the states and territories could be improved. The Panel will proceed on the basis that horizontal fiscal equalisation should still be applied but will focus on any improvements.<sup>108</sup> It initially appeared that the Panel’s findings may not be what the Commonwealth anticipated. This was because of comments by Nick Greiner that he had no wish to penalise the states, as was suggested by the Commonwealth government, for raising state mining royalties in order to reduce the revenue that the Commonwealth will receive from the

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<sup>104</sup> Commonwealth Grants Commission, *Report on GST Revenue Sharing Relativities — 2011 Update* (2011) <[http://www.cgc.gov.au/data/assets/pdf\\_file/0005/21758/2011\\_Update\\_final\\_report.pdf](http://www.cgc.gov.au/data/assets/pdf_file/0005/21758/2011_Update_final_report.pdf)> 25.

<sup>105</sup> Commonwealth Grants Commission, *Report on GST Revenue Sharing Relativities — 2011 Update* (2011) <[http://www.cgc.gov.au/data/assets/pdf\\_file/0005/21758/2011\\_Update\\_final\\_report.pdf](http://www.cgc.gov.au/data/assets/pdf_file/0005/21758/2011_Update_final_report.pdf)> 27.

<sup>106</sup> Commonwealth Grants Commission, *Report on GST Revenue Sharing Relativities — 2011 Update* (2011) <[http://www.cgc.gov.au/data/assets/pdf\\_file/0005/21758/2011\\_Update\\_final\\_report.pdf](http://www.cgc.gov.au/data/assets/pdf_file/0005/21758/2011_Update_final_report.pdf)> 26.

<sup>107</sup> GST Distribution Review, *The Review* (2011) <<http://www.gstdistributionreview.gov.au/content/Content.aspx?doc=review.htm>>.

<sup>108</sup> GST Distribution Review, *Issues Paper* (2011) <<http://www.gstdistributionreview.gov.au/content/issuespaper/downloads/IssuesPaper.pdf>> 1.

proposed Mining Tax.<sup>109</sup> The Panel's interim report, handed down in March 2012, states that horizontal fiscal equalisation will remain the basis for the distribution of GST revenue to the states, but anticipates that reforms will be required to make it more understandable and transparent. Significantly, the report also notes that an increase in a state's share of GST revenue means that another state's share will decrease. The interim report also highlights the need for greater 'Commonwealth/State fiscal cooperation'.<sup>110</sup> This latter statement is arguably foreshadowing the difficulty with any future amendments to horizontal fiscal equalisation being acceptable to all states and territories, and is perhaps foreshadowing the need for some states, such as Western Australia, to accept a significantly lower distribution than other states and territories, despite their substantial contribution to the Australian economy. In summary, it seems that despite the Review, from the perspective of states such as Western Australia, the ultimate recommendations made by the Panel are unlikely to be anywhere near significant enough to restore the fiscal federal balance to the states.

In addition, although the terms of reference state that the federal Treasurer will bring the Panel's final report to the attention of COAG before making a final decision regarding the distribution of GST revenue,<sup>111</sup> there is no guarantee that the Commonwealth government will implement its recommendations. In fact, despite the Review being underway, the Commonwealth has recently announced that it is drastically reducing Western Australia's portion of GST revenue for 2012–13 by approximately \$600 million.<sup>112</sup> In his speech at the opening of the Western Australian Parliament on 21 February 2012, several days prior to this announcement, Premier Colin Barnett highlighted the need for urgent fiscal reforms and the frustration of the State at the need to rely heavily on Commonwealth funding. He stated:

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<sup>109</sup> David Uren, 'Greiner Hits Out at GST Penalties for Royalty Hikes', *The Australian* (Sydney), 22 November 2011 <<http://www.theaustralian.com.au/national-affairs/greiner-hits-out-at-gst-penalties-for-royalty-hikes/story-fn59niix-1226201821309>>.

<sup>110</sup> GST Distribution Review, *Interim Report* (2012) <<http://www.gstdistributionreview.gov.au/content/Content.aspx?doc=reports.htm>> page v.

<sup>111</sup> GST Distribution Review, *Terms of Reference* (17 November 2011) <<http://www.gstdistributionreview.gov.au/content/Content.aspx?doc=tor.htm>>.

<sup>112</sup> Annabel Hepworth and Paige Taylor, 'Western Australia's Fury at Plunge in GST Share', *The Australian* (Sydney), 25 February 2012 <<http://www.theaustralian.com.au/national-affairs/western-australias-fury-at-plunge-in-gst-share/story-fn59niix-1226281095414>>.

Unless something changes, the crunch will come on State Government finances. The people of Western Australia know we are being short-changed in the carve up of Goods and Services Tax (GST) revenues.

Last year, we received 72 cents for every dollar paid in GST. The big States of New South Wales, Victoria and Queensland all received over 90 cents in the dollar back. It is a bizarre system that penalises Western Australia for having a successful mining industry, while at the same time rewards other States for their reliance on gambling revenue. The message is all wrong!

State Treasury forecasts are that our share of GST revenues will fall below 50 cents in the dollar by 2013–14 and could be as low as 36 cents in the dollar by 2014–2015. This will see us lose \$12 billion in revenue to 2014–15, or even more if recent reports that our GST share will fall to 55 cents in the dollar next year are true. The Commonwealth just doesn't care. By anyone's measure this scenario is unfair, unrealistic and unsustainable. It is forcing the State into an over reliance on debt to fund infrastructure and services. ...

Western Australia accepts it can make a net contribution to other States and only asks for a floor of 75 cents in the dollar for our share of GST revenues. We're not asking for a special deal, we're only asking for a fair deal. For Western Australia, fixing the GST is the number one issue in Federal-State relations.<sup>113</sup>

The dire situation that Western Australia and other states are now in is due to their inability to raise sufficient finances themselves. The resultant financial dependence of the states on the Commonwealth supports the argument that more permanent measures, such as a referral of income taxation powers to the states to restore the status quo prior to the *First* and *Second Uniform Tax Cases*, could assist to restore the fiscal federal balance.

### 5 Senate Reforms

Chapter 2 discussed the framers' specific contemplation of the Senate as a 'States' House' in which the people of each state directly elected Senators to represent them.<sup>114</sup> The framers' view was that the Senate would specifically represent the people of each state, would protect state interests when passing legislation in the

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<sup>113</sup> Western Australia, *Premier's Statement*, Legislative Assembly, 21 February 2012, 16a–69a (Colin Barnett).

<sup>114</sup> See *Constitution* s 7.

Senate, and importantly, guard against Commonwealth encroachment on state powers.<sup>115</sup>

However, the Senate has failed in its role as a ‘States’ House’, with the political party interests of Senators dictating their actions, rather than the interests of their states. For example, the *Workplace Relations Amendment (WorkChoices) Act 2005* (Cth) was passed by the Senate, despite its dire implications for state residual powers, as the states had previously been largely responsible for regulating employment law in Australia.<sup>116</sup> It is therefore recommended that reforms to the Senate based on the German constitutional model should be considered so that the Senate is truly a ‘States’ House’ that can guard state interests and avert unwarranted centralisation.

In the German federation, the equivalent to the Australian Senate is the ‘Bundesrat’ and the equivalent to the House of Representatives is the ‘Bundestag’. Like its Australian counterpart, the Bundesrat could be described as a ‘States’ House’, however, of a different kind to the Australian Senate because it has stronger institutional links to the states, called ‘Länder’.<sup>117</sup> More specifically, whilst the Bundestag is comprised of members elected by the people, the Bundesrat is comprised of members of the executive branches of the German states.<sup>118</sup> Thus, the current state governments have more direct representation at a federal level and the ability to directly participate in the federal legislative process. In addition, depending on the type of legislation, the legislation will either need a majority vote in the Bundesrat, or the Bundesrat can object to it, requiring an absolute majority vote in the Bundestag for it to be passed. Bröhmer notes that this arrangement ‘give[s] the the Länder immense power to influence and shape political decision-making on the

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<sup>115</sup> See Mr Edmund Barton, Adelaide Convention Debates, 21–23, cited in John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, first published 1901, 2002 ed) 417.

<sup>116</sup> As discussed in Chapter 6, the *Workplace Relations Amendment (WorkChoices) Act 2005* (Cth) was upheld by a 5–2 majority of the High Court of Australia in *Work Choices* (2006) 229 CLR 1.

<sup>117</sup> Jürgen Bröhmer, ‘The Federal Element of the German Republic — Issues and Developments’ in Jürgen Bröhmer (ed), *The German Constitution Turns 60: Basic Law and Commonwealth Constitution, German and Australian Perspectives* (Peter Lang, 2011) 15, 19.

<sup>118</sup> Jürgen Bröhmer, ‘The Federal Element of the German Republic — Issues and Developments’ in Jürgen Bröhmer (ed), *The German Constitution Turns 60: Basic Law and Commonwealth Constitution, German and Australian Perspectives* (Peter Lang, 2011) 15, 19.

federal level'.<sup>119</sup> In summary, these enhanced institutional links between the Länder and the Federal Parliament protect federalism significantly more than the Australian model does.

Bröhmer further notes the role of the Mediation (Conference) Committee to prevent 'blockade-politics', or in other words, to prevent the blocking of federal legislation where there are differing political parties in power at a state and federal level. The Committee, comprised of 16 representatives from both the Bundesrat and the Bundestag, can negotiate in these situations to bring about an agreement.<sup>120</sup> Although the Committee has been criticised for acting outside public scrutiny,<sup>121</sup> it is valuable in maintaining cooperative federalism.

It is recommended that Australia should amend its *Constitution* to reform the Senate to reflect its German counterpart, the Bundesrat. Although these reforms would be seen by many as a radical departure from the existing Australian constitutional model, reforms based on the German model would strengthen institutional ties between the Federal Parliament and the states and would make the Senate considerably more effective as a States' House. It is suggested that the first paragraph of s 7 of the Commonwealth *Constitution* which currently states, 'The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate' should be amended. It is further suggested that the amended version, in which I have highlighted the amendment, could read as follows: 'The Senate shall be composed of senators for each State, *directly chosen by the Executive Government of the State*.'<sup>122</sup>

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<sup>119</sup> Jürgen Bröhmer, 'The Federal Element of the German Republic — Issues and Developments' in Jürgen Bröhmer (ed), *The German Constitution Turns 60: Basic Law and Commonwealth Constitution, German and Australian Perspectives* (Peter Lang, 2011) 15, 20.

<sup>120</sup> Jürgen Bröhmer, 'The Federal Element of the German Republic — Issues and Developments' in Jürgen Bröhmer (ed), *The German Constitution Turns 60: Basic Law and Commonwealth Constitution, German and Australian Perspectives* (Peter Lang, 2011) 15, 20–21.

<sup>121</sup> Jürgen Bröhmer, 'The Federal Element of the German Republic — Issues and Developments' in Jürgen Bröhmer (ed), *The German Constitution Turns 60: Basic Law and Commonwealth Constitution, German and Australian Perspectives* (Peter Lang, 2011) 15, 21.

<sup>122</sup> The first paragraph of the *Constitution*, s 7 currently states: 'The senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate.'

## 6 *An Expanded Role for COAG*

The role of COAG (the Council of Australian Governments), should be expanded so that it is an Australian equivalent to a Committee of the Regions to represent more effectively state and regional interests and act as a further check on the federal balance.

Chapter 4 of this thesis discussed the role of COAG which was established in 1992 by agreement of its members, who consist of the Prime Minister, state Premiers, Chief Ministers of the Territories and the President of the Australian Local Government Association. Further, in Chapter 4 the role of COAG was contrasted with the Committee of the Regions in the European Union, a more institutionalised body, being established in art 305 of the *TFEU*.

More specifically, it was noted that COAG's discussions primarily focus on the discussion and implementation of policy issues requiring intergovernmental cooperation, often culminating in intergovernmental agreements. On the other hand, the *TFEU* requires the Committee of the Regions to be consulted by the European Parliament, Council or the Committee where the treaties provide, or in cases involving 'cross-border cooperation'.<sup>123</sup> This allows for the Committee to be consulted on directives and regulations that may have regional implications, as well as issues of policy implementation that may require cooperation.

The role of COAG could be adapted in a similar manner so that it has a more formalised and independent role in commenting upon Commonwealth legislation that may impact upon regional interests. In order to make COAG truly representative of regional interests, it should be a completely separate body from the federal government, and should not be part of the Prime Minister's Office, nor should the Prime Minister be a member of it. In the spirit of subsidiarity, its membership should be expressed in more general terms, so as not to exclude elected representatives at a more local level. However, like the European Union where membership to the Committee of the Regions is capped at 350,<sup>124</sup> membership to COAG would also need to be capped in order to maintain its effectiveness. In order to best achieve this,

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<sup>123</sup> *TFEU* art 307.

<sup>124</sup> *TFEU* art 305.

COAG would need to be an institutionalised body, rather than just a voluntary association. Ideally, the role of COAG in this respect could be formalised in the Commonwealth *Constitution*, which has the further advantage of emphasising that federalism is a cooperative relationship between the Commonwealth and the states. It is suggested that a new provision could be inserted at the end of ch V — The States, based on art 300 of the *TFEU*, as follows:

121. (i) With respect to Bills that concern issues of federalism and the federal balance of power between the Commonwealth and the States the Federal Parliament shall be assisted by a Council of the Australian Governments, exercising advisory functions.

(ii) The Council of the Australian Governments shall consist of representatives of State, regional and local bodies who either hold a State, Regional or Local authority electoral mandate or are politically accountable to an elected assembly, but shall consist of no more than 100.<sup>125</sup>

(iii) The Members of the Council of the Australian Governments shall not be bound by any mandatory instructions. They shall be completely independent in the performance of their duties, in the Federation's general interest.

One issue to overcome, however, is the effect of any disagreement by COAG with proposed legislation. For example, it is foreseeable that with the majority of COAG members being state Premiers from different political parties to the federal government, COAG could potentially be used to frustrate new legislation proposed by the Commonwealth Government if its majority opinion was coercive in nature. Consequently, it is recommended that, like the Council of the Regions, COAG should only comment on Bills that would impact on state or regional interests, hence the wording of s 121 (i) above referring to 'advisory functions'. It is recommended that any findings of COAG should be tabled in both Houses of the Federal Parliament so as to act as additional material in any debate on proposed legislation that may impact on federal or regional interests.

### ***B Procedural Reforms***

This section outlines procedural safeguards that could be made to the federal legislative process, inspired by the European Union model, to better protect the

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<sup>125</sup> I have chosen the figure of 100 with reference to the European Union which has 27 Member States and up to 350 Members of the Committee of the Regions. A similar proportion in an Australian context would be 100 persons for six states and two territories. However, this figure could be revised downwards.

federal balance. These reforms would be substantially easier to implement because they do not require a referendum. They do, however, primarily need to be made at a Commonwealth level, which is somewhat problematic because a commitment to maintaining federalism is unlikely to be a high priority for the federal government, which may regard any such changes as having the potential to hinder its own reform and policy agenda and detract from its powers.

### 1 *Reforms to the High Court of Australia Act*

Unlike the European Union whose Court of Justice comprises one Justice from each member state,<sup>126</sup> the selection process and composition of the High Court bench does not provide for any state representation. As noted in Chapter 4, s 6 of the *High Court of Australia Act 1979* (Cth) requires that before making an appointment to the High Court, the Commonwealth Attorney-General must consult the state Attorneys-General. However the Commonwealth Attorney-General is left with the ultimate discretion to make the appointment.

On the one hand, such limited state involvement is surprising given the ability of the High Court to affect the federal balance. On the other hand, the independence of High Court Justices, who have tenure until the age of 70 years, arguably means that state interests should be largely irrelevant in their deliberations. Notwithstanding this, it is well known that High Court appointments are, to a large extent, political, with the government of the day appointing Justices that they believe will be sympathetic to their political agenda and therefore any of the government's legislation that may be the subject of a constitutional challenge. A famous example of the political nature of appointments to the High Court was the appointment in 1975 of Lionel Murphy who, at the time of his appointment, was the Commonwealth Attorney-General.<sup>127</sup>

Greater state involvement in High Court appointments may not have a dramatic effect on protecting federalism, but when included as part of a broader package of

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<sup>126</sup> *TEU* art 19(2).

<sup>127</sup> For a discussion of the political nature of the appointment of High Court Justices and the various models that have from time to time been proposed for reforming the appointment of High Court Justices, see Max Spry, 'Executive and High Court Appointments' (Research Paper No 7, Parliamentary Library, Parliament of Australia, 2000–2001) <<http://www.aph.gov.au/library/pubs/RP/2000-01/01rp07.htm>>.

reforms to promote federalism, they may seek to remind High Court Justices of the importance of the federal balance in Australia's constitutional system over any allegiance to the central government that was responsible for their appointment. It is therefore suggested that Australia should adopt the method of appointing High Court Justices suggested by Moens, and discussed in Chapter 4, where the states as well as the Commonwealth can nominate candidates, with the final appointee having to be approved by at least three state governments.<sup>128</sup> This procedure could be set out by way of amendment to s 6 of the *High Court of Australia Act 1979* (Cth).

## 2 *Scrutiny of Legislation*

Chapter 3 provided an introduction to the procedural operation of subsidiarity in the European Union, which was expanded on in more detail in Chapter 4. Chapter 4 discussed the role of national Parliaments as guardians of subsidiarity.<sup>129</sup> As part of this role, the Union is required to forward draft legislative acts to national Parliaments for their consideration prior to enactment so national Parliaments can give reasoned opinions as to whether the principle of subsidiarity has been complied with. These opinions are allocated votes and, depending on the number of votes received, could result in the legislative act being reconsidered, amended or withdrawn,<sup>130</sup> although the ultimate decision still rests with the Commission which may give its own opinion stating why it thinks subsidiarity has been complied with.<sup>131</sup>

Following the European Union example, federalism would also be enhanced if draft federal legislation was sent to the states for their comment on any federal implications. States could be given a set amount of time to provide an opinion as to whether proposed legislation is detrimental to the federal balance, or encroaches on traditional state powers. If three or more states object, the legislation should be revised to take the objections into account. This would encourage more dialogue and cooperation between the state and Commonwealth governments and would ensure

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<sup>128</sup> I have omitted the territories because the focus of this thesis is on state-Commonwealth relations. However, I acknowledge that the territories could also be included in this process, particularly due to the current proposal for the Northern Territory to be admitted as a state.

<sup>129</sup> See *TEU* art 12(a) and (b).

<sup>130</sup> *Protocol* arts 7(1) and (2).

<sup>131</sup> *Protocol* art 7(3).

that the states have more of a role in commenting on federal legislation that may seek to encroach on their areas of responsibility.

In addition, the second paragraph of art 296 of the *TFEU* states that: ‘Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties.’ This is expanded upon by art 5 of the *Protocol on the Application of the Principles of Subsidiarity and Proportionality*, which requires draft legislative acts to have a detailed statement setting out how the principles of subsidiarity and proportionality have been complied with, including the impact of the legislative act on member states, as well as financial implications.

This type of procedural check could be applied in Australia to better protect the federal balance. In a similar manner to the ‘statement of reasons’ that must accompany legislation in the European Union, the Explanatory Memorandum, required when any Bill is presented to Parliament,<sup>132</sup> could be required to include a statement about how the Bill impacts on the federal balance, and to justify how it falls within federal, rather than state residual powers. Currently, an Explanatory Memorandum has three main parts: a cover sheet; a general outline comprising a financial impact statement, and if necessary a regulation impact statement; and notes on clauses or amendments.<sup>133</sup> The *Legislation Handbook* (*‘Handbook’*) explains the purpose of the Explanatory Memorandum in s 8.1 as ‘a companion document to a bill, to assist members of Parliament, officials and the public to understand the objectives and detailed operation of the clauses of the bill.’<sup>134</sup> The *Standing and Sessional Orders* of the House of Representatives (*‘Standing Orders’*) and the *Handbook* could be amended to include a ‘federalism impact statement’ as part of the Explanatory Memorandum. Such an amendment is also consistent with the stated purpose of the Explanatory Memorandum in the *Handbook* because the federal basis for the bill is a relevant consideration for debate, being relevant to whether the Bill

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<sup>132</sup> See House of Representatives ‘141: First Reading and Explanatory Memorandum’ in *Standing and Sessional Orders* (Department of the House of Representatives, 2010) 62.

<sup>133</sup> Department of the Prime Minister and Cabinet, *Legislation Handbook* (1999) <[http://www.dpmc.gov.au/guidelines/docs/legislation\\_handbook.pdf](http://www.dpmc.gov.au/guidelines/docs/legislation_handbook.pdf)> 39.

<sup>134</sup> Department of the Prime Minister and Cabinet, *Legislation Handbook* (1999) <[http://www.dpmc.gov.au/guidelines/docs/legislation\\_handbook.pdf](http://www.dpmc.gov.au/guidelines/docs/legislation_handbook.pdf)> 38.

and its specific provisions should be enacted at a federal level or left to the states to regulate.

Federalism could also be made a requirement that must be addressed in the Second Reading Speech. Given that the Second Reading Speech is meant to ‘explain the Bill’s background and its key policy objectives’<sup>135</sup> as well as ‘the Minister’s objectives in relation to the Bill, political considerations and intentions, and broader policy strategies which may span beyond the specifics of the Bill’,<sup>136</sup> it is arguably entirely appropriate that the Minister should be required to justify the constitutional basis for the Bill and its potential impact on state powers and the federal balance. This requirement could be included by way of an amendment to House of Representatives Standing Order 142 which provides for a Second Reading Speech. The *Standing Orders* provide for a debate, and for the Minister to be questioned about the Second Reading Speech, at a future sitting after the Second Reading Speech. This presents an opportunity for the Minister to be questioned about, and being made to justify the constitutional basis for the Bill and in particular, debate any federal implications.<sup>137</sup>

An additional advantage of including federalism in both the Explanatory Memorandum and Second Reading Speech is that s 15AB(2)(e) and (f) of the *Acts Interpretation Act 1901* (Cth) provide that when a Court is interpreting legislation, it can take the Explanatory Memorandum and Second Reading Speech into consideration.<sup>138</sup> In summary, this would serve as a further reminder to the judiciary and a safeguard of federalism.

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<sup>135</sup> Department of the Prime Minister and Cabinet, *Legislation Handbook* (1999) <[http://www.dPMC.gov.au/guidelines/docs/legislation\\_handbook.pdf](http://www.dPMC.gov.au/guidelines/docs/legislation_handbook.pdf)> 44.

<sup>136</sup> Department of the Prime Minister and Cabinet, *Legislation Handbook* (1999) <[http://www.dPMC.gov.au/guidelines/docs/legislation\\_handbook.pdf](http://www.dPMC.gov.au/guidelines/docs/legislation_handbook.pdf)> 44.

<sup>137</sup> See House of Representatives ‘142: Second Reading’ and ‘142a: Questions During Second Reading Debate’ in *Standing and Sessional Orders* (Department of the House of Representatives, 2010) 62–63.

<sup>138</sup> For a discussion of the role of the Explanatory Memorandum and Second Reading Speech and their relevance in statutory interpretation, see Department of the Prime Minister and Cabinet, ‘Chapter 8’ in *Legislation Handbook* (1999) <[http://www.dPMC.gov.au/guidelines/docs/legislation\\_handbook.pdf](http://www.dPMC.gov.au/guidelines/docs/legislation_handbook.pdf)>. For a discussion of the history and development of Explanatory Memoranda in the Federal Parliament, see Patrick O’Neill, ‘Was there an EM?: Explanatory Memoranda and Explanatory Statements in the Commonwealth Parliament’ (Research Brief No 15, Parliamentary Library, Parliament of Australia, 2005) <[http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/424G6/upload\\_binary/424g66.pdf](http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/424G6/upload_binary/424g66.pdf)>.

### *3 Additional Scrutiny and Reporting*

In the European Union, as discussed in Chapter 4, the Commission must prepare and submit an annual report to the European Parliament, Council, national Parliaments and Committee of the Regions on the application of the principle of subsidiarity.<sup>139</sup>

As noted in that chapter, the report allows for greater governmental, institutional and public scrutiny of how subsidiarity has been applied throughout the preceding year and thus provides a further check on and analysis of its effectiveness.

No such formalised reporting process exists in Australia, although, as discussed in Chapter 4, there have been several reports on reforming the Australian federation that have not, to date, resulted in any notable reform of the federal balance in favour of the states.<sup>140</sup> At best, these reports can be seen as ‘one-off’ inquiries that are not the subject of on-going scrutiny and that have not resulted in any meaningful reform. Thus, the Australian federation would, like the European Union, most certainly benefit from an annual reporting requirement in which issues of federalism over the preceding year are discussed and highlighted, together with recommendations to improve the federal balance in the forthcoming year. It is recommended that annual reporting requirements could be undertaken by the federal Attorney-General, who could report on federalism in the legislative and executive realm. The federal Treasurer could report on issues of federalism from a fiscal perspective in his reading of the annual budget, which is in fact a Second Reading Speech of the Appropriations legislation that forms the annual federal budget.<sup>141</sup> This is consistent with the recommendations made earlier in this chapter that a ‘federalism impact statement’ should be included in the Explanatory Memorandum to new Bills and in the Second Reading Speech. In addition, an amendment could be made to s 63 of the *Public Service Act 1999* (Cth). Section 63 states, ‘After the end of each financial

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<sup>139</sup> Protocol art 9.

<sup>140</sup> See, for example, Anne Twomey and Glen Withers, *Federalist Paper 1 Australia’s Federal Future: A Report for the Council for the Australian Federation* (2007); Neil Warren, *Benchmarking Australia’s Intergovernmental Fiscal Arrangements: Final Report* (New South Wales Government, 2006); Business Council of Australia, *Reshaping Australia’s Federation — a New Contract for Federal–State Relations* (Business Council of Australia, 2006); Productivity Commission, *Productive Reform in a Federal System* (Roundtable Proceedings, Canberra, 27–28 October 2005); and Senate Select Committee on the Reform of the Australian Federation, Parliament of Australia, *Australia’s Federation: An Agenda for Reform* (2011). These reports and their findings were discussed in more detail in Chapter 4.

<sup>141</sup> See, for example, Wayne Swan, *Budget Speech 2011–12: Delivered on 10 May 2011 on the Second Reading of the Appropriation Bill (no. 1) 2011–2012* (2011) Australian Government <<http://www.budget.gov.au/2011-12/content/speech/html/speech.htm>>.

year, the Secretary of a Department must give a report to the Agency Minister, for presentation to the Parliament, on the Department's activities during the year.<sup>142</sup> The amendment could require the Treasurer and Attorney-General to specifically address issues of federalism in their annual reports.

It is also recommended that part of the legislative process in both Houses of Parliament should involve the scrutiny of legislation by bipartisan Committees which can report back to Parliament on any issues of federalism arising from proposed legislation. One option would be for the Parliament, through an amendment to the *Standing Orders* of the House of Representatives, to establish a Joint Standing Committee on Federalism.<sup>143</sup> The advantage of a Joint Standing Committee is that it is a bipartisan Committee, comprised of Members of the House of Representatives and the Senate from the government's political party, the opposition, and also independents or minority parties.<sup>144</sup> The *Standing Orders* require that the proceedings of the Committee must be reported back to Parliament,<sup>145</sup> thus creating the opportunity for scrutiny and debate.

A further option is to establish a Senate Committee to scrutinise the federal implications of Bills that come before the Senate.<sup>146</sup> With respect to the Senate, the existing *Senate Standing Orders*,<sup>147</sup> namely Order 25(1), establishes eight legislative

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<sup>142</sup> The 'Agency Minister' is defined by s 7 of the *Public Service Act 1999* (Cth) to include the Minister responsible for a Department.

<sup>143</sup> See House of Representatives '224: Appointment of Joint Committees' in *Standing and Sessional Orders* (Department of the House of Representatives, 2010) 91, which provides that the House of Representatives can establish a Joint Committee comprised of Members of both Houses of Parliament.

<sup>144</sup> An example is the Joint Standing Committee on Foreign Affairs, Defence and Trade which comprised 34 Members from the Senate, House of Representatives and minority parties. See Parliament of Australia, 'Committee Members' (2012) *Joint Standing Committee on Foreign Affairs, Defence and Trade* (2012) <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=jfadt/members.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jfadt/members.htm)>.

<sup>145</sup> See House of Representatives '226: Report of Joint Committee' in *Standing and Sessional Orders* (Department of the House of Representatives, 2010) 91.

<sup>146</sup> See Standing Order 238 which states, 'A committee may confer with a similar Committee of the Senate.' This, it would be possible to have both a Joint Committee and a Senate Committee which could confer with one another with respect to issues of federalism. House of Representatives '238: Conferring with Senate Committees' in *Standing and Sessional Orders* (Department of the House of Representatives, 2010) 94.

<sup>147</sup> *Constitution* s 50(ii), allows for the House of Representatives and the Senate to make Standing Orders. These are orders related to the day to day running of the Parliament. The section states: 'Each House of the Parliament may make rules and orders with respect to -... (ii) The order and conduct of its business and proceedings either separately or jointly with the other House.' For further information with respect to Standing Orders, see House of Representatives, *Guide to Procedures* (2010)

and special purpose standing Committees, including the Standing Committee on Legal and Constitutional Affairs. Each Committee is divided into a Legislation Committee and a References Committee. It should be noted that the Legislation Committees are bipartisan Committees consisting of three Senators from the government's political party, two Senators from the opposition and one Senator from a minority political party or who is an independent.<sup>148</sup> Similarly, the References Committees are also bipartisan, consisting of two Senators from the government's political party, three Senators from the opposition and one Senator from a minority political party or who is an independent.<sup>149</sup>

One option would be to empower the existing Standing Committee on Legal and Constitutional Affairs to scrutinise Bills with respect to the federal balance. However, given that this Committee is already established and has a range of matters it is responsible for, a better option would be the creation of a new Committee whose sole responsibility would be the scrutiny of any new Bills into the Senate with respect to their impact upon the federal balance. Hence a new Senate Committee on Federalism should also be established to scrutinise legislation and report back to the Senate, with specific reference to whether Bills or draft Bills may exceed the legislative power of the Commonwealth, trespass on powers reserved to the states, or in any way impact upon the legislative or fiscal federal balance to the detriment of the states. This Committee could also produce an annual report outlining how federal legislation passed by the Senate has been scrutinised or amended to maintain the federal balance.

#### IV CONCLUSION

In summary, the principle of subsidiarity, its philosophy and practical operation in the European Union, offers many insights that could be implemented in Australia to reform Australian federalism in order to, at best, restore the federal balance and at least, guard against future encroachment by the Commonwealth. This chapter

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Parliament of Australia  
<[http://www.aph.gov.au/About Parliament/House of Representatives/Powers practice and procedure/gtp](http://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/gtp)>.

<sup>148</sup> See *Senate Standing Order* 25(5)(a).

<sup>149</sup> See *Senate Standing Order* 25(5)(b).

divided these reforms into two types: constitutional, requiring a referendum under s 128 of the Commonwealth *Constitution*; and procedural, involving changes to legislation and Parliamentary Standing Orders to provide safeguards and accountability checks against centralisation.

The constitutional reforms have the advantage of re-confirming federalism as a fundamental principle and also ensuring that the federal judiciary, in particular the High Court of Australia, considers federalism in their deliberations. This would avoid the problems that the equivalent principle of subsidiarity has encountered as a judicial principle in the European Union. The problems with subsidiarity at a judicial level in the European Union were highlighted earlier in this chapter where all of the case law where subsidiarity had been pleaded or otherwise judicially considered were examined to show that subsidiarity was ineffective as a judicial principle in the European Union. In summary, the constitutional amendments that this chapter recommended included:

- Adding an express principle of federalism, based on art 5(3), in the *Constitution*;
- Creating the role of Advocates-General to advise the High Court on issues of federalism in proceedings before the High Court;
- Inserting an express statement, based on federal principles and considerations, as to how the High Court should interpret the *Constitution*;
- The Commonwealth referring some financial powers back to the states by way of constitutional amendment;
- Reforms to the Senate to institutionalise the Senate as a States' House involving Senators being chosen from the state executive governments, and thus allowing the states a more direct representation in Federal Parliament; and
- Establishing COAG as an independent constitutional institution who can advise on issues of federalism in proposed Bills that may have a regional or federal impact.

The procedural reforms are more easily made than the recommended constitutional reforms because they do not require a referendum. They do, however, require bipartisan support at a federal level, which as has been pointed out, may encounter some opposition by a federal government not wanting to have its powers checked by the states. In summary, the procedural reforms recommended in this chapter included:

- Amending s 6 of the *High Court of Australia Act 1979* (Cth) to give greater state involvement to the appointment of High Court Justices;
- Ensuring that the states can comment on proposed legislation that might affect them;
- Including a ‘federalism impact statement’ in the Explanatory Memorandum to new Bills and ensuring a statement regarding any federal implications of the Bill is included in the Minister’s Second Reading Speech;
- Imposing annual reporting requirements on the federal Attorney-General and federal Treasurer to report on issues of federalism and how they have been addressed in the preceding year.
- Establishing Parliamentary Committees to scrutinise the impact of Bills on the federal balance.

## CHAPTER 8: CONCLUSION

Whilst the federal balance has shifted toward centralisation, it is not too late for reform. The principle of subsidiarity, which is entirely compatible with, and in fact a characteristic of federalism, offers an excellent foundation from which to consider federal reforms in order to re-establish the position of the states as constitutional equals to the Commonwealth and Australia as a true federation.

The introduction to this thesis, whilst providing an overview of the thesis including its argument, significance and structure, also outlined a fundamental premise of this thesis, namely that a federal system, as envisaged by the framers, is the most appropriate system of government for Australia. Federalism offers many advantages, including economic, social and political advantages that outweigh other forms of government, including a unitary government, confederation or league of states.

These advantages were outlined in Chapter 2 which also examined the theory and philosophy of federalism (Research Objective 1). In discussing the key characteristics of federalism, the centrality and importance of the states was highlighted as fundamental to a federal system of government. This was supported by reference to the fundamental federal structure of the *Constitution* itself (Research Objective 2), the intentions manifested in the Constitutional Convention Debates and the philosophical writings from theorists such as Bryce, and Hamilton, Jay and Madison, to which the framers significantly referred in their deliberations.

Chapter 3 introduced the principle of subsidiarity, and outlined the many facets of the principle (Research Objective 3). Subsidiarity was noted to have its origins in ancient Greek and Roman philosophy, and was promulgated by Pope Pius XI as a central principle in Catholic social theory. The general political nature of subsidiarity as a decentralising principle was also discussed, followed by a discussion of the incorporation of the principle in European Union law in the *TEU*. A recurrent theme in this chapter was the resolution of issues closest to their source and the empowerment of those people and institutions to resolve their own issues instead of involvement by centralised persons or institutions removed from the problem and therefore less equipped to determine the best solutions.

This theme, of the decentralisation of power and issues being determined at a local/community level wherever possible, was shown to be compatible with the concept of federalism in Chapter 4 (Research Objective 4). This chapter emphasised the similarities between subsidiarity and federalism. Theoretical similarities were examined, including academic commentary adverse to the compatibility of the two concepts, which was refuted. The textual and practical similarities of subsidiarity and federalism were also examined by first analysing the principle of subsidiarity, as embodied in the *TEU*, *TFEU*, and *Protocol on the Application of the Principles of Subsidiarity and Proportionality*, in comparison with the structure and provisions of the Australian *Constitution* which establish it as a federalist document. The practical operation of both principles was also outlined comparatively through an examination of the legislative, administrative and judicial operation of the principles in both the Australian and European Union jurisdictions. This analysis showed that there were many aspects of subsidiarity's practical operation in the European Union that Australia could adopt to reform Australian federalism and potentially restore the federal balance (Research Objective 7). However, it highlighted the lack of success of subsidiarity as a judicial principle which would need to be overcome in an Australian context if reforms based on subsidiarity were to be implemented in Australia.

In Chapters 5 and 6, this thesis explained why Australia is now in the position where the federal government is superior to and more powerful than the state governments (Research Objective 6). Chapter 5 commenced with a discussion of the methods of interpretation that had been employed by the High Court when interpreting the *Constitution*, namely originalism, literalism, and revisionism (Research Objective 5). It outlined how the early High Court Justices sought to give effect to the federalist *Constitution* through an originalist approach which respected the intentions of the framers of the *Constitution*, and accordingly, the rights and powers of the states. It examined the case law in which they recognised and developed the reserved powers and implied intergovernmental immunities doctrines, implied from the federal nature of the *Constitution*. The chapter concluded by discussing how these doctrines were discarded in the landmark *Engineers* case, in which the majority adopted a literalist

approach to constitutional interpretation, thereby rejecting any constitutional limitations or implications based on the federal balance.

Chapter 6 then examined the High Court's interpretation of the *Constitution* following the decision in *Engineers* which has progressively undermined the federal balance (Research Objective 6 continued). It commenced with an examination of the role of precedent and *stare decisis* in the High Court in order to explain the endurance of *Engineers*. The chapter explained how, by utilising a literalist approach, the High Court departed from the previous interpretative tradition of the High Court (namely originalism). This chapter further examined two case studies to illustrate the demise of the financial and legislative powers of the states. These were excise duties, which s 90 of the *Constitution* makes exclusive to the Commonwealth, and the corporations power in s 51(xx) of the *Constitution*. These discussions culminated in an examination of *Work Choices* and *Ha v New South Wales*. *Work Choices* was an example of the significant broadening of the legislative power of the Commonwealth to the detriment of state residual power, while *Ha v New South Wales* was an example of the loss of the financial autonomy of the states.

The analysis in Chapters 5 and 6 illustrated that the Australian federal system has been progressively altered so that the federal balance is very much shifted toward centralisation and the dependence of the states on the Commonwealth. Further, the analysis in these chapters supports the conclusion that major reforms are required in order to correct this centralisation, and to guard against future centralisation. In view of the lack of consensus amongst commentators and High Court judges about which should be the preferred method of constitutional interpretation, and the lack of direction in the *Constitution* as to how it should be interpreted, this thesis suggested looking elsewhere for guidance. It suggested that the solutions as to how the Australian federal system should be reformed should be guided by the principle of subsidiarity, given the compatibility between the objects and characteristics of both principles (Research Objective 7).

Chapter 7 brought together the analysis in the preceding chapters to make very specific recommendations about the exact nature of the reforms required and how they should be implemented (Research Objectives 7 and 8). However, before

outlining these reforms, it firstly examined the failure of the principle in the European Union at a judicial level by examining a number of cases from the European Court of Justice in which subsidiarity was pleaded or otherwise considered (Research Objective 8 continued). As well as showing that no regulation or direction has been judicially invalidated on the basis of subsidiarity, this chapter showed that subsidiarity was not effective at a judicial level because it was somewhat of an afterthought. That is, the first question to be asked is whether a matter falls within the exclusive competence of the Union. If the answer is ‘yes’, then subsidiarity is not a consideration. If the answer is ‘no’, the European Court of Justice regards the decision as to whether the Union or member states are best able to regulate an issue as a political one that can be justified as requiring Union regulation. This analysis was important to ensure that, due to the Australian High Court’s propensity towards centralisation, subsidiarity could be implemented effectively in Australia as a judicial principle.

The recommended reforms included:

- Inserting an express principle of federalism, based on art 5(3) of the *Treaty on European Union*, in the *Constitution*;
- Creating the role of Advocates-General to advise the High Court on issues of federalism in proceedings before the High Court;
- Inserting an express statement in the *Constitution*, based on federal principles and considerations, as to how the High Court should interpret the *Constitution*;
- The Commonwealth referring some financial powers, such as income taxation, back to the states by way of constitutional amendment;
- Reforms to the Senate to institutionalise the Senate as a ‘States’ House’ involving Senators being chosen from the state executive governments, and thus allowing the states a more direct representation in Federal Parliament;
- Establishing COAG as an independent constitutional institution which can advise on issues of federalism in proposed Bills that may have a regional or federal impact;

- Amending s 6 of the *High Court of Australia Act 1979* (Cth) to give greater state involvement to the appointment of High Court Justices;
- Ensuring that the states can comment on proposed legislation that might affect them as part of the federal legislative process;
- Including a ‘federalism impact statement’ in the Explanatory Memorandum to new Bills and ensuring a statement regarding any federal implications of the Bill is included in the Minister’s Second Reading Speech;
- Imposing annual reporting requirements on the federal Attorney-General and federal Treasurer to report on issues of federalism and how they have been addressed in the preceding year; and
- Establishing Parliamentary Committees to scrutinise the impact of Bills on the federal balance.

This thesis has shown that the Australian federal system of government requires reform so that the balance of power between the state and federal governments can be restored and so that equality can be maintained. The Australian states, which started as constitutional equals with the Commonwealth, have been gradually divested of their financial and legislative powers to the extent that the Australian federation is no longer functioning effectively and as the framers intended. It is, in fact, no longer an authentic federation. The Australian federal system requires protection against future attempts by the federal government and the High Court to weaken it. The mistakes of the past (such as *Engineers*) do not need to be repeated in Australia’s future; centralisation does not have to be inevitable, and reform, although difficult, is possible. The principle of subsidiarity offers much inspiration and hope as to how this can be achieved.

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