

**Murdoch University**  
**School of Law**

**Australia's Fiscal Crisis: The High Court's Erosion of State  
Autonomy**

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## **DECLARATION**

This thesis contains no material which has been accepted for the award of any other degree or diploma in any other University and, to the best of my knowledge or belief, contains no material previously published or written by another person, except when due reference is made in the text.

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Lyndsay Elizabeth Barrett

## ABSTRACT

In drafting the *Constitution*, the Framers were conscious about the need to maintain the division of powers between the central government and the regions (which later became known as States) so that each level of government would be equal to one another. Australia has since seen a gradual erosion of State autonomy as a result of a series of unsatisfactory decisions of the High Court. The erosion of State legislative and financial powers began when Isaacs and Higgins JJ were appointed to the High Court in 1906. Following this, the High Court has demonstrated a willingness to interpret Commonwealth powers broadly, at the expense of the States. This expansive, literalist approach to interpreting the *Constitution* enunciated in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* ('*Engineers*') (1920) was later used to expand the Commonwealth's financial power in the cases of *South Australia v Commonwealth* ('*First Uniform Tax Case*') (1942), *Victoria v Commonwealth* ('*Second Uniform Tax Case*') (1971) and *Ha v New South Wales* (1997). The culmination of these decisions effectively precluded the States from levying income tax, and rendered all State franchise fees on petroleum, tobacco and alcohol constitutionally invalid. This thesis will illustrate the fundamental decisions in the centralisation of Commonwealth legislative and financial powers. In doing so, it will argue that the High Court has failed in its duty to protect the *Constitution*, and instead has allowed the Commonwealth to increase its powers, thus undermining Australian federalism. This thesis will conclude by examining Australia's current financial situation, and will propose specific solutions to restore Australia's fiscal federal balance to the framework that was envisioned by the Framers in 1890.

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I would like to dedicate this thesis to my family, for always believing in me. I hope I have done you all proud.

Lyndsay Barrett

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## CHAPTER 1: INTRODUCTION

‘In 1901, the six colonies of Australia “agreed to unite in one indissoluble Federal Commonwealth”’.<sup>1</sup> Federalism has been enshrined in Australia since the enactment of the *Constitution* in 1901. By providing a case study of the High Court’s interpretation of Commonwealth legislative and financial powers, this paper will examine how the High Court’s expansive interpretation of the *Constitution* has resulted in a centralised system of government that is far from what was envisioned by the Framers at the time of Federation. In doing so, it will examine how the High Court has allowed the central government to usurp State legislative powers, thus undermining federalism. Furthermore, it will argue that the High Court’s characterisation of the Commonwealth financial powers has resulted in a fiscal crisis whereby the States operate at the financial peril of the Commonwealth.

In order to properly appreciate the High Court’s erosion of State financial autonomy, it is first necessary to identify the High Court’s interpretation of the s 51 enumerated powers generally. By examining the early decisions of the High Court, it will become increasingly apparent that the subsequent members of the High Court have adopted vastly different interpretive approaches to construing the provisions of the *Constitution*. It is these choices that informed the High Court’s later decisions in considering whether Commonwealth laws dealing with taxation are laws for the ‘peace, order and good government of the Commonwealth’<sup>2</sup> and in characterising duties of excise and customs.<sup>3</sup>

Chapter 2 will provide a broad overview of federalism and will identify the key characteristics of a federal system of governance. This Chapter explains that the federal model was the framework that was intended for Australia. This is supported through an analysis of the intentions of Drafters, such as

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<sup>1</sup> See, Commonwealth of Australia, above n 1, 1 citing Preamble, *Commonwealth of Australia Constitution Act 1900 (UK)* (‘*Constitution*’).

<sup>2</sup> *Constitution* s 51.

<sup>3</sup> *Ibid* s 90.

their desire to limit the power of the central government and preserve the plenary powers of the States.<sup>4</sup> It will argue that these intentions informed the States' decision to surrender certain legislative powers to the central government. It will also briefly outline some of the advantages and perceived disadvantages of the federal system of government. Following this, it will examine the interrelationship between the High Court and the States. Chapter 2 will note that the High Court has adopted alternate approaches to interpreting the s 51 enumerated powers. Finally, it will illustrate the decisions of the High Court over the past century in order to demonstrate the trend towards interpreting Commonwealth legislative power broadly and to the detriment of the States. The author contends that federalism in Australia has been significantly undermined by the High Court, and argues that reforms are necessary to restore Australia's federal balance.<sup>5</sup>

Chapter 3 will continue from the discussions about the expansion of Commonwealth power in Chapter 2 by examining the High Court's characterisation of the financial powers, and the subsequent erosion of State financial autonomy. It will examine the increasing financial dominance of the Commonwealth over the past century,<sup>6</sup> and will identify the implications for State revenue and State financial independence. This Chapter will begin by

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<sup>4</sup> See, *Ibid* s 107 (saving of power of State parliaments). See generally, Augusto Zimmermann and Lorraine Finlay, 'Reforming Federalism: A Proposal for Strengthening the Australian Federation' (2011) 37(2) *Monash University Law Review* 190; Anne Twomey, 'Federal Limitations on the Legislative Power of the States and the Commonwealth to Bind one Another' (2003) 31(3) *Federal Law Review* 507, 515.

<sup>5</sup> Numerous commentators have argued in favour of constitutional reform. See, eg, Zimmermann and Finlay, *above n 4*; Anne Twomey, 'Reforming Australia's Federal System' (2008) 36 *Federal Law Review* 57; Michelle Evans, 'The Use of the Principle of Subsidiarity in the Reformation of Australia's Federal System of Government' (PhD thesis, 2012, Curtin University, School of Business Law and Taxation) 16, 20; Isabelle Joumard and Per M Kongsrud, 'Fiscal Relations Across Government Levels' (2003) 29 *OECD Economics Department Working Papers*, No. 375, OECD Publishing, 47  
<<http://www.oecdilibrary.org/docserver/download/5lgsjhyj7wjj.pdf?expires=1444535508&id=id&accname=guest&checksum=457D4963EE089C00996A37FE7B52EFCE>>; A Zimmermann and L Finlay, Submission to the Select Committee on the Reform of the Australian Federation (20 August 2010); Anne Twomey and Glenn Withers, *Federalist Paper 1 Australia's Federal Future: A Report for the Council of the Australian Federation* (2007); Griffith University, Reform of Australia's Federal System – Identifying the Benefits', Discussion Paper, May 2006 (NSW Farmers' Association); Lorraine Finlay, 'The Power of the Purse: An Examination of Fiscal Federalism in Australia' (2012) 24 *Journal of Constitutional History* 81, 82. See also, Geoffrey Blainey, 'What Should We Say About Our Federation?' (Paper presented at the Nineteenth Conference of the Samuel Griffith Society, Bayview Eden Hotel, Queens Road, 17-19 August 2007) vii, vii.



discussing the High Court's characterisation of the taxation power in section 51(ii) of the *Constitution*. Following this, it will analyse High Court's expansion of the definition of 'excise' duties in s 90. This Chapter will also demonstrate how the States have become increasingly reliant on the Commonwealth for financial support through s 96 grants. The author concludes that the Australia's federal fiscal relations have been undermined by the High Court and are in desperate need of reform.

Finally, Chapter 4 proposes solutions to Australia's fiscal crisis, in an attempt to undo some of the damage caused by the High Court in relation to federalism and State financial independence. The primary objective of this Chapter is to recommend financial reforms to improve Federal-State financial relations and restore State independence. The reforms discussed in this Chapter will be focused on enhancing State taxation revenue and expanding State tax bases,<sup>7</sup> and will include both constitutional reforms, and procedural reforms. A discussion of these reforms will also briefly outline the primary arguments in support of these proposals, as well as the barriers or practical limitations for implementing these recommendations.

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<sup>7</sup> Zimmermann and Finlay, above n 4, 222.

## CHAPTER 2: THE HIGH COURT AND FEDERALISM

This Chapter will summarise the key characteristics of federalism, and will identify federalism as the model that the Framers chose to adopt for Australia. Following this, it will examine the principles that guided the Framers during the drafting of Australia's *Constitution*, and will then provide an overview of the advantages and purported disadvantages of the federal model. The remainder of this Chapter will examine the history of the High Court and the landmark decisions that led to the expansion of Commonwealth power. As a consequence, it will be argued that the Commonwealth now exerts significant control over the States. This Chapter will not discuss the High Court's interpretation of the financial powers under the *Constitution* in any significant detail, because this will be discussed in Chapter 3.

The author contends that Australia's federal landscape is far from that what was envisioned by the Framers, and is in desperate need of reform.<sup>8</sup> It will be argued that the need for reform is largely the result of the approach taken by the High Court in interpreting the *Constitution*. Before discussing these reforms in Chapter 4, it is necessary to identify firstly, how the High Court originally sought to uphold the federal nature of the *Constitution*, and secondly, the series of interpretive choices where the High Court failed in its duty to protect the federal balance.<sup>9</sup>

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<sup>8</sup> Statistics from the Australian Constitutional Values survey 2012 shows that around two-thirds of Australians do not believe governments work well together, and believe the *Constitution* needs reform. See Australian Government, Above n 1, iv.

<sup>9</sup> The *Constitution* establishes the High Court as a protector of the federal balance, or 'keystone of the federal arch'. See, Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 8th ed, 1915) 387-8, cited in Zimmermann and Finlay, above n 4, 203; Brian Galligan, *A Federal Republic: Australia's Constitutional System of Government* (Melbourne: Cambridge University Press, 1<sup>st</sup> ed, 1995) 170; Bradley Selway, 'The Use of History and Other Facts in the Reasoning of the High Court of Australia' (2001) 20(2) *University of Tasmania Law Review* 129, 138. Selway referred to ss 75(1), (iv), (v) and 76(i) as evidence of this proposition.

## I MEANING OF A FEDERATION

The Drafters of the *Constitution* intended Australia to be a ‘Federal Commonwealth’.<sup>10</sup> This intention is clearly established in the preamble to the *Constitution* and s 3 of the *Constitution*, which proclaims Australia as having agreed ‘to be united under a Federal Commonwealth’.<sup>11</sup> According to Nicholas Aroney, the notion of a Federal Commonwealth is fundamental to ‘the text, structure and meaning of the Australian Constitution’.<sup>12</sup> More importantly, in adopting a federal structure, the Framers envisioned Australia to be an authentic federation, whereby the legislative powers of the regions would vastly outweigh those of the central government.<sup>13</sup>

The causes or ‘motivating forces’<sup>14</sup> that led to the federation of the Australian colonies were numerous,<sup>15</sup> although according to one commentator, Gordon Greenwood, ‘the desire for “fiscal union” was a compelling motive throughout’.<sup>16</sup> In drafting the *Constitution*, the Framers were heavily influenced by the federal model adopted by the United States.<sup>17</sup> This is evidenced by their reliance on

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<sup>10</sup> Preamble, *Constitution* and s 3, cited in Michelle Evans, ‘Rethinking the Federal Balance: How Federal Theory Supports States’ Rights’ (2010) 1 *The Western Australian Jurist* 14, 14; Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, Cambridge, 2009) 1. See also, Nicholas Aroney, ‘The Idea of a Federal Commonwealth’ (Paper presented at the Twentieth Conference of the Samuel Griffith Society, Rydges North Sydney Hotel, North Sydney, 22-24 August 2008) 1, 6-7.

<sup>11</sup> Aroney, above n 10, *The Constitution of a Federal Commonwealth*, 1. See also, *Constitution* s 3.

<sup>12</sup> Aroney, above n 10, *The Constitution of a Federal Commonwealth*, 6.

<sup>13</sup> 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) 44, 45.

<sup>14</sup> Gordon Greenwood, *The Future of Australian Federalism* (University of Queensland Press, 2<sup>nd</sup> ed, 1976) 26.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> See, Nicholas Aroney, ‘Imagining a Federal Commonwealth: Australian Conceptions of Federalism, 1890-1901’ (2002) 30(2) *Federal Law Review* 265, 268-9, citing E M Hunt, *American Precedents in Australian Federation* (AMS Press, 1963), Owen Dixon, *Jesting Pilate and Other Papers and Addresses* (Law Book Co, 1965), Galligan, above n 9, James Warden, *Federal Theory and the Formation of the Australian Constitution* (PhD Thesis, Australian National University, 1990), Geoffrey Sawer, *Modern Federalism* (Pitman Australia, 2<sup>nd</sup> ed, 1976) and J A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1974) 18-20, 23-4, 273. Matthew N C Harvey, ‘James Bryce, “The American Commonwealth”, and the Australian Constitution’ (2002) 76 *The Australian Law Journal* 362. See also, Kathleen Morris and James Allsop, ‘The United States and the Australian Constitution: Influence of the US Constitutional Model on Development and Interpretation of the Australian Constitution’ (2015) 89 *Australian Law Journal* 309.

James Bryce's book, *The American Commonwealth*,<sup>18</sup> Edward A Freeman's *History of Federal Government in Greece and Italy* (1893)<sup>19</sup> and the *Federalist Papers*, written by Alexander Hamilton, James Madison and John Jay.<sup>20</sup>

### *A Essential Characteristics of Federalism*

This Section will provide a brief overview of the primary characteristics of federalism, which will inform the later discussion about the advantages and disadvantages of federal systems. An analysis of the literature by early federal theorists is useful for aiding our understanding of Australia's federal system, which was largely informed by the experiences from the United States' Constitution.<sup>21</sup> Possibly the most influential text relied on by the framers in drafting the *Constitution* was Lord Bryce's book, *The American Commonwealth*.<sup>22</sup> In his book, Bryce discussed the essential characteristics that make a federation in the context of American federalism. This thesis is not intended to provide a detailed analysis of its characteristics, although federalism is most commonly defined by reference to the characteristics that constitute and define it.<sup>23</sup> This thesis will adopt the following definition of federalism by Daniel Elazar:<sup>24</sup>

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<sup>18</sup> Matthew Harvey comments that Bryce's book 'was probably the most widely read and certainly the most frequently cited [during the Convention Debates in 1890]': Harvey, above n 17, 362.

<sup>19</sup> Edward A Freeman, *History of Federal Government in Greece and Italy* (MacMillan, 2<sup>nd</sup> ed, 1893).

<sup>20</sup> Evans, above n 10, 18; Nicholas Aroney, "'A Commonwealth of Commonwealths": Late Nineteenth-Century Conceptions of Federalism and Their Impact on Australian Federation, 1890-1901' (2002) 23(3) *Journal of Legal History* 253, 255. According to Matthew Harvey, these works were frequently cited at the Melbourne Conference and the Conventions: Bryce was cited 70 times, Freeman was cited 45 times; and Hamilton, Madison and Jay were cited 25 times: Harvey, above n 17, 366, cited in Evans, above n 5, 29. The *Federalist Papers* are 'a collection of 85 essays' that supported the ratification of the United States Constitution and emphasised the principle of limited government'. See, Aroney, *The Idea of a Federal Commonwealth*, above n 10, 2; Evans, above n 5, 45 citing 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, 11.

<sup>21</sup> George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 6<sup>th</sup> ed, 2014) 2.

<sup>22</sup> Evans, above n 10, 22 citing James Bryce, *The American Commonwealth* (MacMillan, 1889).

<sup>23</sup> Evans, above n 10, 19. See, eg, Sawyer, above n 17, 1 and Geoffrey Sawyer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 1.

<sup>24</sup> Professor Elazar was a leading political scientist and a specialist in federal theory. He was the author and editor of over 60 books. His books in the area of federalism include: Daniel J Elazar, *The American Partnership* (University of Chicago Press, 1962); *American Federalism, A View from the States* (Thomas Y. Crowell, 1966); Daniel J Elazar, *The*

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>25</sup>

Of particular significance, Michelle Evans notes that in a federation, the regional governments are required to be financially independent,<sup>26</sup> and must be equal in autonomy to ‘the central government, whose powers must be limited’.<sup>27</sup> Although maintaining State independence was a fundamental priority of the framers,<sup>28</sup> the division of power is not the only feature that defines federalism.<sup>29</sup> Broadly speaking, a federal system requires four essential characteristics:<sup>30</sup>

1. Supremacy of a written *Constitution*<sup>31</sup> which is difficult to alter;<sup>32</sup>
2. A division of power between a central government and State governments;<sup>33</sup>
3. State sovereignty so that the State governments can exercise their powers free from interference from the central government;<sup>34</sup> and

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*American Mosaic; Cities of the Prairie and Cities of the Prairie Revisited* (Westview Press, 1994); and Daniel J Elazar, *Exploring Federalism* (University of Alabama Press, 1989). He was also the founder and editor of *Publius, The Journal of Federalism* (Oxford University Press, 1973 – present), the word’s leading journal devoted to federalism.

<sup>25</sup> Elazar, above n 24, *Exploring Federalism*, 7.

<sup>26</sup> Evans, above n 10, 14. See also, Finlay, above n 5, 82. Lorraine Finlay notes that ‘[the] financial independence [of the States is] ... recognized as an important element of [ensuring the continued existence of the States]’: Finlay, above n 5, 82.

<sup>27</sup> Evans, above n 10, 14.

<sup>28</sup> Evans, above n 10, 14-15. See also, commentary on the Australasian Federation Conference, Melbourne, 6 February 1890 – 14 February 1890 and the National Australasian Convention, Sydney, 2 March 1891 – 9 April 1891 (‘the Constitutional Conventions’).

<sup>29</sup> Elazar, above n 24, *Exploring Federalism*, 34.

<sup>30</sup> Evans, above n 10, 21-2; Evans, above n 5, 33. Cf Dicey who argues that there are three characteristics of a federal system: Supremacy of the *Constitution*; a distribution of power between different levels of government; and a High Court to act as an interpreter of the *Constitution*. Dicey, above n 9, 140, cited in Anthony Gray, ‘Excise Taxation in the Australian Federation’ (PhD thesis, 1997, The University of New South Wales, School of Law) 1-3.

<sup>31</sup> Aroney, *The Idea of a Federal Commonwealth*, above n 10, 5 citing Robert Garran, *The Coming Commonwealth: An Australian Handbook of Federal Government* (Angus and Robertson, 1897) 23-4.

<sup>32</sup> See also, Bryce, above n 22, 33 and Twomey and Withers, above n 5, Executive Summary, cited in Evans, above n 10, 23.

<sup>33</sup> See also, Bryce, above n 22, 306, cited in Evans, above n 10, 23 and Federalist Papers 39 and 51 in Howard Mumford Jones (ed), Alexander Hamilton, James Madison and John Jay, *The Federalist* (Belknap Press of Harvard University Press, 1972) 285, 357, cited in Evans, above n 5, 46-47.

4. An independent High Court to act as a guardian of the *Constitution* and to maintain the federal balance.<sup>35</sup>

In addition to these characteristics, Geoffrey Sawer argues that a federation requires ‘an independent country with a central government that has the institutionalised power to govern the whole of the country’,<sup>36</sup> and that the written constitution provides ‘rules to determine any conflict of authority’ between the central government and the regional governments.<sup>37</sup>

Prior to federation, the States assumed plenary legislative powers.<sup>38</sup> As such, the independence of the States was an important consideration during the drafting of the *Constitution*.<sup>39</sup> It is clear from the constitutional text that the Framers intended to limit the central government’s legislative power to the enumerated powers specifically defined in the *Constitution*.<sup>40</sup> Indeed, any powers not expressly conferred upon the central government were intended to remain within the domain of the States, as so-called ‘residual powers’.<sup>41</sup> This intention is supported by

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<sup>34</sup> See also, Bryce, above n 22, 312, cited in Evans, above n 10, 24-5 and Federalist Paper 39 in Howard Mumford Jones (ed), Alexander Hamilton, James Madison and John Jay, *The Federalist* (Belknap Press of Harvard University Press, 1972) 285, 357, cited in Evans, above n 5, 46-7.

<sup>35</sup> See also, Bryce, above n 22, 242, cited in Evans, above n 10, 26 and Federalist Paper 39 in Howard Mumford Jones (ed), Alexander Hamilton, James Madison and John Jay, *The Federalist* (Belknap Press of Harvard University Press, 1972) 285, cited in Evans, above n 5, 48. See generally, *Constitution* ss 71-80.

<sup>36</sup> Sawer, above n 17, 1, cited in Gray, above n 30, 3. See *Constitution* s 109.

<sup>37</sup> Sawer, above n 17, 1, cited in Gray, above n 30, 3.

<sup>38</sup> See, *R v Barger* (1908) 6 CLR 41, 67 (Griffith CJ and Barton and O’Connor JJ).

<sup>39</sup> Finlay, above n 5, 82. See also, Evans, above n 5, 43 citing Edward A Freeman, *History of a Federal Government in Greece and Italy* (MacMillan, 1893) 8.

<sup>40</sup> This intention is made clear in ss 107 and 108 of the *Constitution*, which provide that State laws should continue (s 108) unless it is exclusively vested in the Commonwealth or is withdrawn from the State Parliaments (s 107). See also, *Huddart, Parker & Co Pty Ltd v Moorhead* (‘*Huddart*’) (1909) 8 CLR 330, 408 (Higgins J); Sir Anthony Mason, ‘The Australian Constitution in Retrospect and Prospect’ in French, Robert Shenton, Lindell Geoffrey and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (Federation Press, 2003) 7, 9. See, eg, acquisition of property on just terms (s 51(xxxi)), trial on indictment by jury (s 80), freedom of religion (s 116) rights of out of State residents (s 117).

<sup>41</sup> See, Zimmermann and Finlay, above n 4, 201 citing Mark Cooray, ‘A Threat to Liberty’ in Ken Baker (ed), *An Australian Bill of Rights: Pro and Contra* (Institute of Public Affairs, 1986) 35. See also, Greenwood, above n 14. According to Greenwood, during the Convention Debates of the 1890’s ‘there was insistent demand by almost all members of the conventions that the only basis for union was that of a large amount of state autonomy’: Greenwood, above n 14, 40. See also, Callinan J’s comments in *Sweedman v Transport Accident Commission* (2006) 226 CLR 362, 421 (Callinan J), cited in James Allan, ‘Implied Rights and Federalism: Inventing Intentions While Ignoring Them’ (2009) 34 *University of Western Australia Law Review* 228, 233; Michael Manetta, ‘Sovereignty in the Australian Federation’ (Paper presented at the Nineteenth Conference of The Samuel Griffith Society,

Alexander Hamilton's comments in *Federalist Paper (No 32)*, where he stated that: '[In a federation], the individual states should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants'.<sup>42</sup>

Furthermore, the Framers intended the *Constitution* to provide 'stability and certainty',<sup>43</sup> making the *Constitution* difficult to alter. This is demonstrated through s 128 of the *Constitution*, which provides a strict mechanism for effecting constitutional change.<sup>44</sup> Various commentators, including A V Dicey,<sup>45</sup> Bryce,<sup>46</sup> Sawyer,<sup>47</sup> Evans,<sup>48</sup> Zimmermann and Finlay,<sup>49</sup> also agree that the existence of an 'independent and impartial umpire' to determine disputes between the different tiers of government<sup>50</sup> is an essential characteristic of a federal system.

### B Advantages and Disadvantages of Federalism

The author argues that federalism offers many advantages, which can only be properly appreciated when the *Constitution* is interpreted according to federalist principles. It is generally accepted that federal systems of government provide numerous advantages over unitary systems of government,<sup>51</sup> including political,

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Bayview Eden Hotel Hotel, Melbourne, 17-19 August 2007) 90.

<sup>42</sup> A Hamilton, *Federalist No, 32* (1788) in Clinton Rossiter (ed) *The Federalist Papers* (New American Library of World Literature, 1961) 197, 197-8, cited in David Flint and Jai Martinkovits, *Give us Back Our Country: How to Make the Politicians Truly Accountable... On Every Day, of Every Month and of Every Year* (Connor Court Publishing, Ballarat, 2013) 190. See also, David Flint, 'Canberra Slugs the States', *Quadrant Online* (14 June 2011) <<https://quadrant.org.au/opinion/david-flint/2011/06/canberra-must-abandon-the-mineral-tax/>>.

<sup>43</sup> Anne Twomey, 'Constitutional Alteration and the High Court: The Jurisprudence of Justice Callinan' (2008) 27(1) *The University of Queensland Law Journal* 47, 47. See, eg, *Attorney General (WA) v Marquet* (2003) 217 CLR 545, 629 [268] (Callinan J), cited in Twomey, above n 43, 47-8.

<sup>44</sup> Ibid. See also, Jeffrey Goldsworthy's criticism about constitutional change by judges, 'evad[ing]' s 128 in Jeffrey Goldsworthy, 'Interpreting the *Constitution* in its Second Century' (2000) 24(3) *Melbourne University Law Review* 677, 683-4.

<sup>45</sup> Dicey, above n 9, 140, cited in Evans, above n 10, 38. See also Gray, above n 30, 2-3, 4.

<sup>46</sup> Bryce, above n 22, 242, cited in Evans, above n 10, 26.

<sup>47</sup> Sawyer, above n 17, 1, cited in Gray, above n 30, 4.

<sup>48</sup> Evans, above n 10, 26.

<sup>49</sup> Zimmermann and Finlay, above n 4, 191-2.

<sup>50</sup> Zimmermann and Finlay, above n 4, 191.

<sup>51</sup> Finlay, above n 5, 81 citing G de Q Walker, *Ten Advantages of a Federal Constitution and How to Make the Most of Them*, Centre for Independent Studies, Sydney (4 April 2001) 53. The Australian Government recently noted the 'many financial and other benefits' federal systems offer. See, Commonwealth of Australia, above n 1, 1. For a detailed discussion of

social and economic benefits.<sup>52</sup> At its very essence, the federal structure is designed to be a system that ‘controls power, safeguards democracy, and pronounces liberty’.<sup>53</sup> Some of the advantages of federalism include:

- Diversity of preference by providing citizens with a choice to choose to support one political party at the State and another at the Federal level,<sup>54</sup> and thus promoting access to justice;
- Competition and cooperation through freedom of interstate trading,<sup>55</sup> which improves the productivity and efficiency of government;<sup>56</sup>
- Regulation and accountability by providing better supervision of government. This facilitates transparency and informative decision-making,<sup>57</sup> and minimises the risk of abuse of power;<sup>58</sup>
- Better efficiency compared to unitary systems of government.<sup>59</sup> According to the OECD’s figures, ‘in 2006 public spending as a share of gross domestic product was 13% higher on average in countries that have a unitary structure compared to federations’.<sup>60</sup> Anne Twomey and Glenn Withers note that if Australia were a unitary State, its 2006 public

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the advantages of federalism, see, Zimmermann and Finlay, above n 4, 194-199. See also, Twomey and Withers, above n 5.

<sup>52</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) 21, 22, citing Wolfgang Kasper, ‘Competitive Federalism: May the Best State Win’ in Geoffrey De Q Walker, Suri Ratnapala and Wolfgang Kasper, *Restoring the True Republic* (Centre for Independent Studies, 1993) 60, 66. For a discussion of the advantages of federal systems see, Geoffrey de Q Walker, ‘Ten Advantages of a Federal Constitution’ (1999) 73(9) *Australian Law Journal* 634.

<sup>53</sup> Zimmermann and Finlay, above n 5, 3, cited in Finlay, above n 5, 81.

<sup>54</sup> Twomey and Withers, above n 5, 9.

<sup>55</sup> Ibid 12. See also, Australian Government Productivity Commission, *Productive Reform in a Federal System — Roundtable Proceedings — Canberra, 27–28 October 2005* (Commonwealth of Australia, 2006) 35  
<[http://www.pc.gov.au/data/assets/pdf\\_file/0019/9217/productivereform.pdf](http://www.pc.gov.au/data/assets/pdf_file/0019/9217/productivereform.pdf)>.

<sup>56</sup> Commonwealth of Australia, above n 1, 1.

<sup>57</sup> Robyn Hollander, ESD, *Federalism and Intergovernmental Relations in Australia* 22(1) *Australasian Journal of Environmental Management* (2015) 21, 21; Walker, above n 52, 645. According to Geoffrey de Q Walker:

decentralised governments make better decisions than centralised ones’ because the costs of monitoring government functions are lower since the State governments are closely watched by the people.

Walker, above n 52, 645, citing Bryce, above n 22, 314.

<sup>58</sup> Augusto Zimmermann, ‘The Case for Federalism’ (2012) 28(2) *Policy* 14, 15.

<sup>59</sup> See, eg, Twomey and Withers, above n 5, 13; Commonwealth of Australia, above n 1, 1.

<sup>60</sup> Economic Outlook, Volume 2006/1, Number 79, June 2006, Annex Table 25, cited in Commonwealth of Australia, above n 1, 1.



spending may have been \$44 billion greater in the 2006 financial year.<sup>61</sup> Approximately 40% of the world's population prescribes to the federalist model, and federations constitute around 50% of global gross domestic product;<sup>62</sup>

- Protection against elitism and preservation of individual liberty by facilitating public political debate<sup>63</sup> and protecting freedom of speech.<sup>64</sup> Accordingly, Gabriël Moens argues that '[f]ederalism implicitly protects individuals because it prevents an excessive accumulation of power in either level of government';<sup>65</sup> and
- Encouragement of creativity and innovation between jurisdictions by enabling 'social and economic experimentation by State governments without risk to the whole nation'.<sup>66</sup>

Despite the numerous advantages of federal systems, the effectiveness of federalism in contemporary society is often criticised in Australia.<sup>67</sup> This can be attributed to the nation's overwhelming focus on the perceived disadvantages of federalism. Some of the 'myths'<sup>68</sup> about federalism that arise are:

- Convolution and inefficiency.<sup>69</sup> Unitary systems are sometimes preferred over federalist systems because of preconception that in a unitary Commonwealth, standards can be consistently and uniformly applied across the country.<sup>70</sup> However, it is not empirically proven that federalist

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<sup>61</sup> Twomey and Withers, above n 5, 13, cited in Commonwealth of Australia, above n 1, 1.

<sup>62</sup> Australian Government Productivity Commission, above n 55, 25, cited in Commonwealth of Australia, above n 1, 1.

<sup>63</sup> Walker, above n 51, 23.

<sup>64</sup> See generally, *Ibid* 21.

<sup>65</sup> Moens, above n 52, 21.

<sup>66</sup> See, eg, *New State Ice Co v Liebmann* (1932) 285 US 262 (Brandeis J) 311, cited in Moens, above n 52, 22. See also, Twomey and Withers, above n 5, 13; Walker, above n 51, 15.

<sup>67</sup> See generally, Twomey and Withers, above n 5, 13; Commonwealth of Australia, above n 1.

<sup>68</sup> Twomey and Withers, above n 5, 18.

<sup>69</sup> A de Tocqueville, *Democracy in America* (1864) I, 220-2, cited in Greenwood, above n 14, 1.

<sup>70</sup> Cf Twomey and Withers, above n 5, 10. Twomey and Withers argue that: 'this can [actually] lead to unfair results where it does not take account of relevant differences and preferences': Twomey and Withers, above n 5, 10.

systems are less efficient and/or costly, unless you alter the distribution of powers;<sup>71</sup>

- Duplication, high cost and divided accountability.<sup>72</sup> This ‘overlap’ can be problematic for businesses that engage in cross-border trading,<sup>73</sup> and consequently can undermine the efficiency and effectiveness of Australian federalism.<sup>74</sup> Twomey and Withers contend that duplication can be minimised by clearly defining the roles and responsibilities of the different tiers of government,<sup>75</sup> ‘with each managing and funding its own responsibilities’;<sup>76</sup> and
- Conflict and ‘buck-passing’.<sup>77</sup> Dicey supported unitary systems of government and was critical of limiting sovereign power under the federalist division of powers.<sup>78</sup> According to him, the division of sovereignty generates ‘conflict between local and national loyalties’.<sup>79</sup> However, this perceived disadvantage of federalism can be limited, or even eliminated, by drawing attention to National priorities, and by clearly defining the roles and responsibilities of different tiers of government.<sup>80</sup>

In summary, this Section has argued that the advantages of the federalist system far outweigh its perceived disadvantages.<sup>81</sup> The author contends that the

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<sup>71</sup> See, eg, Twomey and Withers, above n 5, 3, 20. According to Twomey and Withers, ‘federal nations such as Australia have: more efficient governments; and higher rates of economic growth and higher per capita GDP’: Twomey and Withers, above n 5, 2. Twomey and Withers further note that ‘[m]any of the largest and most efficient economies belong to federations’: Twomey and Withers, above n 5, 20.

<sup>72</sup> Greg Craven, ‘The New Centralism and the Collapse of the Conservative Constitution’ (Paper presented at the Department of the Senate Occasional Lecture Series, Parliament House, Canberra, 2005). See also, Kevin Rudd, Interview with Chris Uhlman, ABC TV News (20 April 2008) <<http://pmtranscripts.dpmc.gov.au/browse.php?did=15881>>.

<sup>73</sup> Zimmermann and Finlay, above n 4, 193.

<sup>74</sup> Australian Government, *Issues Paper 5 COAG and Federal Financial Relations* (2015) 1 <[https://federation.dpmc.gov.au/sites/default/files/issues-paper/issues-paper-5\\_COAG\\_FFR.pdf](https://federation.dpmc.gov.au/sites/default/files/issues-paper/issues-paper-5_COAG_FFR.pdf)>.

<sup>75</sup> Twomey and Withers, above n 5, 22.

<sup>76</sup> Zimmermann and Finlay, above n 4, 194.

<sup>77</sup> Greenwood, above n 14, 2.

<sup>78</sup> Dicey, above n 9, 1xxvii, cited in Greenwood, above n 14, 1.

<sup>79</sup> Greenwood, above n 14, 2.

<sup>80</sup> Council of Australian Governments, COAG’s Reform Agenda <[https://www.coag.gov.au/reform\\_agenda](https://www.coag.gov.au/reform_agenda)>.

<sup>81</sup> According to Twomey and Withers, by adopting a federal system, Australia benefits by over 10% of the Gross Domestic Product (‘GDP’). However, they argue that this amount could be increased significantly if Australia decentralises power out of the hands of the central government. See, Twomey and Withers, above n 5, 42.

disadvantages of federalism are aggravated when the High Court fails to properly safeguard the constitutional limitations on the exercise of Commonwealth legislative power.<sup>82</sup>

## II THE HIGH COURT AND THE *CONSTITUTION*

In the previous Section it was established that the Framers intended Australia to be a federal Commonwealth, and were particularly mindful of protecting the independence and sovereignty of the States. During the first two decades of its existence, the High Court upheld the federal structure of the *Constitution*, by interpreting it in a manner consistent with the Framers' intentions.<sup>83</sup> In order to give effect to the Framers' intentions, the early High Court<sup>84</sup> developed two federal implications, known as the 'implied intergovernmental immunities doctrine' and the 'reserve powers doctrine' (discussed below). However in 1920, the new High Court, under the leadership of Justices Isaacs and Higgins,<sup>85</sup> abandoned these federal implications in favour of an expansive interpretation of the constitutional text.<sup>86</sup> In a series of cases that followed, it will be seen that the High Court has consistently undermined the federal balance<sup>87</sup> by interpreting Commonwealth powers broadly, at the expense of the States. It is argued that this approach to interpretation has been 'widely at variance with the intentions and

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<sup>82</sup> Zimmermann and Finlay, above n 4, 193.

<sup>83</sup> See, Ibid 204; Nicholas Aroney et al, *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (Cambridge University Press, 2015) 34.

<sup>84</sup> Consisting of Griffith CJ, Barton and O'Connor JJ.

<sup>85</sup> Justices Isaac and Higgins were appointed to the High Court in 1905: John Nethercote, 'The Engineers' Case: Seventy Five Years On' (Paper presented at the Sixth Conference of The Samuel Griffith Society, Townhouse Hotel, Carlton, 17-19 November 1995) 116, 118.

<sup>86</sup> See, *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* ('*Engineers*') (1920) 28 CLR 129. See also, Aroney et al, above n 83, 34.

<sup>87</sup> See, eg, James Allan and Nicholas Aroney, 'An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism' (2008) 30(2) *Sydney Law Review* 245; Greg Craven, 'Reforming the High Court' (Paper presented at the Seventh Conference of The Samuel Griffith Society, Stamford Plaza Hotel, Adelaide, 7-9 June 1996) 23, 27; Craven, above n 13, 65-104; Greg Craven, 'The Engineers' Case: Time for a Change?' (Paper presented at the Eighth Conference of The Samuel Griffith Society, 7-9 March 1997) 46-68; Geoffrey de Q Walker, 'The Seven Pillars of Centralism: Federation and the *Engineers' Case*' (Paper presented at the Fourteenth Conference of The Samuel Griffith Society, Menzies Hotel, 14-16 June 2002) 18; Greg Craven, 'The High Court and the Founders: an Unfaithful Servant' in *Senate Papers on Parliament (No 30): The Constitution Makers* (1997) 63, cited in John Gava, 'Can Judges Resuscitate Federalism?' Case' (Paper presented at the Nineteenth Conference of The Samuel Griffith Society, Bayview Eden Hotel, Melbourne, 17-19 August 2007) 9, 16 (endnote 4); Aroney et al, above n 83, 33-4.

expectations of the founders’.<sup>88</sup>

The High Court was established under s 71 of the *Constitution* as the final court of appeal and the adjudicator of constitutional disputes.<sup>89</sup> The traditional view postulates that the Framers intended the High Court act to as ‘guardians’ of the *Constitution*<sup>90</sup> and protectors of the States.<sup>91</sup> This view is supported by the Framers’ desire to limit the legislative powers of the central government to the specifically defined provisions in the *Constitution*.<sup>92</sup> Indeed, Alfred Deakin, Australia’s first Attorney-General, who played an important role in the federation movement,<sup>93</sup> referred to the High Court as the ‘keystone of the federal arch’.<sup>94</sup>

### *A Approaches to Constitutional Interpretation*

Broadly speaking, the *Constitution* can be interpreted according to three different constructions: ‘originalism’; ‘literalism’; and ‘revisionism’ (otherwise known as the ‘living constitution approach’). This is because the *Constitution* itself is silent on which method of interpretation should be adopted.<sup>95</sup> Evans argues that the lack of express guidance in the *Constitution* is attributable to the fact that:

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<sup>88</sup> Allan and Aroney, above n 83, 246.

<sup>89</sup> See generally, Sir Anthony Mason ‘The High Court of Australia: A Personal Impression of its First 100 Years’ (2003) 27 *Melbourne University Law Review* 864, 865. See also, *Constitution* s 73 (‘Appellate jurisdiction of the High Court’).

<sup>90</sup> See, Daryl Williams, ‘Judicial Independence and the High Court’ (1998) 27 *University of Western Australia Law Review* 140, 152; Zimmermann and Finlay, above n 4, 203.

<sup>91</sup> Craven, above n 13, 46. See also, Evans, above n 10, 51; Craven, above n 87, 25; Michelle Evans, ‘Subsidiarity and Federalism: A Case Study of the Australian Constitution and Its Interpretation’ in Michelle Evans and Augusto Zimmermann (eds), *Global Perspectives on Subsidiarity* (Springer Netherlands, 2014) 185, 194; 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, 221.

<sup>92</sup> See generally, Zimmermann and Finlay, above n 4, 201; Craven, above n 13, 46.

<sup>93</sup> Deakin was involved in the Convention Debates during 1985, 1987 and 1990. See generally, R Norris, ‘Alfred Deakin’ in Bede Nairne and Geoffrey Serle, *Australian Dictionary of Biography* (Melbourne University Press, 8<sup>th</sup> ed, 1996) 248-56, cited in Museum of Australian Democracy, ‘Prime Facts: Alfred Deakin’

<<http://static.moadoph.gov.au/ophgovau/media/images/apmc/docs/02-Deakin-Web.pdf>>; See also, Deakin University, ‘Alfred Deakin and Federalism’

<<http://www.deakin.edu.au/library/special-collections/alfred/federation>>.

<sup>94</sup> Dicey, above n 9, 387-8, cited in Zimmermann and Finlay, above n 4, 203; Galligan, above n 9, 170. See also, Selway, above n 9, 138.

<sup>95</sup> Cf the *Acts Interpretation Act 1901* (Cth) s 15AA and equivalent State legislation, which provides that statutory instruments should be interpreted to give effect to the ‘purpose’ or ‘object’ of the legislation (otherwise known as the ‘purposive’ approach). See, eg, *Acts Interpretation Act 1901* (Cth) s 15AA; *Interpretation Act 1984* (WA) s 18; *Legislation Act 2001* (ACT) ss 139; *Interpretation Act 1987* (NSW) s, 33; *Interpretation Act 2015* (NT) s

the [F]ramers' regard[ed] ... 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.<sup>96</sup>

Accordingly, there is a lack of consensus in the High Court about which is the preferred method of interpretation to adopt.<sup>97</sup> Whilst the author accepts that originalism is not a 'perfect' mode of constitutional interpretation, it is argued that originalism is the best method to ensure that basic constitutional principles (such as the need to maintain a federal balance of power) are protected from change and political influence.<sup>98</sup>

'Originalism' seeks to 'give effect to the intention of the makers of the *Constitution*',<sup>99</sup> and is premised on the notion that the *Constitution* can only be

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62A; *Acts Interpretation Act 1954* (Qld) s 14A; *Acts Interpretation Act 1915* (SA) s 22; *Acts Interpretation Act 1931* (Tas) s 8A; *Interpretation of Legislation Act 1984* (Vic) s 35. See also, Allan and Aroney, above n 87, 251.

<sup>96</sup> Evans, above n 5, 149.

<sup>97</sup> *Work Choices* (2006) 229 CLR 1, 301-3. Justice Callinan stated:

In this part of my reasons I search for consistency of interpretation of the Constitution by the Justices of this Court but cannot find it because it does not exist.

*Work Choices* (2006) 229 CLR 1, 736 (Callinan J). However, literalism has been regarded as the 'orthodox' approach that has been preferred by the High Court since 1920. See, Greg Craven, 'Cracks in the Façade of Literalism: Is There an Engineer in the House?' (1992) 18(3) *Melbourne University Law Review* 540, 540; *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* ('*Engineers*') (1920) 28 CLR 129.

<sup>98</sup> Michael Stokes, 'Meaning, Theory and the Interpretation of the Constitutional Grants of Power' (2013) 39(2) *Monash University Law Review* 319, 319. In the United States Supreme Court case of *McDonald v Chicago* 561 US 742 (2010) 13-4, Scalia J defended originalism on the basis that it is 'the best means available'. See, Amanda Hollis Brusky, *Ideas With Consequences: The Federalist Society and the Conservative Counterrevolution* (Oxford University Press, 2015) 53-4. See also, James Allan and Michael Kirby AC CMG, 'A Public Conversation on Constitutionalism and the Judiciary Between Professor James Allan and Michael Kirby AC CMG' (2009) 33(3) *Melbourne University Law Review* 1032, 1038. Allan describes originalism as: 'simply the least bad option on offer, not a flawless approach': James Allan and Michael Kirby AC CMG, 'A Public Conversation on Constitutionalism and the Judiciary Between Professor James Allan and Michael Kirby AC CMG' (2009) 33(3) *Melbourne University Law Review* 1032, 1038

<sup>99</sup> Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1, 8, quoting *Re Wakim; Ex parte McNally* ('*Cross-vesting Case*') (1999) 198 CLR 511, 551 (McHugh J). This is consistent with the strict separation of powers between the legislature and the judiciary pursuant to the rule of law principles. Justice McHugh stated:

The starting point for a principled interpretation of the *Constitution* is the search for the intention of the makers. That does not mean a search for their subjective beliefs, hopes or expectations. Constitutional interpretation is not a search for the mental states of those who made, or for that matter approved or enacted, the *Constitution*.

*Cross-vesting Case* (1999) 198 CLR 511, 551 (McHugh J), quoted in Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1, 8.

understood by reference to wider contextual considerations known as ‘the spirit of the *Constitution*’.<sup>100</sup> However, the 1920 case of *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (‘*Engineers*’) marked the turning point for a new method of constitutional interpretation, known as ‘literalism’.<sup>101</sup> This approach involves interpreting the words of the *Constitution* according to their natural sense, ‘as if it were nothing more than a British statute’,<sup>102</sup> and giving them the ‘widest literal meaning that the words can possibly bear’.<sup>103</sup>

This thesis argues that by construing the *Constitution* as an ordinary statute of Imperial Parliament (UK),<sup>104</sup> the High Court has broadened Commonwealth legislative powers at the expense of the States. Unfortunately, due to constraints on word limits, the author is unable to provide a detailed discussion of the different modes of constitutional interpretation and their advantages and disadvantages. Rather, the focus of this thesis will be on the expansion of Commonwealth power under the literalist approach.

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<sup>100</sup> *Engineers* (1920) 28 CLR 129, 150-2 (Knox CJ, Isaacs, Rich and Starke JJ), cited in Craven, above n 97, 544. An originalist judge will look to the intentions of the legislature (as evidenced through the Convention Debates) in order to determine the original meaning of the constitutional provisions. See, Lael Weis, ‘What Comparativism Tells us About Originalism’ (2013) 11(4) *International Journal of Constitutional Law* 842, 845. This is especially true where provisions of the *Constitution* are ambiguous or obscure.

<sup>101</sup> According to Michelle Evans, an appeal to literalism was made in an attempt to eliminate the power of elected judges imposing their own ‘subjective and idiosyncratic views’ about the meaning of constitutional provisions. See, Evans, above n 5, 169. See generally, Angus J O’Brien, ‘Wither Federalism: The Consequences and Sustainability of the High Court’s Interpretation of Commonwealth Powers’ (2008) 23(2) *Australian Parliamentary Review* 166, 170.

<sup>102</sup> Geoffrey de Q Walker ‘The Seven Pillars of Centralism: The *Engineers*’ Case and Federalism’ (2002) 76 *The Australian Law Journal* 678, 682. See also, *Melbourne University Law Review* 541, 541-2. *Commonwealth v Tasmania* (‘*Tasmanian Dam Case*’) (1983) 158 CLR 1, 127-128 (Mason J); Craven, above n 97, 543.

<sup>103</sup> Walker, above n 102, 684, citing *Tasmanian Dam Case* (1983) 158 CLR 1, 127-8 (Mason J); *R v Public Vehicles Licensing Appeal Tribunal; Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207, 224 and Sir Daryl Dawson ‘The Constitution – Major Overhaul or Simple Tune-Up?’ (1984) 14 *Melbourne University Law Review* 353, 356.

<sup>104</sup> Walker, above n 102, 682. As such, the judiciary is guided by the principles such as the ‘ordinary meaning rule’, which involves ascertaining the plain and natural meaning of the words, and adopting the broadest interpretation that those words are capable of bearing. See, Walker, above n 102, 684, citing *Tasmanian Dam Case* 158 CLR 1, 127-128 (Mason J). Greg Craven identifies four characteristics of the literalist formulation. See, Craven, above n 97, 542.

The next Section will examine how the *Constitution* has been interpreted by the High Court, in particular, how the literalist approach has ‘radically altered’ the federal balance.<sup>105</sup>

#### IV THE EARLY HIGH COURT

The first High Court was established in 1903, and was comprised of only three judges – Griffith CJ, Barton and O'Connor JJ.<sup>106</sup> They were leaders of the federation movement and Founding Fathers of Australia's *Constitution*.<sup>107</sup> Accordingly, they sought to interpret the *Constitution* in a way that gives effect to the Framers's intentions.<sup>108</sup> In determining the enumerated powers under the *Constitution*, the early High Court took into account the nature of the *Constitution* as ‘an enduring instrument of government, not merely a British statute’.<sup>109</sup> For them, the *Constitution* was ‘an agreement among sovereign powers’,<sup>110</sup> whereby the States were, ‘at the very least’, equal to the central government.<sup>111</sup> Above all, the early High Court was mindful that prior to federation the colonies had almost unlimited powers.<sup>112</sup>

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<sup>105</sup> Sir Anthony Mason in ‘The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience’ (1986) 16 *Federal Law Review* 1, 22.

<sup>106</sup> Williams, Brennan and Lynch, above n 21, 242; Mason, above n 89, 865.

<sup>107</sup> Walker, above n 87, 18; Mason, above n 89, 865; Nicholas Aroney, ‘Constitutional Choices in the ‘Work Choices’ Case, or What Exactly Is Wrong with the Reserved Powers Doctrine’ (2008) 32(1) *Melbourne University Law Review* 1, 13-4. Cf Justices Isaacs and Higgins. See, Zimmermann and Finlay, above n 4, 205, citing Nicholas Aroney, ‘Constitutional Choices in the ‘Work Choices’ Case, or What Exactly Is Wrong with the Reserved Powers Doctrine’ (2008) 32(1) *Melbourne University Law Review* 1, 14.

<sup>108</sup> See, Greg Craven, ‘Heresy as Orthodoxy: Were the Founders Progressivists?’ (2003) 31 *Federal Law Review* 87, 87.

<sup>109</sup> Walker, above n 87, 18. This was the approach enunciated by the High Court in *Federated Amalgamated Government Railway and Tramway Service Association v NSW Rail Traffic Employees Association* (‘*Railway Servant's Case*’) (1906) 4 CLR 488, 534. There, the Court stated:

The *Constitution* Act is not only an Act of the Imperial legislature, but it embodies a compact entered into between the six Australian colonies which formed the Commonwealth. This is recited in the Preamble to the Act itself.

*Railway Servant's Case* (1906) 4 CLR 488, 534, quoted in Walker, above n 87, 18.

<sup>110</sup> Nethercote, above n 85, 117.

<sup>111</sup> Evans, above n 10, 36.

<sup>112</sup> Walker, above n 87, 18, citing *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087, 1093. In 1904, Griffith CJ noted that:

[i]n considering the respective powers of the Commonwealth and the States it is essential to bear in mind that each is, within the ambit of its authority, a sovereign State.

*D'Emden v Pedder* (‘*D'Emden*’) (1904) 1 CLR 91, 109 (Griffith CJ).

### *A Federal Implications*

The early High Court developed two implications to give effect to the Drafters' intentions. These principles are 'derived from the federal nature of the *Constitution*',<sup>113</sup> and according to Craven, are 'an embodiment of a federalism of a co-ordinate and strongly decentralized type'.<sup>114</sup> The first, and arguably the most important doctrine,<sup>115</sup> is the doctrine of 'reserved powers'. This doctrine supports a narrow interpretation of the constitutional text in order to avoid any reduction of State power,<sup>116</sup> and is premised on the notion that 'the *Constitution* impliedly reserved to the States their traditional areas of legislative power'.<sup>117</sup> As a result, this doctrine compelled a narrow construction of Commonwealth power.<sup>118</sup> According to the early High Court, the reserved powers doctrine gained its legitimacy from s 107 of the *Constitution*.<sup>119</sup>

The doctrine of reserved powers was first applied in *Peterswald v Bartley* (1904),<sup>120</sup> to support a narrow interpretation of 'excise' in s 90 of the *Constitution*.<sup>121</sup> The reserved powers doctrine was again applied in *R v Barger* (1908)<sup>122</sup> another case concerning excise duties. However neither of these cases clarified the basis on which the doctrine was applied.<sup>123</sup> Chief Justice Griffith explained the effects of the doctrine in two later cases: *Attorney-General (NSW) v Brewery Employees Union of NSW* ('*Union Label Case*') (1908)<sup>124</sup> and *Huddart*

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<sup>113</sup> Aroney, above n 10, *The Constitution of a Federal Commonwealth*, xi. See also, Evans, above n 5, 177.

<sup>114</sup> Craven, above n 97, 544.

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*

<sup>117</sup> Mason, above n 40, 11-12.

<sup>118</sup> *Ibid.*

<sup>119</sup> See, eg, *R v Barger* (1906) 6 CLR 41, cited in Zimmermann and Finlay, above n 4, 204-5. 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.

*Constitution* s 107.

<sup>120</sup> *Peterswald v Bartley* ('*Peterswald*') (1904) 1 CLR 497.

<sup>121</sup> Williams, Brennan and Lynch, above n 21, 248.

<sup>122</sup> *R v Barger* (1908) 6 CLR 41.

<sup>123</sup> Williams, Brennan and Lynch, above n 21, 249.

<sup>124</sup> *Union Label Case* (1908) 6 CLR 469, cited in Williams, Brennan and Lynch, above n 21, 249-50.



*Parker and Co Pty Ltd v Moorehead* (1909).<sup>125</sup> In those cases, the High Court contended that any reservation of legislative powers to the Commonwealth, to the exclusion of the States, must be ‘clearly and unequivocally expressed’.<sup>126</sup>

A second doctrine, known as the ‘implied intergovernmental immunities’ doctrine, emphasises the distinction between the Commonwealth and the States as being two separate entities that need to be kept immune to any kind of interference from the other.<sup>127</sup> This doctrine was first expressed in Australian law in the 1904 case of *D’Emden v Pedder*.<sup>128</sup> There, the Court<sup>129</sup> considered whether a Commonwealth public servant was liable to pay stamp duty on his salary receipts.<sup>130</sup> Applying the doctrine of implied intergovernmental immunities,<sup>131</sup> it was held that the *Stamp Duties Amendment Act 1902* (Tas) did not apply because Commonwealth officers were immune from State laws.<sup>132</sup> Chief Justice Griffith, delivering the judgment of the Court, reiterated the importance of individual sovereignty of the States. He declared that the Commonwealth and each State are

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<sup>125</sup> *Huddart Parker and Co Pty Ltd v Moorehead* (‘Huddart’) (1909) 8 CLR 330, cited in Williams, Brennan and Lynch, above n 21, 249-50.

<sup>126</sup> *Huddart* (1909) 8 CLR 330, 352 (Griffith CJ). See also, *Union Label Case* (1908) 6 CLR 469, 503 (Griffith CJ), cited in Williams, Brennan and Lynch, above n 21, 250. See also, O’Brien, above n 101, 169-70, citing Suri Ratnapala, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, 2<sup>nd</sup> ed, 2007) 214.

<sup>127</sup> See, eg, Evans, above n 5, 177; Jennifer Clarke, Patrick Keyzer and James Stellios, *Hanks Australian Constitutional Law: Materials and Commentary* (LexisNexis Butterworths, 9th ed, 2013) 493.

<sup>128</sup> *D’Emden v Pedder* (‘D’Emden’) (1904) 1 CLR 91. This was the first major constitutional law case in Australia: Mason, above n 89, 868. See also, Catherine Penhallurick, ‘Commonwealth Immunity as a Constitutional Implication’ (2001) 29(2) *Federal Law Review* 151, 151, citing Sawyer, above n 23, 126.

<sup>129</sup> Griffith CJ, Barton and O’Connor JJ.

<sup>130</sup> See, Mason, above n 89, 868.

<sup>131</sup> The implied intergovernmental immunities doctrine was enunciated in the United States Supreme Court case of *McCulloch v Maryland* (‘*McCulloch*’) 17 US (4 Wheat) 316 (1819). See, *D’Emden* (1904) 1 CLR 91, 109-11. See also, 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. See also, Charles Parkinson, ‘The Early High Court and the Doctrine of Immunity of Instrumentalities’ (2002) 13 *Public Law Review* 26, 27. The High Court justified its reliance on *McCulloch* on the basis that the *United States Constitution* and the *Australian Constitution* are similar, and also because the Framers, in drafting the *Australian Constitution*, were informed by the experiences from the *United States Constitution*. See, Evans, above n 5, 180 quoting *D’Emden* (1904) 1 CLR 91, 112-3 (Griffith CJ). Accordingly, Griffith CJ stated: ‘it is not an unreasonable inference that its framers intended that like provisions should receive like interpretation’. See, *D’Emden* (1904) 1 CLR 91, 113 (Griffith CJ) applied in *Deakin v Webb* (1904) 1 CLR 585, 616. See also, Williams, Brennan and Lynch, above n 21, 243.

<sup>132</sup> *D’Emden* (1904) 1 CLR 91, 109-11. The judgment was delivered by Griffith CJ, with Barton and O’Connor JJ agreeing. See, Williams, Brennan and Lynch, above n 21, 243.

‘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’.<sup>133</sup>

The implied intergovernmental immunities doctrine was again applied in *Deakin and Lyne v Webb* (1904),<sup>134</sup> in determining that a Commonwealth Minister was not liable to pay State income tax. There, the High Court held that the provisions of the Federal law were invalid to the extent that they interfered with State agencies and with the freedom of the Commonwealth to transfer officers from State to State.<sup>135</sup> These two decisions were later overruled by the Privy Council in *Webb v Outtrim* (1906).<sup>136</sup> However, just eleven days after the Privy Council’s decision, the High Court reaffirmed the implied intergovernmental immunities doctrine.<sup>137</sup>

In *Federated Amalgamated Government Railway and Tramway Service Association v NSW Rail Traffic Employees Association* (‘*Railway Servant’s Case*’) (1906)<sup>138</sup> Griffith CJ affirmed and applied the principle in *D’Emden*, to prevent the Commonwealth from interfering with the States.<sup>139</sup> This case concerned the validity of the *Commonwealth Conciliation and Arbitration Act 1904* (Cth) under the industrial arbitration power in s 51(xxxv). The Court<sup>140</sup> held that the Act was *ultra vires* and void to the extent that it purported to control State railways.<sup>141</sup>

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<sup>133</sup> *D’Emden* (1904) 1 CLR 91, 109 (Griffith CJ), quoted in Mason, above n 89, 869. See also, *D’Emden* (1904) 1 CLR 91, 111 (Griffith CJ).

<sup>134</sup> *Deakin and Lyne v Webb* (1904) 1 CLR 585. See, Mason, above n 89, 869 and Clarke, Keyzer and Stellios, above n 127, 493.

<sup>135</sup> *Deakin v Webb* (1904) 1 CLR 585, 616 (Brennan J), cited in Williams, Brennan and Lynch, above n 21, 243.

<sup>136</sup> *Webb v Outtrim* (1906) 4 CLR 356. See, Sir Anthony Mason and Geoffrey Lindell, *The Mason Papers: Selected Articles and Speeches* (Federation Press, 2007) 129 footnote 63. In 1907 the Privy Council’s decision in *Webb v Outtrim* was overturned by the High Court, and the immunities doctrine was reinstated (*Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087). See generally, Tony Blackshield and George Williams *Australian Constitutional Law and Theory* (Federation Press, 4<sup>th</sup> ed abridged, 2006). In *Webb v Outtrim* the Privy Council rejected appeals to the implied intergovernmental immunities doctrine. See, *Webb v Outtrim* (1906) 4 CLR 356, 360-1 (The Earl of Halsbury), cited in Evans, above n 5, 183.

<sup>137</sup> *Railway Servants’ Case* (1906) 4 CLR 488, cited in Williams, Brennan and Lynch, above n 21, 244-5.

<sup>138</sup> *Railway Servants’ Case* (1906) 4 CLR 488. See also, Aroney et al, above n 87, 244.

<sup>139</sup> *Railway Servants’ Case* (1906) 4 CLR 488, 537 (Griffith CJ). See, Evans, above n 5, 185 and Williams, Brennan and Lynch, above n 21, 245.

<sup>140</sup> Consisting of Griffith CJ, Barton and O’Connor JJ.

<sup>141</sup> *Railway Servants’ Case* (1906) 4 CLR 488, 489, 547.

Another example of the High Court's expansion of Commonwealth legislative power is its interpretation of the corporations power in s 51(xx). It is clear from the text of s 51(xx) that the Framers only intended the provision to extend to 'foreign corporations' and 'trading or financial corporations', on the proviso that the latter corporations are 'formed within the limits of the Commonwealth'.<sup>142</sup> According to Greg Craven, the wording of s 51(xx) as evidence that the Framers intended the Australian federation to be 'a loose one', whereby 'the balance of power would lie decidedly with the States'.<sup>143</sup> Indeed, the Griffith High Court<sup>144</sup> adopted a narrow interpretation of the corporations power.

The first major case considering the scope of the Commonwealth's corporations power was *Huddart* (1909).<sup>145</sup> There, a 4:1 majority<sup>146</sup> held that s 15b of the *Australian Industries Preservation Act 1906* (Cth)<sup>147</sup> (which sought to prohibit the restraint of trade and commerce) was *intra vires*, and was therefore valid. The High Court, 'under the influence of the reserve powers doctrine',<sup>148</sup> adopted a very narrow definition of the corporations power. It determined that s 51(xx) did not extend to intra-State trading operations of foreign corporations or trading or financial corporations formed within the limits of the Commonwealth.<sup>149</sup> This was justified on the basis that such a characterisation would unlawfully encroach on State legislative powers.<sup>150</sup>

Chief Justice Griffith referred to the need to protect State legislative powers.<sup>151</sup> He espoused a view that s 51(xx) should be interpreted narrowly, so that it 'empowers

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<sup>142</sup> Craven, above n 13, 46. See also, Zimmermann and Finlay, above n 4, 211.

<sup>143</sup> Craven, above n 13, 46; Greg Craven, 'The States – Decline, Fall or What? In Greg Craven (ed) *Towards the Second Century* (Melbourne University Press, 1992) 49, 50.

<sup>144</sup> This refers to the first High Court, composed of the Founders Griffith CJ, Barton and O'Connor JJ.

<sup>145</sup> *Huddart* (1909) 8 CLR 330.

<sup>146</sup> Griffith CJ, Barton, O'Connor, and Higgins JJ (Isaacs J dissenting).

<sup>147</sup> As amended by the *Australian Industries Preservation Act 1907* (Cth).

<sup>148</sup> *Huddart* (1909) 8 CLR 330, 352-4 (Griffith CJ). See, Clarke, Keyzer and Stellios, above n 127, 283-4 and Williams, Brennan and Lynch, above n 21, 250-1.

<sup>149</sup> *Huddart* (1909) 8 CLR 330, 534, cited in *Strickland v Rocla Concrete Pipes Ltd* (1909) 8 CLR 330, 480-1 (Barwick CJ) and *Work Choices* (2006) 229 CLR 1, 81-2.

<sup>150</sup> See, *Huddart* (1909) 8 CLR 330, 353-4 (Griffith CJ).

<sup>151</sup> Chief Justice Griffith noted that:

[t]he *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

the commonwealth to prohibit a trading or financial corporation formed within the limits of the Commonwealth from entering into any field of operation'.<sup>152</sup> On the other hand, Justice Higgins in his majority judgment adopted an alternate, 'literalist', approach to characterising s 51(xx), declaring that 'the Constitution [should be construed] as ... an ordinary Act of Parliament'.<sup>153</sup> In similar vein, Isaacs J (dissenting) declared that the *Constitution* should not be interpreted according to the 'spirit of the document' nor any implications such as federalism.<sup>154</sup> Justice Isaacs stated:

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 ... [based on] subjective preconceptions of the individual observer.<sup>155</sup>

As the following Section demonstrates, Justices Isaacs and Higgins were eventually successful in applying an expansive interpretation of the Commonwealth powers.<sup>156</sup>

## V THE *ENGINEERS* HIGH COURT

The balanced model of federalism envisioned by the Framers began to be eroded when Isaacs and Higgins JJ were appointed to the High Court in 1906.<sup>157</sup> Justices

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State to regulate the carrying on of any businesses or trades within their boundaries, or even, if they think fit, to prohibit them altogether.

*Huddart* (1909) 8 CLR 330, 353 (Griffith CJ). See also, Williams, Brennan and Lynch, above n 21, 251.

<sup>152</sup> Ibid 354 (Griffith CJ). See also, Evans, above n 5, 197.

<sup>153</sup> Ibid 414 (Higgins J) quoted in Evans, above n 5, 198. This position was later reiterated by Higgins J in *Engineers* (1920) 28 CLR 129.

<sup>154</sup> See, Evans, above n 5, 198.

<sup>155</sup> *Huddart* (1909) 8 CLR 330, 388 (Isaacs J) quoted in Graham Fricke, 'Constitutional Implications: A Misty and Uncertain Light' (1996) 3(1) *Deakin Law Review* 79, 79. See also, See, Evans, above n 5, 198.

<sup>156</sup> *Engineers* (1920) 28 CLR 129. These Justices have been described as being more centralist than the foundation Justices, and were both strongly critical of the reserved powers and implied intergovernmental immunities prohibitions. See, eg, Nethercote, above n 85, 118. This was possible due to changes in the membership of the High Court, with the replacement of the founding Justices. See, Michael Kirby, 'Isaac Isaacs: A Sesquicentenary Reflection' (Paper presented at the Samuel Alexander Lecture, Wesley College, Melbourne, 4 August, 2005) 22.

<sup>157</sup> See, Augusto Zimmermann, 'Judicial Betrayal' 28(2) *Policy* 18, 19; Williams, Brennan and Lynch, above n 21, 242. Whereas Griffith CJ was a federalist, Isaacs J, for example,

Isaacs and Higgins participated in the 1891 and 1897-8 Convention Debates, but were often in the minority and were not formally involved in drafting the *Constitution*.<sup>158</sup> For these reasons, legal commentators have questioned the reliability of their views.<sup>159</sup> And yet, the new High Court successfully initiated a new method of constitutional interpretation, whereby the *Constitution* would be construed broadly and generally.<sup>160</sup> In *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908),<sup>161</sup> O'Connor J, in considering the scope of the industrial relations power under s 51 (xxxv), affirmed a broad interpretation of the *Constitution*.<sup>162</sup> Later, in *Engineers* (1920),<sup>163</sup> a 5-1 majority of the High Court<sup>164</sup> rejected the implied intergovernmental immunities doctrine and the reserved powers doctrine in favour of a literalist approach.<sup>165</sup>

*Engineers* marked the turning point for constitutional interpretation.<sup>166</sup> Instead of interpreting the *Constitution* as a 'federating agreement between the peoples and

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'favoured strong central power'. See, Mason, above n 89, 866-7. The additional appointment of Justices Isaacs and Higgins disrupted the unanimity of the early High Court, and 'the influence of Griffith CJ progressively declined'. See, Mason, above n 89, 866. The justification for the appointment of Isaacs and Higgins JJ was that the *Judiciary Amendment Act 1906* (Cth) increased the members of the High Court from 3 justices to 5. See, Evans, above n 5, 176.

<sup>158</sup> Aroney, above n 107, 4, cited in Zimmermann and Finlay, above n 4, 205; Augusto Zimmermann, 'Judicial Betrayal' 28(2) *Policy* 18, 19.

<sup>159</sup> See, eg, Zimmermann and Finlay, above n 4, 205; Aroney, above n 107, 1.

<sup>160</sup> See, eg, *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* ('*Jumbunna Case*') (1908) 6 CLR 309, 367-8 (O'Connor J).

<sup>161</sup> *Jumbunna Case* (1908) 6 CLR 309.

<sup>162</sup> *Jumbunna Case* (1908) 6 CLR 309, 367-8 (O'Connor J). However, Angus O'Brien notes that this broad interpretation was subject to a certain limitation that:

[where] there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose.

O'Brien, above n 101, 172, quoting *Jumbunna Case* (1908) 6 CLR 309, 368 (O'Connor J). See also, Aroney, above n 107, 36-7.

<sup>163</sup> *Engineers* (1920) 28 CLR 129.

Consisting of Knox CJ, Isaacs, Rich, Starke and Higgins JJ (Duffy J dissenting).

<sup>164</sup> See, Michelle Evans, '*Engineers*: The Case That Changed Australian Constitutional History' (2012) 24 *Journal of Constitutional History* 65, 67.

<sup>165</sup> Craven, above n 97, 544; Walker, above n 102, 678. Geoffrey de Q Walker states:

[the *Engineers* decision] is crucial not so much for what it actually decided as for the way in which it 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.

Walker, above n 102, 678. See also, Nicholas Aroney, 'The Ghost in the Machine: Exorcising *Engineers*' (Paper presented at the Fourteenth Conference of The Samuel Griffith Society, Menzies Hotel, Sydney 14-16 June 2002) 61, 61, citing Sir Robert Menzies, *Central Power in the Australian Commonwealth: An Examination of the Growth of Commonwealth Power in the Australian Federation* (Cassell, 1967) 30; Leslie Zines, *The High Court and the Constitution* (Butterworths, 4<sup>th</sup> ed, 1997) 8.

representatives of the Australian states',<sup>167</sup> the majority adopted a new approach to constitutional interpretation, known as 'literalism'.<sup>168</sup> The majority joint judgment, written by Isaacs J,<sup>169</sup> affirmed and applied the principle enunciated in *The Queen v Burah* (1878)<sup>170</sup> and *Hodge v The Queen* (1883),<sup>171</sup> 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>172</sup>

### *A Abandoning Federal Implications*

Literalism formed a justification for the High Court's rejection of the use of federal implications.<sup>173</sup> These doctrines were overturned on the basis that 's 107 is simply about continuing State powers that are exclusive, or which are protected by express reservation of the *Constitution*'.<sup>174</sup> The *Engineers* decision is controversial, and has been the subject of criticism from numerous commentators.<sup>175</sup> Sawyer, for example, described the *Engineers* joint judgment as 'one of the worst written and organized in Australia judicial history'.<sup>176</sup> The implications of *Engineers* on Australia's federal balance are significant. Accordingly, Craven explains that 'since the decision in the *Engineers* case in

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<sup>167</sup> Allan and Aroney, above n 87, 272.

<sup>168</sup> *Engineers* (1920) 28 CLR 129, 149 (Knox CJ, Isaacs, Rich and Starke JJ).

<sup>169</sup> Allan and Aroney, above n 87, 272.

<sup>170</sup> *R v Burah* (1878) 3 App Cas 889, cited in *R v Barger* (1908) 6 CLR 41, 66 (Griffith CJ and Barton and O'Connor JJ).

<sup>171</sup> *Hodge v The Queen* (1883) 9 App Cas 117.

<sup>172</sup> *Ibid* 132, cited in *Engineers* (1920) 28 CLR 129, 153 (Knox CJ, Isaacs, Rich and Starke JJ).

<sup>173</sup> *Engineers* (1920) 28 CLR 129, 142 (Knox CJ, Isaacs, Rich and Starke JJ), cited in Evans, above n 165, 66.

<sup>174</sup> Zimmermann and Finlay, above n 4, 205.

<sup>175</sup> See, eg, Walker, above n 102, 686-7, citing Sawyer, above n 23, 130 and Nethercote, above n 85. Evans, above n 5; Craven, above n 97. Justice Dixon attempted to re-instate some of the federal principles which were abandoned in *Engineers*' (particularly the implied immunity of instrumentalities). He was motivated by a desire to construe the *Constitution* as a federalist document, taking into account the need to protect the States from discriminatory Commonwealth legislation. See, Phillip Ayres, 'Federalism and Sir Owen Dixon' (Paper presented at the Eleventh Conference of The Samuel Griffith Society, Rydges Carlton Hotel, Melbourne, 9-11 July 1999) 139, 140. See also, Graham Fricke, 'Constitutional Implications: A Misty and Uncertain Light' (1996) 3(1) *Deakin Law Review* 79, 80, citing *West v Commissioner of Taxation* (1937) 56 CLR 657, 681; *Melbourne Corporation v Commonwealth* ('*Melbourne Corporation Case*') (1947) 74 CLR 31 and *R v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 ('*Boilermakers Case*').

<sup>176</sup> Sawyer, above n 23, 130, cited in Evans, above n 165, 65 and John Nethercote, 'The *Engineers*' Case: Seventy Five Years On' (Paper presented at the Sixth Conference of The Samuel Griffith Society, Townhouse Hotel, Carlton, 17-19 November 1995) 116, 120.

the 1920's, the High Court has been strongly, institutionally, anti-federal'.<sup>177</sup> As will be discussed in Chapter 3, following this decision, the High Court has, among other things, allowed the High Court to usurp control of State finances, thus rendering the States unable to raise enough revenue to meet their financial expenditures.

### B *Departure from Precedent*

The High Court considers itself not bound by the doctrine of *stare decisis* and has expressed a willingness to depart from its existing precedent.<sup>178</sup> The prevailing view, outlined by Kirby J, is that 'given its position now as the final court of appeal in Australia, and as a constitutional court' the High Court should not be strictly bound by its previous decisions.<sup>179</sup> Undoubtedly the leading example of the High Court's 'radical departure from precedent' is *Engineers*.<sup>180</sup> Notably, the *Engineers* joint majority declared that the previous decisions of this court were based on 'personal opinion'.<sup>181</sup> The High Court's willingness to depart from its existing precedent was affirmed by Dixon J in *Attorney-General (NSW) v Perpetual Trustee Company Ltd* (1952)<sup>182</sup> and later by the joint majority in *Nguyen v Nguyen* (1990).<sup>183</sup>

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<sup>177</sup> Craven, above n 91, 222, cited in Evans, above n 165, 65.

<sup>178</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>179</sup> Michael Kirby, 'Precedent Law, Practice and Trends in Australia' (2007) 28 *Australian Bar Review* 243, 246.

<sup>180</sup> See, Evans, above n 5, 213. See also, Walker, above n 87, 21. Leslie Zines, summarized the High Court's radical departure from existing precedent in *Engineers* as follows:

In 1920 [in the *Engineers' Case*] the High Court, in a sharp reversal of its earlier decisions and doctrines, proclaimed that the role of the court was merely to construe the powers of the Commonwealth, without regard to the question of how much exclusive power was left to the States.

L Zines, 'Social Conflict and Constitutional Interpretation' (1996) 22 *Monash University Law Review* 195, 196, cited in Susan Kenny, 'The High Court of Australia and Modes of Constitutional Interpretation' in Tom Gotsis (ed), *Statutory Interpretation: Principles and Pragmatism for a New Age* (Judicial Commission of New South Wales, 2007) 45, 56.

<sup>181</sup> *Engineers* (1920) 28 CLR 129, 141-142 (Knox CJ, Isaacs, Rich and Starke JJ), cited in Evans, above n 165, 68.

<sup>182</sup> *Attorney-General (NSW) v Perpetual Trustee Company Ltd* (1952) 85 CLR 237, 244 (Dixon J), cited in Michael Kirby, 'Precedent Law, Practice and Trends in Australia' (2007) 28 *Australian Bar Review* 243, 246.

<sup>183</sup> *Nguyen v Nguyen* (1990) 169 CLR 245, 269 (Dawson, Toohey and McHugh JJ), 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.

## VI THE HIGH COURT POST-ENGINEERS

The effects of *Engineers* are exemplified through the High Court's characterisation of the corporations power.<sup>184</sup> As previously mentioned, s 51(xx) gives the Commonwealth the power to legislate with respect to 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'.<sup>185</sup> It is clear from the Convention Debates that the Framers did not intend the corporations power to extend to all aspects of corporations (such as municipal, charitable or government corporations).<sup>186</sup> Instead, it was intended to only regulate corporations whose primary purposes were trading or financial.<sup>187</sup>

Despite this, the High Court's interpretation of the corporations power has been fundamental to the centralisation of legislative power. The scope of s 51(xx) was re-examined in *Strickland v Rocla Concrete Pipes Ltd* (1971).<sup>188</sup> There, the High Court unanimously overruled 'the *Huddart* interpretation of the corporations power in relation to intrastate trade',<sup>189</sup> which held that the corporations power only extended to the regulation of conduct in relation to transactions with or affecting the public. The Court justified its departure from *Huddart* on the basis that it had been decided under the influence of the reserved powers doctrine. As a result, the Court upheld legislation which regulated trading corporations, irrespective of whether the trading activities of the corporation extended beyond the confines of any particular State.<sup>190</sup> Here, Menzies J reiterated the *Engineers* principle, that 'grants of power should be construed broadly and not narrowly'.<sup>191</sup> While Barwick CJ declared that the corporations power was 'not necessarily

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<sup>184</sup> Allan and Aroney, above n 87, 273.

<sup>185</sup> *Constitution* s 51(xx).

<sup>186</sup> Matt Harvey et al, *Constitutional Law* (LexisNexis Butterworths, 2010) 149, citing S. W. Griffith, Convention Debates, Sydney, Official Report of the National Australasian Convention Debates, 1891.

<sup>187</sup> Nicholas Aroney, 'Una Società di Società': Why Australia is a Federation' (2012) 24 *Journal of Constitutional History* 23, 30.

<sup>188</sup> *Strickland v Rocla Concrete Pipes Ltd* ('Concrete Pipes') (1971) 124 CLR 468.

<sup>189</sup> Lumb, Moens and Trone, above n 183, 153, citing *Huddart* (1909) 8 CLR 330, 512-513 (Windeyer and Isaacs JJ).

<sup>190</sup> Allan and Aroney, above n 87, 275.

<sup>191</sup> *Strickland v Rocla Concrete Pipes Ltd* ('Concrete Pipes') (1971) 124 CLR 468, 511 (Menzies J). See, Suzanne Corcoran 'Corporate law and the Australian Constitution: A History of section 51 (xx) of the Australian Constitution' (1994) 15(2) *Journal of Legal History* 131, 142.



limited to trading activities'<sup>192</sup> and that the scope of s 51(xx) must not 'be approached in any narrow or pedantic manner'.<sup>193</sup>

### *A The Melbourne Corporation Principle*

In *Melbourne Corporation v Commonwealth* (1947),<sup>194</sup> the High Court attempted to 'undo some of the damage caused by *Engineers*'.<sup>195</sup> There a majority<sup>196</sup> identified an implied limitation on the Commonwealth Parliament's power to legislate with respect to the States.<sup>197</sup> According to Twomey, this implication was based on the federal structure of government, 'which requires the existence of separate governments exercising independent functions'.<sup>198</sup> Although the majority determined that banking power in s 51(xiii) was not broad enough to allow the Commonwealth to hinder State functions,<sup>199</sup> the Court made it clear that it did not intend to overrule *Engineers*.<sup>200</sup>

The scope of the *Melbourne Corporation* principle was defined in subsequent cases as consisting of two elements:

1. 'the prohibition against discrimination which involves placing special

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<sup>192</sup> *Concrete Pipes* (1971) 124 CLR 468, 490 (Barwick CJ).

<sup>193</sup> Ibid. See, Suzanne Corcoran 'Corporate law and the Australian Constitution: A History of section 51 (xx) of the Australian Constitution' (1994) 15(2) *Journal of Legal History* 131, 142.

<sup>194</sup> *Melbourne Corporation v Commonwealth* ('*Melbourne Corporation*') (1947) 74 CLR 31.

<sup>195</sup> Evans, above n 10, 17. See also, G.E. Fisher, 'External Affairs and Federalism in the Tasmanian Dam Case' (1985) 1(1) *Queensland University of Technology Law Journal* 157, 160 and Evans, above n 5, 245.

<sup>196</sup> Consisting of Latham CJ, Dixon, Rich, Starke and Williams JJ (McTiernan J dissenting).

<sup>197</sup> Twomey, above n 4, 508.

<sup>198</sup> Ibid citing *Melbourne Corporation* (1947) 74 CLR 31, 81, 83 (Dixon J), 66 (Rich J), 74-5 (Starke J), 99 (Williams J).

<sup>199</sup> *Melbourne Corporation* (1947) 74 CLR 31, 31 (Latham CJ, Rich, Starke, Dixon and Williams JJ), 61 (Latham CJ), 66-7 (Rich J). Justice Rich stated that: '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': *Melbourne Corporation Case* (1947) 74 CLR 31, quoted in Zines, above n 166, 490. While Dixon J observed that:

The position of the federal government is necessarily stronger than that of the States. The Commonwealth is a government to which enumerated powers have been affirmatively granted. The grant carries all that is proper for its full effectuation. Then supremacy is given to the legislative powers of the Commonwealth.

*Melbourne Corporation* (1947) 74 CLR 31, 82-83 (Dixon J), quoted in Zines, above n 166, 490.

<sup>200</sup> See, eg, *Melbourne Corporation* (1947) 74 CLR 31, 55 (Latham CJ).

burdens or disabilities on the States’;<sup>201</sup> and

2. ‘the prohibition against laws of general application which operate to destroy or curtail the continued existence of the States in exercising its power, or obviously interfere with State government functions’.<sup>202</sup>

The *Melbourne Corporation* principle has been described as a non-reciprocal version of the immunities doctrine<sup>203</sup> which was intended to prevent the Commonwealth from burdening the States or hindering their capacity to function effectively.<sup>204</sup> Unfortunately however, this principle has provided little protection for the States.<sup>205</sup> In subsequent cases, the High Court has only been prepared to apply the *Melbourne Corporation* principle in the most extreme instances of interference or discrimination of State power.<sup>206</sup>

For example, in *Austin v Commonwealth* (2003)<sup>207</sup> the High Court made it clear that discrimination alone was insufficient to invalidate Commonwealth legislation on the basis of the *Melbourne Corporation* principle.<sup>208</sup> More recently in *Fortescue Metals Group Limited & Ors v The Commonwealth of Australia* (‘*Mining Tax Case*’) (2013)<sup>209</sup> the High Court rejected the plaintiff’s argument that the relevant legislation hindered the States from exercising their

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<sup>201</sup> Twomey, above n 4, 509. See also, *Melbourne Corporation* (1947) 74 CLR 31, 74 (Starke J).  
<sup>202</sup> *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192, 217 (Mason J); quoted with approval in *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, 231 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) (‘*Australian Education Union Case*’), cited in Twomey, above n 4, 509. See also, *Melbourne Corporation* (1947) 74 CLR 31, 74 (Starke J).

<sup>203</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, cited in Evans, above n 5, 245. See generally, Fisher, above n 195, 160. As Twomey points out: ‘In practice, the *Melbourne Corporation* principle has been applied to protect the States from Commonwealth laws, rather than the reverse’: Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 192. See also, Penhallurick, above n 128, 154, citing *Melbourne Corporation* (1947) 74 CLR 31, 82.

<sup>204</sup> See, Twomey, above n 203, 192.

<sup>205</sup> Evans, above n 10, 17. See generally, Fisher, above n 195, 160.

<sup>206</sup> Evans notes that the only successful attempts to invalidate Commonwealth legislation on the basis of the *Melbourne Corporation* principle were the cases of: *Queensland v Electricity Commission* (1985) 159 CLR 193; *Austin v Commonwealth* (2003) 215 CLR 185; and *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272: Evans, above n 10, 17. See also, Andrew Lynch and George Williams, ‘Beyond a Federal Structure’ (2008) 31(2) *New South Wales Law Journal* 395, 408.

<sup>207</sup> *Austin v Commonwealth* (2003) 215 CLR 185.

<sup>208</sup> See, eg, *Ibid* 200 (Kirby J), cited in Evans, above n 10, 17. See also, Lynch and Williams, above n 206, 408.

<sup>209</sup> *Mining Tax Case* (2013) 250 CLR 548.

governmental functions.

### B Expansion of Commonwealth Power

In *Murphyores Inc Pty Ltd v Commonwealth* (1976)<sup>210</sup> the High Court considered the constitutional validity of s 112 of the *Customs Act 1901* (Cth), which prohibited the exportation of mineral sands unless authorised by the Minister. The Court<sup>211</sup> unanimously upheld the legislation as being validly enacted under trade and commerce power in s 51(i) of the *Constitution*, even though the legislation could be characterized under another purpose which was outside the scope of s 51(i).<sup>212</sup> This decision effectively meant the Commonwealth could use the trade and commerce power to regulate ancillary areas. Another significant case in the centralisation of legislative powers was the *Tasmanian Dam Case* (1983).<sup>213</sup> There, the majority<sup>214</sup> held that the Tasmanian Hydro-Electric Commission was a trading corporation<sup>215</sup> even though it was a State-owned commission that conducted public undertakings.<sup>216</sup> Three of the majority justices<sup>217</sup> expanded the scope of the corporations power ‘to [both] the regulation and protection of the trading activities of trading corporations’, including state corporations.<sup>218</sup> Justice

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<sup>210</sup> *Murphyores Inc Pty Ltd v Commonwealth* (‘*Murphyores*’) (1976) 136 CLR 1.

<sup>211</sup> Consisting of Barwick CJ, McTiernan, Gibbs, Stephen, Mason, Jacobs and Murphy JJ.

<sup>212</sup> The Court held that s 51(i) is a ‘non-purposive’ power. This means the law will be valid so long as it relates to trade and commerce. It does not matter if the law is capable of a second, ‘dual characterisation’, which is outside the scope of s 51(i). See, Clarke, Keyzer and Stellos, above n 127, 139. See, eg, *Murphyores* (1976) 136 CLR 1, 11 (Stephen J), 22 (Mason J). Justice Mason stated: ‘... no objection to the validity of a law otherwise in power that it touches or affects a topic on which the Commonwealth has no power to legislate’: *Murphyores* (1976) 136 CLR 1, 22 (Mason J). See generally, Anthony Gray, ‘Reinterpreting the Trade and Commerce Power’ (2008) 36(1) *Australian Business Law Review* 29, 31.

<sup>213</sup> *Tasmanian Dam Case* (1983) 158 CLR 1.

<sup>214</sup> By Murphy, Brennan, Deane and Mason JJ.

<sup>215</sup> *Tasmanian Dam Case* (1983) 158 CLR 1, 155-7 (Mason J), 179 (Murphy J), 240 (Brennan J), 293 (Deane J), cited in Lumb, Moens and Trone, above n 183, 152.

<sup>216</sup> Lumb, Moens and Trone, above n 183, 152, citing *Tasmanian Dam Case* (1983) 158 CLR 1, 156 (Mason J). Justice Mason was of the view that the fact that the Commission sold electricity was sufficient to regard it as a ‘trading corporation’: *Tasmanian Dam Case* (1983) 158 CLR 1, 156 (Mason J), cited in Lumb, Moens and Trone, above n 183, 152.

<sup>217</sup> Justices Mason, Murphy and Deane JJ.

<sup>218</sup> See, *Tasmanian Dam Case* (1983) 158 CLR 1, 147-8 (Mason J), 179 (Murphy J). Justice Murphy stated:

The power under s. 51(xx) 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.

*Tasmanian Dam Case* (1983) 158 CLR 1, 179 (Murphy J). See also, *Tasmanian Dam Case* (1983) 158 CLR 1, 268-71 (Deane J), cited in Lumb, Moens and Trone, above n 183, 153.

Mason was of the view that there is nothing in the context of s 51(xx) that indicates it should be given a restrictive interpretation,<sup>219</sup> declaring that ‘the power confers a plenary power with respect to the categories of corporation mentioned’.<sup>220</sup>

The State of Tasmania argued that the Commonwealth legislation constituted a direct interference with the State’s hydro-electric program,<sup>221</sup> which amounted to an ‘undue interference’<sup>222</sup> with the State’s capacity to function.<sup>223</sup> It was held that the Commonwealth’s interference with the State hydro-electric program was not substantial enough to offend the *Melbourne Corporation* principle.<sup>224</sup> In considering the requisite threshold, Mason J stated:

[t]o fall foul of the prohibition ... 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>225</sup>

Justices Brennan and Deane adopted a similar approach in determining that the provisions were valid and not *ultra vires*. The majority<sup>226</sup> adopted a broad interpretation of s 51(xx), which effectively removed all existing limitations on the Commonwealth’s ability to enact laws ‘with respect to’ corporations.<sup>227</sup> Even Gibbs CJ, although disagreeing with the majority that the Commission was a trading corporation, agreed that ‘the scope of the corporations power extended to

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Justice Brennan did not determine whether s 51(xx) was restricted to trading activities: *Tasmanian Dam Case* (1983) 158 CLR 1, 241 (Brennan J), citing *Fontana Films* (1982) 150 CLR 169, 218-19, cited in Lumb, Moens and Trone, above n 183, 154.

<sup>219</sup> *Tasmanian Dam Case* (1983) 158 CLR 1, 149 (Mason J), affirming and applying *Fontana Films* (1982) 150 CLR 169, 207-8.

<sup>220</sup> *Tasmanian Dam Case* (1983) 158 CLR 1, 149 (Mason J), cited in George Williams, ‘The Constitution and a National Industrial Relations Scheme’ (2005) 10(2) *Deakin Law Review* 498, 504.

<sup>221</sup> See, Williams, Brennan and Lynch, above n 21, 1091. See also, Evans, above n 5, 252.

<sup>222</sup> *Tasmanian Dam Case* (1983) 158 CLR 1, 22.

<sup>223</sup> *Ibid* 169. See also, *Tasmanian Dam Case* (1983) 158 CLR 1, 212 and Evans, above n 5, 252.

<sup>224</sup> Evans, above n 5, 252. See, eg, *Tasmanian Dam Case* (1983) 158 CLR 1, 139 (Mason J).

<sup>225</sup> *Ibid*, cited in Williams, Brennan and Lynch, above n 21, 1092.

<sup>226</sup> Consisting of Murphy, Brennan, Deane and Mason JJ.

<sup>227</sup> Williams, above n 219, 504. To adopt the words of Williams, so long as the corporation ‘has the characteristics that bring it within s 51(xx), ‘any aspect or activity of that corporation can be regulated by the Commonwealth (including the relationship of a Constitutional corporation with its employees)’: Williams, above n 219, 504.

allowing the federal parliament to regulate the pre-trading activities of the corporation'.<sup>228</sup>

The view that the corporations power should be construed as a plenary power with respect to the categories of corporations mentioned in s 51(xx) was affirmed in *Re Dingjan; Ex parte Wagner* (1995).<sup>229</sup> In that case the Court considered whether a contract was within the scope of the corporations power. A narrow 4:3 majority<sup>230</sup> held that the provisions of the *Industrial Relations Act 1988* (Cth),<sup>231</sup> which gave the Industrial Relations Commission the power to set aside or vary unfair contracts imposed on independent contractors,<sup>232</sup> were invalid.

Although the majority decided that there was no sufficient connection between the corporations head of power and the legislation in question, the Court displayed a willingness to interpret s 51(xx) broadly. Justice McHugh in his majority judgment expressed the view that 'if a law regulates the activities, functions, relationships or business of a corporation, no more is needed to bring it within s 51(xx)'.<sup>233</sup> While Gaudron J took a similar approach in his dissent, making it clear that the definition of the corporations power was inclusive, not exclusive. According to him, 'the power extended "at the very least" to corporate activities, functions, relationships and business'.<sup>234</sup>

Another key example of the centralisation of legislative power is the High Court's interpretation of the external affairs power in s 51(xxix) of the *Constitution*. Accordingly, Sir Anthony Mason argues that the High Court's characterisation of

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<sup>228</sup> *Tasmanian Dam Case* (1983) 158 CLR 1, 148 (Gibbs CJ), quoted in Evans, above n 5, 236.

<sup>229</sup> *Re Dingjan; Ex parte Wagner* ('*Dingjan's Case*') (1995) 183 CLR 323. See, eg, *Dingjan's Case*' (1995) 183 CLR 323, 333-34 (Mason CJ), 368 (McHugh J), Cf *Dingjan's Case* (1995) 183 CLR 323, 346 (Dawson J). See, Williams, Brennan and Lynch, above n 21, 832-3 and Darrell Barnett, 'The Corporations Power and Federalism: Key Aspects of the Constitutional Validity of the *Work Choices Act*' (2006) 29(1) *University of New South Wales Law Journal* 91, 101.

<sup>230</sup> Consisting of Brennan, Dawson, Toohey and McHugh JJ (Mason CJ, Deane and Gaudron JJ dissenting).

<sup>231</sup> *Industrial Relations Act 1988* (Cth) ss 127A-127C.

<sup>232</sup> See also, Williams, above n 19, 504 and Matt Harvey et al, *Constitutional Law* (LexisNexis Butterworths, 2010) 152.

<sup>233</sup> *Dingjan's Case* (1995) 183 CLR 323, 369 (McHugh J), quoted in Barnett, above n 228, 102 and Williams, above n 219, 505.

<sup>234</sup> *Ibid* 365, cited in Graeme Orr and Andrew Johnston, 'Does the Corporations Power Extend to Re-consulting Corporations?' (2011) 39(1) *Federal Law Review* 71, 95.

the external affairs power has ‘skewed the balance of power in favour of the Commonwealth’.<sup>235</sup> By adopting a broad interpretation of s 51(xxix), the High Court has enabled the Commonwealth to implement treaties in relation to conduct taking place in Australia.<sup>236</sup> This is demonstrated by the decisions of *Koowarta v Bjelke-Peterson* (1982),<sup>237</sup> *Tasmanian Dam Case* (1983) (discussed above) and *Victoria v Commonwealth* (‘*Industrial Relations Act Case*’) (1996).<sup>238</sup> In *Koowarta*, for example, the Court considered the validity of the *Racial Discrimination Act 1975* (Cth) under s 51(xxix). There, the Commonwealth purported to use this Act to overturn a Queensland housing policy which precluded aboriginal people from purchasing land in North Queensland. Indeed, the High Court interpreted ‘external affairs’ broadly (even though the policy applied entirely within Australia) to enable the Commonwealth to influence State housing policy.<sup>239</sup>

More recently, in *Wales v Commonwealth* (‘*Work Choices*’) (2006),<sup>240</sup> the High Court confirmed an expansive interpretation of the corporations power,<sup>241</sup> which enabled the Commonwealth to legislate over industrial relations.<sup>242</sup> There, a 5-2 majority<sup>243</sup> upheld the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) as being validly enacted under s 51(xx). The majority rejected appeals to the Convention Debates and the Framers’ intentions as evidence of limitations on the scope of s 51(xx) and s 51(xxxv) (the conciliation and arbitration

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<sup>235</sup> Mason, above n 40, 13.

<sup>236</sup> Ibid.

<sup>237</sup> *Koowarta v Bjelke-Peterson* (‘*Koowarta*’) (1982) 153 CLR 168.

<sup>238</sup> *Industrial Relations Act Case* (1996) 187 CLR 416.

<sup>239</sup> Robert Dalton, ‘The Adverse Attributes of Specific Purpose Payments in Australia’ (2006) 10 *Southern Cross University Law Review* 43, 70. Campbell Sharman contends that this decision meant the Commonwealth has the ‘unilateral ability to amend the scope of its jurisdiction in areas of settled State administration without the need for formal constitutional change’. See, Campbell Sharman, ‘Secession and Federalism’ (Paper presented at the Third Conference of the Samuel Griffith Society, The Esplanade Hotel, Fremantle, 5-6 November 1993) 56, 59, cited in Robert Dalton, ‘The Adverse Attributes of Specific Purpose Payments in Australia’ (2006) 10 *Southern Cross University Law Review* 43, 70.

<sup>240</sup> *Work Choices* (2006) 229 CLR 1.

<sup>241</sup> See generally, Andrew Stewart and George Williams, *Work Choices: What the High Court Said* (Federation Press, 2007), cited in Lynch and Williams, above n 206, 410.

<sup>242</sup> Allan and Aroney, above n 87, 247.

<sup>243</sup> Constituted by Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; Kirby and Callinan JJ dissenting.

power).<sup>244</sup> Similarly, arguments that the provisions should be construed narrowly in order to uphold the federal balance<sup>245</sup> were rejected on the basis that such a view is contrary to the expansive approach to constitutional construction which is mandated under the literalist approach.<sup>246</sup>

This decision has been labeled as having confirmed ‘the mammoth scope of the Corporations power’<sup>247</sup> by ‘empathetically reject[ing] the last of Isaac J’s suggested limitations on the scope of [Commonwealth] power’<sup>248</sup> (the distinctive character test).<sup>249</sup> The Australian Government recently expressed a similar view in *Issues Paper 1 A Federation for Our Future* (2014). Here, it was noted that the *Work Choices* decision ‘represents a significant shift in the distribution of power from the States to the Federal Parliament, and is regarded by many as an important legal landmark in the Australian federalism landscape’.<sup>250</sup>

The majority’s approach to interpreting s 51(ii) in *Work Choices* was strikingly opposed to the interpretive method adopted by Justices Kirby and Callinan in their dissenting judgments. Notably, Kirby J, contrary to his earlier decisions, recognised that the Court ‘needs to give respect to the federal character of the

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<sup>244</sup> See, *Work Choices* (2006) 229 CLR 1, 97 [120]-[121]. The majority stated: ‘To pursue the identification of what is said to be the framers’ intention, much more often than not, is to pursue a mirage’. See, *Work Choices* (2006) 229 CLR 1, 97 [120] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), quoted in Allan and Aroney, above n 87, 281.

<sup>245</sup> Allan and Aroney, above n 87, 281.

<sup>246</sup> Ibid, citing *Work Choices* (2006) 229 CLR 1, 20, 46, 55, 56, 57, 59–60, 60, 75, 76; *Work Choices* (2006) 229 CLR 1, 118-9, cited in Zimmermann and Finlay, above n 5, 51

<sup>247</sup> Oscar Roo, ‘From Labour’s Pain Comes Labor’s Gain? The High Court’s Decision in the Work Choices Case and the Commonwealth’s Corporations Power (2007) 11 *Southern Cross University Law Review* 81, 83-4, citing *Work Choices* (2006) 229 CLR 1.

<sup>248</sup> Clarke, Keyzer and Stellios, above n 127, 288.

<sup>249</sup> The distinctive character test was one of the earlier tests applied by the High Court for characterizing laws with respect to corporations. This test postulated that:

the fact that the corporation is a foreign, trading or financial corporation should be significant in the way in which the law relates to it [if the law is to be valid].

*Work Choices* (2006) 229 CLR 1, 16 quoted in Lenny Roth and Gareth Griffith, ‘The *Workplace Relations Case*: Implications for the States’ Briefing Paper No 18/06 (2006) 7. For an application of the ‘distinctive character test’ see, *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169, 182 (Gibbs CJ), 194 (Stephen J), 122 (Brennan J); *Tasmanian Dam Case* (1983) 158 CLR 1, 240 (Brennan J), 316 (Dawson J); *Dingjan’s Case* (2000) 203 CLR 323, 345-6 (Dawson J), 336 (Brennan J), 368-70 (McHugh J) cf 334 (Mason CJ), 352-3 (Toohey J) cited in Oscar Roo, ‘From Labour’s Pain Comes Labor’s Gain? The High Court’s Decision in the Work Choices Case and the Commonwealth’s Corporations Power (2007) 11 *Southern Cross University Law Review* 81, 86-7.

<sup>250</sup> Commonwealth of Australia, above n 1, 12.

*Constitution*’,<sup>251</sup> while <sup>252</sup> Callinan J described ‘the maintenance of the federal balance is a powerful [constitutional implication]’.<sup>253</sup>

Following *Work Choices*, the Commonwealth can now effectively use s 51(xx) to regulate any aspect of corporations, ‘including any relationship the corporation may have with a third party or its employees.’<sup>254</sup> The only remaining limitation is that the Commonwealth legislation must be characterised as a law with respect to foreign, trading or financial corporations.<sup>255</sup> Consequently, the joint judgment has been the subject of heavy criticism from commentators. Among these, Craven describes the decision as representing the ‘death of federalism’ in Australia.<sup>256</sup> Although the *Work Choices* decision may be regarded as ‘revolutionary’,<sup>257</sup> Nicholas Aroney argues that the joint judgment merely represents a culmination of interpretive choices made by the High Court since its establishment.<sup>258</sup> Indeed, the author agrees that *Work Choices* should not be read in isolation, but rather can be regarded as a ‘predictable’ consequence of the High Court’s continuous endorsement of the literalist approach since 1920.<sup>259</sup>

## VII CONCLUDING REMARKS

In summary, this Chapter identified the characteristics of federalism and the intentions of the Framers in drafting the *Constitution*. It was seen that a federal

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<sup>251</sup> *Work Choices* (2006) 229 CLR, 229 [558] (Kirby J).

<sup>252</sup> He described this as ‘a liberty-enhancing feature’: *Work Choices* (2006) 229 CLR, 229 (Kirby J), cited in Lynch and Williams, above n 206, 410.

<sup>253</sup> *Work Choices* (2006) 229 CLR 1, 320 [772] (Callinan J), quoted in Lynch and Williams, above n 206, 410. See also, *Work Choices* (2006) 229 CLR 1, 229 (Callinan J), cited in Zimmermann and Finlay, above n 5, 51.

<sup>254</sup> *Work Choices* (2006) 229 CLR 1, [178] cited in Lenny Roth and Gareth Griffith, ‘The *Workplace Relations Case*: Implications for the States’ Briefing Paper No 18/06 (2006) 8-9. See also, Williams, above n 219.

<sup>255</sup> Lenny Roth and Gareth Griffith, ‘The *Workplace Relations Case*: Implications for the States’ Briefing Paper No 18/06 (2006)

<sup>256</sup> Greg Craven, ‘How the High Court Failed Us’, *The Australian Financial Review* (2006), cited in Susan Kenny, ‘The High Court of Australia and Modes of Constitutional Interpretation’ in in Tom Gotsis (ed), *Statutory Interpretation: Principles and Pragmatism for a New Age* (Judicial Commission of NSW, 2007) 45, 47. Craven further contends that ‘at the stroke of a pen the High Court was making one of the greatest unauthorized amendments to the Constitution in its entire history’: Greg Craven, ‘How High Court Failed Us’, *The Australian Financial Review* (2006) 82.

<sup>257</sup> See, Aroney, above n 107, 3.

<sup>258</sup> Ibid.

<sup>259</sup> See, Ibid.



system requires a division of power between the States and the central government, whose powers must be limited. This Chapter briefly summarised the advantages and disadvantages of federal systems. It was argued that federal systems offer numerous advantages over centralist systems of governments, including political, social and economic benefits.<sup>260</sup> It was also seen that when federal systems are not operating efficiently, they also have disadvantages, such as duplication of responsibility.

Following this, it discussed how the numerous advantages federal systems offer have been undermined, or have not been properly realised,<sup>261</sup> as a result of the High Court's interpretation of the *Constitution*. It examined the interpretive methods adopted by the High Court in interpreting the *Constitution*, and illustrated the decisions that led to the gradual erosion of the federal balance. Until the declaration of the First World War in 1914, federalism appeared to be functioning with reasonable efficiency and was well received in Australia and other nations, such as Canada.<sup>262</sup> However, this Section argued that as a result of the High Court's interpretation of the *Constitution*, and its assumption of powers and responsibilities which were ordinarily vested in the States, the Commonwealth now exerts significant control over the States.<sup>263</sup> As Aroney and Allan explain, the Framers could not have envisioned, for example, that the corporations power (s 51(xx)) would extended to cover industrial relations,<sup>264</sup> or that the external affairs power (s 51(xxix)) would allow the Commonwealth to legislate over such things as environmental, human rights and industrial relations.<sup>265</sup>

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<sup>260</sup> Moens, above n 52, 22, citing Kasper, above n 52, 66.

<sup>261</sup> Zimmermann and Finlay, above n 4, 190, 192, 199.

<sup>262</sup> Greenwood, above n 14, 1.

<sup>263</sup> John M Williams, 'The Constitution and Workplace Relations Act 1996' (2006) 16(2) *The Economics and Labour Relations Review* 62.

<sup>264</sup> Allan and Aroney, above n 87, 247. See, eg, *Work Choices* (2006) 229 CLR 11; Orr and Johnston, above n 227, 72; George Williams, 'The Constitution and National Industrial Relations Regime' (2005) 10(2) *Deakin Law Review* 498, 503.

<sup>265</sup> Allan and Aroney, above n 87, 247. See, eg, *Tasmanian Dam Case* (1983) 158 CLR 1. See also, Sir Harry Gibbs, 'Addresses Launching Volume 1 of Upholding the Australian Constitution' (Paper presented at the Third Conference of The Samuel Griffith Society, The Esplanade Hotel, Fremantle, 5-6 November 1993) 135, 137.

The next Chapter will provide a case study of the High Court's characterisation of the Commonwealth financial powers. In particular, it will examine the meaning of 'taxes' in s 51(ii) and 'excise' in s 90 of the *Constitution*. In doing so, it will argue that the High Court's expansion of the meaning of 'excise' and its broad characterisation of specific purpose payments in s 96 has undermined State financial autonomy, which is a fundamental characteristic of federal systems. In addition, it will argue that Australia's federal system is in desperate need of reform.

### CHAPTER 3: AUSTRALIA'S FINANCIAL SITUATION

The previous Chapter provided a broad insight into the High Court's characterisation of the Commonwealth legislative powers, through a series of pivotal Constitutional law cases. This Chapter continues from Chapter 2, and provides an analysis of the High Court's interpretation of the taxation power and excise duties. This will demonstrate the pivotal role *Engineers* had in shifting the federal balance towards centralism. Notably, this Chapter contends that the federal distribution of power has been undermined as a result of a series of poor interpretative choices by the High Court.

In this Chapter the author will examine the controversial decisions that led to the expansion of the taxation power in s 51(ii), which has resulted in the States' overwhelming reliance on the Commonwealth for financial support. It will illustrate the key examples of the trend towards centralisation, such as the High Court's resumption of income taxes, its expansive characterisation of excise under s 90, and its broad interpretation of expenditure grants under s 96 of the *Constitution*.<sup>266</sup> Finally, it will identify the problem of Vertical Fiscal Imbalance in Australia, as well as the approaches the Commonwealth has taken to distribute funds to the States. In doing so, it will examine how the reliance on Commonwealth grants has undermined the federation which the Framers envisioned for Australia.

It is argued that the scope of the Commonwealth taxation power has far exceeded the scope of what was envisioned by the Framers during federation.<sup>267</sup> The Framers could not have foreseen that the Commonwealth would levy taxes beyond customs and excise duties granted under s 90. As McMillan observed, the central government 'will never go beyond Customs: nobody dreams of such a

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<sup>266</sup> Finlay, above n 5, 84.

<sup>267</sup> See, eg, *R v Barger* (1908) 6 CLR 41, 51. According to Solicitor Irvine KC: [The Framers could not have envisioned] that the power of taxation would be used, or was capable of being used, for the purpose of enabling the Commonwealth Parliament to completely usurp the field of State functions.

thing’.<sup>268</sup> It has been suggested that in drafting the financial provisions of *Constitution*, the Framers relied on a number of unexpressed assumptions.<sup>269</sup> Among these was the assumption that States would levy their own income tax.<sup>270</sup> In addition, the Framers assumed that the prohibition on levying excise duties under s 90 would be limited to duties on the production and manufacture of goods, thus, giving the States ‘the ability to impose taxes and fees on the sale of goods and commodities’.<sup>271</sup>

The fiscal-federal relations between the central government and the States has significant implications for the federal balance.<sup>272</sup> This so-called ‘fiscal federalism’ results in a decentralisation of fiscal activity and involves ‘the devolution of taxation and spending powers to the regions’.<sup>273</sup> As Lorraine Finlay observes, ‘[w]ith fiscal power comes policy power [...] Thus fiscal dominance within a federal system brings with it the ability to skew the federal balance’.<sup>274</sup> In order to identify the trend towards centralisation of spending power, it is first necessary to examine the distribution of financial power under the early High Court. At the time of Federation, State and Local Governments levied 87% of total taxation revenue, while the Commonwealth was only responsible for collecting 13% of taxation revenue.<sup>275</sup> However, the Commonwealth gradually expanded their tax-base onto areas which were traditionally the domain of the States. As a result, these figures have become skewed to such a degree that the States are no longer capable of financing their own expenditure requirements.

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<sup>268</sup> Greg Craven, ‘The Convention Debates 1891-1898: Commentaries, Indices and Guide cit.’, 865, cited in Finlay, above n 5, 83 and Robert French, ‘Tax and the Constitution’ (Paper presented at The Tax Institute’s 27<sup>th</sup> National Convention, DG Memorial Hill Lecture, Canberra, 14 March, 2012) 13. See, Commonwealth, *Convention Debates*, Melbourne, 11 February 1898, 865  
<[http://parlinfo.aph.gov.au/parlInfo/download/constitution/conventions/1898-1107/upload\\_binary/1898\\_1107.pdf;fileType=application%2Fpdf#search=%22constitution/conventions/1898-1107%22](http://parlinfo.aph.gov.au/parlInfo/download/constitution/conventions/1898-1107/upload_binary/1898_1107.pdf;fileType=application%2Fpdf#search=%22constitution/conventions/1898-1107%22)>.

<sup>269</sup> Mason, above n 40, 14.

<sup>270</sup> Ibid.

<sup>271</sup> Ibid.

<sup>272</sup> Finlay, above n 5, 82.

<sup>273</sup> Suri Ratnapala, ‘Fiscal Federalism in Australia: Will *Williams v Commonwealth* be a Pyrrhic Victory?’ (2014) 33(1) *University of Queensland Law Journal* 53, 66.

<sup>274</sup> G. Appleby, N. Aroney and T. John (eds), *The Future of Australian Federalism* (Cambridge University Press, 2012) 17, cited in Finlay, above n 5, 82.

<sup>275</sup> Finlay, above n 5, 88.

## I THE EROSION OF STATE FISCAL AUTONOMY: TAXATION POWER

Section 51(ii) of the *Constitution* gives the Commonwealth the ability to enact laws with respect to taxation, so long as the law does not discriminate between States or parts of States. The object of the prohibition on discriminatory law is to ensure that one State does not benefit at the expense of another.<sup>276</sup> The *Constitution* contains several express limitations on the exercise of Commonwealth legislative power with respect to taxation. Section 55 states that laws imposing taxation can only deal with taxation matters,<sup>277</sup> while s 53 provides that laws imposing taxation must originate in the House of Representatives and not the Senate.<sup>278</sup>

The meaning of a ‘tax’ has evolved since the establishment of the High Court. This definition is important because if a Commonwealth law cannot be characterised as a law ‘with respect to taxation’ then it will be invalid (unless it falls within another s 51 head of power).<sup>279</sup> In addition, the meaning of taxation represents a vital role in the interpretation of excise duties in s 90 of the *Constitution*.<sup>280</sup> The High Court’s interpretation of ‘excise’ will be discussed in the later Section of this Chapter.

Before the doctrines of reserved powers and implied intergovernmental immunities were abandoned in *Engineers*, the High Court adopted a very narrow interpretation of the taxation power in s 51(ii) of the *Constitution*. In *D’Emden* (1904) (discussed in detail in the previous Chapter), the High Court held that the taxation power does not extend to destroy the effects of Acts of Parliament enacted by the States which are within their exclusive powers.<sup>281</sup> Similarly, in *R v Barger* (1908),<sup>282</sup> the majority<sup>283</sup> under the influence of the reserved powers and

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<sup>276</sup> *R v Barger* (1908) 6 CLR 41, 61 (Griffith CJ).

<sup>277</sup> *Constitution* s 55.

<sup>278</sup> *Constitution* s 53.

<sup>279</sup> Vince Morabito and Stephen Barkoczy ‘What is a Tax? The Erosion of the “Latham Definition”’ (1996) 6(1) *Revenue Law Journal* 43, 44. See, eg, *R v Barger* (1908) 6 CLR 41, 69 (Griffith CJ and Barton and O’Connor JJ).

<sup>280</sup> Morabito and Barkoczy, above n 278, 45.

<sup>281</sup> *D’Emden* (1904) 1 CLR 91, 111.

<sup>282</sup> *R v Barger* (1908) 6 CLR 41.

<sup>283</sup> Constituted by Griffith CJ and Barton and O’Connor JJ.

intergovernmental immunities doctrines,<sup>284</sup> held that the imposition of a fee under the *Excise Tariff 1906* (Cth) was an invalid exercise of the s 51(ii) power. The majority joint judgment expressed a very narrow characterisation of s 51(ii).<sup>285</sup> It held that the tax imposed an excise duty on the manufacture of agricultural implements<sup>286</sup> and was therefore inconsistent with the Commonwealth's prohibition on regulating 'the internal affairs of the States'.<sup>287</sup>

In *R v Barger*, Solicitor Irvine KC for the defendant argued that in construing the *Constitution*, the High Court 'is entitled to look at the circumstances and history in which the federal compact has been brought about'.<sup>288</sup> The majority adopted the federalist position raised by the defendant, noting that 'regard must be had to the substance of the legislation rather than its literal form'.<sup>289</sup> Even justice Higgins (dissenting) affirmed the view that any powers not expressly granted, or not necessary for the exercise of power granted to the Commonwealth, are presumed to remain in the States.<sup>290</sup>

Justice Isaacs in his dissent adopted a broad approach to interpreting the taxation power. He was of the view that the only limitations on Commonwealth legislative power are those which are expressly stated in the *Constitution*.<sup>291</sup> As noted by Twomey, this decision marked the commencement of Commonwealth's gradual encroachment over traditional State revenue taxation sources, including income

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<sup>284</sup> *R v Barger* (1908) 6 CLR 41, 72 (Griffith CJ and Barton and O'Connor JJ). See generally, Williams, Brennan and Lynch, above n 21, 248-9.

<sup>285</sup> See, Evans, above n 5, 194.

<sup>286</sup> *R v Barger* (1908) 6 CLR 41, 63-4, 77-8 (Griffith CJ and Barton and O'Connor JJ). See also, Williams, Brennan and Lynch, above n 21, 764.

<sup>287</sup> *R v Barger* (1908) 6 CLR 41, 69 (Griffith CJ and Barton and O'Connor JJ). See also, Williams, Brennan and Lynch, above n 21, 248. Consequently, the majority held that the 'Act [could not be characterized as] an exercise of the power of taxation conferred by the Commonwealth'. See, *R v Barger* (1908) 6 CLR 41, 77 (Griffith CJ and Barton and O'Connor JJ). See also, Arthur Berriedale Kieth, *Responsible Government in the Dominions* (Clarendon Press, 1912) vol 2, 839.

<sup>288</sup> *R v Barger* (1908) 6 CLR 41, 51.

<sup>289</sup> *Ibid* 65 (Griffith CJ and Barton and O'Connor JJ), quoted in Evans, above n 5, 195.

<sup>290</sup> *R v Barger* (1908) 6 CLR 41, 50 (Higgins J), referring to *State Tax on Railway Gross Receipts* 82 US (15 Wall) 284 (1872), 293.

<sup>291</sup> *R v Barger* (1908) 6 CLR 41, 84-5 (Isaacs J). As such, Isaacs J viewed any attempt to limit expressly granted powers by the undefined residue of legislative powers of the States as 'contrary to reason'. See, Zines, above n 166, 9.

tax and land tax.<sup>292</sup> These taxes, along with estate duties, represented a major source of revenue for the States.<sup>293</sup>

### *A Meaning of a Tax*

One of the earliest definitions of a tax was that enunciated by Latham CJ in *Matthews v Chicory Marketing Board (Vic)* (1938).<sup>294</sup> In that case the issue was whether s 32 of the *Marketing of Primary Products Act 1935* (Vic) was invalid for imposing an ‘excise’. Under this provision, produces of chicory were required to pay a levy measured at the rate of one pound per half acre of land planted with chicory. A 3:2 majority<sup>295</sup> held that the legislation did impose a duty of excise, and was therefore invalid.<sup>296</sup> Before determining whether the legislation imposed an excise, the High Court defined what was meant by the term ‘tax’. Chief Justice Latham defined a tax as ‘a compulsory exaction of money by a public authority for public purposes, enforceable by law, and is not a payment for services rendered’ (‘the Latham definition’).<sup>297</sup> Of particular significance, the majority held that a fee can constitute an excise duty regardless of the quantity or value of the end product.<sup>298</sup> An analysis of the decisions of the High Court post-*Matthews v Chicory Marketing Board (Vic)* will demonstrate the gradual erosion the Latham definition.

In *Fairfax v Federal Commissioner of Taxation* (1965),<sup>299</sup> the High Court held that s 11 of the *Income Tax and Social Services Contribution Assessment Act 1961* (Cth) was validly enacted under s 51(ii) of the *Constitution*. Section 11 exempted

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<sup>292</sup> Anne Twomey, ‘Public Money: Federal State Financial Relations and the Constitutional Limits on Spending Public Money’ Report No 4 (2014) 14.

<sup>293</sup> Ibid.

<sup>294</sup> *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263.

<sup>295</sup> Rich, Starke, Dixon JJ (Latham CJ and McTierman J dissenting).

<sup>296</sup> *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263, 263 (Rich, Starke, Dixon JJ).

<sup>297</sup> Ibid 270 (Latham CJ).

<sup>298</sup> Ibid 302-3 (Dixon J), cited in Brian Opeskin, ‘Section 90 of the Constitution and the Problem of Precedent’ (1986) 16 *Federal Law Review* 170, 184. Cf Latham CJ and McTierman J (dissenting), who preferred a narrow interpretation of s 90. See also, Neil Halliday, ‘Ha & Anor v State of New South Wales & Ors; Walter Hamond & Associates v State of New South Wales & Ors’ (1998) 20 (1) *Sydney Law Review* 158, 162. Cf *Peterswald* (1904) 1 CLR 497, 509 (Griffith CJ) quoted in Brian Opeskin, ‘Section 90 of the Constitution and the Problem of Precedent’ (1986) 16, *Federal Law Review* 170, 183-4; See also *Matthews v Chicory Marketing Board* (1938) 60 CLR 263, 281 (Rich J), 286 (Starke J).

<sup>299</sup> *Fairfax v Federal Commissioner of Taxation* (*Fairfax*) (1965) 114 CLR 1.

superannuation funds from having to pay income tax if they invested in government securities.<sup>300</sup> Justice Kitto emphasised that a tax is not invalid simply because it serves some additional purpose beyond raising revenue.<sup>301</sup> Williams, Brennan and Lynch summarised the effect of this decision as follows:

so long as the law can fairly be characterised as being a law ‘with respect to’ a subject matter that is within Commonwealth power, it does not matter that it might also be characterised as bearing upon some other subject matter that is not within power.<sup>302</sup>

The Latham definition was expanded in the case of *Air Caledonie International v Commonwealth* (1988).<sup>303</sup> There, the High Court had to determine whether a ‘fee for immigration clearance’<sup>304</sup> under s 7 of the *Migration Amendment Act 1987* (Cth) was a tax. The Court<sup>305</sup> unanimously held that the ‘fee’ did constitute a tax.<sup>306</sup> The legislation was held to be invalid under s 55 of the *Constitution*, because it did not only deal with taxation matters.<sup>307</sup> The High Court said (albeit obiter) that the Latham formula ‘should not be seen as providing an exhaustive definition of a tax’.<sup>308</sup> They declared that an exaction of money will have the character of a tax if it has the attributes of being a compulsory exaction<sup>309</sup> and is

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<sup>300</sup> See generally, Joyce Chia et al, ‘Regulating the Not-for-Profit Sector (Working Paper, University of Melbourne Law School, 2011) 13  
<<http://law.unimelb.edu.au/files/dmfile/MicrosoftWord-RegulatingtheNot-for-ProfitSectorWorkingPaperfinalversion2.pdf>>.

<sup>301</sup> Justice Kitto stated:

It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed ... The principle applies even though the revenue obtained is obviously negligible ... or the revenue purpose of the tax may be secondary ... Nor does a tax statute necessarily fall because it touches on activities which Congress might not otherwise regulate.

*Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1, 12 (Kitto J), quoting *United States v Sanchez* 340 US 42 (1950), 44 (Clark J for Vinson CJ, Black, Reed, Frankfurter, Douglas, Jackson, Clark and Minton JJ) (1950), cited in Michelle Gordon, ‘The Commonwealth’s Taxing Power and its Limits: Are We There Yet?’ (2013) 36(3) *Melbourne University Law Review* 1037, 1042.

<sup>302</sup> Williams, Brennan and Lynch, above n 21, 765.

<sup>303</sup> *Air Caledonie International v Commonwealth* (‘*Air Caledonie*’) (1988) 165 CLR 462.

<sup>304</sup> *Ibid* 464.

<sup>305</sup> Consisting of Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ.

<sup>306</sup> *Ibid* 468.

<sup>307</sup> *Ibid* 470-2.

<sup>308</sup> *Ibid* 467 (Latham CJ), quoted in Morabito and Barkoczy, above n 278, 47.

<sup>309</sup> The High Court determined that a fee would constitute a ‘compulsory exaction’ if:

the person required to pay the exaction is given no choice about whether or not he acquires the services and the amount of the exaction has no discernable relationship with



by a public authority, for public purposes enforceable by law,<sup>310</sup> and it is not a payment for services rendered, nor a penalty, nor arbitrary.<sup>311</sup> In addition, the Court noted that there is no reason why a compulsory exaction could not be properly characterised as a tax if it was by a non-public authority and for non-public purposes.<sup>312</sup>

The expansive definition of a tax was affirmed in the case of *Australian Tape Manufacturers Association Ltd v Commonwealth* ('*Tape Manufacturers' Case*') (1993).<sup>313</sup> In that case, a 4:3 majority<sup>314</sup> held that a 'royalty' on blank tapes did constitute a tax,<sup>315</sup> irrespective of whether or not the levy was exacted by a public authority.<sup>316</sup>

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the value of what is acquired, the circumstances may be such that the exaction is, at least to the extent that it exceeds that value, properly to be seen as a tax.

*Air Caledonie* (1988) 165 CLR 462, 467, quoted in Morabito and Barkoczy, above n 278, 49.

<sup>310</sup> *Air Caledonie* (1988) 165 CLR 462, 467, cited in Morabito and Barkoczy, above n 278, 48.

<sup>311</sup> *Air Caledonie* (1988) 165 CLR 462, 467-8, citing *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622, 639 and *Deputy Federal Commissioner of Taxation v Truhold Benefit Pty Ltd* (1985) 158 CLR 678, 684.

<sup>312</sup> *Air Caledonie* (1988) 165 CLR 462, 467 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ), quoted in Simon Evans, 'The Meaning of Constitutional Terms: Essential Features, Family Resemblance and Theory-Based Approaches' (2006) 29(3) *University of New South Wales Law Journal* 207, 224. See also, Morabito and Barkoczy, above n 278, 47.

<sup>313</sup> *Tape Manufacturers' Case* (1993) 176 CLR 480.

<sup>314</sup> Consisting of Mason CJ, Brennan, Deane and Gaudron JJ with Dawson, Toohey and McHugh JJ dissenting.

<sup>315</sup> *Tape Manufacturers' Case* (1993) 176 CLR 480, 507. The legislation was therefore invalid for contravening s 55 of the *Constitution*. The majority was satisfied that the royalty had the characteristics of an 'excise' on the basis that:

it [was] imposed upon the vendors of blank tapes in respect of the sale of the tapes and it [was] a charge which the vendor [would], in the ordinary course of business, pass on to the purchaser.

*Tape Manufacturers' Case* (1993) 176 CLR 480, 507 (Mason, Brennan, Deane and Gaudron JJ), quoted in Williams, Brennan and Lynch, above n 21, 1013.

<sup>316</sup> *Tape Manufacturers' Case* (1993) 176 CLR 480, 501 (Mason CJ, Brennan, Deane and Gaudron JJ) affirming *Air Caledonie* (1988) 165 CLR 462, 467. The majority held:

It would seem to be a remarkable consequence if a pecuniary levy imposed for public purposes by a non-public authority acting pursuant to a statutory authority falls outside the concept of a tax simply because the authority which imposes the levy is not a public authority ... the better view is that it is not essential that the exaction should be by a public authority.

*Tape Manufacturers' Case* (1993) 176 CLR 480, 501 (Mason, Brennan, Deane and Gaudron JJ), quoted in Williams, Brennan and Lynch, above n 21, 1013 and Morabito and Barkoczy, above n 278, 49.

## B The Uniform Tax Cases

Income tax accounted for a significant source of State revenue until 1942.<sup>317</sup> At the Premiers' Conference in 1941 the States rejected the Commonwealth's proposal to take over income tax during the period of the war.<sup>318</sup> Notwithstanding this, in 1942 Uniform Income Tax legislation<sup>319</sup> was enacted and upheld by the High Court on two separate occasions.<sup>320</sup> The States challenged the validity of the legislation in the High Court.<sup>321</sup> In the first challenge, *South Australia v Commonwealth* ('First Uniform Tax Case') (1942),<sup>322</sup> the High Court considered the validity of four pieces of uniform income tax legislation,<sup>323</sup> enacted by the Commonwealth to support the war effort during the Second World War.<sup>324</sup> The *Income Tax Act 1942* (Cth) imposed a very high tax rate, making it almost impossible for individuals to pay both State and Commonwealth taxes.<sup>325</sup> Section 221 of the *Income Tax Assessment Act 1942* (Cth) prohibited States from levying income tax until after Commonwealth tax had been paid. The *States Grants Act 1942* (Cth) imposed conditions on the grant of financial assistance to the States, pursuant to s 96 of the *Constitution*. It provided that the commonwealth can only grant financial assistance to the States where the States had not levied their own income tax. The final challenge was to the *Income Tax (Wartime Arrangements)*

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<sup>317</sup> Until 1942, State income taxes accounted for nearly half of national tax revenues and three-quarters of all income taxation in Australia. See, Russell Matthews, 'The Development of Commonwealth-State Financial Arrangements in Australia' in Ian Castles, *Year Book Australia No 71* (Australian Bureau of Statistics, 1988) 859, 860.

<sup>318</sup> Dalton, above n 239, 49. See generally, Matthews, above n 316, 860.

<sup>319</sup> *Income Tax Act 1942* (Cth); *Income Tax Assessment Act 1942* (Cth); *States Grants (Income Tax Reimbursement) Act 1942* (Cth).

<sup>320</sup> In *South Australia v Commonwealth* ('First Uniform Tax Case') (1942) 65 CLR 373 and later in *Victoria v Commonwealth* ('Second Uniform Tax Case') (1957) 99 CLR 575 (collectively referred to as the 'Uniform Tax Cases'). See, Dalton, above n 239, 49.

<sup>321</sup> See generally, Michael McHugh, 'How High Court Decisions Impact the Governance of Australia' (Speech delivered at the Hal Wootten Lecture, University of New South Wales, Kensington Campus, 23 August, 2007) 30-1 <[http://www.law.unsw.edu.au/sites/law.unsw.edu.au/files/pre/f/docs/news/2007/speech\\_michael\\_mchugh.pdf](http://www.law.unsw.edu.au/sites/law.unsw.edu.au/files/pre/f/docs/news/2007/speech_michael_mchugh.pdf)>.

<sup>322</sup> *First Uniform Tax Case* (1942) 65 CLR 373.

<sup>323</sup> *Income Tax Act 1942* (Cth); *States Grants Act 1942* (Cth); *Income Tax Assessment Act 1942* (Cth); and the *Income Tax (Wartime Arrangements) Act 1942* (Cth). The constitutional validity of these pieces of legislation was challenged by the states of South Australia, Victoria, Queensland and Western Australia.

<sup>324</sup> S J Butlin, *Official Histories: Second World War Vol IV War Economy 1942-45* (1977) Australian War Memorial (2005) <<http://www.awm.gov.au/histories/chapter.asp?volume=33>>, cited in Dalton, above n 239, 50.

<sup>325</sup> Dalton, above n 239, 49-50.

*Act 1942* (Cth). This legislation transferred assets and employees of State taxation departments to the Commonwealth.<sup>326</sup>

However, the High Court upheld all four pieces of legislation as being validly enacted under s 51(ii) and s 96 of the *Constitution*. Notably, the Court unanimously upheld the *Income Tax Act 1942* (Cth) and the *Income Tax Assessment Act 1942* (Cth) under the taxation power,<sup>327</sup> while a 4:1 majority<sup>328</sup> upheld the validity of the *States Grants Act 1942* (Cth) under s 96. The *Income Tax (Wartime Arrangements) Act 1942* (Cth) was held to be valid by a 3:2 majority (with Latham CJ and Starke J dissenting).<sup>329</sup>

This decision enabled the Commonwealth to assert exclusive control over income tax even after the war had ended.<sup>330</sup> Although the *States Grants Act 1942* (Cth) was later repealed in 1942, it was replaced by a similar piece of legislation, the *States Grants (Income Tax Reimbursement) Act 1946* (Cth), which effectively prevented the States from ever being able to re-assert control over income tax.<sup>331</sup> According to the committee for the Review of Commonwealth-State Funding, the effect of this legislation was that it ‘oblige[d] States either to forgo levying income taxes or to operate without Commonwealth grants’.<sup>332</sup> Robert Dalton<sup>333</sup> notes that surrendering Commonwealth grants ‘would have been near impossible in 1946, given the amount of money the States were ... receiving in grants’.<sup>334</sup>

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<sup>326</sup> Miranda Stewart, ‘Australia’ in Gianluigi Bizioli and Claudio Sacchetto (eds), *Tax Aspects of Fiscal Federalism: A Comparative Analysis* (IBFD, 2011) 137, 158.

<sup>327</sup> See, eg, *First Uniform Tax Case* (1942) 65 CLR 373, 374, 415 (Latham CJ), 447 (Starke J), 448-9 (McTiernan J).

<sup>328</sup> Consisting of Latham CJ, Rich, McTiernan and Williams JJ (Starke J dissenting).

<sup>329</sup> See, eg, *First Uniform Tax Case* (1942) 65 CLR 373, 448-9 (McTiernan J) Cf *First Uniform Tax Case* (1942) 65 CLR 373, 433 (Latham CJ), 445-6, 448 (Starke J).

<sup>330</sup> Dalton, above n 239, 50.

<sup>331</sup> *States Grants (Income Tax Reimbursement) Act 1946* (Cth), cited in Dalton, above n 239, 50.

<sup>332</sup> Ross Garnaut and Vince Fitzgerald, *Review of Commonwealth-State Funding Final Report* (2002) 39, 26

<[http://www.dtf.wa.gov.au/cms/uploadedFiles/FinalReport\\_30August%20with%20letter%20of%20transmital.pdf](http://www.dtf.wa.gov.au/cms/uploadedFiles/FinalReport_30August%20with%20letter%20of%20transmital.pdf)>, cited in Dalton, above n 239, 51.

<sup>333</sup> Dalton was formerly a Policy Officer of Resources and Infrastructure in the Department of Premier and Cabinet, Victoria.

<sup>334</sup> Dalton, above n 239, 51.

The taxation power was subject to another important High Court challenge in the case of *Victoria v Commonwealth* ('*Second Uniform Tax Case*') (1971).<sup>335</sup> There, the High Court upheld the Commonwealth Parliament's power to monopolise income tax during peacetime,<sup>336</sup> and confirmed that the Commonwealth government could use s 96 to 'coerce States to give up taxation power'.<sup>337</sup> The States of Victoria and New South Wales argued that the uniform tax scheme (enacted pursuant to two pieces of Commonwealth legislation)<sup>338</sup> was *ultra vires* under ss 51(ii) and 96. Here, the plaintiff sought to rely on the *Melbourne Corporation* principle, arguing that the *Constitution* is 'fundamentally federal' and that the sovereignty of the States is impaired by the uniform tax legislation scheme.<sup>339</sup> However, Dixon CJ rejected this argument on the basis that the uniform tax legislation was not a 'coercive law', but was a valid exercise of a legislative power conferred by s 96.<sup>340</sup>

In the *Second Uniform Tax Case*, a 4:3 majority<sup>341</sup> overturned its previous decision on s 221 of the *Income Tax and Social Services Contribution Assessment Act 1936* (Cth) and held that the law was invalid under s 51(ii).<sup>342</sup> The States of Victoria and New South Wales also raised a s 96 argument in relation to the validity of the *States Grants (Tax Reimbursement) Act 1946* (Cth). Nevertheless, the High Court unanimously upheld the *States Grants (Tax Reimbursement) Act 1946* (Cth) as valid under s 96.<sup>343</sup> This decision confirmed the Commonwealth's ability to allocate grants subject to any conditions the Commonwealth sought to impose. The effect of this decision was that it removed 'a State's capacity to

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<sup>335</sup> *Second Uniform Tax Case* (1971) 122 CLR 353.

<sup>336</sup> Brian Galligan, *Parliament's Development of Federalism*, Research Paper 26 (Parliament of Australia, 2001).

<sup>337</sup> Dalton, above n 239, 51, citing *First Uniform Tax Case* (1942) 65 CLR 373, 379.

<sup>338</sup> *States Grants (Special Financial Assistance) Act 1955* (Cth) ss 5, 11; *Income Tax and Social Services Contribution Assessment Act 1936* (Cth) s 221.

<sup>339</sup> *Second Uniform Tax Case* (1971) 122 CLR 353, 581, 587, citing *Melbourne Corporation Case* (1947) 74 CLR, 75.

<sup>340</sup> *Second Uniform Tax Case* (1971) 122 CLR 353, 609-10 (Dixon CJ). See Dalton, above n 239, 51.

<sup>341</sup> Consisting of Dixon CJ, McTiernan, Kitto and Taylor JJ (Williams, Webb and Fullagar JJ dissenting).

<sup>342</sup> See, Leslie Zines, 'Sir Owen Dixon's Theory of Federalism' (1965) 1 *Federal Law Review* 221, 232.

<sup>343</sup> See generally, Cheryl Saunders, 'Towards a Theory for Section 96: Part 1' (1987) 16(1) *Melbourne University Law Review* 1, 16; Williams, Brennan and Lynch, above n 21, 1074. See especially, *Second Uniform Tax Case* (1971) 122 CLR 353, 629 (Williams J), 643 (Webb J), 657 (Fullager J).

exercise their constitutional power to raise taxes other than customs and excise duties'.<sup>344</sup> Indeed, the Commonwealth has 'forced the States to vacate' the field of income tax by relying on s 109 of the *Constitution* to invalidate State law on the ground of inconsistency.<sup>345</sup> As such, Saunders describes this case as marking the 'turning point in Australian constitutionalism'.<sup>346</sup>

The Commonwealth's assumption of income tax had immediate financial implications for the States. Income tax is Australia's most significant source of revenue, accounting for approximately 74% of total taxation receipts.<sup>347</sup> Following the decisions in the *Uniform Tax Cases*, the States suffered a loss of 33% of their total taxation receipts.<sup>348</sup> Prior to the Second World War, revenue derived from taxation accounted for approximately 61% of the States' total revenue. After the War, this decreased to 28%.<sup>349</sup> The *Uniform Tax Cases* also confirmed the Commonwealth's broad discretion to impose conditions upon the grant of financial assistance to the States, under s 96 of the *Constitution*.<sup>350</sup> A detailed discussion of s 96 will be provided later in this Chapter. The most recent example of the High Court's broad characterisation of s 51(ii) is the *Mining Tax Case* (2013).<sup>351</sup> There, the plaintiff, Fortescue, challenged four pieces of minerals resource rent tax legislation,<sup>352</sup> and argued *inter alia*, that the legislation discriminated between the States, and was therefore contrary to s 51(ii) of the *Constitution*. The Court unanimously upheld the legislation and rejected the

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<sup>344</sup> D Hamill, 'Taxing Federalism: The Australian Federation in its Second Century', Paper Presentation to the Paddington Workers' Club Program (2004) <[http://www.fabian.org.au/library/event\\_papers\\_2004/1103604591\\_11277.html](http://www.fabian.org.au/library/event_papers_2004/1103604591_11277.html)>, cited in Dalton, above n 239, 51.

<sup>345</sup> New South Wales Government, Submission to the Select Committee on the Reform of the Australian Federation, 5-6.

<sup>346</sup> C Saunders, 'The Uniform Tax Cases' in HP Lee and G Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 62.

<sup>347</sup> Australian Government The Treasury, 'Pocket Guide to the Australian Tax System' (2013) <<http://www.treasury.gov.au/Policy-Topics/Taxation/Pocket-Guide-to-the-Australian-Tax-System/Pocket-Guide-to-the-Australian-Tax-System/Part-2>>.

<sup>348</sup> Denis James, 'Federal-State Financial Relations: The Deakin Prophecy' in G Lindell and R Bennett, *Parliament: The Vision in Hindsight* (Federation Press, 2001) 224-5, Twomey, above n 291, 15.

<sup>349</sup> Denis James, 'Federal-State Financial Relations: The Deakin Prophecy' in G Lindell and R Bennett, *Parliament: The Vision in Hindsight* (Federation Press, 2001) 224-5, Twomey, above n 291, 5.

<sup>350</sup> *First Uniform Tax Case* (1942) 65 CLR 373; *Second Uniform Tax Case* (1957) 99 CLR 575.

<sup>351</sup> *Mining Tax Case* (2013) 250 CLR 548.

<sup>352</sup> The *Minerals Resource Rent Tax Act 2012* (Cth); the *Minerals Resource Rent Tax (Imposition-Customs) Act 2012* (Cth); the *Minerals Resource Rent Tax (Imposition-Excise) Act 2012* (Cth) and the *Minerals Resource Rent Tax (Imposition-General) Act 2012* (Cth).

plaintiff's argument on the basis that the fact that a law operates differently in different States is not in itself discriminatory.<sup>353</sup>

In summary, a result of the High Court's expansive interpretation of taxation powers, the States have been effectively precluded from levying income tax.<sup>354</sup> As discussed above, income tax represented a major tax-base for the State. Following 1942, the States were left with a very limited tax base, which consisted primarily of 'estate duties, motor vehicle taxes, land taxes, stamp duties and local government rates'.<sup>355</sup> The following Section will examine the High Court's widening of the definition of excise in s 90 of the *Constitution*. In doing so, it will demonstrate how the States have become increasingly reliant on the Commonwealth for financial support.

## II THE EROSION OF STATE FISCAL AUTONOMY: EXCISE DUTIES

Section 90 vests in the Commonwealth exclusive power to legislate over 'customs, excise and bounties'.<sup>356</sup> The object of this provision was to preserve

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<sup>353</sup> *Mining Tax Case* (2013) 250 CLR 548, 605 [117]-[118] (Hayne, Bell and Keane JJ). There the Court stated:

a law is not shown to discriminate between States by demonstrating only that it will have a different practical operation in different States because those States have created different circumstances to which the Federal Act will apply by enacting different State legislation.

*Mining Tax Case* (2013) 250 CLR 548, 605 [117]-[118] (Hayne, Bell and Keane JJ).

<sup>354</sup> Andrew Stewart and George Williams, *Work Choices: What the High Court Said* (Federation Press, 2007) 12.

<sup>355</sup> Twomey, above n 291, 15, In 1946, the States only raised \$96 million in tax, \$34 million of which was from local government rates, \$16 million from estate duties, \$11 million from stamp duties and \$15 million from motor vehicle taxes. See, R L Mathews and W R C Jay, *Federal Finance: Intergovernmental Financial Relations in Australia Since Federation* (Nelson, 1972) 16. The primary revenue-raising State taxes now consists of: payroll tax (around \$21 billion); stamp duties on conveyances of (around \$13 billion); and taxes on goods and services (around \$11 billion). Other sources of State tax revenue includes: land tax (around \$6 billion), other property taxes (around \$3 billion); and other taxes (around \$10 billion). These figures are taken from the 2013-14 data, which is the most recent local government data available. See, Australian Government, *Tax Discussion Paper Chart Data 8: The Goods and Services Tax and State Taxes* (30 March 2015) <<http://bettertax.gov.au/publications/discussion-paper/chart-data/chpt8/>>, citing Australian Bureau of Statistics 2014, Taxation Revenue, Australia, 2012-13, cat. no. 5506.0, ABS, Canberra.

<sup>356</sup> *Constitution* s 90. See generally, Chris Caleo, 'Section 90 and Excise Duties: A Crisis of Interpretation' (1987) 16 *Melbourne University Law Review* 296; Gonzalo Villalta Puig and Roshan Chaile, 'For a Narrow Interpretation of Section 90 of the Australian Constitution: The Excise Duty System as a Guarantee of Free Trade in an Internal Market' (2010) *University of Queensland Law Journal* 319. Evans, above n 5, 219.

control of tariffs to the Commonwealth. Any legislation purporting to levy duties of excise will be invalid, and any money paid to the State under invalid legislation will need to be refunded.<sup>357</sup> The phrase ‘excise’ has been the subject of over thirty High Court challenges.<sup>358</sup> In contrast, the second phrase under section 90, ‘customs’ is much less contentious.<sup>359</sup> Section 90 places a fundamental restraint on State legislative and financial power.<sup>360</sup> As a result, the High Court’s interpretation of duties of excise ‘has significant implications for the federal balance’.<sup>361</sup> To adopt the words of McHugh J in *Phillip Morris v Commissioner of Business Franchises (Vic)* (1989):<sup>362</sup>

Any extension of the scope of an excise duty inevitably affects the distribution of public revenue within the Australian federation since it narrows the revenue base of the States and reduces their financial autonomy.<sup>363</sup>

This Section will examine the High Court’s interpretation of the meaning of ‘excise’, and will argue that this interpretation is characterized by a ‘progressive widening’<sup>364</sup> of Griffith CJ’s original definition in *Peterswald* (1904).<sup>365</sup> Broadly speaking, the High Court has adopted one of two approaches to interpreting s 90: a ‘narrow view’ and a ‘broad view’.<sup>366</sup> Under the narrow view, the scope of an excise duty is limited to a tax imposed on goods ‘manufacture or produced in Australia’.<sup>367</sup> Whereas according to a broad view, an excise duty may be imposed

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<sup>357</sup> *British American Tobacco Ltd v Western Australia* (2003) 217 CLR 30.

<sup>358</sup> Nicolee Dixon, ‘Section 90: Ninety Years On’ (1993) 21 *Federal Law Review* 228, 230.

<sup>359</sup> *Ibid.*

<sup>360</sup> Craven, above n 13, 44.

<sup>361</sup> Finlay, above n 5, 91. See also, Graeme Lowe, ‘Hematite Petroleum Pty Ltd v Victoria: Breakthroughs in the Interpretation of Section 90 of the Constitution’ (1986) 12(3) *Monash University Law review* 107, 107.

<sup>362</sup> *Philip Morris Ltd v Commissioner of Business Franchises (Vic)* (‘*Phillip Morris*’) (1989) 167 CLR 399.

<sup>363</sup> *Phillip Morris Ltd* (1989) 167 CLR 399, 489 (McHugh J).

<sup>364</sup> Craven, above n 13, 52.

<sup>365</sup> *Peterswald* (1904) 1 CLR 497. See, Graeme Lowe, ‘Hematite Petroleum Pty Ltd v Victoria: Breakthroughs in the Interpretation of Section 90 of the Constitution’ (1986) 12(3) *Monash University Law Review* 107, 108.

<sup>366</sup> Brian Opeskin contends that the two ways of interpreting s 90 are the ‘purposive approach’ and the ‘definitional approach’ (otherwise known as the ‘literal approach’): Opeskin, above n 297, 175.

<sup>367</sup> Gareth Griffith, ‘The Future of State Revenue: The High Court Decision in *Ha v Hammond*’ Briefing Paper No 16 (1997) 1.

at any stage during the ‘production, manufacture, sale or distribution of goods’.<sup>368</sup> This Section will examine the consequences that any expansion of the meaning of ‘excise’ has on the States’ financial autonomy.

The High Court first determined the meaning of excise duties in *Peterswald* (1904).<sup>369</sup> There, the Court considered the validity of the *Liquor Act 1898* (NSW), which made it an offence to carry on the business of brewing without a licence. Applying the reserve powers doctrine,<sup>370</sup> the Court unanimously held that the licence fee was a flat rate, and did not satisfy the definition of an excise duty. Chief Justice Griffith, adopting a narrow interpretation of s 91, defined an ‘excise’ as ‘a 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’.<sup>371</sup> Under this narrow definition, a tax only constituted an excise duty if it was imposed on the goods at the time of production of manufacture.<sup>372</sup>

In formulating this definition, the High Court adopted an originalist approach to constitutional interpretation, noting that regard must be had to the substance of the legislation rather than its literal form,<sup>373</sup> and that in construing the *Constitution*, it must be ‘ascertain[ed] ... whether the power to deal with such matters was intended to be withdrawn from the States, and conferred upon the Commonwealth’.<sup>374</sup> Support for this narrow definition ‘derived from’<sup>375</sup> Quick

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<sup>368</sup> Ibid; Dalton, above n 239, 79. This was the view adopted by the majority in *Ha v New South Wales* (‘*Ha*’) (1997) 189 CLR 465 (Brennan CJ, McHugh, Gummow, Kirby JJ., Dawson, Toohey and Gaudron JJ dissenting).

<sup>369</sup> *Peterswald* (1904) 1 CLR 497. See, Opeskin, above n 297, 176; Caleo, above n 355, 297.

<sup>370</sup> Griffith CJ argued that the fact that the Constitution did not provide for the Commonwealth to interfere with the internal affairs of the States or their ability to regulate businesses within their boundaries was a very important consideration in deciding whether s 90 should be interpreted to interfere with States’ powers in that respect: *Peterswald* (1904) 1 CLR 497, 507 (Griffith CJ).

<sup>371</sup> *Peterswald* (1904) 1 CLR 497, 509, cited in Caleo, above n 355, 297.

<sup>372</sup> See, Deborah Z Cass, ‘Lionel Murphy and Section 90 of the Australian Constitution’ in Michael Coper and George Williams (eds), *Justice Lionel Murphy: Influential or Merely Prescient?* (Federation Press, 1997) 22 citing *Peterswald* (1904) 1 CLR 497.

<sup>373</sup> *Peterswald* (1904) 1 CLR 497, 511.

<sup>374</sup> The High Court stated:

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.

Ibid 507, cited in Rosalind Dixon and George Williams, *The High Court, The Constitution and Australian Politics* (Cambridge University Press, 2015) 90; Evans, above n 5, 193, and *R v Barger* (1908) 6 CLR 41, 71 (Griffith CJ and Barton and O’Connor JJ).



and Garran's text, *The Coming Commonwealth*,<sup>376</sup> as well as s 93 of the *Constitution*.<sup>377</sup>

According to one commentator, Chris Caleo, the *Peterswald* definition began to be extended or eroded 'almost immediately'.<sup>378</sup> In *Commonwealth and Commonwealth Oil Refineries Ltd v South Australia* ('*Petrol Case*') (1926),<sup>379</sup> the High Court re-defined the scope of s 90. There, the majority held that a tax on the first sale of locally produced goods and imported petrol was an excise. Justice Rich broadened the definition of 'excise', by determining that a tax in respect of goods was an excise, and that the tax did not have to be imposed on locally produced goods.<sup>380</sup> Justices Isaacs and Higgins also indicated towards a broader construction of s 90.<sup>381</sup> Justice Higgins, for example, rejected the fourth element of the *Peterswald* definition, determining that an excise was a tax on goods irrespective of when it was imposed.<sup>382</sup>

Later, in the case of *Parton v Milk Board (Vic)* (1949)<sup>383</sup> Dixon J (with whom Rich and Williams JJ agreed) rejected Griffith CJ's criteria, holding that a fee need not be imposed at the time of manufacture. Instead, Dixon J, adopting a broad interpretation of s 90 held that an excise duty be imposed at any stage from production, manufacture, sale and distribution, up until the goods reached the

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<sup>375</sup> Caleo, above n 355, 300-1

<sup>376</sup> Quick and Garran defined duties of excise as:

taxes on the production and manufacture of articles which could not be taxed through the customs house.

J Quick and R R Garran, *Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1901) 837. See also, Caleo, above n 355, 300-1; Nicolee Dixon, 'Section 90: Ninety Years On' (1993) 21 *Federal Law Review* 228, 247; Gray, above n 30, 54.

<sup>377</sup> Caleo, above n 355, 300-1. This section refers to 'duties of excise paid on goods produced or manufactured in the state': *Constitution* s 93, cited in Gray, above n 30, 54.

<sup>378</sup> *Ibid* 301.

<sup>379</sup> *Petrol Case* (1926) 38 CLR 408.

<sup>380</sup> *Ibid* 437 (Rich J). Cf *Petrol Case* (1926) 38 CLR 408, 435 (Higgins J). See also, Gray, above n 30, 56 and Peter Hanks, 'Section 90 of the Commonwealth Constitution: Fiscal Federalism or Economic Unity' (1986) 10(3) *Adelaide Law Review* 365, 375.

<sup>381</sup> Gray, above n 30, 54, 56-7.

<sup>382</sup> *Petrol Case* (1926) 38 CLR 408, 435 (Higgins J). Justice Higgins stated:

[W]hereas an excise duty means a duty on the manufacture, production [and consumption] in the country itself; it matters not whether the duty is imposed at the moment of actual sale or not, or sale and delivery, or consumption.

*Petrol Case* (1926) 38 CLR 408, 435 (Higgins J), cited in Gray, above n 30, 54, 56. Cf Isaacs J, who held that excise duties did not extend to taxes imposed at the point of consumption: *Petrol Case* (1926) 38 CLR 408, 426, cited in Gray, above n 30, 54, 56. See also, Brian Opeskin, above n 297, 188.

<sup>383</sup> *Parton v Milk Board (Vic)* ('*Parton*') (1949) 80 CLR 229.

consumer.<sup>384</sup> The principle that can be taken from *Parton* is that s 90 did not extend to taxes on consumption. This limitation on Commonwealth power later became known as the ‘consumption tax exemption’, and was one of two limitations adopted by the High Court in characterizing s 90.<sup>385</sup> The second exemption, known as the ‘criterion of liability’ will be discussed in further detail below.

### *A Criterion of Liability*

As the previous Chapter outlined, following *Engineers*, the High Court prescribed to a new method of *Constitutional* interpretation, which favoured a broad interpretation of Commonwealth power. This approach largely influenced the High Court’s interpretation of the meaning of ‘excise’, which led to the gradual erosion of the criteria for an excise duty, enunciated by Griffith CJ in *Peterswald*.

Subsequent cases sought to limit the *Peterswald* definition of an excise, by applying the ‘criterion of liability’ test<sup>386</sup> (formulated by Kitto J in *Dennis Hotels v Victoria* (1960)).<sup>387</sup> The criterion of liability test relevantly provides that a tax will only constitute an excise if it is ‘directly imposed on goods’.<sup>388</sup> Under this definition, the States were allowed to levy backdated licence fees, or ‘franchise fees’.<sup>389</sup> In *Dennis Hotels*, the High Court considered the validity of two fees imposed under the *Licensing Act 1958* (Vic). Section 19(1)(a) imposed a fee on liquor purchased under a permanent licence, while s 19(1)(b) imposed a fee for liquor purchased under a temporary licence. The amount imposed under both licences was 6% of the value of the liquor purchased. A narrow majority of the High Court upheld the first licence fee,<sup>390</sup> but rejected the second.<sup>391</sup>

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<sup>384</sup> Ibid 260 (Dixon J).

<sup>385</sup> See, Peter Hanks, *Constitutional Law in Australia* (Butterworths, 2<sup>nd</sup> ed, 1996) 300-301 cited in Patricia Sampathy, ‘Section 90 of the Constitution and Victorian Stamp Duty on Dealings in Goods’ (2001) 4(1) *Journal of Australian Taxation* 133. See also, Evans, above n 5, 221.

<sup>386</sup> Craven, above n 13, 52.

<sup>387</sup> *Dennis Hotels v Victoria* (‘*Dennis Hotels*’) (1960) 104 CLR 529, 559-60.

<sup>388</sup> Craven, above n 13, 52. See also, *Dennis Hotels Pty Ltd v Victoria* (‘*Dennis Hotels*’) (1960) 104 CLR 529, 559 (Kitto J). According to Kitto J, This tax can be imposed at any time between the point of manufacture or production, and the point of reception by the consumer.

<sup>389</sup> See, Evans, above n 5, 221.

<sup>390</sup> Fullager, Kitto, Taylor and Menzies JJ (Dixon CJ, McTiernan and Windeyer JJ dissenting). See, *Dennis Hotels* (1960) 104 CLR 529, 555-8 (Fullager), 557-60 (Kitto J), 572, 575-8

There was a lack of consensus within the majority about the meaning of excise, including when an excise duty had to be imposed,<sup>392</sup> and whether excise duties were confined to locally produced goods. Justice Fullager in his majority judgment adopted a very narrow definition of s 90. Applying *Peterswald*, he determined that a tax could only be characterised as an excise duty if it was imposed on the production or manufacture of the goods.<sup>393</sup> His view is starkly contrasted to the views of the other justices, who agreed that the tax could be imposed at any time before the goods reached the consumer.<sup>394</sup>

The division of the High Court demonstrates uncertainty about the interpretation of s 90.<sup>395</sup> In addition, the dissenting justices displayed a willingness to depart from the *Peterswald* definition of ‘excise’, in favour of a broad interpretation of s 90. Chief Justice Dixon and McTiernan J abandoned the restrictive approach they had adopted in *Parton*. Similarly, Windeyer J was of the view that the definition of ‘excise’ was not limited to the manufacture or production of goods.<sup>396</sup> The effect of this decision can be summarised as follows: a licence fee imposed during the carrying on of a business of selling goods did not constitute an excise duty if it was calculated ‘by reference to the value of the quantity of [the goods] sold [or

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(Taylor J), 586-7, 591 (Menziez J) Cf *Dennis Hotels* (1960) 104 CLR 529, 339 (Dixon CJ), 548-50 (McTiernan J), 592, 608 (Windeyer J).

<sup>391</sup> Dixon CJ, McTiernan, Menziez and Windeyer JJ (Fullager, Kitto and Taylor JJ dissenting). *Dennis Hotels* (1960) 104 CLR 529, 339 (Dixon CJ), 548-50 (McTiernan J), 586-7, 591 (Menziez J), 592, 595, 608 (Windeyer J).

Cf *Dennis Hotels* (1960) 104 CLR 529, 555-8 (Fullager), 557-60 (Kitto J), 572, 575-8 (Taylor J).

<sup>392</sup> See, eg, *Dennis Hotels* (1960) 104 CLR 529, 559-60 (Kitto J). Justice Kitto stated:

a tax is not a duty of excise unless the criterion of liability was the taking of a step in the 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.

*Dennis Hotels* (1960) 104 CLR 529, 589 (Menziez J) (an excise is a tax on sale or production of goods at any point before the sale or consumption). Cf *Dennis Hotels* (1960) 104 CLR 529, 553 (Fullager J) (applying the *Peterswald* definition), Gray, above n 30, 67-8. See generally, Williams, Brennan and Lynch, above n 21, 1033.

<sup>393</sup> *Dennis Hotels* (1960) 104 CLR 529, 555 (Fullager J).

<sup>394</sup> See, eg, *Dennis Hotels* (1960) 104 CLR 529, 549 (McTiernan J), 573 (Taylor J), 582, 589-90 (Menziez J), cited in Gray, above n 30, 64-5.

<sup>395</sup> See generally, Nicolee Dixon, ‘Section 90: Ninety Years On’ (1993) 21(2) *Federal Law Review* 228.

<sup>396</sup> *Dennis Hotels* (1960) 104 CLR 529, 558-9 (Windeyer J).

purchased] during a period preceding that in respect of which the licence is granted'.<sup>397</sup>

A further broadening of the definition of excise occurred in the case of *Bolton v Madsen* (1963).<sup>398</sup> There, the Court unanimously upheld legislation that imposed a fee on owners of a motor vehicle carrying goods. This fee was assessed by multiplying the vehicle's carrying capacity by the distance over which the goods were carried. The Court adopted a broad definition of 'excise', and unanimously held that a tax on the taking of a step in the process of the production or distribution of goods before they reach consumers is an excise.<sup>399</sup> The Court unanimously applied and affirmed the criterion of liability test from *Dennis Hotels*.

The criterion of liability test was applied in the later cases of *Dickenson's Arcade Pty Ltd v Tasmania* (1974)<sup>400</sup> and *HC Sleigh Ltd v South Australia* (1977)<sup>401</sup> and successfully enabled States to charge certain retrospective licencing and franchise fees in relation to alcohol, tobacco<sup>402</sup> and petrol.<sup>403</sup>

### B Substantive Approach

The validity of the criterion of liability test was questioned in the cases of *Hematite Petroleum Pty Ltd v Victoria* (1983);<sup>404</sup> *Philip Morris Limited v Commissioner of Business Franchises (Victoria)* (1989)<sup>405</sup> and *Capital*

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<sup>397</sup> *HC Sleigh Ltd v South Australia* (1977) 136 CLR 475, 491 (Gibbs J), cited in Vince Morabito, 'The Constitutional Restriction on Taxes Imposed on Crown Property' (1998) 1(1) *Journal of Australian Taxation* 41, 47.

<sup>398</sup> *Bolton v Madsen* (1963) 110 CLR 264.

<sup>399</sup> *Ibid* 271, quoted in Sampathy, above n 383, 142. See also, Vince Morabito, 'The Constitutional Restriction on Taxes Imposed on Crown Property' (1998) 1(1) *Journal of Australian Taxation* 41, 47. See also, *Capital Duplicators Pty Limited v Australian Capital Territory [No 2]* ('*Capital Duplicators*') (1993) 178 CLR 561, 587 (Mason CJ, Brennan J, Deane J, McHugh J).

<sup>400</sup> *Dickenson's Arcade Pty Ltd v Tasmania* ('*Dickenson's Arcade*') (1974) 130 CLR 177.

<sup>401</sup> *HC Sleigh Ltd v SA* (1977) 136 CLR 475.

<sup>402</sup> *Dickenson's Arcade* (1974) 130 CLR 177.

<sup>403</sup> *HC Sleigh Ltd v South Australia* (1977) 136 CLR 475 cited in Griffith, above n 366, 9 and Williams, Brennan and Lynch, above n 21, 1042.

<sup>404</sup> *Hematite* (1983) 151 CLR 599, cited in Evans, above n 224.

<sup>405</sup> *Philip Morris Limited v Commissioner of Business Franchises (Victoria)* ('*Philip Morris*') (1989) 167 CLR 399, cited in Evans, above n 224.

*Duplicators Pty Limited v Australian Capital Territory [No 2]* (1993).<sup>406</sup> In those cases, the High Court adopted a new test, known as the ‘substantive approach’. Under the substantive approach, the High Court determines ‘whether the tax *in substance* falls within the definition of excise’.<sup>407</sup> This is contrasted to the earlier ‘criterion of liability’ test.

In the case of *Hematite* (1983), the High Court held by a majority of 4-2,<sup>408</sup> that a pipeline operation fee imposed by the Victorian government on the transportation of hydrocarbons produced in Bass Strait was an excise. The ‘pipeline operation fee’ imposed under the *Pipelines Act 1967* (Vic) was calculated at \$10 million for each trunk pipeline. In the case of non-trunk pipelines, the fee was fixed at a rate of \$40 per complete kilometre. Justice Brennan preferred a broad approach to construing ‘excise’, subject to the restrictions imposed by the criterion of liability test.<sup>409</sup> Chief Justice observed that s 90 severely ‘narrows ... the field of taxation open to [the States]’.<sup>410</sup> Justices Wilson, Dawson and Gibbs applied the substantive approach, noting that the validity of the State law depends on whether the substance of the legislation falls within the definition of ‘excise’.<sup>411</sup>

In *Philip Morris* (1989)<sup>412</sup> the High Court had to determine the validity of particular provisions of the *Business Franchise (Tobacco) Act 1974* (WA). Under this legislation, tobacco companies were required to obtain a wholesalers licence to supply cigarettes and tobacco to retailers. The licences were months, and the licence fee consisted of a flat fee of \$50, plus an additional fee of 25% of the value of the tobacco sold in the previous month. A 5-2 majority<sup>413</sup> of the High Court upheld the licence fee. Some of the members of the High Court expressed some doubt about the validity of the criterion of liability test in determining

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<sup>406</sup> *Capital Duplicators* (1993) 178 CLR 561, cited in Evans, above n 224.

<sup>407</sup> See, Deborah Z Cass, ‘Lionel Murphy and Section 90 of the Australian Constitution’ in Michael Coper and George Williams (eds) *Justice Lionel Murphy: Influential or Merely Prescient?* (Federation Press, 1997) 24.

<sup>408</sup> Justices Mason, Murphy, Brennan and Deane (Gibbs CJ and Wilson J dissenting).

<sup>409</sup> *Hematite* (1983) 151 CLR 599, 655 (Brennan J). See especially, Hanks, above n 379, 367.

<sup>410</sup> *Ibid* 617 (Gibbs CJ), cited in Gray, above n 30, 281.

<sup>411</sup> See, eg, *Hematite* (1983) 151 CLR 599, 618 (Gibbs CJ). See especially, Opeskin, above n 297, 198.

<sup>412</sup> *Philip Morris* (1989) 167 CLR 399.

<sup>413</sup> Consisting of Mason CJ, Deane, Dawson, Toohey and Gaudron JJ (Brennan and McHugh JJ dissenting).

whether a fee constituted an excise. Justice Brennan in his dissent held that the Court should adopt a substantive approach to characterising a tax.<sup>414</sup> Justice McHugh (dissenting) expressed a similar view. He noted that ‘[r]egard must be had to the substance of the operation of the statute’.<sup>415</sup>

The substantive approach was applied in the case of *Capital Duplicators* (1993).<sup>416</sup> There, the Court had to determine the validity of the *Business Franchise (‘X’ Videos) Act 1990* (ACT) was valid. This Act imposed a licence fee on wholesalers and retailers of X-rated videos. The licence fee was assessed at a monthly rate of \$50, plus an additional 40% of the value of videos sold during the relevant period.<sup>417</sup> The majority joint judgment<sup>418</sup> expressly rejected the criterion of liability test.<sup>419</sup> However, the Court refused to overrule its previous decisions in *Dennis Hotels* and *Dickinson’s Arcade*.<sup>420</sup>

The most recent case to consider s 90 is the decision in *Ha v New South Wales* (1997).<sup>421</sup> There, the High Court invalidated the *Business Franchise Licenses (Tobacco) Act 1987 (NSW)* on the basis that imposed an excise duty. The legislation required tobacco retailers to pay a fee in order to obtain a licence to sell tobacco. The amount payable for the licence was calculated on the basis of \$100 together with an amount equal to 100% of the value of the tobacco sold by the applicant during the relevant period. The High Court held that State business franchise fees on tobacco, alcohol and petrol did constitute excise duties, and thus were prohibited under s 90 of the *Constitution*.<sup>422</sup> In reaching this conclusion, the majority<sup>423</sup> adopted a broad interpretation of ‘excise’. Chief Justice Brennan, McHugh, Gummow and Kirby JJ were of the view that an excise duty could be imposed on at any stage during the manufacture, sale or distribution of the goods. They rejected the criteria that an excise must be imposed on locally produced

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<sup>414</sup> *Philip Morris* (1989) 167 CLR 399, 460 (Brennan J), cited in Evans, above n 5, 225.

<sup>415</sup> *Ibid* 492 (McHugh J), cited in Evans, above n 5, 225.

<sup>416</sup> *Capital Duplicators* (1993) 178 CLR 561.

<sup>417</sup> Evans, above n 5, 226.

<sup>418</sup> Delivered by Mason CJ, Deane, Brennan and McHugh JJ.

<sup>419</sup> *Capital Duplicators* (1993) 178 CLR 561, 383 (Mason CJ, Brennan, Deane and McHugh JJ), cited in Evans, above n 5, 226.

<sup>420</sup> Evans, above n 5, 226.

<sup>421</sup> *Ha v New South Wales* (‘Ha’) (1997) 189 CLR 465.

<sup>422</sup> See, Commonwealth of Australia, above n 1, 11.

<sup>423</sup> Consisting of Brennan CJ, McHugh, Gummow and Kirby JJ.

goods, and affirmed the view that the tax can be imposed at any stage before distribution.<sup>424</sup> In summary, they defined excise duties as ‘inland taxes ... on the importation of goods [which are] taxes on some step taken in dealing with goods’.<sup>425</sup> The majority also confirmed a rejection of the criterion of liability test.<sup>426</sup>

*Ha* has been described as ‘a landmark [case] in the development of State-Federal financial relations’.<sup>427</sup> The High Court’s willingness to interpret s 90 broadly has limited the areas of control for the States, thus resulting in a ‘significant, sudden and unexpected loss of revenue for the States’.<sup>428</sup> According to Twomey and Withers, following *Ha*, the States suffered a loss of \$5 billion in revenue.<sup>429</sup> In addition, the High court’s interpretation of s 90 has effectively limited State revenue across a broad range of other taxation areas. As one commentator, Denis James, notes: ‘[e]ven though the cases heard related to the imposition of franchise fees on tobacco, the decision has effectively declared all current State business franchise fees on petroleum, tobacco and alcoholic products to be constitutionally invalid’.<sup>430</sup>

### III FEDERAL FINANCIAL RELATIONS

Vertical Fiscal Imbalance describes the situation whereby State and Territory governments are unable to raise sufficient revenue to meet their expenditure obligations.<sup>431</sup> As a consequence, these governments are reliant on funding

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<sup>424</sup> *Ha* (1997) 189 CLR 465, 493, 499 (Brennan CJ, McHugh, Gummow and Kirby JJ).

<sup>425</sup> *Ibid*, cited in Williams, Brennan and Lynch, above n 21, 1047.

<sup>426</sup> *Ha* (1997) 189 CLR 465, 499 (Brennan CJ, McHugh, Gummow and Kirby JJ). Cf Justices Dawson, Toohey and Gaudron JJ, who favoured a narrow interpretation of ‘excise’. They held that taxes on locally manufactured goods that discriminate between locally manufactured goods and imported goods could constitute an excise. See, *Ha* (1997) 189 CLR 465, 1101 (Dawson, Toohey and Gaudron JJ), cited in Neil Halliday, ‘*Ha & Anor v State of New South Wales & Ors; Walter Hamond & Associates v State of New South Wales & Ors*’ (1998) 20 (1) *Sydney Law Review* 158, 160.

<sup>427</sup> Griffith, above n 366, 1.

<sup>428</sup> Commonwealth of Australia, above n 1, 11.

<sup>429</sup> Twomey and Withers, above n 5, 36.

<sup>430</sup> Denis James, ‘Federalism up in Smoke: The High Court Decision on State Tobacco Tax’, Current Issues Brief 1 1997-98 (Canberra: Department of the Parliamentary Library, 1999) i. See also, Matthews, above n 316, 860. Matthews notes that the High Court’s interpretation of ‘excise’ ‘ha[s] the effect of excluding the States from sale taxes on goods on the grounds that they are excise duties’: Matthews, above n 316, 860.

<sup>431</sup> Australian Government the Treasury, Tax Discussion Paper (2015) 16.

transfers from the Commonwealth government<sup>432</sup> ‘to provide services such as schools, hospitals, police and public transport’.<sup>433</sup> By adopting a broad interpretation of the scope of s 51(ii) and the meaning of ‘excise’ in s 91, the High Court has enabled the Commonwealth to dominate Australia’s major sources of revenue.<sup>434</sup> As such, the Commonwealth now generates revenue from a vast range of sources, while the States are unable to raise sufficient revenue to meet their expenditure requirements. Australia now exhibits one of the highest levels of Vertical Fiscal Imbalance in federalist nations worldwide.<sup>435</sup>

### *A Fiscal-Federal Relations*

While some degree of fiscal imbalance is necessary to facilitate competition between the Commonwealth and the States, Australia is experiencing a high degree of Vertical Fiscal Imbalance in comparison to other federalist nations.<sup>436</sup> This is largely the result of the High Court’s characterisation of the s 51(ii) and s 90 powers. The reasons for this are that any expansion in Commonwealth taxation power limits State tax sources. The most obvious example of the interrelationship between the High Court’s characterisation of s 51(ii) and the high levels of Vertical Fiscal Imbalance is seen by the High Court’s decisions to make income tax exclusive to the Commonwealth in the *Uniform Tax Cases*. Whereas in 1902-1903, the Commonwealth collected 41% of revenue and the States collected the remaining 59% of taxation revenue,<sup>437</sup> in recent times, the States are only

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<sup>432</sup> Ibid.

<sup>433</sup> Twomey, above n 5, 65.

<sup>434</sup> See, Commonwealth of Australia, above n 1, 30. The Australian Parliament observed that:  
In Australia, VFI [Vertical Fiscal Imbalance] has grown largely as a result of the High Court decisions on the interpretation of the *Constitution* in relation to taxation matters, and also because States have passed up opportunities to take back a greater role in levying income tax.

<sup>435</sup> Twomey, above n 5, 65; Brian Dollery, ‘A Century of Vertical Fiscal Imbalance in Australian Federalism’ (2002) 36 *History of Economics Review* 26, 38; The Australian Government notes that ‘Australia’s degree of VFI [Vertical Fiscal Imbalance] is very high by international standards’: Commonwealth of Australia, above n 1, 30. Cf Canada where the central government only raises 45% of total tax revenue: Commonwealth of Australia, above n 1, 30.

<sup>436</sup> Alan Fenna, ‘Commonwealth Fiscal Power and Australian Federalism’ (2008) 31(2) *University of New South Wales Law Journal* 509, 509. All federations have a degree of Vertical Fiscal Imbalance, however Australia exhibits higher levels of Vertical Fiscal Imbalance as a consequence of the High Court’s interpretation of the taxation powers in the *Constitution* (particularly since the States stopped collecting income tax). See, Commonwealth of Australia, above n 1, 30.

<sup>437</sup> Commonwealth Grants Commission, Report on GST Revenue Sharing Relativities — 2014



responsible for collecting around 15% of taxes (despite being responsible for around 40% of outlays).<sup>438</sup>

Maintaining healthy Federal-State financial relations is an important part of preserving the federal balance. In Australia, Vertical Fiscal Imbalance has been described as the primary deficiency with Australia's federalism.<sup>439</sup> An analysis of the financial position of the respective state and federal governments demonstrates a clear correlation between the High Court's decision in the *Uniform Tax Cases* on the State's ability to levy income taxes. According to economics Professor Brian Dollery's sources, in the 1948-49 financial year, the Commonwealth collected 88% of all taxes levied in Australia, compared to only 8% by the States and 4% by Local Governments.<sup>440</sup> Following the decision in *Engineers*, the Commonwealth has gradually usurped control over State-revenue raising ability.

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Update (2014) 23

<[https://cgc.gov.au/index.php?option=com\\_content&view=article&id=155:2014-update&catid=62&Itemid=142](https://cgc.gov.au/index.php?option=com_content&view=article&id=155:2014-update&catid=62&Itemid=142)>.

<sup>438</sup> Business Council of Australia, 'The Future of Tax: Australia's Current Tax System' (2014) 12 <<http://www.bca.com.au/publications/the-future-of-tax-australias-current-tax-system>>.

See also, Australian Government the Treasury, Above n 429, 15 and N. Warren, Benchmarking Australia's Intergovernmental Fiscal Arrangements, Final Report to the NSW Treasury (May 2006) xxxi

<[http://www.treasury.nsw.gov.au/\\_data/assets/pdf\\_file/0006/5793/fin-bench-rep.pdf](http://www.treasury.nsw.gov.au/_data/assets/pdf_file/0006/5793/fin-bench-rep.pdf)>, cited in Scott Bennett and Richard Webb, 'Specific Purpose Payments and the Australian Federal System' (2008) 19. See also, Australian Government Productivity Commission, above n 55, 11. According to the Australian Government's most recent statistics, in 2013-14 State expenses equated to around \$220 billion. While the States' total own-source revenue in 2013-14 was equal to around \$122 billion. State expenditure requirements are comprised of: health expenses (around \$61 billion); education expenses (around \$51 billion); transport and communications expenses (around \$24 billion); public order expenses (around \$22 billion); and other expenses (around \$62 billion). See, Australian Government, *Tax Discussion Paper Chart Data 8: The Goods and Services Tax and State Taxes* (30 March 2015)

<<http://bettertax.gov.au/publications/discussion-paper/chart-data/chpt8/>>, citing New South Wales Government 2014, Report on State Finances 2013-14, New South Wales Government, Sydney; Victorian Government 2014, 2013-14 Financial Report (incorporating Quarterly Report No. 4), Victorian Government, Melbourne; Queensland Government 2014, 2013-14 Report on State Finances of the Queensland Government — 30 June 2014, Queensland Government, Brisbane; Government of Western Australia 2014, 2013-14 Annual Report on State Finances, Government of Western Australia, Perth; Government of South Australia 2014, 2014-15 Budget Paper 3: Budget Statement, Government of South Australia, Adelaide; Government of Tasmania (2014), Treasurer's Annual Financial Report (2013-14), Government of Tasmania, Hobart. Australian Capital Territory Government (2014), Consolidated Annual Financial Statements (2013-14); Northern Territory Government (2014), Treasurer's Annual Financial Report, Northern Territory Government, Darwin.

<sup>439</sup> Twomey, above n 5. See also, Zimmermann and Finlay, above n 4, 220.

<sup>440</sup> Dollery, above n 431, 35, citing R L Mathews and W R C Jay Australian Fiscal Federalism From Federation to McMahon (Thomas Nelson 1972) 191. See also, Brian Dollery, 'One Hundred Years of Vertical Fiscal Imbalance in Australian Federalism' in D. Alagiri (eds), *Fiscal Imbalances and Sustainability: Concepts and Country Experience* (ICFAI University Press, 2009) 113, cited in Finlay, above n 5, 85.

By upholding the validity of the legislation enacted during the *Uniform Tax Cases*, the States have been effectively unable to levy income tax.<sup>441</sup> In addition, they have been unable to ‘impose their own indirect taxes on goods like GST’.<sup>442</sup> This represents a significant loss of revenue for the States. As a result of these decisions, the States have become unable to raise enough revenue to meet their expenditure requirements and to perform their functions.<sup>443</sup>

### B Current Fiscal Situation

According to the Australian Government’s 2015 Tax Discussion Paper, in 2012-2013 the Commonwealth collected approximately 81% of tax revenue in Australia, predominantly from income taxes levied on individuals and corporations.<sup>444</sup> On the other hand, State and Territory governments collected around 15% of tax revenue ‘but [were] responsible for around 40 per cent of expenditure’.<sup>445</sup> State revenue largely consists of payroll taxes and property taxes (especially stamp duties).<sup>446</sup> The remaining tax revenue was collected by Local Governments through municipal rates.<sup>447</sup> In contrast, in Canada’s federal system, the central government collects only 45% of total taxation revenue.<sup>448</sup>

Income tax is the Commonwealth government’s main source of revenue, accounting for around 74.4% of total taxation receipts in 2012-13.<sup>449</sup> Consequently, the loss of State income tax in 1914 was a significant burden on State revenue-raising capacity. In 2013-14, State and Territory governments (excluding local governments) raised approximately 30% of their total revenue

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<sup>441</sup> *Constitution*, Overview and Notes by the Australian Government Solicitor, vi-vii.

<sup>442</sup> George Williams, ‘A Guide to Our Constitution’ (Paper presented at the National Archives of Australia, Canberra, 10 July 2011).

<sup>443</sup> *Ibid*; *Constitution*, Overview and Notes by the Australian Government Solicitor, vi.

<sup>444</sup> Australian Government the Treasury, above n 429, 15. Cf Canada, where the central government is only responsible for raising 45% of total tax revenue. See, Commonwealth of Australia, above n 1, 30.

<sup>445</sup> Business Council of Australia, above n 436, 12. See also, Australian Government the Treasury, Above n 429, 15.

<sup>446</sup> Australian Government the Treasury, above n 429, 15.

<sup>447</sup> *Ibid*.

<sup>448</sup> Commonwealth of Australia, above n 1, 30.

<sup>449</sup> Commonwealth of Australia, <<http://www.treasury.gov.au/Policy-Topics/Taxation/Pocket-Guide-to-the-Australian-Tax-System/Pocket-Guide-to-the-Australian-Tax-System/Part-2>>; Australian Government the Treasury, above n 429, 20.

from taxes they administer.<sup>450</sup> They were reliant on the Commonwealth government for 45% of their revenue, through specific purpose payments and general revenue assistance, including all GST revenue.<sup>451</sup> A discussion of grants the Commonwealth can make will be discussed in further detail in the following section of this Chapter.

The States are now dependent on the Commonwealth for 45% of their revenue.<sup>452</sup> In Australia, only 31% of the revenue from State and Territory governments (excluding local governments) is derived from taxes they administer.<sup>453</sup> This is starkly contrasted to other federalist nations such as Germany, Canada, and Switzerland, which fund more than 50% of their expenditure from State taxes,<sup>454</sup> and over 70% of expenditure from other revenue raised by the States.<sup>455</sup>

The Commonwealth Treasury has acknowledged that ‘the fiscal relationship between the Australian Government and the States is characterised by a “vertical fiscal imbalance”’.<sup>456</sup> In a 2015 discussion paper, *Issues Paper 1 A Federation for Our Future*, the Commonwealth Government highlighted the negative consequences of this imbalance. These include:

- reduced State and Territory autonomy through the increased use of tied grants;
- ‘reduced transparency and accountability to taxpayers due to the misalignment between States and Territories’ revenue raising and expenditure’; and
- ‘increased risk of unnecessary duplication and overlap’.<sup>457</sup>

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<sup>450</sup> Australian Government the Treasury, above n 429, 16. These figures are based on calculations of the Commonwealth Treasury, using State and Territory Financial Budget Outcomes (or equivalents).

<sup>451</sup> Ibid.

<sup>452</sup> Commonwealth of Australia, above n 1, iv; Commonwealth Treasury, *Architecture of Australia’s Tax and Transfer System* (2008) 297, cited in Fenna, above n 432, 509.

<sup>453</sup> Australian Government the Treasury, above n 429, 16.

<sup>454</sup> Including shared taxes.

<sup>455</sup> Warren, above n 436, 56, citing Government Finance Statistics Yearbook 2004, International Monetary Fund.

<sup>456</sup> Commonwealth Treasury, above n 448, xxi. See also, Commonwealth of Australia, above n 1, 30.

<sup>457</sup> Commonwealth of Australia, above n 1, 32. See also, Commonwealth Treasury, above n 448, xxi. In this report, the Commonwealth Treasury identified a number of ‘costs’ of Vertical

Vertical Fiscal Imbalance is determined by measuring ‘the revenue transferred from the Australian government to the States as a proportion of the States’ total revenue’.<sup>458</sup> As a consequence of this imbalance, the States have become increasingly reliant on the Commonwealth for expenditure grants. According to the Commonwealth Treasury, ‘in 2006-07, the Australian government transferred approximately \$68 billion to the States in the form of GST revenue and [specific purpose payments] (‘SPP’s’), accounting for around 45 per cent of total state revenue’.<sup>459</sup> While the Commonwealth *Budget Paper No 3: Federal Financial Relations 2014-15* predicts an increase in expenditure grants, forecasting that between 2014 and 2015 the Commonwealth will provide the States with \$101.1 billion funding.<sup>460</sup> The next Section will discuss the constitutional basis of these grants and their implications for the federal balance.

#### IV COMMONWEALTH GRANTS

Upon Federation, ‘it was understood that the Commonwealth would receive far more revenue than it needed to meet its expenditure obligations’, and that the Commonwealth would need to distribute its surplus revenue to the States to enable them to meet their own expenditure requirements.<sup>461</sup> The Framers envisioned that the States would lose significant revenue sources by surrendering customs and excise duties to the commonwealth,<sup>462</sup> which, prior to Federation, accounted for approximately three-quarters of the colonies’ taxation revenue.<sup>463</sup> Consequently, s 87 of the *Constitution* effectively provides that ‘no less than three-quarters of the net Commonwealth revenue from duties of customs and of

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Fiscal Imbalance, including: accountability problems in decision making; shifting responsibility for providing services; and the provision of services being influenced by the relevant government providing the funding.

<sup>458</sup> Commonwealth Treasury, above n 448, 300.

<sup>459</sup> Ibid. The Commonwealth Treasury acknowledged that ‘the introduction of the GST in 2000-01 and the abolition of a number of state taxes resulted in an increase in measured VFI [vertical fiscal imbalance]’. See, Commonwealth Treasury, above n 448, 301.

<sup>460</sup> Commonwealth of Australia, *Federal Financial Relations* (Budget Paper No 3 2014-15) 1.

<sup>461</sup> Twomey, above n 421, 5.

<sup>462</sup> Dalton, above n 239, 47.

<sup>463</sup> R L Mathews and W R C Jay, *Federal Finance – Intergovernmental Financial Relations in Australia Since Federation*, (Thomas Nelson, 1972) 24, cited in Twomey, above n 291, 10.

excise should be returned to the States without control over its use'<sup>464</sup> 'for a period of ten years ... and thereafter until the Parliament otherwise provides'.<sup>465</sup>

However, just as the Framers could not have ever imagined in the 1890's or 1901 that the Commonwealth would levy taxes beyond customs and excise duties, they could not have foreseen that the States 'would be so dependent upon the Commonwealth for their government finances.'<sup>466</sup> Section 96 gives the Commonwealth the ability to grant financial assistance to the States. However, the intentions of the Framers' indicate that this provision was 'only intended to allow the Commonwealth Parliament to deal with any *exceptional circumstances* which may from time to time arise in the financial position of any of the States'.<sup>467</sup> In this Section it is argued that tied grants have been fundamental to the increasing centralisation of financial relations by enabling the Commonwealth to exert control over areas far beyond the structure and the text of the *Constitution*.<sup>468</sup>

Following the decisions in the *Uniform Tax Cases*, the States' ability to raise revenue has been significantly limited. This is largely due the sudden and serious loss of State income tax, which accounted for a large source of State tax revenue. The Commonwealth government's tax revenue now consists of all the major taxes (including income tax, sales tax and duties of customs and excise). Revenue raised from these areas greatly exceeds the Commonwealth's own expenditure requirements.<sup>469</sup> As a consequence, the Commonwealth now 'provides a significant amount of financial assistance to the States'.<sup>470</sup>

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<sup>464</sup> Dalton, above n 239, 47.

<sup>465</sup> *Constitution* s 87.

<sup>466</sup> Allan and Aroney, above n 87, 246.

<sup>467</sup> Twomey, above n 291, 10, citing J Quick and R R Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1901) 219; R L Mathews and W R C Jay, *Federal Finance – Intergovernmental Financial Relations in Australia Since Federation* (Thomas Nelson, 1972) 38.

<sup>468</sup> Bennett and Webb, above n 434, 19. See also, Australian Government Productivity Commission, above n 55, 93; Sharon Scully, 'Does the Commonwealth Have Constitutional Power to Take Over the Administration of Public Hospitals?' (2009) 26-7. See also, Menzies, above n 166, 76. Sir Robert Menzies described s 96 grants as:

[A] major and flexible instrument for enlarging the boundaries of Commonwealth action; or, to use realistic terms, Commonwealth powers.

Menzies, above n 166, 76, quoted in Zimmermann and Finlay, above n 5, 28.

<sup>469</sup> James, above n 426, 9.

<sup>470</sup> *Ibid.*

### *A Grants the Commonwealth Can Make*

In order to compensate for the fiscal imbalance between State revenue-raising and State expenditures, the *Constitution* provides a mechanism whereby the Commonwealth can grant financial assistance to the States. Section 96 of the *Constitution*, allows the Commonwealth to make conditional grants of money to the States ‘on any such terms as the Commonwealth [Parliament] thinks fit’.<sup>471</sup> These grants fall within two broad categories of assistance: ‘general revenue grants’ (‘untied’ grants); and ‘special purpose payments’ (‘tied’ grants). ‘General revenue grants’ are moneys given to the States to spend however they see fit.<sup>472</sup> General revenue grants do not impose any conditions on expenditure of money. Whereas ‘special purpose payments’ are grants made to the States and are usually subject to conditions.<sup>473</sup> The primary source of specific purpose payments are the Goods and Services Tax revenue.<sup>474</sup>

### *B Encroachment on State Legislative Powers*

Specific purpose payments arise from agreements between the Commonwealth and the States and include conditions on expenditure by the States. One of the strongest criticisms of specific purpose payments is that the use of conditions has enabled the Commonwealth to exert control over areas beyond its constitutional domain.<sup>475</sup> As a consequence, specific purpose payments, according to Dalton, ‘undermine both democracy and federalism’.<sup>476</sup> The High Court has expressed a willingness to characterise s 96 broadly.<sup>477</sup> In doing so, it has confirmed the Commonwealth’s ability to impose conditions on the grant of financial assistance to the States on whatever terms it deems fit. As noted by Crowe and

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<sup>471</sup> *Constitution* s 96.

<sup>472</sup> Robert J Searle, ‘Commonwealth Grants to States and Territories: The Impact of Criminal Justice Services’ (Paper presented at a Conference of the Australian Institute of Criminology, Canberra, 19-21 April 1993) 73.

<sup>473</sup> Bennett and Webb, above n 434, 4 citing House of Representatives Standing Committee on Health and Ageing, *The Blame Game*. Report on the inquiry into health funding, Canberra (2006) 144  
<<http://www.aph.gov.au/house/committee/haa/healthfunding/report/fullreport.pdf>>.

<sup>474</sup> Bennett and Webb, above n 434, 4.

<sup>475</sup> Dalton, above n 239, 55.

<sup>476</sup> *Ibid* 73.

<sup>477</sup> See, eg, *First Uniform Tax Case* (1942) 65 CLR 373; *Second Uniform Tax Case* (1957) 99 CLR 575, [21] (Dixon CJ). See also, Sharon Scully, ‘Does the Commonwealth Have Constitutional Power to Take Over the Administration of Public Hospitals?’ (2009) 26.

Stephenson:<sup>478</sup>

[t]he High Court has subsequently declined to place any substantive limits on s 96, allowing the power to be used by the Commonwealth to exercise control over such areas as state income taxes,<sup>479</sup> private education,<sup>480</sup> road construction,<sup>481</sup> and the acquisition of property other than on just terms.<sup>482</sup>

Dalton notes that the recent increase in special purpose grants has resulted in the Commonwealth ‘gaining more control over State policy than before and weakening the autonomy of the States’.<sup>483</sup> This has serious implications for federalism, which requires the Commonwealth and the States to operate separately and free from any interference of the other.

The *Uniform Tax Cases* (discussed in the earlier section of this Chapter) confirmed a broad interpretation of tied grants in s 96. These cases held that there was no constitutional restriction to the Commonwealth attaching conditions to s 96 grants.<sup>484</sup> In the *Second Uniform Tax Case* the plaintiff argued that the terms and conditions referred to in s 96 of the *Constitution* are ‘terms and conditions touching the thing granted’.<sup>485</sup> This argument was rejected in favour of a broad interpretation of the grants the Commonwealth is permitted to make.

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<sup>478</sup> Jonathan Crowe and Peta Stephenson, ‘Reimagining Fiscal Federalism: Section 96 as a Transitional Provision’ (2014) 33(1) *University of Queensland Law Review* 221, 221.

<sup>479</sup> *First Uniform Tax Case* (1942) 65 CLR 373; *Second Uniform Tax Case* (1957) 99 CLR 575.

<sup>480</sup> *DOGS Case* (1981) 146 CLR 559.

<sup>481</sup> *Victoria v Commonwealth* (1926) 38 CLR 399.

<sup>482</sup> *Pye v Renshaw* (1951) 84 CLR 58. In that case, the High Court held that the Commonwealth could use s 96 to grant money to the States for the compulsory acquisition of land. This enabled the Commonwealth to evade the ‘just terms’ requirement of property acquisition in s 51(xxxi). See also, *Deputy Federal Commissioner of Taxation (NSW) v W R Moran Pty Ltd* (1939) 61 CLR 735. There, the High Court permitted the Commonwealth to evade s 51(ii) by raising revenue equally but making unequal grants between the States. See especially, Zimmermann and Finlay, above n 5, 28.

<sup>483</sup> Dalton, above n 239, 56. See also, Australian Government Productivity Commission, above n 55, 93. Ross Garnaut comments that: ‘There is a sense in which [SPP’s] have completely undermined the federal character of government in Australia’: Australian Government Productivity Commission, above n 55, 93, quoted in Zimmermann and Finlay, above n 4, 224.

<sup>484</sup> Jonathan Crowe and Peta Stephenson, ‘Reimagining Fiscal Federalism: Section 96 as a Transitional Provision’ (2014) 33(1) *University of Queensland Law Review* 221, 221.

<sup>485</sup> *Second Uniform Tax Case* (1957) 99 CLR 575, 585 citing Inglis Clark, *Studies in Australian Constitutional Law* (Charles F Maxwell, 2<sup>nd</sup> ed, 1905) 214-16; W Harrison Moore, *The Constitution of the Commonwealth of Australia* (Melbourne Maxwell, 1910, 2<sup>nd</sup> ed) 524-27; Quick and Garran, above n 368, 869-71.

Other significant cases in the expansion of s 96 are the cases of *Pye v Renshaw* (1951)<sup>486</sup> and *Attorney-General (Vic); Ex Rel Black v Commonwealth* ('*DOGS Case*') (1981).<sup>487</sup> *Pye v Renshaw* the High Court affirmed a broad interpretation of conditions the Commonwealth may impose on grants under s 96. There, the High Court confirmed that s 96 could be enforced to grant money to the States, on the condition that they used the money to effect the compulsory purchase of land for returning servicemen at less than its value.<sup>488</sup> Similarly, in *DOGS Case*, the High Court held that the Commonwealth could grant the States money on the condition that it transferred the money to religious schools.<sup>489</sup> The plaintiffs challenged the legislation on the basis of s 96. They argued that the conditions attached to the grants gave financial assistance schools and school authorities, and not to the States.<sup>490</sup> Nevertheless, the Court upheld the legislation under s 96.<sup>491</sup>

A fundamental problem with tied grants, is that the States are at the peril of the Commonwealth to accept the grants upon whatever conditions the Commonwealth deems fit. This is particularly due to the States' having an insufficient tax-base to fund their expenditure requirements, as a result of the High Court's centralisation of taxation power. The High Court's broad characterisation of s 96 is contrary to the Framers' intentions,<sup>492</sup> by placing the States in a position that is inferior to the Commonwealth. Chapter 2 demonstrated that the Framers were mindful of protecting the Sovereignty of the States, and further that they intended the States to be equal to the Commonwealth, at the very least.

It is argued that increasing State reliance on specific purpose payments distorts the

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<sup>486</sup> *Pye v Renshaw* (1951) 84 CLR 58.

<sup>487</sup> *DOGS Case* (1981) 55 ALJR 155; (1981) 33 ALR 321.

<sup>488</sup> Zimmermann and Finlay, above n 5, 28; *Pye v Renshaw* (1951) 84 CLR 58.

<sup>489</sup> Zimmermann and Finlay, above n 5, 28; *DOGS Case* (1981) 55 ALJR 155.

<sup>490</sup> 'Case Note – Attorney-General For Victoria; Ex Rel. Black v The Commonwealth' (1991) 12 *Federal Law Review* 272, 272.

<sup>491</sup> *DOGS Case* (1981) 55 ALJR 155, 160 (Barwick C.J), 162-163 (Gibbs J), 170 (Stephen J), 173 (Mason J) 174, (Murphy J), 189-190 (Wilson J), cited in 'Case Note – Attorney-General For Victoria; Ex Rel. Black v The Commonwealth' (1991) 12 *Federal Law Review* 272, 272-3.

<sup>492</sup> Jonathan Crowe and Peta Stephenson, 'Reimagining Fiscal Federalism: Section 96 as a Transitional Provision' (2014) 33(1) *University of Queensland Law Review* 221, 222.



federal balance that was envisioned by the Framers.<sup>493</sup> One commentator, Dalton, notes the ‘overlap’ between democratic accountability and federalism. According to him, ‘if States decide not to follow the policy directions of the federal government, then 39.7% of then Commonwealth funding can be withheld’.<sup>494</sup> Similarly, Garnaut and Fitzgerald contend that ‘the enlarged role of SPPs since the 1970s has effectively converted some areas of state responsibility into areas of shared responsibility between the Commonwealth and the States’.<sup>495</sup> In addition, Australia’s Federal system has been characterised by a ‘relatively high and increasing degree [of] shared government functions’ in comparison to other Federalist nations.<sup>496</sup> Some commentators have identified numerous problems shared responsibilities can have on Australia’s federal structure. These include inefficiencies, arising from ‘blurring of government responsibilities’ and ‘duplication’.<sup>497</sup>

Commonwealth transfers now account for a large portion of State revenue. The Commonwealth Grants Commission has identified a large increase in specific purpose payments in 2009-10.<sup>498</sup> Specific purpose payments with conditions accounted for approximately 46% of total transfers in 2012-13, while the remaining 54% of Commonwealth transfers were in the form of general revenue without conditions.<sup>499</sup> More recently, the 2015 Australian Government Tax Discussion Paper identified that State and Territory governments receive approximately 45% of their revenue from transfers from the Commonwealth government.<sup>500</sup>

## V CONCLUDING REMARKS

A pivotal development for Australia’s Federal-State financial relations was the enactment of the uniform tax scheme in 1942. Following this, Australia has

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<sup>493</sup> Dalton, above n 239, 46, citing Bede Harris, *A New Constitution for Australia* (London: Cavendish Publishing, 2002) 137.

<sup>494</sup> Dalton, above n 239, 46.

<sup>495</sup> Garnaut and Fitzgerald, above n 332, 75, cited in Bennett and Webb, above n 434, 7.

<sup>496</sup> Warren, above n 436, xxi, cited in Bennett and Webb, above n 434, 7.

<sup>497</sup> *Ibid.*

<sup>498</sup> Commonwealth Grants Commission, above n 435, 23.

<sup>499</sup> *Ibid.*

<sup>500</sup> Australian Government the Treasury, above n 429, 13.

continued ‘on the path towards greater concentration of power in the hands of the central government at the expense of the power of its State governments’.<sup>501</sup> Some primary factors in the centralisation of power are the High Court’s expansion of excise and the subsequent increase in tied grants.<sup>502</sup> This Chapter has argued that the High Court’s interpretation of the financial provisions of the *Constitution* has drastically altered Federal-State relations, to the detriment of the States. It has provided an overview of the High Court’s centralisation of taxation, by expanding the meaning of a tax in s 51(ii) of the *Constitution*.

The referral of income tax by the States in 1942, intended to be a ‘war-time measure’, long outlasted the Second World War. The States have not levied income tax since 1942, and as a consequence, they have become reliant on the Commonwealth for financial assistance.<sup>503</sup> This Chapter further examined the High Court’s interpretation of the meaning of ‘excise’ and the gradual erosion of the *Peterswald* definition. It was seen that in the aftermath of *Engineers*, the High Court condoned a radical departure from precedent and affirmed a broad interpretation of the meaning of excise. The High Court acknowledged that a fee could only amount to an excise if it was imposed on goods at the time of manufacture or production.<sup>504</sup> However, following *Engineers* the High Court gradually eroded the limitations on the meaning of excise. This Chapter identified two limitations on the interpretation of an excise: the ‘consumption tax exemption’; and the ‘criterion of liability’. It examined the application of these doctrines and the High Court’s subsequent rejection of these limitations in favour of an expansive interpretation of excise.<sup>505</sup>

The end-result was that a fee could be characterised as an excise if it was imposed at any time before distribution. Following the decision in *Ha*, the States have been

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<sup>501</sup> Dalton, above n 239, 87.

<sup>502</sup> See, Matthews, above n 316, 860. Matthews states ‘[a] factor which has played an important role in the distribution of taxing powers has been a series of decisions of the High Court, which have had the effect of excluding the States from sale taxes on goods on the grounds that they are excise duties’: Matthews, above n 316, 860.

<sup>503</sup> In the form of specific purpose payments made pursuant to s 96 of the *Constitution*.

<sup>504</sup> *Peterswald* (1904) 1 CLR 497.

<sup>505</sup> The High Court abandoned the ‘criterion of liability’ test in *Phillip Morris Ltd v Commissioner of Business Franchises (Vic)* (*‘Phillip Morris’*) (1989) 167 CLR 399.

unable to charge business fees over petroleum, tobacco and alcohol.<sup>506</sup> As demonstrated in this Chapter, this sudden loss of revenue-raising ability resulted in significant loss of revenue for the States. In order to compensate for the loss of taxation revenue, the States have become increasingly reliant on the central government for financial support. This Chapter provided an overview of the Commonwealth's power to grant financial support to the States under s 96 of the *Constitution*. In doing so, it highlighted the problems this has caused for the States' financial autonomy. This Chapter has argued that Australia is characterised by a high degree of Vertical Fiscal Imbalance. This was explained to mean a situation whereby the States are unable to raise sufficient revenue to meet their expenditure obligations. Finally, it was argued that the erosion of State financial autonomy has undermined the Federal system that was envisioned for Australia at the time of Federation. In summary, by interpreting the *Constitution* broadly, 'the High Court has consistently upheld the capacity of the Commonwealth to dominate the States financially'.<sup>507</sup>

Having identified the problems with Australia's current financial situation, it is clear that Australia's Federal-State relations are in desperate need of reform. Chapter 4 will outline various reforms to strengthen Australia's fiscal federal balance. It is argued that although the *Constitution* does not expressly preclude the States from levying income tax, the High Court's interpretation of the taxation powers have made States reluctant to re-assume control over income tax.

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<sup>506</sup> James, above n 426, i.

<sup>507</sup> Allan and Aroney, above n 87, 259.

## CHAPTER 4: RESOLVING AUSTRALIA'S FISCAL CRISIS

The previous Chapter examined the controversial decisions of the High Court that resulted in the central government exerting significant control over State finances. It examined the landmark cases in relation to income taxes, excise duties and commonwealth grants, and identified the unsatisfactory fiscal federal arrangements between the Commonwealth and the States. An analysis of Commonwealth-State revenue raising statistics identified that the States have suffered a significant loss of financial autonomy, thus weakening the federal balance.<sup>508</sup> This Chapter will continue from Chapter 3 by identifying proposals to reform Australia's fiscal federal balance. The proposals include both reforms through amendment to the *Constitution*, and reforms that can be achieved without a formal constitutional amendment. This Chapter is not intended to provide an exhaustive discussion of solutions, however this is something the author hopes to explore further in a doctoral thesis.

### I CONSTITUTIONAL REFORMS

This paper has established that Australia is, and has always been, a 'Federal Commonwealth'.<sup>509</sup> Curiously however, Australia has become 'one of the most centralised systems of government in the world'.<sup>510</sup> It is argued that reform is necessary to restore some of the damage caused by the High Court over the past century. Chapters 2 and 3 illustrated the High Court's endorsement for the centralisation of Commonwealth legislative and financial powers through its decisions in *Engineers* (1920), the *Income Tax Cases* of 1942 and 1957, *Ha* (1997), and more recently, *Work Choices* (2006).

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<sup>508</sup> See generally, Scott Bennett, 'The Politics of Constitutional Amendment' (Research Paper No 11, Parliamentary Library, Parliament of Australia, 2002—2003) 1 <[http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp0203/03rp11](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0203/03rp11)>. Bennett identified a series of factors that negatively impacted on Australia's federal system. Among these are the States' increasing dependence on grants from the Commonwealth and the increased Commonwealth power following the High Court's decisions.

<sup>509</sup> Preamble, *Constitution* and s 3 cited in Evans, above n 10, 14; Aroney, above n 10, The Constitution of a Federal Commonwealth, 1.

<sup>510</sup> Williams, above n 440.

The author acknowledges that there is no single solution to resolve the problem of fiscal imbalance. Although Dalton contends that the problem of Vertical Fiscal Imbalance can be characterised under two areas: firstly, the States are unable to raise sufficient revenue to meet their own spending responsibilities; and secondly, the Commonwealth ties specific purpose payments to policy initiatives by imposing conditions on grants.<sup>511</sup> Chapter 2 of this thesis identified duplication between different levels of government as a disadvantage of federal systems. This problem is exacerbated as a result of the ‘Commonwealth’s fiscal dominance’.<sup>512</sup> The reforms proposed in this Chapter seek to limit duplication by improving efficiency, innovation and competition in the economy.<sup>513</sup>

### *A Brief History of State-Federal Financial Relations*

Proposals to reform Australia’s federal system have gained increasing public support in recent years. According to the 2012 Australian Constitutional Values Survey, approximately two-thirds of the Australian population does ‘not believe governments work well together, and believe [Australia’s] Federation needs reform’.<sup>514</sup> Taxation reform has also become a very topical issue in Australian Parliament. The Commonwealth Treasury has been seriously considering reforming Australia’s tax system since 2009.<sup>515</sup> In addition, the Australian Parliament is currently formulating two White Papers in response to the public pressure for change: the *Reform of the Federation White Paper* and the *Tax Reform White Paper*.

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<sup>511</sup> Dalton, above n 239, 73.

<sup>512</sup> Business Council of Australia, above n 436, 13.

<sup>513</sup> Organisation for Economic Co-operation and Development, ‘The OECD Report on Regulatory Reform: Synthesis’ (1997) 5.

<sup>514</sup> A J Brown, *Australian Constitutional Values Survey*, Griffith University, 2012 cited in Commonwealth of Australia, above n 1, 1. In addition, Australia’s federal system has been labeled as “dysfunctional” and in need of rescue’. See, Zimmermann and Finlay, above n 4, 214 citing Andrew Stewart and George Williams, *Work Choices: What the Court Said* (Federation Press, 2007) 12-13.

<sup>515</sup> In a 2009 Report to the Treasurer, one of the recommendations made was in relation to State tax reform. See, Commonwealth of Australia, *Australia’s Future Tax System Report to the Treasurer* (2009) 103

<[http://taxreview.treasury.gov.au/content/downloads/final\\_report\\_part\\_1/00\\_AFTS\\_final\\_report\\_consolidated.pdf](http://taxreview.treasury.gov.au/content/downloads/final_report_part_1/00_AFTS_final_report_consolidated.pdf)>. Recommendation 119 stated: ‘Reforms to State taxes should be coordinated through intergovernmental agreements between the Australian government and the States to provide the States with revenue stability and to facilitate good policy outcomes’.

The Commonwealth Government released a Discussion Paper entitled *Reform of the Federation* on 23 June 2015.<sup>516</sup> This identified the objectives of the *Reform of the Federation White Paper*, which include: reducing duplication in different tiers of government; improving efficiency; and ensuring Australia’s federal system has clearer allocations of roles and responsibilities.<sup>517</sup> A second Discussion Paper, *Re:think Tax Discussion Paper, Better Tax System, Better Australia*, was released on 30 March 2015.<sup>518</sup> According to the Australian Parliament, the objective of the Commonwealth’s 2015 tax review is to ‘develop a better tax system that delivers taxes which are lower, simpler, fairer’.<sup>519</sup>

In a speech pertaining to the *Reform of the Federation White Paper* and the *Tax Reform White Paper*, former Prime Minister Tony Abbott said that ‘the Commonwealth would be ready to work with states on a range of tax reforms that could permanently improve the states’ tax base— including changes to the indirect tax base with compensating reductions in income tax’.<sup>520</sup> It should be noted that the Green Paper on the Reform of the Federation which was due to be released in the second half of 2015<sup>521</sup> had not yet been released at the time of writing this thesis. Similarly, the Tax Reform Green Paper, which was expected to be released in October 2015, has been delayed following the appointment of Malcolm Turnbull as Prime Minister.<sup>522</sup>

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<sup>516</sup> Australian Government, Reform of the Federation White Paper <<https://federation.dpmc.gov.au/publications>>.

<sup>517</sup> For a further discussion of the objectives of the Reform of the Federation Whitepaper, see the ‘Terms of Reference’ in Commonwealth of Australia, above n 1, iv-vii.

<sup>518</sup> PricewaterhouseCoopers, *Tax Reform White Paper Process Begins With Release of Discussion Paper* (2015) 1.

<sup>519</sup> Australian Government the Treasury, Above n 429, 1.

<sup>520</sup> Tony Abbott, (Speech delivered at the Sir Henry Parkes Commemorative Dinner, Tenterfield, 25 October 2014) <<http://australianpolitics.com/2014/10/25/abbott-henry-parkes-tenterfield-speech.html>>, cited in Peter Hendy, ‘Reforming Taxation Isn’t About Increasing Taxes’ (2015) 67(2) *Institute of Public Affairs Review: A Quarterly Review of Politics and Public Affairs* 45, 47 and David Donaldson, ‘Time for a State Income Tax? Federation Paper’s Bold Look Forward’, *The Mandarin* (2015) <<http://www.themandarin.com.au/21199-vertical-fiscal-imbalance-agenda-issues-paper/?pgnc=1>>.

<sup>521</sup> Australian Government, ‘What is a Green Paper?’ <<https://federation.dpmc.gov.au/what-green-paper>>.

<sup>522</sup> Mark Hawthorne, ‘Tax White Paper Delayed by Malcom Turnbull’, *The Sydney Morning Herald* <<http://www.smh.com.au/federal-politics/political-news/tax-white-paper-delayed-by-malcolm-turnbull-20150923-gjthtx.html>>.

Although these reform papers represent a step in the right direction for Australia's federal financial relations, the author argues that their application is somewhat restricted. Most notably, the current proposals omit formal constitutional reform, with the Australian Government having expressly stated that the White Papers will not propose any constitutional amendments.<sup>523</sup>

### *B Reallocating Powers and Responsibilities Between Governments*

This Section will discuss the confusion and lack of certainty about the responsibilities of different levels of government in Australia. In doing so, it will propose reforms to enhance federalism and reduce Vertical Fiscal Imbalance. It is widely accepted that the allocation of responsibilities in Australian governments 'is unclear and confusing'.<sup>524</sup> It is also accepted that federations function more effectively 'when the powers and responsibilities of the different levels of government are clearly defined'.<sup>525</sup> In light of these propositions, it is necessary to re-define the roles of the Commonwealth and State governments by redistributing legislative powers a second time.<sup>526</sup> The Business Council of Australia suggests that aligning taxation and expenditure responsibilities 'could enhance government's accountability to citizens and improve efficiency and service delivery'.<sup>527</sup>

#### *1 Principles For Reallocating Roles*

The Business Council of Australia further contends that one of the objectives of tax reform should be ensuring that governments are able to 'raise enough revenue for an efficient level of spending'.<sup>528</sup> In 2014, Abbott noted that the problem of Vertical Fiscal Imbalance could be addressed by one of two ways: either by

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<sup>523</sup> Commonwealth of Australia, above n 1, 32.

<sup>524</sup> Neil Warren, 'Fiscal Federalism Under Review (at *Speed*) 10(1) *eJournal of Tax Research* (2012) 165, 167.

<sup>525</sup> Twomey, above n 5, 59.

<sup>526</sup> There is a strong consensus for reallocating roles between governments: See especially, Twomey and Withers, above n 5, 46; Commonwealth of Australia, Budget Strategy and Outlook 2005–06, Budget Paper No 1, 10 May 2005, 4–18; J Hewson, 'What price federalism?' *The Australian Financial Review*, 4 March 2005, 86; K Rudd, 'The Case for Cooperative Federalism' (Speech delivered at the Don Dunstan Foundation, Queensland Chapter, 15 July 2005) 27; S Burrell, 'It's time to Rethink the Economics of federation', *The Sydney Morning Herald*, 27 February 2007; Bennett and Webb, above n 434, 12; Twomey, above n 5, 58–64.

<sup>527</sup> Business Council of Australia, above n 436, 13.

<sup>528</sup> *Ibid* 20.

‘adjust[ing] the States’ spending responsibilities down to match their revenues, or... adjust[ing] their revenues up’.<sup>529</sup> This thesis supports the latter proposal, and argues that the Commonwealth should ‘stop funding programmes in areas of state responsibility and stop using its financial power to influence how the states deliver services’.<sup>530</sup> It is argued that Zimmermann and Finlay’s proposal to hold a constitutional convention to consider reallocating constitutional powers and responsibilities should be implemented.<sup>531</sup> In particular, the convention should, according to Zimmermann and Finlay, focus on clearly defining roles by ‘isolat[ing] a particular area of policy and allocat[ing] it in its entirety to one level of government’.<sup>532</sup> This will ensure that the ‘problems of cost-shifting and buck passing’ can be reduced.<sup>533</sup>

Just as there is no single solution to the Vertical Fiscal Imbalance issue, it is generally conceded that there is ‘no single best model’ for allocating functions between Commonwealth and State governments.<sup>534</sup> The mechanisms for re-allocating expenditure responsibilities and functions<sup>535</sup> are complex and are beyond the scope of this paper. However, as a general note, the assessment mechanism that is often cited with support is the subsidiarity principle.<sup>536</sup> This principle vests functions ‘in the lowest level of government to ensure that their

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<sup>529</sup> Tony Abbott, (Speech delivered at the Sir Henry Parkes Commemorative Dinner, Tenterfield, 25 October 2014) <<http://australianpolitics.com/2014/10/25/abbott-henry-parkes-tenterfield-speech.html>>, cited in David Donaldson, ‘Time for a State Income Tax? Federation Paper’s Bold Look Forward’, The Mandarin (2015) <<http://www.themandarin.com.au/21199-vertical-fiscal-imbalance-agenda-issues-paper/?pgnc=1>>.

<sup>530</sup> Ibid.

<sup>531</sup> Zimmermann and Finlay, above n 4, 215-6.

<sup>532</sup> Zimmermann and Finlay, above n 5, 40, quoting Twomey and Withers, above n 5, 46.

<sup>533</sup> Zimmermann and Finlay, above n 4, 215-6, quoting Twomey and Withers, above n 5, 46.

<sup>534</sup> Australian Government Productivity Commission, above n 55, 4. See also, Organisation for Economic Co-operation and Development, ‘The OECD Report on Regulatory Reform: Synthesis’ (1997); Joumard and Kongsrud, above n 5.

<sup>535</sup> See generally, Twomey and Withers, above n 5, 47.

<sup>536</sup> See, eg, Twomey, above n 5, 59; Zimmermann and Finlay, above n 4, 216; Organisation for Economic Co-operation and Development, ‘Fiscal Relations Across Government Levels’, *Economic Studies No 36* (2003) 161; Zimmermann and Finlay, above n 5, 40; Twomey and Withers, above n 5, 46 citing Business Council of Australia, *Reshaping Australia’s Federation – A New Contract for Federal–State Relations* (2006) 23 and Appendix 2 by Access Economics, 14; Warren, above n 436, xxix; National Commission of Audit, *Report to the Commonwealth Government (AGPS, Canberra, June 1996)* 44–5; and T Abbott, ‘Responsible Federalism’ in W Hudson and A J Brown, *Restructuring Australia* (Federation Press, Sydney, 2004) 183, 185.



exercise is as close to the people as possible and reflects community preferences and local conditions’.<sup>537</sup>

It has also been suggested that a re-allocation of powers can be achieved without a formal constitutional amendment.<sup>538</sup> However, this thesis argues that a formal constitutional amendment is preferable in that it will provide greater security that future governments will not repudiate on the arrangement.<sup>539</sup> Commentators in support of reallocating responsibilities through constitutional amendment include Gareth Evans, John McMillan and Haddon Storey. They contend that constitutional reform is necessary to expressly define the division of financial powers between the Commonwealth and the States.<sup>540</sup>

## 2 Formal Constitutional Amendment

It is well known that the *Constitution* can only be properly amended through a referendum,<sup>541</sup> as provided in s 128 of the *Constitution*. Out of the 44 attempts to amend the *Constitution*, only 8 proposals have been successful.<sup>542</sup> One explanation for this is that referenda proposals in Australia have traditionally sought to expand Commonwealth power.<sup>543</sup> Despite these failed attempts, Australia should not be deterred from pursuing formal constitutional change to increase State legislative power. Zimmermann argues that the infrequency of constitutional change in Australia ‘is itself no evidence of difficulty in amending

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<sup>537</sup> Twomey, above n 5, 59, quoted in Augusto Zimmermann, ‘Subsidiarity, Democracy and Individual Liberty in Brazil’ in Michelle Evans and Augusto Zimmermann (eds), *Global Perspectives on Subsidiarity* (Springer, 2014) 85, 87. See also, Bennett and Webb, above n 434, 15 and Productivity Commission, Annual Report 2004–05, Canberra, 2005, 3.

<sup>538</sup> Twomey, above n 5, 63.

<sup>539</sup> Ibid 63, 69.

<sup>540</sup> Gareth Evans, John McMillan and Haddon Storey, *Australia’s Constitution: Time for Change?* (Sydney: Law Foundation of New South Wales: George Allen & Unwin Australia, 1983) 104, cited in Dalton, above n 239, 78.

<sup>541</sup> The use of the word ‘proper’ is used to acknowledge that the *Constitution* has also undergone amendments as a result of decisions handed down by the High Court.

<sup>542</sup> Moens and Trone, above n 183, 448; Arney et al, above n 83, 35; Alan Fenna, Jane Robbins and John Summers, *Government Politics in Australia* (Pearson Australia, 10<sup>th</sup> ed, 2013) 18.

<sup>543</sup> See, eg, the failed referenda to expand Commonwealth power in 1911, 1913, 1919, 1926, 1937, 1944, 1946, 1948, 1951, 1973: House of Representatives Standing Committee on Legal and Constitutional Affairs, Commonwealth Parliament, *Constitutional Change – Select Sources on Constitutional Change in Australia 1901-1997* (1997) 61-114 cited in Twomey, above n 5, 64.

the *Constitution*'.<sup>544</sup> This proposition is supported by the fact that other jurisdictions which have more onerous requirements for altering their respective Constitutions, have nonetheless been successful in doing so.<sup>545</sup>

### *C Inserting an Express Provision to Recognise Federalism*

This Section contends that a reallocation of responsibilities under the *Constitution* would not in itself be sufficient to undo damage the High Court has caused to the Federal-State financial relations. As this thesis has demonstrated, Australia's federal system is significantly influenced by the High Court's interpretation of the constitutional provisions.<sup>546</sup> This Section argues that an express statement should be included into the *Constitution* to require the *Constitution* to be interpreted as a federal compact, taking into account federalist principles.<sup>547</sup> This recommendation is supported by Evans,<sup>548</sup> Zimmermann and Finlay,<sup>549</sup> as a possible measure to improve federalism and State autonomy in Australia.<sup>550</sup> Another advantage of this proposal is that it would encourage cooperation between governments, and would therefore 'enhance co-operative federalism'.<sup>551</sup>

The proposed amendment should effectively state that the provisions of the *Constitution* must be interpreted according to the intentions of the Drafters or to the legislative purpose. This approach is currently prescribed under the *Acts Interpretation Act 1901* (Cth)<sup>552</sup> and similar State legislation in interpreting all other State and Commonwealth legislation.<sup>553</sup> In addition to this, the express

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<sup>544</sup> Augusto Zimmermann, *Western Legal Theory: History, Concepts and Perspectives* (LexisNexis Butterworths, 2013) 260.

<sup>545</sup> See, eg, the United States constitution, which according to American economist Thomas Sowell, was amended no less than four times in eight years, between 1913 and 1920: T Sowell, *Intellectuals and Society* (Basic Books, 2009) cited in Augusto Zimmermann, *Western Legal Theory: History, Concepts and Perspectives* (LexisNexis Butterworths, 2013) 260. See, *Constitution of the United States 1787*, 16<sup>th</sup> – 19<sup>th</sup> amendments.

<sup>546</sup> Twomey, above n 5, 73.

<sup>547</sup> See, Evans, above n 5, 294-5; Zimmermann and Finlay, above n 5, 48.

<sup>548</sup> Evans, above n 5, 294-5. Evans's proposal was influenced by the subsidiarity principle in art 5(3) of the *Treaty on European Union*, opened for signature 7 February 1992, [2009] OJ C 115/13 (entered into force 1 November 1993).

<sup>549</sup> Zimmermann and Finlay, above n 5, 48.

<sup>550</sup> Evans, above n 5, 294-5.

<sup>551</sup> *Ibid* 295.

<sup>552</sup> *Acts Interpretation Act 1901* (Cth) s 15AA.

<sup>553</sup> See, eg, *Acts Interpretation Act 1901* (Cth) s 15AA; *Interpretation Act 1984* (WA) s 18; *Legislation Act 2001* (ACT) ss 139; *Interpretation Act 1987* (NSW) s, 33; *Interpretation*

statement could give statutory recognition to federalist doctrines such as the implied intergovernmental immunities doctrine and the reserved powers doctrine (discussed in Chapter 2 of this thesis).

### 1 *Limitations on Constitutional Amendment*

In practical terms, reallocating powers and restoring the Framers' intentions<sup>554</sup> is unlikely to receive support.<sup>555</sup> This is because the Commonwealth has a vested interest in the retention of power and is the beneficiary of the centralisation of legislative and financial powers.<sup>556</sup> The procedure for constitutional amendment is prescribed in s 128 of the *Constitution*. Pursuant to s 128, a Bill to amend the *Constitution* must derive from the Commonwealth Parliament.<sup>557</sup> Therefore, only the Commonwealth can propose amendments to the *Constitution*.<sup>558</sup> The States are only involved in amending the *Constitution* once a draft amendment has been made. This is perhaps a disastrous flaw that the Framers overlooked when drafting the *Constitution*. Consequently, it would be difficult to reform the *Constitution* to expand State powers because it is unlikely that either House of Commonwealth Parliament would support a formal amendment to limit Commonwealth power.<sup>559</sup> Furthermore, it is unlikely that the Commonwealth Government would advise the Governor-General that such a referendum should be held.<sup>560</sup>

Twomey notes that the reallocation of powers and responsibilities is often described as 'the "holy grail" of legal rationalists' because it is 'something sought,

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*Act 2015 (NT) s 62A; Acts Interpretation Act 1954 (Qld) s 14A; Acts Interpretation Act 1915 (SA) s 22; Acts Interpretation Act 1931 (Tas) s 8A; Interpretation of Legislation Act 1984 (Vic) s 35. See also, Allan and Aroney, above n 87, 251.*

<sup>554</sup> Twomey, above n 5, 66.

<sup>555</sup> Jeffrey Goldsworthy, 'A Role for the States in Initiating Referendums' (Paper presented at the Eighth Conference of The Samuel Griffith Society, University House, Canberra, 7-9 March 1997) 31, 35; Twomey, above n 5, 66.

<sup>556</sup> Goldsworthy, above n 543, 31. Goldsworthy comments that: 'No Commonwealth government has ever sponsored a constitutional amendment to reduce Commonwealth powers, and none is ever likely to do so': Goldsworthy, above n 543, 31.

<sup>557</sup> Goldsworthy, above n 543, 31. As Goldsworthy explained:

referendums to amend the *Constitution* are only held if the Commonwealth government advises the Governor-General to submit a proposed amendment to the people, and if the proposal has previously been passed by at least one House of the Commonwealth Parliament.

Goldsworthy, above n 543, 31.

<sup>558</sup> Bennett, above n 503, 4.

<sup>559</sup> Goldsworthy, above n 543, 35.

<sup>560</sup> *Ibid.*

but never won'.<sup>561</sup> Notwithstanding this, Twomey identifies that reallocating powers and responsibilities is not impossible.<sup>562</sup> This proposition is supported by a comparative analysis of Nations that have successfully adjusted the allocation of responsibilities between different levels of government, including Switzerland, France, Germany, Italy, Norway and Spain.<sup>563</sup>

#### *D Giving States the Right to Propose Referendums*

In order to overcome the inequality between the Commonwealth and the States' ability to initiate referendums, it is argued that s 128 should be amended to include an alternate method for initiating referendums – such as giving the State Parliaments the right to initiate referendums.<sup>564</sup> This proposal would give effect to the original purpose of the *Constitution*, which intended the States to have a mechanism to initiate referendums.<sup>565</sup>

In opposition to this proposal, some commentators have suggested that '[reforming s 128] would be an expensive waste of time, because just as Commonwealth-initiated referendums fail if they are strongly opposed by the States, so would State-initiated referendums fail if they were strongly opposed by the Commonwealth'.<sup>566</sup> However, Goldsworthy argues that objection is not a sufficient reason 'not to allow the States to initiate proposals opposed by the Commonwealth'.<sup>567</sup>

#### *1 Practical Difficulties With Introducing State Referenda*

As this Chapter previously mentioned, given that the Commonwealth has a vested

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<sup>561</sup> Twomey, above n 5, 61 citing John Wanna, 'Improving Federalism: Drivers of Change, Repair Options and Reform Scenarios' (2007) 66 *Australian Journal of Public Administration* 275, 277.

<sup>562</sup> Twomey, above n 5, 61.

<sup>563</sup> Ibid, citing OECD, 'Fiscal Relations Across Government Levels', *Economic Studies No 36* (2003) 161; Giampaolo Arachi and Alberto Zanardi, 'Designing Intergovernmental Fiscal Relations: Some Insights from the Recent Italian Reform' (2004) 25 *Fiscal Studies* 325; Cesare Pinelli, 'The 1948 Italian Constitution and the 2006 Referendum: Food for Thought' (2006) 2 *European Constitutional Law Review* 329; Arthur Gunlicks, 'German Federalism Reform: Part One' (2007) 8 *German Law Journal* 111.

<sup>564</sup> See, eg, Goldsworthy, above n 543, 35.

<sup>565</sup> Ibid.

<sup>566</sup> Ibid 36.

<sup>567</sup> Ibid 36-7.

interest in centralising power, the Commonwealth would be unlikely to initiate such a proposal to be put to a referendum.<sup>568</sup> Goldsworthy recommends possibly the best way to ‘persuade the Commonwealth to allow the people to decide’ is through a People’s Convention.<sup>569</sup>

### *E Re-Introducing State Income Tax*

In Chapter 3 it was seen that following the High Court’s expansive interpretation of s 51(ii), the States have not levied income tax since 1942. The Commonwealth’s assumption of income tax represents the ‘single most significant cause of Vertical Fiscal Imbalance’ in Australia.<sup>570</sup> Consequently, the financial relations between Federal and State governments has been described as ‘the area in which reform is most urgently needed’.<sup>571</sup> This Section argues that the problem of Vertical Fiscal Imbalance should be addressed by implementing a tax base sharing initiative, whereby the States could resume control over income taxation.<sup>572</sup> This proposal is supported by a number of commentators.<sup>573</sup> Notably, Dalton describes re-introducing State income tax as ‘the most straightforward thing the States could do’.<sup>574</sup> In addition, Kenneth Wiltshire, an economics professor at the University of Queensland, argues that it is possible for the States to fundamentally restructure their own financial arrangements to resume income tax, even without support from the federal government.<sup>575</sup> According to him, ‘the States could reasonable easily resume their income taxing powers given the political will to do so’.<sup>576</sup>

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<sup>568</sup> Ibid 37; Evans, above n 5, 293.

<sup>569</sup> Goldsworthy, above n 543, 37.

<sup>570</sup> Intergovernmental Relations Division Western Australian Treasury, ‘Revenue Sharing or Tax Base Sharing? Directions for Financial Reform of Australia’s Federation’ (1998) 8.

<sup>571</sup> Zimmermann and Finlay, above n 5, 44.

<sup>572</sup> See generally, Zimmermann and Finlay, above n 4, 222; Evans, above n 5, 302.

<sup>573</sup> See eg, Zimmermann and Finlay, above n 4, 222; Evans, above n 5, 302; Dalton, above n 239, 73. It has also been suggested as a potential option for reform of the institutional arrangements in Australia by the Senate Select Committee on the Reform of the Australian Federation, Parliament of Australia, *Australia’s Federation: An Agenda for Reform* (2011) 68.

<sup>574</sup> Dalton, above n 239, 73.

<sup>575</sup> K Wiltshire, ‘Barriers to Rationalising Commonwealth/State Overlap’ in Towards a More Cooperative Federalism?, Economic Planning Advisory Council, Discussion Paper 90/04 (1990) cited in Robert Dalton, ‘The Adverse Attributes of Specific Purpose Payments in Australia’ (2006) 10 *Southern Cross University Law Review* 43, 74.

<sup>576</sup> K Wiltshire, ‘Barriers to Rationalising Commonwealth/State Overlap’ in Towards a More Cooperative Federalism?, Economic Planning Advisory Council, Discussion Paper 90/04

## 1 Practical Limitations on Re-Introducing State Income Tax

Re-introducing State taxation power seems like a promising way to increase state revenue and undo the damage caused by the High Court in the *Uniform Tax Cases* of 1942 and 1957. However, there are a number of practical limitations which make it difficult for the States to ‘re-enter the income tax field’.<sup>577</sup> Among these is the States’ reluctance to resume control over income tax.<sup>578</sup> In the 2014 discussion paper, *Issues Paper 1 A Federation for Our Future*, the Australian Parliament noted that ‘at a Constitutional Conference in Melbourne in 1934, some States proposed that the Commonwealth “could vacate the field of income tax”’.<sup>579</sup> However, when the Commonwealth offered to surrender some control over income taxation to the States on two occasions, the States rejected this offer.<sup>580</sup>

In 1952, under the leadership of Prime Minister Menzies the States refused the Commonwealth’s proposal to re-enter the field of income tax. A similar offer was made to the States in 1977, when Prime Minister Malcom Fraser enacted the *States (Personal Income Tax Sharing) Act 1975* (Cth), which enables the States to levy income tax surcharges and rebates.<sup>581</sup> Under this regime called ‘New Federalism’, Fraser offered to return income taxing powers to the States and reducing the number of specific purpose grants.<sup>582</sup> Once again, this offer was refused by the States.

In discussing the reasons for the States’ refusal of income tax power, some commentators have suggested that the States were skeptical about the ‘potential political ramifications’ of this arrangement.<sup>583</sup> Dalton argues that unless the

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(1990) cited in Dalton, above n 239, 74.

<sup>577</sup> Dalton, above n 239, 73-4.

<sup>578</sup> See generally, Commonwealth of Australia, above n 1, 8, citing Robert Garran, *Prosper the Commonwealth* (Angus and Robertson, 1958) 207-8.

<sup>579</sup> Commonwealth of Australia, above n 1, 8.

<sup>580</sup> Ibid citing Robert Garran, *Prosper the Commonwealth* (Angus and Robertson, 1958) 207-8.

<sup>581</sup> Phillip Ayres, *Malcolm Fraser: A Biography* (William Heinemann Australia, 1987) 327, Dalton, above n 239, 74. See also, Peter Hendy, ‘Reforming Taxation Isn’t About Increasing Taxes’ (2015) 67(2) *Institute of Public Affairs Review: A Quarterly Review of Politics and Public Affairs* 45 and Cheryl Saunders and Kenneth Wiltshire, ‘Fraser’s New Federalism 1975-1980: An Evaluation (1980) 26(3) *Australian Journal of Politics and History* 355. See also, Dalton, above n 239, 74.

<sup>582</sup> Phillip Ayres, *Malcolm Fraser: A Bibliography* (Heinemann, Richmond, 1987) 324.

<sup>583</sup> Robert Garran, *Prosper the Commonwealth* (Angus and Robertson, 1958) 207-8 and Phillip Ayres, *Malcolm Fraser* (Heinemann, Richmond, 1987) 323 cited in Commonwealth of Australia, above n 1, 8.

Commonwealth lowered taxation rates, the States in reality could not have re-entered the field of income tax, because this would have resulted in ‘a sudden and immense increase in taxation’.<sup>584</sup> In order to overcome this barrier, Dalton contends that cooperation is needed from the Commonwealth government so that it substantially reduces its income taxes.<sup>585</sup> Unless this occurs, even if the Commonwealth did propose to ‘vacate the field of income tax’<sup>586</sup> (as it did in 1952 and 1997) the States would be likely to refuse it for a third time.<sup>587</sup>

### F *Removing Tied Grants*

Chapter 3 discussed how the Commonwealth’s allocation of specific purpose payments has undermined the financial independence and autonomy of the States.<sup>588</sup> Another suggested reform is for the Commonwealth to remove tied grants and to ‘stop tying payments to projects’.<sup>589</sup> Under this initiative, specific purpose payments could be replaced by untied general purpose grants,<sup>590</sup> utilising the principles of horizontal fiscal equalization.<sup>591</sup> This could be achieved by either reforming the *Constitution* to remove s 96, or if by the Federal Government making a conscious decision not to use its power to impose conditions on the grant of financial assistance to the States.<sup>592</sup> Alternatively, Twomey suggests that State funding could be tied ‘to a percentage of all Commonwealth tax revenue or gross domestic product, so that the Commonwealth would maintain control of the tax base and rates of national taxes, but any manipulation of those taxes would affect the Commonwealth as much as the States’.<sup>593</sup>

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<sup>584</sup> Dalton, above n 239, 74, citing Phillip Ayres, *Malcolm Fraser: A Bibliography* (Heinemann, Richmond, 1987) 323.

<sup>585</sup> Dalton, above n 239, 74.

<sup>586</sup> Commonwealth of Australia, above n 1, 8.

<sup>587</sup> Dalton, above n 239, 74.

<sup>588</sup> See, Commonwealth of Australia, above n 1, 32; Zimmermann and Finlay, above n 4, 223.

<sup>589</sup> Dalton, above n 239, 76; Zimmermann and Finlay, above n 5, 47-8.

<sup>590</sup> See, Zimmermann and Finlay, above n 4, 223-4. Zimmermann and Lorraine recommend ‘reducing the use of SPP’s [Specific Purpose Payments] in favour of general purpose grants’.

<sup>591</sup> Dalton, above n 239, 77.

<sup>592</sup> Ibid.

<sup>593</sup> Twomey, above n 5, 68.

## 1 *Practical Limitations on Removing Tied Grants*

Some commentators have suggested that constitutional amendment may not be sufficient to guarantee the protection of the States against the imposition of tied grants. Saunders contends that even if s 96 is removed by referendum, the High Court may still infer ‘a limited power to make grants to the States’.<sup>594</sup> While Saunders argues that the Commonwealth could still continue to grant assistance to the States ‘in the exercise of its substantive heads of Constitutional power’.<sup>595</sup>

In addition, political and social considerations make it difficult to remove tied grants.<sup>596</sup> As seen in Chapter 3, the Commonwealth uses tied grants to exert political influence over the States by imposing conditions on State expenditure. Furthermore, this Chapter previously demonstrated that only the Commonwealth parliament can propose a Bill to amend the *Constitution*. Given that the Commonwealth has a vested interest in using specific purpose grants, it would be unlikely to initiate a referendum to relinquish this power.

## 2 *Guidelines for Making Tied Grants*

Dalton suggests a more moderate proposal improve Australia’s State-Federal financial relations, arguing that Australia should ‘lobby’ for the implementation of a guiding set of principles that the Commonwealth government should adopt when drafting specific purpose payment agreements.<sup>597</sup> Dalton argues that this proposal has ‘the most potential to strengthen genuine cooperation between the two levels of government in the longer term’.<sup>598</sup> The object of these guidelines, according to Dalton, would be to ‘better reflect the principles of democratic accountability and federalism’.<sup>599</sup> A detailed discussion of the possible guidelines

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<sup>594</sup> Cheryl Saunders, ‘Commonwealth Power Over Grants’ in G Brennan (ed), *Constitutional Reform and Fiscal Federalism* 12, Centre for Comparative Constitutional Studies, Law School, University of Melbourne (1987) 35, cited in Dalton, above n 239, 77.

<sup>595</sup> Ibid.

<sup>596</sup> ALP Advisory Group on Federal-State Reform, A Framework to Guide the Future Development of Specific Purpose Payments’, Discussion Paper (2007) cited in Twomey, above n 5, 68.

<sup>597</sup> Dalton, above n 239, 74.

<sup>598</sup> Ibid.

<sup>599</sup> Ibid 80.



is beyond the scope of this thesis. However, broadly speaking, it has been suggested that guidelines governing the exercise of tied grants should seek to:

- Maximise flexibility with specific purpose payments;<sup>600</sup>
- Minimise State financial risk in specific purpose payment arrangements. Dalton notes that many specific purpose payment arrangements ‘expose the States to a financial risk’;<sup>601</sup> and
- Minimise administrative costs by streamlining how specific purpose payment arrangements are administered.<sup>602</sup>

## II PROCEDURAL REFORMS

The previous Chapter identified the significant amount of revenue that is derived from income tax in Australia, whilst examining the detrimental effect the 1942 uniform income tax scheme had on the States’ revenue-raising abilities. It was seen that the States are currently unable to raise sufficient revenue to meet their own spending responsibilities, and as a consequence, have become reliant on the Commonwealth for financial support. This Section will suggest a number of ways to strengthen Federal-State financial relations without a formal constitutional amendment.

### *A Sharing Taxation Revenue*

Revenue sharing has been defined to mean a situation whereby ‘the Commonwealth and the States each receive an agreed share of a tax, or group of taxes, raised by the Commonwealth’.<sup>603</sup> This is contrasted to ‘tax base sharing’,

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<sup>600</sup> Dalton, above n 239, 80-1. See also, State and Territory Treasuries, Specific Purpose Payments Discussion Paper (1999) 9 <[http://www.dtf.wa.gov.au/cms/uploadedFiles/SPP\\_Discussion\\_July\\_99.pdf](http://www.dtf.wa.gov.au/cms/uploadedFiles/SPP_Discussion_July_99.pdf)>. This will to ensure the States can adequately address policy considerations and are not restricted by tied grants.

<sup>601</sup> Dalton, above n 239, 81. Dalton suggests including a provision for making contractual remedies available upon breach of a specific purpose payment arrangement, and further, inserting a provision to cap unforeseen costs.

<sup>602</sup> State and Territory Treasuries, above n 595, cited in Dalton, above n 239, 82.

<sup>603</sup> Intergovernmental Relations Division Western Australian Treasury, ‘Revenue Sharing or Tax Base Sharing? Directions for Financial Reform of Australia’s Federation’ (1998) 6. See generally, Twomey, above n 5, 66. Twomey comments that tax-sharing is a common way of distributing taxes and reducing Vertical Fiscal Imbalance in Federalist Nations.

under which ‘the Commonwealth and the States independently tax the same, or roughly the same, tax base’.<sup>604</sup> The New South Wales Treasury suggests that State financial independence can only be restored if the States are given access to sufficient revenue sources to meet their expenditure needs.<sup>605</sup> As such, various commentators have proposed tax-sharing as a solution to increase the States’ tax-base and improve State financial autonomy and independence.<sup>606</sup> An advantage of revenue sharing is that it would give the States a greater portion of taxation revenue and would therefore reduce the States’ reliance on tied grants.

### 1 *How Can Revenue Sharing be Achieved?*

Revenue sharing may include allocating the States a portion of income tax revenue and GST revenue. Alternatively, this could be given statutory force by amending the *Constitution* to provide for a permanent, equal division of income tax between the Commonwealth and the States.<sup>607</sup> However, as this Chapter previously outlined, constitutional reform is difficult to achieve, and has had limited success in Australia. OECD notes that tax sharing can be achieved in three different ways.<sup>608</sup> These include:

- using ‘piggyback’ taxes, whereby ‘a State may impose a percentage of tax on top of a national tax’;<sup>609</sup>

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<sup>604</sup> Intergovernmental Relations Division Western Australian Treasury, ‘Revenue Sharing or Tax Base Sharing? Directions for Financial Reform of Australia’s Federation’ (1998) 6. An example of tax base sharing is the proposal for States to re-enter the field of income taxation. This proposal will be discussed in detail in the following Section.

<sup>605</sup> New South Wales Treasury ‘Financial Arrangements with the Commonwealth’, 5-3 [http://www.treasury.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0014/4406/5-1.pdf](http://www.treasury.nsw.gov.au/__data/assets/pdf_file/0014/4406/5-1.pdf)

<sup>606</sup> See, eg, Senate Select Committee on the Reform of the Australian Federation, Parliament of Australia, *Australia’s Federation: An Agenda for Reform* (2011) 68; Twomey, above n 5, 66; Commonwealth of Australia, above n 1, 32.

<sup>607</sup> See, eg, Dalton, above n 239, 73.

<sup>608</sup> OECD, ‘Fiscal Relations Across Government Levels’, *Economic Studies No 36* (2003) 184 cited in Twomey, above n 5, 66.

<sup>609</sup> Twomey notes that ‘[t]his assumes that the national government will reduce the level of its tax to make room for the sub-national governments, so the overall tax burden is not increased’. See, Twomey above n 5, 66 citing OECD, *Economic Surveys: Australia* (2006) 86. Twomey further comments that ‘the Fraser Government’s proposal for State piggy-back income taxes failed because the national rate of income tax was not reduced to make room for the States’. See, Garnaut and Fitzgerald, above n 332, 30. Piggyback taxes are used in the United States and most Nordic countries. See, OECD, ‘Fiscal Relations Across Government Levels’, *Economic Studies No 36* (2003) 184 cited in Twomey, above n 5, 66.

- giving sub-national governments ‘a percentage of national tax revenue that is collected in their jurisdictions’; and <sup>610</sup>
- allocating sub-national governments a share of national tax revenue, irrespective of the jurisdiction that collected the revenue. This effectively shares both ‘the benefits of increasing revenue as well as the burden of decreasing revenue’. <sup>611</sup>

### *B Increasing the Range of State Revenue*

Another suggestion to improve Australia’s Federal-State financial relations is for the States to exert ‘upward pressure’ to increase their own-source revenue. <sup>612</sup> It is argued that this would provide the States with ‘bargaining power’ to negotiate some long-term specific purpose payments, which would be beneficial to the States. <sup>613</sup> This proposal is currently being evaluated by the Australian Government in the *Issues Paper 1 A Federation for Our Future* (2014) as one possible mechanism for correcting the problem of Vertical Fiscal Imbalance. <sup>614</sup>

#### *1 Practical Limitations on Increasing State Tax-Bases*

Dalton notes that this proposal would be ‘very unpopular’ and that it would have the potential for public and Commonwealth backlash. <sup>615</sup> A further practical difficulty with this proposal arises from the High Court’s decision in *Ha* (discussed in Chapter 3). Following this decision, the States have been effectively prohibited from raising business franchise fees. <sup>616</sup> This therefore limits the revenue base available to the States.

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<sup>610</sup> According to Twomey, this will serve as an ‘incentive to promote economic activity in their jurisdictions in order to increase their tax revenue’. OECD, ‘Fiscal Relations Across Government Levels’, *Economic Studies No 36* (2003) 184 cited in Twomey, above n 5, 66.

<sup>611</sup> OECD, ‘Fiscal Relations Across Government Levels’, *Economic Studies No 36* (2003) 184 cited in Twomey, above n 5, 66.

<sup>612</sup> Dalton, above n 239, 78.

<sup>613</sup> Ibid.

<sup>614</sup> Commonwealth of Australia, above n 1, 32.

<sup>615</sup> Dalton, above n 239, 78.

<sup>616</sup> J Harrison, *Total Tax Review: Major Reform Issues* (2003) Parliament of Australia Parliamentary Library 6 <<http://www.aph.gov.au/library/pubs/CIB/1996-97/97cib7.htm>>, cited in Dalton, above n 239, 79.

### *C Introducing a Judicial Appointment's Policy*

There have been a number of criticisms about the process of judicial appointment in Australia.<sup>617</sup> One of the fundamental concerns is the lack of State involvement with High Court appointments, and the implications this has for federalism.<sup>618</sup> Currently, the States play a very limited role in appointments to the High Court, and there is no constitutional requirement for the States to be involved in appointments to the High Court.<sup>619</sup> Section 6 of the *High Court of Australia Act 1979* (Cth) imposes a requirement for the Commonwealth Attorney-General to 'consult' with the Attorneys-General of the States before appointing a Justice to the High Court.<sup>620</sup> However, the *High Court of Australia Act 1979* (Cth) is silent on the nature and the extent of consultation.<sup>621</sup> Furthermore, Gabriël Moens suggests that the requirement of consultation is of limited practical relevance to the States in terms of High Court appointments, since 'the consequences of non-compliance with this statutory requirement would not necessarily invalidate an appointment' if the appointment is otherwise valid under s 72(i) of the *Constitution*.<sup>622</sup>

In light of these concerns, it is argued that the process of appointing Justices to the High Court is in desperate need of reform. This proposal has seen increasing support from Craven,<sup>623</sup> Moens,<sup>624</sup> and more recently, Allan.<sup>625</sup> Moens notes that 'if a federal system is to work well, the appointment of judges to its highest constitutional court cannot be the exclusive province of one level of

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<sup>617</sup> See, eg, Craven, above n 87, 29; Zimmermann and Finlay, above n 5, 52-3.

<sup>618</sup> Craven, above n 87, 29. Other concerns include the lack of transparency and therefore accountability by government in the appointment process, and the restricted pool from which justices are selected.

<sup>619</sup> Moens, above n 52, 22. See, *Constitution* s 72(i) which states that 'The Justices of the High Court and of the other courts created by the Parliament ... shall be appointed by the Governor-General in Council'.

<sup>620</sup> *High Court of Australia Act 1979* (Cth) s 6 cited in Moens, above n 52, 22.

<sup>621</sup> See, George Williams, 'High Court Appointments: The Need for Reform' (2008) 30 *Sydney Law Review* 163, 164; Moens, above n 52, 22.

<sup>622</sup> Moens, above n 52, 22. See also, George Williams, 'High Court Appointments: The Need for Reform' (2008) 30 *Sydney Law Review* 163, 164; Appendix B to Judicature Sub-Committee, Second Report to Standing Committee, May, 1985, 31, in *Proceedings of the Australian Constitutional Convention*, Brisbane, 29 July – 1 August, 1985, vol. II.

<sup>623</sup> Craven, above n 87, 23.

<sup>624</sup> Moens, above n 52, 21.

<sup>625</sup> James Allan, 'The Need for a Judicial Appointments Policy' (Paper presented at the Twenty Seventh Conference of The Samuel Griffith Society, Crowne Plaza, Canberra, 28-30 August 2015) (forthcoming).

government'.<sup>626</sup> The reasons for this are that 'the division of power between the Commonwealth and the States means that both levels of government have a vital interest in the appointment of High Court Justices who will determine the distribution of that power',<sup>627</sup> and furthermore that 'the community at large also has a profound interest in the appointment of those who decide these issues'.<sup>628</sup> Furthermore, in August 2015, Allan expressed support for a judicial appointments policy and the need to ensure that candidates embody 'some version of an originalist understanding of [the] *Constitution*'.<sup>629</sup> It was argued that this framework is preferable because it would increase the likelihood of the *Constitution* being interpreted according to federalist principles.<sup>630</sup>

A primary supporting argument for reforming judicial appointments is that this would better reflect democracy,<sup>631</sup> because the States would have a more meaningful involvement in selecting candidates to appoint to the High Court. In addition, involving Commonwealth and State Governments would improve accountability and transparency of the appointment process.<sup>632</sup>

### 1 *How Can Judicial Appointments be Achieved?*

It is suggested that the States could be engaged in the process of appointment by having the Commonwealth and each State select a new appointee once a justice retires from the High Court. In practice this could be achieved through rotations between each State and the Commonwealth. However, there is a general consensus that the best proposal to reform judicial appointments is the Queensland government's proposal during 1983.<sup>633</sup> In summary, this proposal postulated that when it was necessary to appoint a new Justice to the High Court bench, the Commonwealth Attorney-General would invite expressions of interest and nominations from the State Attorney-Generals for 'suggestions of possible

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<sup>626</sup> Moens, above n 52, 21.

<sup>627</sup> Ibid.

<sup>628</sup> Ibid.

<sup>629</sup> Allan, above n 620.

<sup>630</sup> Ibid.

<sup>631</sup> See generally, Ibid.

<sup>632</sup> See, Craven, above n 87, 34.

<sup>633</sup> Ibid. See also, Moens, above n 52, 25-6.

appointees'.<sup>634</sup> The Commonwealth itself may then submit suggestions of potential appointees for the scrutiny of State Attorneys-General'.<sup>635</sup> An appointment could only occur if at least three states consented to the candidate.<sup>636</sup> In practice, this reform could be achieved by amending s 72(i) of the *Constitution*.

Unfortunately in 1988 the Constitutional Commission rejected the Queensland Government's proposal,<sup>637</sup> on the basis that *inter alia*, it would compromise candidates instead of having candidates exclusively in support of the Commonwealth government<sup>638</sup> and 'would give undue prominence to regional considerations'.<sup>639</sup> Craven provides a number of useful counter-arguments in response to these contentions. In particular, he identifies that there is no clear basis as to why compromising candidates is undesirable, and instead he argues that 'the best candidates [may not necessarily] ... arouse the unbridled passion of the Commonwealth Government alone'.<sup>640</sup> As to the Commission's second argument, Craven observes that "'regional considerations" should be given a very great prominence in the appointment of High Court Justices, on the grounds that the States and the Commonwealth in reality have a roughly equal interest in the operation of the Court'.<sup>641</sup>

## 2 Difficulties With Involving the States in Judicial Appointments

One of the strongest impediments to introducing a judicial appointments policy is the proposal's failure in 1988. In addition, the difficulties with amending the *Constitution* have previously been noted. It is argued that these difficulties can be resolved by implementing the proposal suggested by Evans in 2012, namely by

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<sup>634</sup> Moens, above n 52, 25.

<sup>635</sup> Ibid. In 2014, similar recommendations were suggested in relation to appointment to the judiciary in the Supreme Court of Western Australia, the District Court of Western Australia, and the Family Court of Western Australia: See, Women Lawyers of Western Australia (Inc.), '20<sup>th</sup> Anniversary Review of the 1994 Chief Justice's Gender Bias Taskforce Report' (2014) 199 <<http://www.wlwa.asn.au/projects/2014-gender-bias-review-report.html>>.

<sup>636</sup> Moens, above n 52, 25.

<sup>637</sup> Craven, above n 87, 34.

<sup>638</sup> Australian Constitutional Commission, *Final Report of the Constitutional Commission* (Australian Government Publishing Service, 1<sup>st</sup> ed, 1988) vol 2, 401, cited in Craven, above n 87, 34.

<sup>639</sup> Ibid.

<sup>640</sup> Craven, above n 87, 34.

<sup>641</sup> Ibid. See also, Zimmermann and Finlay, above n 5, 54.

amending the *High court of Australia Act 1979* (Cth) to enhance State involvement with judicial appointments.<sup>642</sup> This thesis supports Evans's proposal to amend s 6 of the *High court of Australia Act 1979* (Cth) to give States the ability to recommend candidates, and further, to impose a statutory requirement that the appointment must be supported by at least three States (as recommended by the Queensland Government in 1988).<sup>643</sup>

### III CONCLUDING REMARKS

In summary, this Chapter began by illustrating the widespread support for reforming Australia's tax system and strengthening the federal balance. It was seen that reforming Australia's Federal-State financial relations is currently under consideration by the Australian Parliament. As such, there is no better time to recommend proposals to strengthen Australia's federal balance and improve financial relations with the States. This Chapter acknowledges that there is no single solution to resolve Australia's fiscal crisis. Following this, it outlined a number of suggested proposals to reduce vertical fiscal balance so that Australia can properly realise the enumerated advantages that federal systems offer.<sup>644</sup> It discussed both procedural reforms involving constitutional amendment and substantive reforms, which can be implemented without a formal amendment. In discussing these proposals, this Chapter outlined the advantages as well as the practical difficulties for achieving constitutional reform.

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<sup>642</sup> Evans, above n 5, 308.

<sup>643</sup> Ibid.

<sup>644</sup> See, eg, Zimmermann and Finlay, above n 4, 190, 192, 199; Zimmermann and Finlay, above n 5, 3. Zimmermann and Finlay argue that the increase in Commonwealth powers has meant that 'many of the advantages of federalism are no longer realised': Zimmermann and Finlay, above n 4, 190, 192, 199.

## CHAPTER 5: CONCLUSION

Upon federation, duties of customs and excise represented the largest source of revenue.<sup>645</sup> As such, they were made exclusive to the Commonwealth. However, since *Engineers*, the Commonwealth has severely limited the States' ability to levy taxes, and now exercises control over all of the major taxes (including income tax, sales and excise duties, and the Goods and Services Tax). The fundamental problem with Australia's federal system is the high degree of Vertical Fiscal Imbalance between the Commonwealth and the States.<sup>646</sup> In an effective federal system, the different tiers of government have the capacity to raise sufficient revenue to meet their expenditure obligations.<sup>647</sup> By characterising the *Constitution* broadly, and in favour of the Commonwealth, the High Court has undermined the advantages that federal systems offer over unitary systems.<sup>648</sup> This thesis has demonstrated that reforms are necessary to undo the damage that the High Court has caused, particularly with respect to the States' financial autonomy.

Chapter 2 provided a broad overview of the origins of federalism, the key characteristics that define federalism, and its reception into Australian law during the Convention Debates. Following this, it identified the numerous advantages that federal systems offer over other structures of government. These advantages included diversity of preference, competition and cooperation, regulation and accountability, efficiency, protection against elitism and preservation of individual liberty. Following this, it examined the gradual centralisation of State legislative powers. It noted that the scope of State legislative powers is largely dependent on the approach taken by the High Court in interpreting the *Constitution*. It then examined how the early High Court sought to give effect to the Framers' intentions by developing two federalist implications known as the doctrines of implied intergovernmental immunities and reserved powers. Chapter 2 examined

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<sup>645</sup> Commonwealth Grants Commission, above n 435, 22.

<sup>646</sup> Twomey, above n 5, 64.

<sup>647</sup> Ibid, 64-5.

<sup>648</sup> See, eg, Zimmermann and Finlay, above n 4, 190, 192, 199; Zimmermann and Finlay, above n 5, 3.



the High Court's decision in *Engineers*, where these federalist implications were rejected in favour of an expansive interpretation of the constitutional text, known as literalism. This Chapter concluded by examining the expansion of the enumerated powers through the decisions handed down in the aftermath of *Engineers*. In doing so, it exemplified how the High Court has expanded the ambit of Commonwealth power, particularly with respect to the corporations power in s 51(xx) and the external affairs power in s 51(xxix).

Following from the broad analysis of the High Court's expansion of Commonwealth legislative power in Chapter 2, Chapter 3 provided a specific case study of the High Court's expansion of Commonwealth financial powers in the aftermath of *Engineers*. It examined the High Court's characterisation of the taxation power in s 51(ii), as well as the gradual expansion of the definition of 'excise' in s 90. In particular, it highlighted the detrimental effects of the decision in *Ha* (1997), which resulted in a \$5 billion loss of revenue for the States.<sup>649</sup> In this Chapter it was argued that the fundamental problem with Australia's federal system is that the States do not have an adequate tax base to meet their expenditure responsibilities. The author contended that in order to meet their expenditure requirements, the States have surrendered their financial autonomy, by becoming reliant on the Commonwealth to accept grants on whatever conditions the Commonwealth deems fit.

Finally, Chapter 4 proposed a number of solutions to restore the fiscal federal balance that was envisioned by the Framers. These recommendations included both reforms for constitutional amendment and procedural reforms. In summary, the following proposals for reform were made:

- Reallocating powers and responsibilities between governments to better reflect the federal distribution of power;
- Inserting an express provision into the *Constitution* that requires the High Court to interpret the *Constitution* according to the federal nature of the document and in accordance with its statutory purpose;

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<sup>649</sup> Commonwealth of Australia, above n 1, 34.

- Giving States the right to propose referendums so that the States can initiate constitutional reform;
- Re-introducing State income tax to enable the States to exert greater control over their own revenue;
- Removing tied grants and replacing them with general purpose payments, or implementing guidelines for making tied grants, in order to increase State autonomy and financial independence;
- Sharing taxation revenue;
- Increasing the range of State revenue to expand State tax-bases; and
- Introducing a judicial appointments policy by amending s 72(i) of the *Constitution* to reflect the Queensland Government's 1983 proposal, or alternatively, by amending s 6 of the *High court of Australia Act 1979* (Cth) to increase State involvement with judicial appointments to the High Court bench.

In conclusion, this thesis has demonstrated how the High Court's interpretation of the *Constitution*, particularly the State financial powers, has centralised financial power in the hands of the Commonwealth. As a result of these decisions, the States are now effectively precluded from raising income tax and numerous State franchise business fees. It was seen that the Commonwealth's resumption of these taxes following the Second World War has resulted in a significant loss of income for the States. Consequently, the States are now unable to raise sufficient revenue to finance their own expenses and have become increasingly reliant on the Commonwealth to accept financial support on whatever terms the Commonwealth deems fit. As such, the States, originally intended to be financially independent and on equal footing to the central government, are now inferior to the Commonwealth. It is apparent that Australia's federal system, particularly the Commonwealth-State financial relations, is in desperate need of reform. The solutions suggested in this thesis offer an insight into the types of reforms that are necessary to restore Australia's financial system to the federal model that was originally envisioned by the Framers, and administered by the early High Court.

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