

Chapter 10

The High Court and Dynamic Federalism

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I Introduction

While sourced in agreement embodied in the written Constitution, the implementation of the federal scheme inevitably gives rise to tension between political unity and the separateness of the constituent parts. This is so notwithstanding that under the Australian Constitution, the Commonwealth starts from a position of greater strength given the plenary nature of the affirmative grants of power to the Commonwealth Parliament and the supremacy afforded to its laws in the event of inconsistency under s 109 of the Constitution.¹ The balancing of these competing considerations occurs in an evolving manner through constitutional interpretation, through legislation subject to s 109, and through agreement. The balance of power may also be affected by circumstances external to the Constitution and those processes, as, for example, in the case of the Commonwealth's power to make laws with respect to external affairs, including its treaty obligations, under s 51(xxix).² It follows that the agreement encapsulated in the text of the Australian Constitution in 1901 marked only the start of a journey. While it created the essential structure for the federation, the division of powers and responsibilities continues to be worked out in a fluid and dynamic process. The purpose of this chapter is, first, to examine that process, focusing on a consideration of the means by which the balance of powers is determined by the High Court through constitutional interpretation taking two examples and, second, to consider its impact on the structure and functioning of the federation and possible future directions.

1 As Dixon J observed in *Lord Mayor, Councillors and Citizens of the City of Melbourne v Commonwealth* (1947) 74 CLR 31, 82–3 ('*Melbourne Corporation*').

2 See, eg, Michael Coper, 'The Role of the Courts in the Preservation of Federalism' (1989) 63 *Australian Law Journal* 463.

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