

# REFORMING FEDERALISM: A PROPOSAL FOR STRENGTHENING THE AUSTRALIAN FEDERATION

AUGUSTO ZIMMERMANN\* AND LORRAINE FINLAY\*\*

*The drafters of Australia's Constitution favoured federalism due to its recognised advantages in providing for individual choice and checking concentration of power. However, the massive shift of power to the centre over these years has meant that many of the advantages of federalism are no longer realised. Australia's federalism is clearly no longer working. Unless the federal structure undergoes a formal reform, some of the most important advantages of Australia's federalism may eventually disappear. This article thus provides practical solutions aiming at strengthening the manifold advantages of federalism for Australia.*

## I INTRODUCTION

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

This article summarises the main characteristics of a federal system as a system of government worthy of protecting: it controls power, safeguards democracy, and promotes liberty. And yet, it also explains that the interpretative approach preferred by the High Court since the 1920s has expanded Commonwealth powers to the point where many of the advantages of federalism have now been lost. Centralisation indeed has been an on-going pursuit by the Commonwealth, aided by the High Court. This being so, the final part of this paper considers the great need for reforming our 'dysfunctional' federal system, thus offering the potential agenda for a comprehensive reform of the Australian Federation.

\* LLB (Hons), LLM (cum laude), PhD (Monash); Senior Lecturer & Associate Dean (Research), Murdoch University, School of Law.

\*\* BA (Hons) (UWA), LLB (Hons) (UWA), LLM (NYU), LLM (NUS); Lecturer, Murdoch University, School of Law.

1 *New South Wales v Commonwealth* (2006) 229 CLR 1, 228–9 [555] (Kirby J) ('*Work Choices*').

## II CHARACTERISTICS OF FEDERALISM

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

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

The distribution of powers is an essential feature of federalism. The object for which a federal state is formed involves a division of authority between the national government and the separate States. The powers given to the nation form in effect so many limitations upon the authority of the separate States, and as it is not intended that the central government should have the opportunity of encroaching upon the rights retained by the States, its sphere of action necessarily becomes the object of rigorous definition.<sup>3</sup>

In federal systems the regional government enjoys a great degree of political autonomy derived directly from the written constitution. A federal constitution is therefore one which divides legislative power between a central government (Union or Commonwealth) and regional (state or provincial) governments. Such a constitution cannot be amendable unilaterally by any of the spheres of government. This prevents the usurpation by the central government of the regions' powers. As Anstey Wynes explained:

The division of powers between the Federal and State Governments being of the essence of federalism, it follows that the Constitution of the Federal State must almost necessarily be of the written and rigid, or controlled type. For, in order that the terms of the union may be adequately and permanently defined, the manner of apportionment of powers must be reduced to some definite and tangible form, not alterable by the central authority at will.<sup>4</sup>

Federal systems also require an arbiter to decide over disputes between governments. As the power of the federal state is constitutionally divided between the centre and the regions, disputes may arise as to the proper sphere of power to be exercised. So the protection of the federal system is vested in the hands of an

2 Andrew Heywood, *Politics* (Palgrave Macmillan, 2<sup>nd</sup> ed, 2002) 161.

3 Albert Venn Dicey, *Introduction to the Study of the Constitution* (Macmillan, 8<sup>th</sup> ed, 1915) 83.

4 William Anstey Wynes, *Legislative, Executive and Judicial Powers in Australia* (Law Book Co, 1955) 3.

independent and impartial arbiter. Without this the constitutional distribution of powers becomes a dead letter.<sup>5</sup> As John Stuart Mill pointed out:

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

Finally, a federation involves linking institutions between each sphere, usually in the form of a bicameral legislature. In theory, the regions or states are represented in an upper house called the Senate whereby the representatives of each state must defend the regional interests. However, the reality is that in places like Australia and the United States the Senate has been divided along party lines in the same way as the lower house, or House of Representatives, thus not truly protecting the interests of the particular states. To be fair, the whole question of what it would mean for the Senate to represent states' interests was discussed at length by the framers of the *Constitution*. The discussions of the composition of the Senate absorbed a substantial proportion of the debates in both 1891 and 1897–8. As Aroney points out, some of the framers, notably Downer and Hackett:

seemed to suggest that a successful Senate would be marked by a sense of unity and national purpose. Senators from particular states need not always or even usually vote in blocs. They would, instead, be involved individually in national policy debate, and might even be aligned with political parties.<sup>7</sup>

## 1 *Disadvantages of Federalism*

The Business Council of Australia argues that many of the advantages of federalism are theoretical and seldom realised in practice. This is primarily due to the alleged difficulty in coordinating the interests and requirements of

5 See Alexis de Tocqueville, *Democracy in America* (Henry Reeves trans, D Appleton, 1904) vol 1, ch VIII [trans of: *De la Démocratie en Amérique* (first published 1835)].

6 John Stuart Mill, *Considerations on Representative Government* (Parker, Son and Bourn, 1861) ch XVII.

7 Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009) 199.

the different tiers of government.<sup>8</sup> Federalism by its very nature involves two levels of government. This can be particularly onerous for businesses that operate across state borders, because there might be a great degree of overlap in some areas causing a duplication of services.<sup>9</sup>

Centralists, or those who favour a powerful central government, therefore accuse federalism of being ‘messy and costly’.<sup>10</sup> They argue that state governments are expansive and wasteful, and that Australia is currently over-governed. Greenwood, a critic of federalism, questions the sense of maintaining a federal government, six state governments and two territories for a nation of 20 million people.<sup>11</sup>

Multiple jurisdictions mean multiple laws and regulations. Centralists thus contend that the complex nature of a federal system can lead to uncertainty as to which level of government is responsible for particular decisions or services. Naturally, there is little doubt that uncertainty reduces accountability and ‘leads to buck-passing and finger-pointing between governments as they seek to avoid responsibility’.<sup>12</sup> This is particularly true for a federal system in which the Commonwealth’s powers under s 51 of the *Constitution* are shared with the states. Such constitutional arrangement naturally creates duplication because both Commonwealth and state government often legislate on the same issue.

Centralists also argue that federalism has become redundant because the original hurdles to central national government, such as communication and transport have diminished significantly since Federation. Moreover, critics of federalism argue that it leads to parochialism in governments and that it has ‘produced social inequality and economic injustice’.<sup>13</sup> Guy, for example, believes that any improvement to the rights of indigenous Australians in the 1990s was due mostly to the Commonwealth, not the states.<sup>14</sup>

On the other hand, although some of the above disadvantages have certainly been evident in Australia, this does not necessarily lead to the conclusion that federalism should be abolished; quite the contrary. Indeed, many of the perceived disadvantages of Australia’s federalism could stem, among other things, from the High Court’s expansive reading of Commonwealth power. As for duplication this is rather a problem with management, and not an inherent problem with federalism. As Twomey and Withers point out:

if a federal system is well structured and well managed, the amount of duplication may be minimised. Much of the duplication in Australia

8 Business Council of Australia, *Reshaping Australia’s Federation: A New Contract for Federal–State Relations* (2006) 5.

9 For example, businesses that have operations throughout the country, such as transport industries, currently must comply with eight different occupational health and safety regimes.

10 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) 138.

11 Gordon Greenwood, *The Future of Australian Federalism: A Commentary on the Working of the Constitution* (University of Queensland Press, 1976).

12 Business Council of Australia, above n 8, 6.

13 Scott Guy, ‘Overcoming the Institutional and Constitutional Constraints of Australian Federalism: Developing a New Social Democratic Approach to the Federal Framework’ (2006) 34(2) *Federal Law Review* 319, 328.

14 *Ibid.*

arises because the Commonwealth funds and attempts to micro-manage state programs through specific purpose payments. This means that the Commonwealth creates its own bodies to set conditions and monitor their implementation, duplicating state bodies. It also means that the states are required to undertake unnecessary administration in justifying the use of Commonwealth funds. The duplication and waste involved here is not inherent to federalism. It could be avoided if there were a better allocation of responsibilities and financial resources between the Commonwealth and the states, with each managing and funding its own responsibilities.<sup>15</sup>

### III ADVANTAGES OF FEDERALISM

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

Twomey and Withers have previously noted the somewhat unusual disconnect between current Australian attitudes towards federalism and the prevailing attitude in the rest of the world. The modern international trend is strongly towards federalism and decentralised government. As Twomey and Withers stated:

In Australia, it is often asserted that federalism is an old-fashioned, cumbersome and inefficient system. Yet internationally, federalism is regarded as a modern, flexible and efficient structure that is ideal for meeting the needs of local communities while responding to the pressures of globalisation. The difference between these two views is stark.<sup>16</sup>

Beyond the simple reality that there would be enormous practical difficulties associated with attempting to govern a country the size of Australia with a single, centralised government, there are numerous other advantages apparent in a federal system. A direct comparison of federal and unitary governments suggests that federal arrangements tend to produce more stable governments, more efficient governments, higher rates of economic growth, and greater integrity in government.<sup>17</sup> If we were to look at quantifying this benefit, it has been suggested that '... [t]he specific advantage achieved by Australia through the federal structure itself is a sum of \$4,507 per capita in 2006 — or \$11,402 per average household'.<sup>18</sup> Twomey and Withers go on to suggest that the 'federalism dividend' may be increased by further reform of the Australian Federation.<sup>19</sup>

15 Anne Twomey and Glenn Withers, 'Australia's Federal Future: Delivering Growth and Prosperity' (Federalist Paper No 1, Council for the Australian Federation, April 2007) 22.

16 *Ibid* 2.

17 *Ibid* 8.

18 *Ibid* 41.

19 *Ibid*.

Twomey and Withers conclude that federalism is the right political structure for Australia. A well-designed federal system has a number of advantages over a unitary system of government. The broad sweep of advantages can be categorised into three key areas: the plurality achieved through increased participation and access to the political system; regional autonomy and diversity; and innovation and competitive efficiencies.<sup>20</sup> Geoffrey Walker writes:

An awareness of the positive benefits of federalism will make the constitutional debate a more equal and fruitful one. This will mean recognizing that, in a properly working federation, government is more adaptable to the preferences of the people, more open to experiment and its rational evaluation, more resistant to shock and misadventure, and more stable. Its decentralized, participatory structure is a buttress of liberty and a counterweight to elitism. It fosters the traditionally Australian, but currently atrophying, qualities of responsibility and self-reliance. Through greater ease of monitoring and the action of competition, it makes government less of a burden on the people. It is desirable in a small country and indispensable in a large one. And if, as is often said, the pursuit of truth in freedom is the essence of civilization, this ‘liberating and positive form of organization’ has a special contribution to make to the progress of humankind.<sup>21</sup>

Galligan and Walsh assert that this enhancement of democratic participation through dual citizenship and multiple governments is undoubtedly federalism’s most positive quality. According to them, this largely explains its strength and resilience in Australia.<sup>22</sup> Federalism preserves the states as small democratic polities, enabling the national strength of a large nation to be added to the enhanced participatory qualities of small democratic states.<sup>23</sup> Related to the idea of the democratic process, a further strength of federalism is its capacity to secure

20 Heywood, above n 2, 10.

21 Geoffrey de Q Walker, *Ten Advantages of a Federal Constitution and How to Make the Most of Them* (The Centre for Independent Studies, 2001) 53.

22 Brian Galligan and Cliff Walsh, ‘Australian Federalism: Yes or No?’ in G Craven (ed), *Australian Federation* (Melbourne University Press, 1992) 195.

23 Ibid. The idea comes from Baron de Montesquieu, *The Spirit of the Laws* (Thomas Nugent trans, Cosimo, 2011) 126 [trans of: *De l’Esprit de Lois* (first published 1748)]:

If a republic be small, it is destroyed by a foreign force; if it be large, it is ruined by an internal imperfection ... It is, therefore, very probable that mankind would have been, at length, obliged to live constantly under the government of a single person, had they not contrived a kind of constitution that has all the internal advantages of a republican, together with the external force of a monarchical, government. I mean a confederate republic. This form of government is a convention by which several petty states agree to become members of a larger one, which they intend to establish. It is a kind of assemblage of societies, that constitute a new one, capable of increasing by means of further associations, till they arrive at such a degree of power as to be able to provide for the security of the whole body.

Montesquieu’s analysis of the federal republic was discussed by Australian framers such as Thomas Just, who, according to Nicholas Aroney, wrote ‘one of the most important studies of federalism’ specifically for the federal convention of 1891: Aroney, above n 7, 105. As Aroney also points out, Thomas Cook Just, *Leading Facts Connected with Federation — Compiled for the Information of the Tasmanian Delegates to the Australasian Federal Convention, 1891, on the Order of the Government of Tasmania* (“The Mercury” Office, 1891), sought to introduce Australian readers not only to the views of Montesquieu, but also to those of Hamilton, Jay and Madison, and ‘sought to show how their perspectives could be applied to Australian conditions’: Aroney, above n 7, 105.

regional autonomy and to accommodate and reconcile competing diversities between and within states. According to Hans Kelsen:

Democracy ... may be centralized as well as decentralized in a static sense; but decentralization allows a closer approach to the idea of democracy than centralization. This idea is the principle of self-determination ... Conformity to the order with the will of the majority is the aim of democratic organization. But the central norms of the order, valid of the whole territory, may easily come into contradiction with the majority will of a group living on a partial territory. The fact that the majority of the total community belongs to a certain political party, nationality, race, language, or religion, does not exclude the possibility that within certain partial territories the majority of individuals belong to another party, nationality, race, language, or religion. The majority of the entire nation may be socialistic or Catholic, the majority of one or more provinces may be liberal or Protestant. In order to diminish the possible contradiction between the contents of the legal order and the will of the individuals subject to it, in order to approximate as far as possible the ideal of democracy, it may be necessary, under certain circumstances, that certain norms of the legal order be valid only for certain partial territories and be created only by majority of votes of the individuals living in these territories. Under the condition that the population of the State has no uniform social structure, territorial division of the State territory into more or less autonomous provinces ... may be a democratic postulate.<sup>24</sup>

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

Related to this discussion is also the assumption that federalism protects individuals because it prevents an excessive accumulation of power in either level of government. Sir Harry Gibbs once remarked that the most effective way to curb political power was to divide it.<sup>25</sup> This argument that federalism can better secure human rights and freedoms was supported by Sir Robert Menzies, who once declared that 'in the division of power, in the demarcation of powers between a Central Government and the State governments there resides one of

24 Hans Kelsen, *General Theory of Law and State* (Russell & Russell, 1945) 313.

25 Harry Gibbs, 'Courage in Constitutional Interpretation and its Consequences: One Example' (1991) 14 *University of New South Wales Law Journal* 325.

the true protections of individual freedom'.<sup>26</sup> A similar point was made by James Madison:

In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.<sup>27</sup>

The idea that federalism enhances personal freedom has been bolstered under contemporary 'public choice' theories by notions of 'voice' and 'exit'.<sup>28</sup> According to American federal Judge Robert Bork, the federal system enhances personal autonomy because

if another state allows the liberty you value, you can move there, and the choice of what freedom you value is yours alone, not dependent on those who made the Constitution. In this sense, federalism is the constitutional guarantee most protective of the individual's freedom to make his own choices.<sup>29</sup>

A similar point is made by Antonin Scalia J of the United States Supreme Court:

Now there are many reasons for having a federal system, but surely the most important is that it produces more citizens content with the laws under which they live. If, for example, the question of permitting so-called 'sexually oriented businesses' — porn shops — were put to a nationwide referendum, the outcome might well be 51 per cent to 49 per cent, one way or the other. If that result were imposed nationwide, nearly half of the population would be living under a regime it disapproved. But such a huge proportion of the pro-sex-shop vote would be in states such as New York, California, and Nevada; and a huge proportion of the anti-sex-shop vote would be in the south, and in such western states as Utah and New Mexico. If the question of permitting sexually oriented businesses were left to the states — which is surely where the First Amendment originally left it — perhaps as much as 80 per cent of the population would be living under a regime that it approved. Running a federal system is a lot of trouble; a large proportion of the time of my Court is spent sorting out federal-

26 Robert Menzies, *Central Power in the Australian Commonwealth: An Examination of the Growth of Commonwealth Power in the Australian Federation* (Cassel & Company Ltd, 1967) 24.

27 James Madison, 'The Federalist No 51' in Alexander Hamilton, James Madison and John Jay (eds), *The Federalist Papers* (Pocket Books, 2004) 370, 373.

28 See Geoffrey Brennan and James M Buchanan, *The Power to Tax: Analytical Foundation of a Fiscal Constitution* (Cambridge University Press, 1980). See also James Gillespie, 'New Federalisms' in Judith Brett, James Gillespie and Murray Goot (eds), *Developments in Australian Politics* (MacMillan, 1994) 60, 69–71.

29 Robert Bork, *The Tempting of America* (Simon & Schuster, 1991) 53.



state relations. It is quite absurd to throw away the principal benefit of that system by constitutionalizing, and hence federalizing, all sorts of dispositions never addressed by the text of the Constitution.<sup>30</sup>

The competitive nature of a federal system is a further benefit, promoting efficiency, innovation and responsiveness. Competition between state and federal governments should (theoretically) encourage an overall improvement in government performance. Policy innovations can be tested on a smaller scale and, if these experiments fail, federalism ‘cushions the nation as a whole from the full impact of government blunders’.<sup>31</sup>

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

The involvement of more than one government means that a proposal will receive a great deal more scrutiny than if it were the work of one government alone. Problems with implementing the proposal in different parts of the country are more likely to be identified. Where there is conflict between governments on the nature and detail of the proposal, there is more likely to be a public debate as different governments are forced to put their positions and justify them in the public domain. While this has the disadvantage of sometimes slowing down reform, the need for co-operation has the corresponding advantage of ensuring that reform, when implemented, is better considered and more moderate in its nature.<sup>32</sup>

Of course, a federal system is not without its disadvantages also. The most common arguments against federalism are that it is inefficient, expensive, and leads to wasteful duplication and excessive bureaucracy; that it reduces accountability by encouraging ‘conflict and buck-passing’;<sup>33</sup> and that it is incompatible with the needs of a modern economy. The first point to note in response to these criticisms is that some of the largest and most internationally competitive economies in the world are federations. A federal system is clearly not itself an impediment to economic success in a globalised world, or to the delivery of competitive and efficient services. Indeed, recent attempts at service delivery at the Commonwealth level reinforce the point that centralised administration does not automatically lead to greater efficiencies, reduced costs, or better outcomes. The second point is that many of the above criticisms are not criticisms of federalism *per se*, but of the way that federalism operates in Australia. Reforms to the federal system may well help to address some of these criticisms and produce a more effective federal system.

30 Antonin Scalia, ‘Romancing the Constitution: Interpretation as Invention’ in G Huscroft and I Brodie (eds), *Constitutionalism in the Charter Era* (LexisNexis, 2004) 314, 342.

31 Walker, above n 21.

32 Twomey and Withers, above 15, 15.

33 Ibid 24.

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

A plausible response is that if federalism is complex, expensive and difficult, so is democracy. In both cases, the question is not simply how much it costs, but what you get for the money and effort you expend.<sup>34</sup>

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

Perhaps the most popular argument of centralism ... is that federalism in Australia involves duplication and divided accountability in government. There is considerable truth in this argument. One of its dangers for centralisers, however, is that much of the difficulty in this context has occurred because the Commonwealth, through use of its financial muscle, has invaded State areas, such as education and health. Confusion of accountability and responsibility thus may be sheeted home to Commonwealth incursion, not State incompetence. In these circumstances, a reasonable State response might well be that if the Commonwealth is prepared to vacate the field and leave the cheque behind, the State would be more than happy to eliminate all elements of division and overlap.<sup>35</sup>

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

#### **IV AUSTRALIAN FEDERALISM: FOUNDATIONS AND STRUCTURE**

Australia became a federation when it became a nation, on 1 January 1901. The country's federal *Constitution* was drafted at two conventions held in the 1890s. Some of the key issues during those conventions involved questions of finance and trade, and how to conciliate the interests of small states with those of the more

34 Craven, above n 10, 138.

35 Ibid.

populous ones. Also relevant was the issue about the preservation of the rights of the six existing colonies when they became states of the new Federation.<sup>36</sup>

The American model was especially attractive to the drafters of the *Constitution*. According to Sir Owen Dixon, they regarded the American system as an ‘incomparable model’.<sup>37</sup> Elaborated in 1891 by Andrew Inglis Clark, a Tasmanian jurist who greatly admired the United States, the first draft followed quite closely the American model. The general structure of that first ‘draft continued into the *Constitution*’s final version which came into force in 1901’.<sup>38</sup>

The drafters of the *Constitution* favoured the federal system due to its recognised advantages of being able to promote democracy, protect the rights and liberties of citizens, and to prevent the concentration of power.<sup>39</sup> They drew much of their inspiration from the works of A V Dicey and James Bryce. Lord Bryce was so influential that the inspiration for the official name of the nation, the *Commonwealth of Australia*, is said to derive from his classic *The American Commonwealth*.<sup>40</sup> The drafters often quoted from him to explain things such as why the new federation should follow the American model of state rights and judicial review of legislation.

## **A Federal Distribution of Powers**

The *Constitution* allocates the areas of legislative power to the Commonwealth in ss 51 and 52, with these powers being variously concurrent with the states and exclusive. Moreover, the federal Parliament is allowed to make laws with respect to ‘matters incidental to the execution of any power vested by this *Constitution* in the Parliament’.

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

The separate states are to continue as autonomous bodies, surrendering only so much of their powers as is necessary to the establishment of a

36 The drafters of the *Constitution* created federalism by dividing power solely between the Commonwealth and the states. Although Australia has municipal powers, such powers are not mentioned in the *Constitution*. Local councils therefore exist only so long as they are maintained by the states which create them.

37 Owen Dixon, ‘The Law and the Constitution’ (1935) 51 *Law Quarterly Review* 590, 597.

38 Nicholas Aroney, ‘Federalism and the Formation of the Australian Constitution’ in Greg Fraser (ed), *Democracy Down Under: Understanding Our Constitution* (Presbyterian Church of Victoria, 1997) 17.

39 Walker, above n 21.

40 See John Andrew La Nauze, ‘The Name of the Commonwealth of Australia’ (1972) 15 *Historical Studies* 59, 59–71. See also Helen Irving, *To Constitute a Nation: A Cultural History of Australia’s Constitution* (Cambridge University Press, 1999) 76–8.

general government to do for them collectively what they cannot do individually for themselves, and which they cannot do as a collective body for themselves.<sup>41</sup>

In fact, Alfred Deakin, also a leading figure of the Australasian Federation Conference of 1890, was convinced that the *Constitution* would succeed in protecting the independence of the states, asserting that ‘so far from our Federal Government over-awing the States, it is more probable that the States will overawe the Federal Government’.<sup>42</sup>

One of the most remarkable characteristics of the *Constitution* is its express limitation on federal legislative powers. Whereas the legislative power of the central government is limited to the express provisions of the *Constitution*, all the remaining residue is left undefined to the Australian states.<sup>43</sup> The drafters of the *Constitution* thus wished to reserve to the people of each state the right to decide by themselves on the most relevant issues through their own state legislatures. In a late edition of *Introduction to the Study of the Constitution*, Dicey reveals why one of the main goals of the framers was to establish a considerably decentralised federal system:

The Commonwealth is in the strictest sense a federal government. It owes its birth to the desire for national unity ... combined with the determination on the part of the several colonies to retain as States of the Commonwealth as large a measure of independence as may be found compatible with the recognition of Australian nationality. The creation of a true federal government has been achieved mainly by following, without however copying in any servile spirit, the fundamental principles of American federalism. As in the United States so in the Australian Commonwealth the Constitution ... fixes and limits the spheres of the federal or national government and of the States respectively, and moreover defines these spheres in accordance with the principle that, while the powers of the national or federal government, including in the term government both the Executive and the Parliament, are, though wide, definite and limited, the powers of the separate States are indefinite, so that any power not assigned by the *Constitution* to the federal government remains vested in each of the several States, or, more accurately, in the Parliament of each State. In this point ... the States ... retain a large amount of legislative independence. Neither the Executive nor the Parliament of the Commonwealth can either directly or indirectly veto the legislation, eg, of the Victorian Parliament. The founders, then, of the Commonwealth have, guided in the main by the example of the United States, created a true federal government.<sup>44</sup>

41 *Official Report of the National Australasian Convention Debates*, Sydney, 1891, 31–2 (Samuel W Griffith).

42 Andrew Lynch and George Williams, ‘Beyond a Federal Structure: Is a Constitutional Commitment to a Federal Relationship Possible?’ (2008) 31(2) *University of New South Wales Law Journal* 395, 400.

43 Mark Cooray, ‘A Threat to Liberty’ in Ken Baker (ed), *An Australian Bill of Rights: Pro and Contra* (Institute of Public Affairs, 1986) 35.

44 Dicey, above n 3, 387.

## B Inconsistency

According to s 109 of the *Constitution*, '[w]hen a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'. Of course, it is only a valid federal law which prevails over the state law. If a federal law goes outside its proper limits the matter is simply of invalidity of the federal law as is the case of any violations to the distribution of powers established by the *Constitution*.

The most accepted view about inconsistency is that a state law is not so much 'invalid' because the state Parliament could not pass it. Rather, the matter lies on the fact that the state law, though it was enacted with full validity by the state Parliament, is deemed inconsistent with a federal law and so it ceases to operate. But if the overriding federal law ceases to operate, the inconsistent state law which was lying down dormant is reactivated. As explained by Latham CJ in *Carter v Egg Pulp Marketing Board (Vic)*:

[Section 109] applies only in cases where, apart from the operation of the section, both the Commonwealth and the State laws which are in question would be valid. If either is invalid *ab initio* by reason of lack of power, no question can arise under the section. The word 'invalid' in this section cannot be interpreted as meaning that a State law which is affected by the section becomes *ultra vires* in whole or in part. If the Commonwealth law were repealed, the state would again become operative ... Thus the word 'invalid' should be interpreted as meaning 'inoperative'. This is, I think, made clear by the provision that the Commonwealth law 'shall prevail' — that is, the Commonwealth law has authority and takes effect to the exclusion of the inconsistent State law.<sup>45</sup>

Several are the occasions on which a conflict between a federal law and a state law may occur. Inconsistency arises whenever a state law cannot be obeyed at the same time as a Commonwealth law.<sup>46</sup> Inconsistency also arises if a federal law allows something that a state law prohibits;<sup>47</sup> or when a federal law confers some right or immunity that a state law seeks to remove.<sup>48</sup> In addition, inconsistency may arise after the 'cover the field' test is applied. When the federal government, either expressly or impliedly, evinces the intention to 'cover the field', it is then imputed that only its laws must be applicable.

Nowhere found in the text of the *Constitution*, the 'cover the field' principle was created by Isaacs J in *Clyde Enginnering Co Ltd v Cowburn*, in 1926. There Isaacs J argued that 'if a competent legislature expressly or impliedly evinces its intention to cover the whole field that is a conclusive test of inconsistency where

45 (1942) 66 CLR 557, 573.

46 *Mabo v Queensland* (1988) 166 CLR 186.

47 *Colvin v Bradley Bros Pty Ltd* (1943) 68 CLR 151.

48 *Clyde Enginnering Co Ltd v Cowburn* (1926) 37 CLR 466.

another legislature assumes to enter to any extent upon the same field'.<sup>49</sup> The test was later explained by Dixon J as follows:

When the Parliament of the Commonwealth and the Parliament of a State each legislate upon the same subject and prescribe what the rule of conduct shall be, they make laws which are inconsistent ... But the reason is that, by prescribing the rule to be observed, the Federal statute shows an intention to cover the subject matter and provide what the law upon it shall be. If it appeared that the Federal law was intended to be supplementary to or cumulative upon State law, then no inconsistency would be exhibited in imposing the same duties or in inflicting different penalties. The inconsistency does not lie in the mere existence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such intention, it is inconsistent with it for the law of a State to govern the same conduct or matter.<sup>50</sup>

Conceived by Isaacs J and endorsed by the High Court in subsequent cases, the 'cover the field' test has been instrumental in expanding federal powers at the expense of the states. According to Gibbs, the full adoption of the 'cover the field' test 'no doubt indicates that the Courts have favoured a centralist point of view rather than a federal one'.<sup>51</sup>

## V HIGH COURT ON FEDERALISM

Every federation requires a neutral power to determine whether either level of government — federal or state — has exceeded the constitutional limits of its respective legislative, executive or judicial powers. When Deakin introduced the Judiciary Bill into federal Parliament, in 1903, he explained that the federal courts would be in charge of preserving the federal nature of the *Constitution*. He called the High Court the 'keystone of the federal arch',<sup>52</sup> because, as Dicey pointed out, its members were 'intended to be the interpreters, and in this sense the *protectors* of the Constitution. They [were] in no way bound ... to assume the constitutionality of laws passed by the federal legislature'.<sup>53</sup>

49 Ibid 489.

50 *Ex parte Leans* (1930) 43 CLR 472, 483. A few years later, in *Victoria v Commonwealth* (1937) 58 CLR 618, 630 ('*The Kakariki*'), Dixon J provided a shorter definition of the test:

It appears from the terms, the nature or the subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so is inconsistent.

51 Harry Gibbs, 'The Decline of Federalism?' (1994) 18 *University of Queensland Law Journal* 1, 3.

52 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10 967.

53 Dicey, above n 3, 387–8.

During its two first decades of existence the High Court interpreted the *Constitution* in the way it was designed. First appointed in October 1903, the court originally comprised only three judges: Samuel Griffith CJ and Edmund Barton and Richard O'Connor JJ. Griffith was the leader of the convention of 1891 and Barton in 1897–8; O'Connor was one of Barton's closest associates. As Aroney points out, 'no one could have better understood the process by which the Constitution had been brought into being, the animating ideas and the pattern of debate than these three judges'.<sup>54</sup>

Those first members of the High Court faithfully sought to protect the federal structure of the *Constitution* in the way it was designed. To that goal they borrowed from the United States the doctrine of states' 'reserved powers', to ensure 'that the residual legislative powers of the states ... were not diminished through an expansive reading of the Commonwealth's legislative powers'.<sup>55</sup> So when a legislative power is found to belong to the states, they should be entitled to the same level of independence in its exercise as is the central government in wielding its own authority. The 'reserved powers' doctrine dictates that each level of government must possess its own sphere of legislative autonomy. This entitlement to legislative independence is declared a state right. The 19<sup>th</sup> century's US constitutionalist Thomas M Cooley commented:

State rights consist of those rights which belonged to the States when the Constitution was formed, and have not by that instrument been granted to the Federal government, or prohibited to the States. They are maintained by limiting the exercise of federal power to the sphere which the Constitution expressly or by fair implication assigns to it.<sup>56</sup>

That was the position adopted by the High Court in its early years of existence. The first members of the High Court considered the 'reserved powers' to directly derive from s 107 of the *Constitution*. This section informs that

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

Hence, any grant of power which is not explicitly given by the federal *Constitution* to the central government must be interpreted as legislative powers 'continuing' with the states. The intrinsic correlation between 'reserved powers' and s 107 was clarified by the High Court in *R v Barger*:

The scheme of the Australian Constitution, like that of the United States of America, is to confer certain definite powers upon the Commonwealth,

54 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, 15.

55 Peter Hanks, Patrick Keyzer and Jennifer Clarke (eds), *Australian Constitutional Law: Materials and Commentary* (LexisNexis Butterworths, 7<sup>th</sup> ed, 2004) 569.

56 Thomas M Cooley, *Principles of Constitutional Law* (Little, Brown and Company, 3<sup>rd</sup> ed, 1898) 35–6.

and to reserve to the States, whose powers before the establishment of the Commonwealth were plenary, all powers not expressly conferred upon the Commonwealth. This is expressed by sec 107 of the Constitution.<sup>57</sup>

A second doctrine adopted by the early Court to protect federalism is called ‘implied immunity of instrumentalities’. Overall, this doctrine ensures that neither the Commonwealth nor the states are allowed to control each other. Instead, both of them must be generally immune from each other’s laws and regulations, so that their ‘instrumentalities’ (agencies) may be protected from any external encroachment. After all, if federalism implies that each tier of government enjoys a certain degree of independence in its own spheres of power, then none of them must be allowed to tell another what it might or might not do.

These two basic doctrines began to be eroded when Isaac Isaacs and Henry Higgins were appointed to the High Court in 1906. These judges were politically inclined to expand Commonwealth powers and from the beginning they adopted a highly centralist reading of the *Constitution*. Isaacs and Higgins JJ had participated at both the 1891 and 1897–8 conventions, but they were often in the minority in most of the debates, and had no formal role in the drafting of the *Constitution*.<sup>58</sup> Indeed, as Walter Sofronoff explains, Isaacs’s ideas were so unpopular amongst his peers, ‘that despite his acknowledged skill and talent, he was excluded from the drafting committee which settled the final draft of the Constitution for consideration by the Conventions’.<sup>59</sup>

There is a good reason, therefore, to question the reliability of their views concerning the underlying ideas and general objectives of Federation.<sup>60</sup> Even so, in *Amalgamated Society of Engineers v Adelaide Steamship*, in 1920, Isaacs J successfully introduced a new method of interpretation whereby no areas of law are assumed to be reserved to the states.<sup>61</sup> Under Isaacs J’s leadership the ‘implied immunity of instrumentalities’ and the ‘reserved powers’ doctrine were overturned on the grounds that s 107 is simply about continuing state powers that are exclusive, or which are protected by express reservation in the *Constitution*.

This is a gross misreading of s 107, which refers only to legislative powers that are not exclusively granted to the federal government. Section 107, therefore, actually confirms that state parliaments must continue to exercise full legislative powers, except for those that are given exclusively to the Commonwealth at Federation. So when it comes to the configuration of legislative power between the Commonwealth and the states, writes Aroney, the framers of the *Constitution* saw the states as ‘possessing original powers of local self-government, which they specifically insisted would continue under the Constitution, subject only

57 (1906) 6 CLR 41.

58 Aroney, above n 54, 4.

59 Walter Sofronoff, ‘Deakin and the Centralising Tendency’ (2008) 52(9) *Quadrant* 86, 86.

60 Aroney, above n 54, 1.

61 Gibbs, above n 51, 2–3; *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 146–54 (Isaacs J) (‘*Engineers*’).



to the carefully defined and limited powers specifically conferred upon the Commonwealth'.<sup>62</sup> And yet, since the *Engineers'* case, Walker explains:

The reserved powers approach has been called unsupportable because s 107 does not, unlike the Tenth Amendment [to the US Constitution], use the word "reserved". That is just an insubstantial matter of labelling. As s 107 says State powers "shall ... continue", the Court could just as easily have called it the "continuing powers" approach. If anything, s 107 is more forcefully expressed, as it saves "every" power and excepts only those powers "exclusively" vested in the Commonwealth, words of emphasis that do not appear in the American model. Chief Justice Marshall in *McCulloch v Maryland* pointed out that the word "*expressly* [delegated to the central government]" used in the 1781 Articles of Confederation was dropped from the Constitution, probably deliberately. Griffith remarked on this in *D'Emden v Pedder*, pointing out that s 107 was more definite than the Tenth Amendment.<sup>63</sup>

The main problem with the majority decision in the *Engineers'* case was the refusal to interpret the *Constitution* as a federal document. The court opted instead to interpret this merely as an Act of the Imperial Parliament (UK), meaning that any grant of federal power should be interpreted as expansively as possible. As early as 1906, in the *Railway Servants'* case,<sup>64</sup> Isaacs, in his capacity as Commonwealth Attorney-General, could already be found advocating the same interpretative approach that as a Justice he would apply in 1920. Back in 1906 Isaacs submitted:

The Constitution must be dealt with in the same way as any other Imperial Act of Parliament. No prohibitions are to be implied in it ... The Australian Constitution is a grant and distribution of powers by the Imperial Parliament. The Constitutions of the States now depend on the Constitution of the Commonwealth.<sup>65</sup>

Although justifiable by the fact that the *Constitution* in its form was a statute of the Imperial Parliament, such an argument 'completely overlooks the federal basis and structure of the Constitution as a whole'.<sup>66</sup> Since the drafters of the *Constitution* opted for defining only the federal powers specifically, and they explicitly informed that all the existing powers of the states must continue, there is an obvious reason to assume that the preservation of state powers in s 107 is *logically before* the conferral of federal power in s 51. As Aroney explains, 'such a scheme suggests that there is good reason to bear in mind what is *not* conferred on the Commonwealth by s 51

62 Aroney, above n 54, 13.

63 Geoffrey de Q Walker, 'The Seven Pillars of Centralism' (Paper presented at the Fourteenth Conference of the Samuel Griffith Society, Menzies Hotel, Sydney, 14–16 June 2002) 20 <<http://www.samuelgriffith.org.au/papers/pdf/Vol14.pdf>>.

64 *Federated Amalgamated Government Railway and Tramway Service Association v The New South Wales Railway Traffic Employees' Association* (1906) 4 CLR 488 ('*Railway Servants*').

65 Ibid 497.

66 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) 69 <<http://www.samuelgriffith.org.au/papers/pdf/Vol14.pdf>>.

when determining the scope of what *is* conferred. There is, therefore, good reason to be hesitant before interpreting federal heads of power as fully and completely as their literal words can allow'.<sup>67</sup> In sum, writes Aroney,

the configuration of legislative power in the Constitution reflected not so much a ... 'division of powers' between the Commonwealth and the states, but a transfer of limited powers to the Commonwealth by the states. This is not to deny the undoubted fact that the Australian Constitution would derive its legal force from its enactment by the imperial Parliament of Westminster, so that, legally speaking, the powers were ultimately derived from the United Kingdom and 'divided' among them in this sense. But it is to assert that the structural logic of the Constitution was shaped not by the legally defined origin of the Constitution, but by its political origin: the peoples, the representative legislatures and the elected government of the several colonies. The political origin of the Constitution meant that legislative power was conceived as originating with the states, with limited and mostly overlapping or concurrent powers being conferred upon the Commonwealth.<sup>68</sup>

Fortunately, even after the *Engineers'* case the High Court has declared that there are certain things that the central government is not allowed to do. In *Melbourne Corporation v Commonwealth*, a federal law was declared invalid if it either discriminates against a state or if it impinges on the capacity of states to exist as 'independent entities'.<sup>69</sup> In practice, however, this principle has done little to restrict the expansion of Commonwealth power, because it is not uncommon for the Court to recognise the principle but then suggest that it has not been breached in the particular case. Cheryl Saunders is one academic who has questioned the effectiveness of the *Melbourne Corporation* principle, asking:

What is the utility of a principle which protects the formal existence of the States in a federation, or that nebulous concept of their capacity to function, while enabling them to be deprived of an unlimited and unpredicted range of functions or the revenue resources to meet those functions?<sup>70</sup>

Indeed, the fundamental problem of (unconstitutional) centralisation has not been altered, among other things because the general method of interpretation espoused by Isaacs has prevailed as the method most frequently adopted by the

67 Ibid.

68 Aroney, above n 7, 366–7.

69 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 ('*Melbourne Corporation*').

70 Cheryl Saunders, 'The National Implied Power and Implied Restrictions on Commonwealth Power' (1983–84) 14 *Federal Law Review* 267, 275.

High Court, so that the supremacy of the Commonwealth has been judicially assured.<sup>71</sup>

## **A External Affairs and the Constitution**

The High Court's centralist approach can also be observed in the interpretation of s 51(xxix) of the *Constitution*, which states: 'The Parliament shall, subject to this Constitution, have the power to make laws for the peace, order, and good government of the Commonwealth with respect to ... external affairs'.

The federal executive has entered into over a thousand treaties on a wide range of matters.<sup>72</sup> Numerous of these international agreements are related to topics not otherwise covered by the enumerated powers of the *Constitution*. In *R v Burgess* the majority (Latham CJ, Evatt and McTiernan JJ) held that this section should not be restricted to a power to make laws with respect to the external aspects of the other subjects mentioned in s 51. For Latham CJ, it would be 'impossible to say *a priori* that any subject is necessarily such that it could never properly be dealt with by international agreement'.<sup>73</sup>

In his dissenting judgment, Starke J argued that the external affairs power should be limited to situations where the subject of the treaty is 'of sufficient international significance to make it a legitimate subject for international co-operation and agreement'.<sup>74</sup> Similarly, Dixon J dissented in these terms:

It seems an extreme view that merely because the Executive Government undertakes with some other country that the conduct of persons in Australia shall be regulated in a particular way, the legislature thereby obtains a power to enact that regulation although it relates to a matter of internal concern which, apart from the obligation undertaken by the Executive, could not be considered as a matter of external affairs.<sup>75</sup>

There is a wide range of international treaties and conventions which can be used to underpin federal legislation. The Commonwealth can undermine federalism just by making a greater use of the external affairs power, without having to rely

71 Michelle Evans comments:

Federal theory and the Federal Constitution itself which took effect from 1 January 1901, both envisaged the States as sovereign participants on an equal footing with the Federal Government. However, the result of the High Court's decision in *Engineers* was to reject this premise of the equality of the States and to interpret the Constitution in a manner that has resulted in increased centralisation of powers. Thus, Australia is no longer the Federation that it once was

Michelle Evans, 'Rethinking the Federal Balance: How Federal Theory Supports States' Rights' (2010) 1 *The Western Australian Jurist* 14, 52.

72 In 1995 it was estimated by the Department of Foreign Affairs and Trade that Australia was then a party to approximately 920 current treaties: Editors, 'Treaties: International Instruments — Unincorporated by Domestic Legislation — Operation in Australian Law' (1996) 17 *Australian Year Book of International Law* 552, 556.

73 *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, 641.

74 *Ibid* 641.

75 *Ibid* 699.

on any co-operation by the states. Indeed, Gibbs once argued that, together with the regular operation of s 109 (inconsistency) of the *Constitution*, the external affairs power therefore offers the potential to ‘annihilate State legislative power in virtually every respect’.<sup>76</sup> Likewise, in the *Tasmania Dam* case, Gibbs J stated:

The division of powers between the Commonwealth and the States which the Constitution effects could be rendered quite meaningless if the federal government could, by entering into treaties with foreign governments on matters of domestic concern, enlarge the legislative powers of the [Commonwealth] Parliament so that they embraced literally all fields of activity ... Section 51 (xxix) should be given a construction that will, so far as possible, avoid the consequence that the federal balance of the Constitution can be destroyed at the will of the Executive.<sup>77</sup>

The above concerns have not been accommodated. Rather, the High Court has given the power to the Commonwealth to legislate on any area of law covered by a *bona fide* international instrument. Thus what the federal Parliament could not do under the *Constitution* it can now do by virtue of any treaty obligation. As a result, the central government can increase legislative power simply by agreeing to ratify such treaties.<sup>78</sup> This possibility was recognised by Dawson J, who saw a broad interpretation of the external affairs power as having ‘the capacity to obliterate the division of power which is a necessary feature of any federal system and our federal system in particular’.<sup>79</sup>

## **B Industrial Relations and the Constitution**

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

The idea that the Commonwealth should have plenary power to legislate with respect to industrial disputes was first introduced by South Australian Premier Charles Cameron Kingston in 1891. He contended that the Commonwealth Parliament should be able to make laws ‘for the establishment of courts of conciliation and arbitration, having jurisdiction throughout the Commonwealth, for the settlement of industrial disputes’.<sup>80</sup> The reason for this, according to Nicola

76 Gibbs, above n 51, 5.

77 *Commonwealth v Tasmania* (1983) 158 CLR 1, 100 (Gibbs CJ) (*‘Tasmanian Dams’*).

78 Cooray, above n 43, 35.

79 *Victoria v Commonwealth* (1996) 187 CLR 416, 9 (*‘Industrial Relations Act’*).

80 R J Buchanan and I M Neil, ‘Industrial Law and the Constitution in the New Century: An Historical Review of the Industrial Power’ (2001) 20 *Australian Bar Review* 3, 255, citing *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, vol 1, 688.

Petit, is that ‘the strikes of the early 1890’s were fresh in the framers’ minds and both the supporters and opposers of a federal industrial disputes power saw the industrial conflicts as an ‘evil’ that must be avoided’.<sup>81</sup>

Although Kingston withdrew his proposal before the delegates could vote on the subject, a new proposal was presented by Henry Higgins of Victoria in 1897. Higgins argued that the Commonwealth should have the power to legislate with respect ‘to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any State’.<sup>82</sup> Although these are now the words of s 51 (xxxv), this proposal was soundly defeated (22 to 12) because some of the delegates were concerned that industrial disputes were essentially local in character.<sup>83</sup>

Higgins then put the same proposal again in 1898, and, at this time, the conciliation and arbitration power was narrowly adopted 22 to 19. Arguably, the majority of delegates who voted for this inclusion did so because they thought that this would not be used and so there was no harm in including it. Even so, delegates such as McMillan of New South Wales expressed the concern that disputes could actually be manufactured in order to come under federal jurisdiction. Overall, writes Louise Clegg:<sup>84</sup>

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

The worst fears of McMillan were fulfilled in the *Builders Labourers* case, when the High Court decided to broaden the reach of the industrial disputes by declaring that ‘paper disputes’ (ie, the use of written ‘logs of claims’ served on employers) were sufficient to generate an interstate dispute.<sup>85</sup> These paper disputes enabled many people to come under federal jurisdiction, but the Commonwealth still had a limited power to legislate with respect to industrial disputes, because the conciliation and arbitration power is a (limited) purposive power that has far more limitations than other plenary powers of the *Constitution*.

Ten years after Federation, the federal Labor government tried to expand its reach into industrial affairs through referendum. The referendum failed, as did

81 N Petit, *Did the High Court Kill Federalism?* (Honours Thesis, Murdoch University, 2007) 10.

82 Higgins thought the power was necessary because some disputes, such as those in the maritime industry, affected people in more than a single state: John Manning Ward, *The State and the People: A History of Australian Federation and Nation-Making, 1870–1891* (Federation Press, 2001) 116.

83 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 27 January 1898, 187 (Sir John Downer), 199 (O’ Connor).

84 Louise Clegg, *The New Era of Uniform Industrial Relations: How Far Does the Corporations Power Extend?* (2006) UNSW — Gilbert + Tobin Centre of Public Law <[http://www.gtcentre.unsw.edu.au/publications/papers/docs/2006/7\\_LouiseClegg.pdf](http://www.gtcentre.unsw.edu.au/publications/papers/docs/2006/7_LouiseClegg.pdf)>.

85 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte G P Jones* (1914) 18 CLR 224, 242 (*Builders Labourers*). The unions had created an excessive log of claims that were sent to as many employers as possible across state borders. Those claims were excessive so as to ensure the employers would dispute them.

five others put forward by federal Labor governments in 1913, 1919, 1944, 1946 and 1973. The Nationalist Party also unsuccessfully put forward a proposal law affecting industry and commerce in 1926.

Frustrated by the people's reluctance to expand the federal power, the Commonwealth sought a way to overcome the problem by turning to other grants of legislative power. As such, other heads of legislative power have been used to expand the Commonwealth's reach over industrial affairs. The industrial relations reforms in the 1990s saw *Constitution* s 51(xx) — the corporations power — emerge as a major source of power to rival the original reliance on the conciliation and arbitration power.<sup>86</sup>

### C The Work Choices Case

Section 51(xx) of the *Constitution* confers power on the federal government to make laws with respect to trading or financial corporations formed within the limits of the Commonwealth. In 2005, the Commonwealth created a national industrial relations system based mainly on s 51(xx), subjecting all the employees working at 'constitutional corporations' formed within the limits of the Commonwealth to this industrial relations system.

One of the main arguments against the validity of that system was that the corporations power was not the appropriate head of power for regulating industrial relations. The appropriate head of power was s 51(xxxv), which limited the federal power to matters of conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state. The plaintiffs thus contended that a wide reading of a head of power should be prevented if there is an explicit restriction that is based on the express language of the *Constitution*.

In the *Work Choices* case, a five-to-two majority did not accept that express limitation.<sup>87</sup> They followed a centralist approach in which so long as a law could be characterised as a law with respect to a subject-matter within the legislative power, it did not matter that it also affected another subject matter altogether. As such, a head of power did not have to be read narrowly so as to avoid this breaching the explicit limitations of another head of power.

In this sense, the result in *Work Choices* represents the continuation of how the High Court has approached the *Constitution* since the *Engineers'* case. It confirms the Court's centralist method, which has given the Commonwealth the potential to further regulate areas of law that have previously been within state

86 For a detailed analysis of how s 51(xx) may expand the federal power over industrial affairs, see Augusto Zimmermann, 'Industrial Relations and the Commonwealth Constitution: The Constitutional Underpinnings for a National System of Industrial Relations in Australia' (2009) 12 *International Trade and Business Law Review* 185.

87 *Work Choices* (2006) 229 CLR 1.

control.<sup>88</sup> In his dissenting judgment, Kirby J emphasised the need to adopt a more narrow approach to constitutional interpretation, stating that the decision risked ‘destabilising the federal character of the Australian constitution’.<sup>89</sup> According to him:

In the interpretation of legal words, it is accepted today that serious errors can result from focusing on the words alone, in isolation, and omitting the context in which those words appear. Paying regard to context is now a settled requirement for the construction of statutes. The same is true in ascertaining the meaning of a constitutional provision . . . It follows that, to take the language of the corporations power in para (xx) of s 51 in isolation and to ignore the other paragraphs of that section, would involve a serious mistake. . . . Clearly, it was not intended that s 51(xxxv) should be otiose, irrelevant or entirely optional to the Commonwealth in its application. Nor was it intended that the important restrictions imposed on the federal exercise of legislative powers in para (xxxv), with respect to laws on industrial disputes, should be set at nought by invoking another head of power, such as that contained in para (xx).<sup>90</sup>

Callinan J, who also dissented, argued that the centralising principles embraced by the High Court have produced ‘eccentric, unforeseen, improbable and unconvincing results’.<sup>91</sup> For him, they would have ‘subvert[ed] the *Constitution* and the delicate distribution or balancing of powers which it contemplates’.<sup>92</sup> As his Honour pointed out:

There is nothing in the text or the structure of the *Constitution* to suggest that the Commonwealth’s powers should be enlarged, by successive decisions of this Court, so that the Parliament of each State is progressively reduced until it becomes no more than an impotent debating society. This Court too is a creature of the *Constitution*. Its powers are defined in Ch III, and legislation made under it. The Court goes beyond power if it reshape the federation. By doing that it also subverts the sacred and exclusive role of the people to do so under s 128.<sup>93</sup>

88 Even so, the majority who decided that case suggested that the outcome could have been slightly different had the plaintiffs challenged the *Engineers’* case and the centralising process it undesirably engendered. Ibid 71 [50] — Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ held:

No party to these proceedings questioned the authority of the *Engineers’ Case*, or the *Concrete Pipes Case*, or the validity of the *Trade Practices Act* in its application to the domestic (intrastate) trade of constitutional corporations. Necessarily, however, the plaintiffs experienced difficulty in accommodating their submissions to those developments. If s 51(xx) is not affected by the limitations inherent in s 51(i), why is it affected by the limitations inherent in s 51(xxxv)?

89 *Work Choices* (2006) 229 CLR 1, 83.

90 Ibid 201–2 [470]–[471] (citations omitted).

91 Ibid 319–20 [772].

92 Ibid 320 [775].

93 Ibid 322 [779] (citations omitted).

## **D The Money Problem**

Perhaps the least satisfactory aspect of Australian federalism is its vertical fiscal imbalance.<sup>94</sup> The drafters of the *Constitution* wished to secure the states' financial position and independence. And yet, the High Court has allowed for the expansion of Commonwealth powers in areas of taxation that were not envisaged by them. As a result, the states have become heavily dependent on the Commonwealth for their revenue and any semblance of balance has largely disappeared.

The expansion of federal taxation powers has occurred, among other things, as a result of the Commonwealth's exclusive control over the levying of income tax. At Federation, in 1901, only the states levied income tax. By 1942, however, the Commonwealth sought to obtain the exclusive control over the income tax system. It was argued that the war effort required this to be so. Thus a series of Bills were passed that: a) prohibited taxpayers from paying state income tax until Commonwealth tax had been paid; b) provided that the rate of federal income tax was so high that it became politically impossible for the states to levy a concurrent income tax; and c) allowed the Commonwealth Parliament to provide for a grant in order to compensate the states that refrained from imposing their income taxes.

In *South Australia v Commonwealth*, a majority of the High Court held that the grants power could be used subject to any conditions the Commonwealth chose to impose.<sup>95</sup> When the war was over and the Commonwealth continued to monopolise the income tax system, a further challenge was made against the statutory regime. In *Victoria v Commonwealth*, the High Court once again confirmed the Commonwealth power to impose whatever conditions it saw fit in granting money to the states.<sup>96</sup>

The drafters of the *Constitution* conferred upon the Commonwealth the power to levy customs and excise duties so as to develop a national common market.<sup>97</sup> And yet, they sought to limit it by specifying that any surplus revenue derived from these two federal taxes be apportioned to the states. This was done to prevent any serious dislocation to the states' finances, especially during the transition from colonial to federal government. So a compromise was reached with the draft of ss 87, 89 and 93. In brief, any excess revenues should be returned to the states during a specified period of time. Once that period expired, *Constitution* s 96 would give power to the Commonwealth to grant financial assistance 'to any State on such terms and conditions as the Parliament thinks fit'.

94 Brian Galligan and Cliff Walsh, 'Australian Federalism: Developments and Prospects' (1990) 20(4) *Publius* 1, 7.

95 (1942) 65 CLR 373 ('*First Uniform Tax Case*').

96 (1957) 99 CLR 575 ('*Second Uniform Tax Case*'). In the *Second Uniform Tax Case*, however, the High Court struck down the part of the scheme which gave priority to tax due to the Commonwealth, holding that such a law did not fall within s 51(ii) or its implied incidental power. This was of very little assistance to the states, because if they imposed such tax they would lose their s 96 grants. A statement was also made in this case that the imposition of a blanket prohibition on state taxation which relied on s 109 would not lie within the Commonwealth's taxation power under s 51(ii).

97 *Constitution* s 90.



The High Court has allowed s 96 to be used subject to any conditions the Commonwealth chooses to impose.<sup>98</sup> As a result, the states are induced to achieve objects on behalf of the Commonwealth which the Commonwealth itself could not achieve under any of its enumerated powers. These conditions may be directed to any area of state law, including education,<sup>99</sup> health, roads<sup>100</sup> and compulsory purchase of land.<sup>101</sup> Section 96 grants have become, as Sir Robert Menzies put it, ‘a major, and flexible, instrument for enlarging the boundaries of Commonwealth action; or, to use realistic terms, Commonwealth power’.<sup>102</sup>

The financial problems of the states have been aggravated by judicial decisions that have effectively prevented them from raising their own taxes. States cannot raise anywhere near the revenue they need. The Commonwealth collects over 80 per cent of taxation revenue (including the GST), but is responsible for 54 per cent of government outlays.<sup>103</sup> By contrast, the states collect only 16 per cent of taxation revenue and account for approximately 39 per cent of outlays.<sup>104</sup> As a result, the states have turned to others sources of ‘taxation’ such as gambling, although remaining heavily dependent on federal grants. ‘[W]hen the Commonwealth grants them money it often does so with strings attached’.<sup>105</sup> And yet, as Stewart and Williams point out, ‘[t]he States have no real choice but to accept the money, even at the cost of doing the Commonwealth’s bidding’.<sup>106</sup>

## VII A POSSIBLE AGENDA FOR NATIONAL REFORM

The federal system in Australia has been called ‘dysfunctional’ and in need of rescue.<sup>107</sup> Federalism remains the right political structure for Australia, but it is also clear that there are significant challenges facing our federal system and that a process of reform offers the opportunity to improve and strengthen the day-to-

98 *First Uniform Tax Case* (1942) 65 CLR 373.

99 In *A-G (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559 (*‘DOGS’*), the High Court held that the Commonwealth could grant the states money on condition that the states then paid it to religious schools.

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

101 In *Pye v Renshaw* (1951) 84 CLR 58, the Court upheld the use by the Commonwealth of s 96 to grant money to the states, provided it was used to effect the purchase of land for returning servicemen at less than its value. As a result, the Commonwealth evaded the s 51(xxxi) requirement that property must be acquired on just terms.

102 Menzies, above n 26, 76.

103 Andrew Stewart and George Williams, *Work Choices: What the Court Said* (Federation Press, 2007) 12–13.

104 *Ibid* 13.

105 *Ibid*.

106 *Ibid*.

107 See, eg, George Williams, ‘Old Flaws in Federalism Rise Again’, *The Sydney Morning Herald* (Sydney), 12 April 2005; Ken Wiltshire, ‘Academic Urges Constitutional Reform’, *UQ News Online* (online), 28 February 2007 <<http://www.uq.edu.au/news/index.html?article=11518>>; Mike Stekete, ‘Federalism Is a Dead Idea. So What Now?’, *The Australian* (Sydney), 24 April 2010.

day operation of federalism in Australia. This paper will discuss and recommend a number of specific reform proposals in relation to the following areas:

- (a) the distribution of constitutional powers and responsibilities;
- (b) processes for enhancing cooperation between the various levels of Australian government;
- (c) financial relations between federal and state governments; and
- (d) possible constitutional amendments.

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

### **A The Distribution of Constitutional Powers and Responsibilities**

The world has changed significantly since the *Constitution* was drafted over one hundred years ago. While the core constitutional principles and structures remain as relevant today as they were at the time of Federation, it is increasingly accepted that it would be beneficial to revisit the distribution of constitutional powers and responsibilities between levels of government to ensure greater clarity and to better reflect modern conditions. The current Australian Federation is characterised by significant areas of shared responsibility, which heightens the opportunity for a ‘blurring of government responsibilities — from cost and blame-shifting among government levels, wasteful duplication of effort or under-provision of services, and a lack of effective policy coordination’.<sup>108</sup>

It is also important to note that the constitutional allocation of powers envisaged by the Founding Fathers — creating a national government with expressly defined and limited powers — has, in a number of significant areas, shifted considerably as a result of an approach to constitutional interpretation in the High Court that has consistently expanded federal powers. The current constitutional division of powers is, in many respects, the worst of both worlds — it neither faithfully reflects the federal design of the Founding Fathers, nor has it fully evolved to reflect modern realities and challenges.

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

to isolate a particular area of policy, and allocate it in its entirety to one level of government ... [T]his enhances responsibility, provides clarity to

108 Organisation for Economic Co-operation and Development, *Economic Surveys: Australia 2006* (OECD Publishing, 2006) 81–2.

those who use particular services and avoids the problems of cost-shifting and buck-passing.<sup>109</sup>

The principle of subsidiarity should be applied in this analysis to appropriately reflect Australia's federal nature. It consists in letting people do what they can do by themselves and, on a higher level, leaving up to the federal government what cannot be done by lesser circles of power. In other words, subsidiarity leaves up to the states (and the individual citizens) what they can do by themselves and leaves in the hands of the federal government only what cannot be done otherwise.<sup>110</sup> This principle provides:

that functions should, where practical, be vested in the lowest level of government to ensure that their exercise is as close to the people as possible and reflects community preferences and local conditions ... The principle of subsidiarity places the onus on those who seek to place a function with a higher level of government to make the case for it.<sup>111</sup>

That is not to say that there is no role for the national government. It is recognised that certain powers should be vested in the national government, such as where there are overriding national interest concerns (such as defence), where national uniformity is required for reasons of equity (such as social security benefits), where there are significant economies of scale available to a national government, or where there are significant potential inter-jurisdictional spill-overs if a lower level of government is given responsibility. When we speak of re-strengthening federalism this is not just a blanket call to strengthen states' rights, but rather a call to establish an effective and clear balance between national and state responsibilities. This reflects the view of the former Prime Minister, John Howard, who stated that: 'I have never been one to genuflect uncritically at the altar of States' rights. Our Federation should be about better lives for people, not quiet lives for Governments'.<sup>112</sup>

It has been suggested that the reallocation of constitutional powers could largely be achieved in practice without the need for formal constitutional amendment. While this may be possible, and may well be the only practical way of enacting agreed reforms in the short to medium term, it would ultimately be preferable and proper to enact any proposed changes through the formal amendment procedure provided under *Constitution* s 128. As Twomey concluded: 'This ensures that the people are consulted and give their imprimatur to the change and also prevents backsliding or repudiation by future governments'.<sup>113</sup>

109 Twomey and Withers, above n 15, 46.

110 See Augusto Zimmermann, 'The Principle of Subsidiarity: A Policy for the Democratic Reform of the Brazilian Federal State' [2000] (Spring) *Democracy* 2, 2–7.

111 Anne Twomey, 'Reforming Australia's Federal System' (2008) 36 *Federal Law Review* 57, 59.

112 John Howard, 'Reflections on Australian Federalism' (Speech delivered at the Menzies Research Centre, Melbourne, 1 April 2005).

113 Twomey, above n 111, 63.

## **B Processes for Enhancing Cooperation between the Various Levels of Australian Government**

### **1 Reforming the Senate**

The Senate was originally intended as the states' house, but has increasingly moved away from this intended role. The central role occupied by political parties in the Australian political system means that the primary loyalty of individual Senators is now generally to the political party on which their pre-selection depends, rather than to their home state. Given that the same party political divide also permeates the state level of government it is difficult to see that devolving the power to appoint Senators to the state Parliaments would actually make any practical difference.<sup>114</sup> There are, however, other reforms that have been suggested that may help to give the Senate a stronger role in supporting the federal balance. The first of these is the suggestion that a permanent Senate Standing Committee on Federal–State Relations should be established. The second is the suggestion by the Victorian Federal–State Relations Committee:

that Senators be given the right to appear before the Parliament of the State from which they are elected, to report on a regular basis and answer questions on matters of concern to the State. The intention was to make Senators focus more on their role as representatives of the State, as well as to increase their understanding of matters of importance to the States.<sup>115</sup>

While this reform could not be expected, on its own, to be sufficient to entirely restore the federal balance, there are likely to be significant benefits that flow from encouraging greater communication and cooperation between the state Parliaments and the individual Senators who are selected to represent each particular state.

### **2 Strengthening the Council of Australian Governments**

The Council of Australian Governments ('COAG') was established in May 1992, but has had an equivocal history as a mechanism for delivering national reforms. While there have been some significant reforms delivered through COAG, its

114 This is the model that operates in Germany, where the *Bundesrat* represents the sixteen *Länder* directly, through its members being delegated by the respective *Länder* governments. Peter Beattie has previously suggested the German model as a possible reform model that could be adopted in Australia, with every state Premier being automatically appointed to the Senate. He saw this as having a number of potential advantages, including that it 'would force the States and Commonwealth to work more closely together. The result should be a reduction in buck passing, and improved collective responsibility': Peter Beattie, 'A Vision beyond the Blame Game' (2008) 19 *Griffith Review* 38, 41.

115 Twomey, above n 111, 76, citing Victorian Parliament, Federal–State Relations Committee, *Federalism and the Role of the States: Comparisons and Recommendations: Third Report on the Inquiry into Overlap and Duplication of Roles and Responsibilities between the Commonwealth and the State, and Areas of Responsibility for Which the States Should Have an Enhanced Role for the Benefit of the Federation* (Government Printer, 1999) 220.

achievement have been ‘sporadic and unreliable’<sup>116</sup> and ‘its effectiveness has waxed and waned depending upon personalities and political events’.<sup>117</sup> There is, however, a clear need for better cooperative mechanisms both to deal with areas of shared responsibility in the federal system and to encourage a cooperative form of federalism. The suggestion by the Business Council of Australia for the institutionalisation and strengthening of COAG is a worthy one, and a reform that could be effectively enacted with relative ease.<sup>118</sup> The Business Council of Australia has suggested that this would involve strengthening the role of COAG (which would include instituting more regular meetings and a permanent secretariat separate from its current location within the Department of Prime Minister and Cabinet) and improving its accountability mechanisms.<sup>119</sup> As part of these efforts to strengthen COAG as a body promoting cooperative federalism, it has also been suggested that ‘efforts be made to remove the perception of COAG as a creature of the Commonwealth by ensuring that the timing, chairing, hosting and agendas of meetings are determined jointly, rather than by the Commonwealth alone’.<sup>120</sup>

It is also proposed that COAG should be given an enhanced and formalised role in certain policy areas. One obvious example is the Commonwealth’s signing and ratification of treaties under the external affairs power. As discussed above, the external affairs power under s 51(xxix) of the *Constitution* has been given an expansive interpretation by the High Court. The proliferation of treaties has led to an expansion of Commonwealth powers at the expense of the state as ‘[s]imply by entering into a treaty, the Commonwealth Government can give the Commonwealth Parliament what is in effect a new head of legislative power’.<sup>121</sup>

There are currently formal mechanisms designed to encourage consultation with state and territory governments before treaties are entered into. The key consultative body is the Treaties Council within COAG, while the Commonwealth–State–Territories Standing Committee on Treaties is another potentially significant consultative mechanism. COAG attempted to place the consultative process on a more formal footing with the adoption of the *Principles and Procedures for Commonwealth–State Consultation on Treaties* in 1996.<sup>122</sup>

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

116 Business Council of Australia, *A Charter for New Federalism* (2007) 3.

117 Twomey and Withers, above n 15, 47.

118 Business Council of Australia, above n 116.

119 *Ibid* 4–5.

120 Twomey and Withers, above n 15, 47, citing Business Council of Australia, above n 8, 35.

121 Victorian Parliament, Federal–State Relations Committee, *Report on International Treaty Making and the Role of States* (1997) 13.

122 Council of Australian Governments, *Principles and Procedures for Commonwealth–State Consultation on Treaties* (14 June 1996) <[http://www.coag.gov.au/coag\\_meeting\\_outcomes/1996-06-14/docs/attachment\\_c.cfm](http://www.coag.gov.au/coag_meeting_outcomes/1996-06-14/docs/attachment_c.cfm)>.

In the interests of achieving the best possible outcome for Australia, and where a treaty or other international instrument is one of sensitivity and importance to the States and Territories, the Commonwealth should, wherever practicable, seek and take into account the views of the States and Territories, in formulating Australian negotiating policy, and before becoming a party to, or indicating its acceptance of, that treaty or instrument.<sup>123</sup>

The use of phrases such as ‘wherever possible’ and ‘take into account’ highlights the discretionary and largely symbolic nature of the consultative mechanism. In practice, the burden of implementing the obligations imposed under international treaties entered into by the Commonwealth effectively falls on the states where those treaties relate to areas of state policy responsibility. Although the Commonwealth is the signatory who will be held liable at the international level for any failure to confirm to its obligations, where treaties imposed obligations that impact upon areas of state responsibility it is the states at the domestic level who face the prospect of being required to shape their behaviour by reference to the treaty. The alternative is to face the prospect of the Commonwealth deciding to assert the constitutional authority that is granted to it by the external affairs power under s 51(xxix). The external affairs power, in this way, effectively allows the Commonwealth to enter into policy areas not otherwise covered by the enumerated powers of the *Constitution* in order to ensure that it meets its international obligations. The Commonwealth government is therefore effectively free to enter into treaties at the international level that directly impact upon the states at the domestic level, over and above any objections that may be put forward by the states.<sup>124</sup>

While recognising that it is necessary to speak with one voice at the international level and that only the Commonwealth government can ultimately have responsibility for entering into treaties on behalf of Australia, it is submitted that the states should be given a more substantive role in this process. This could be done either by providing for a process of approval by state Parliaments or, recognising the delays that might result from the previous suggestion, by requiring that the Treaties Council be given a more substantive role. This may include a power of veto over a prospective treaty, where the proposed treaty is one that impacts on areas of state activity. Such a process could be incorporated into the existing consultation process that is undertaken when Australia is considering becoming a party to an international treaty, but before the treaty is ultimately signed and ratified.

123 Ibid.

124 This potential tension is not unique to Australia, being recognised and discussed, for example, in the US Supreme Court decision of *Medellin v Texas*, 552 US 491 (2008).

## **C Financial Relations between Federal and State Governments**

Probably the area in which reform is most urgently needed is in the financial relations between federal and state governments. This federal–state relationship has been characterised by an ever-increasing accumulation of financial power on the part of the federal government and ever-decreasing claims to financial independence on the part of the state governments. The states have been described as ‘institutionalised beggars’<sup>125</sup> — a somewhat crude, and yet revealing metaphor. Deakin’s prescient claim that the states were ‘legally free, but financially bound to the chariot wheels of central Government’<sup>126</sup> presents a realistic picture of the current state of affairs.

This increasingly unequal financial relationship has potentially broad consequences for the federal balance in terms of the allocation of responsibilities. The limited financial capacities of the states as compared to the Commonwealth tend to fuel arguments that the Commonwealth should enter areas that have traditionally been state responsibilities. As Twomey and Withers have observed:

It is disingenuous to suggest that the States are failing in their responsibilities because they require Commonwealth funding and that the Commonwealth should therefore take over State policy functions, when this is the system that the Commonwealth deliberately created.<sup>127</sup>

The financial relations between federal and state governments, and proposals for reform, will be considered below in terms of the need to reduce both the vertical fiscal imbalance and the use of specific purpose payments, as well as the need to revisit the extent of horizontal fiscal equity.

### **1 Reducing Vertical Fiscal Imbalance**

The term vertical fiscal imbalance (‘VFI’) describes

a mis-match between the revenue raising powers and expenditure responsibilities of each level of government, where a short-fall in revenue for one level of government (typically the regional level) is made up for by grants funded from the surplus revenue of the other (typically the central government).<sup>128</sup>

125 Matthew Franklin, ‘Abbott Slams State Health “Beggars”’, *Weekend Australian* (Sydney), 12 August 2006, 8.

126 Alfred Deakin, Letter to the Editor, *Morning Post* (London), 1 April 1902, quoted in George Williams, ‘It’s Time to Repair Australia’s Tattered Federalism’, *Canberra Times* (Canberra), 28 March 2008, 15.

127 Twomey and Withers, above n 15, 26.

128 Department of Treasury and Finance, ‘Discussion Paper on Commonwealth–State Relations: An Economic and Financial Assessment of How Western Australia Fares’ (Discussion Paper, Government of Western Australia, April 2006) 11.

In a federal system some level of VFI is realistically to be expected,<sup>129</sup> but it is broadly seen as desirable to aim for an approximate level of fiscal equivalence, where the revenue raising powers and expenditure responsibilities of each level of government are balanced. The central advantage of fiscal equivalence is that it ‘enhances accountability and responsibility, as the same government has to make the hard choices related to balancing tax and expenditure levels.’<sup>130</sup>

The Australian federal system is characterised by one of the highest levels of VFI amongst federal systems across the world.<sup>131</sup> The result of this is that the states are increasingly dependent on the national government for funding. For example, the WA Department of Treasury and Finance has estimated that the WA government relies on the national government for approximately 50 per cent of its total operating revenue.<sup>132</sup> Statistics from the Australian Bureau of Statistics in 2005 showed that the national government directly collected approximately 82 per cent of taxes, of which approximately 27 per cent is transferred back to state governments. On the other hand, state governments undertake 40 per cent of public spending in Australia, evidencing a significant VFI.<sup>133</sup> This comparatively high level of VFI ‘largely reflects the erosion since Federation of the States’ revenue powers’ as seen in the transfer of income taxes to the national government,<sup>134</sup> the abolition of a range of state taxes under the *1999 Intergovernmental Agreement on the Reform of Commonwealth–State Financial Relations* (‘IGA’),<sup>135</sup> and the broad interpretation given to s 90 of the *Constitution* by the High Court of Australia.<sup>136</sup>

Such a stark degree of VFI is not desirable. Their increasing reliance on grants from the national government means that states are, to a growing extent, no longer the masters of their own financial destiny. This has a number of consequences including, as described above, a reduction in accountability and fiscal responsibility. It also ‘exposes State government to budget uncertainty vis a vis Australian government decisions about the level of grants’, allows the national government to use its heightened fiscal leverage to force its way into policy areas traditionally reserved to the states, and also ‘reduces incentive for States to put in place growth promoting policies and infrastructure, as the tax benefits flow primarily to the Commonwealth’.<sup>137</sup>

The *IGA*, which was signed by the federal and state governments in June 1999, was meant to improve this situation by providing states with access to a growth revenue stream by the federal government agreeing to allocate GST revenues to

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

130 Twomey, above n 111, 65.

131 Ibid 65.

132 Department of Treasury and Finance, above n 128, 15.

133 Twomey and Withers, above n 15, 36.

134 Department of Treasury and Finance, above n 128, 12.

135 Council of Australian Governments, *Intergovernmental Agreement on the Reform of Commonwealth–State Financial Relations* (1999) <[http://www.coag.gov.au/intergov\\_agreements/docs/reform\\_of\\_comm-state\\_financial\\_relations.cfm](http://www.coag.gov.au/intergov_agreements/docs/reform_of_comm-state_financial_relations.cfm)>.

136 Department of Treasury and Finance, above n 128, 12.

137 Ibid 14.



the states. The WA Department of Treasury and Finance argues, however, that this has actually increased the financial dependence of state governments on the federal government, observing that under the *IGA* ‘the States have abolished a number of their own taxes ... so that there are less revenue sources under the State’s direct control’<sup>138</sup> and that

States cannot choose (individually or collectively) to increase their revenue from the GST because the GST is an Australian Government tax and the *IGA* provides that amendments to the GST require unanimous agreement of the Australian Government and all State governments.<sup>139</sup>

A number of reforms aimed at reducing the VFI within the Australian federal system have been suggested over the years. These tend to involve either providing state governments with a greater share of overall taxation revenue or enhancing the ability of state governments to raise their own funds. One such suggestion is for the states to return to imposing their own personal income tax. There is no constitutional impediment to the states collecting income tax, and in fact they did so prior to 1942. This is not an unusual arrangement with, for example, state and provincial governments in the USA and Canada collecting their own personal income taxes in addition to income taxes levied by the national government. This would have the advantage of reducing VFI and reducing the financial reliance of the states on Commonwealth transfers, however the Business Council of Australia has warned that ‘any increase in the tax bases of states would need to be offset by equivalent reductions in Commonwealth taxes’ and that there would be a need to avoid ‘the potential for increased administrative burdens dealing with a more fragmented tax system’.<sup>140</sup>

An alternative reform proposal — which would still achieve the aim of reducing VFI while also addressing concerns about the overall tax burden and avoiding additional administrative burdens — is to introduce a formal tax-sharing arrangement, with the states provided with a guaranteed percentage of Commonwealth tax revenue. In addition to reducing VFI this would also have the benefit of providing all states with a direct interest in the economic success of all other states, with increasing economic growth directly benefiting them through corresponding increases in taxation revenues. A formal tax-sharing arrangement would likely also reduce state reliance on specific purpose payments by increasing the revenue available to them on an unconditional basis, which is itself a considerable benefit for reasons expanded upon below. Such an arrangement would not, of course, be a perfect solution for the states. It would not, for example, provide the states with the independence and enhanced budget flexibility that they would gain from levying their own taxes. It would potentially, however, be a significant improvement over current arrangements as it would reduce VFI and provide greater certainty and transparency in the financial relationship between the federal and state levels of government.

138 Ibid 17.

139 Ibid (citations omitted).

140 Business Council of Australia, above n 116, 41.

## 2 Reducing Specific Purpose Payments

The expansion of specific purpose payments ('SPPs') has further eroded the financial independence of the states and allowed the Commonwealth to enter into policy areas that have previously been the exclusive provinces of the states. The conditions that are attached by the Commonwealth to these payments effectively allow the Commonwealth to impose policy directions and programs on the states, without the limitation of requiring any connection to specific Commonwealth constitutional heads of power. They also significantly constrain state discretion and freedom in allocating their own budgets and designing their own programs. The use of SPPs continues to be significant. As Twomey and Withers outlined:

In the 2006–07 financial year there [were] at least 90 distinct SPP programs providing \$28 billion to the States or directly to non-government schools and local governments. SPPs account for 42 per cent of total payments made by the Commonwealth to the States. The requirements in many SPPs that States match funding and maintain existing efforts mean that up to 33 per cent of State budget outlays can be effectively controlled by SPPs, reducing State budget flexibility.<sup>141</sup>

In 2008, COAG agreed to significant reforms to the arrangements for SPPs. The new framework was outlined in the *Intergovernmental Agreement on Federal Financial Relations*, which commenced operation on 1 January 2009.<sup>142</sup> A key feature of the new agreement was the rationalisation of SPPs, which were reduced from over 90 payments to five, namely in the areas of healthcare, schools, skills and workplace development, disability services and affordable housing. This was designed to increase flexibility by allowing funds to be spent by the states within the relevant sector, providing greater discretion to the states in terms of the allocation of the payments to specific projects. The Agreement also involved a new form of payment, namely a National Partnership Payment which is designed 'to fund specific projects and to facilitate and/or reward States that deliver on nationally-significant reforms'.<sup>143</sup> The overall amount of money provided in payments for specific purposes (including both SPPs and National Partnership Payments) continues to be significant, with an estimated total of \$50.1 billion being allocated in 2009–10, which equates to 14.8 per cent of total Commonwealth expenditure.<sup>144</sup>

141 Twomey and Withers, above n 15, 47 (citations omitted).

142 Council of Australian Governments, *Intergovernmental Agreement on Federal Financial Relations* (2008) <[http://www.coag.gov.au/intergov\\_agreements/federal\\_financial\\_relations/docs/IGA\\_federal\\_financial\\_relations.pdf](http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/IGA_federal_financial_relations.pdf)>.

143 Council of Australian Governments, *Council of Australian Governments' Meeting 29 November 2008* (29 November 2008) <[http://www.coag.gov.au/coag\\_meeting\\_outcomes/2008-11-29/index.cfm](http://www.coag.gov.au/coag_meeting_outcomes/2008-11-29/index.cfm)>.

144 Australian Government, *Budget Paper No 3 — Part 2: Payments for Specific Purposes* (2009) Budget 2009–10, 27 <[http://www.budget.gov.au/2009-10/content/bp3/html/bp3\\_payments.htm](http://www.budget.gov.au/2009-10/content/bp3/html/bp3_payments.htm)>.

The increased use of SPPs has obvious consequences for the federal balance, with Ross Garnaut commenting that: ‘There is a sense in which [SPPs] have completely undermined the federal character of governance in Australia’.<sup>145</sup>

SPPs allow the Commonwealth to assert ‘financial and policy control over the States’ and ‘are the primary cause of duplication, excessive administrative burdens, blame-shifting and waste in our federal system’.<sup>146</sup> Reducing the use of SPPs in favour of general-purpose grants should be a priority for the reform of the Australian federation.

### 3 *Revising Horizontal Fiscal Equalisation*

In addition to its comparatively high degree of VFI (when compared against other federations such as Canada, Germany, Switzerland and the USA) the Australian Federation is also characterised by a substantial degree of horizontal fiscal equalisation (‘HFE’).<sup>147</sup> The Commonwealth Grants Commission applies the HFE principle when advising the Commonwealth government on the allocation of GST revenue between the states. It describes the principle of fiscal equalisation as requiring that ‘each State should be given the capacity to provide the average standard of State-type public services, assuming it does so at an average level of operational efficiency and makes an average effort to raise revenue from its own sources’.<sup>148</sup> In simple terms, it is an attempt to adjust Commonwealth transfers to the states to equalise the capacity of both weaker and stronger states to provide services to their citizens.

While most recognise that ‘mechanisms that assist fiscally weaker States are generally considered to be fair and conducive to a well-functioning federation’,<sup>149</sup> there are also costs and disadvantages attached to this process. Most importantly, the equalisation process ‘provides [great] disincentives for sub-national governments to seek and provide efficient delivery of government services’.<sup>150</sup> The current system has been estimated to create ‘deadweight losses of between \$150 and 280 million per annum’.<sup>151</sup>

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

145 Australian Government Productivity Commission, *Productive Reform in a Federal System — Roundtable Proceedings — Canberra, 27–28 October 2005* (Commonwealth of Australia, 2006) 93 <[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)>.

146 Twomey, above n 111, 67.

147 Twomey and Withers, above n 15, 35, comparative statistics can be seen at 37–8.

148 Philippe Le Goff, Parliamentary Information and Research Services (Canada), *Australia’s Equalization System* (31 March 2005) <<http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0460-e.htm>>.

149 Department of Treasury and Finance, above n 128, 20.

150 Twomey and Withers, above n 15, 49.

151 Business Council of Australia, above n 116, 42.

strip \$443 million from Western Australia's share of GST funding next year ... 'Under this proposal, for every dollar Western Australians pay in GST they will only be receiving 68 cents back. Meanwhile people in New South Wales will receive a return of 95 cents, Victorians will receive 93 cents and Queenslanders will receive a return of 91 cents ...'<sup>152</sup>

Premier Barnett stated that if Western Australia 'received an equal per capita share of the GST the State would be \$1.5 billion better off in 2010–11',<sup>153</sup> and noted that within three years, using the amended funding formula 'for every dollar of GST that Western Australians pay at the register, we will only get back 57 cents'.<sup>154</sup>

There is considerable merit in the proposal that a floor should be applied to the equalisation formula, with a state's share of GST revenues unable to fall below that minimum level. While some level of equalisation is generally accepted as being in the broader national interest and as the price of being a member of the Federation, there does seem to be a point at which the costs outweigh the benefits, the disincentives limiting growth-creating policies and investment begin to negatively affect our future economic prosperity, and where there is a real risk of a growing resentment amongst citizens in the fiscally stronger states that may undermine national unity. Exactly when this point will be reached is a matter of conjecture, however with the Mining Minister of Western Australia, The Hon Norman Moore MLC, recently speaking of 'rumblings of secession'<sup>155</sup> in response to any moves by the Commonwealth to 'plunder the revenues of Western Australia',<sup>156</sup> it is clear that the financial relationship between the Commonwealth and the states continues to be a contentious political issue.

## D Possible Constitutional Amendments

### 1 Federalism as an Express Constitutional Principle

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

There are also numerous references to federalism as a constitutional value that should inform our reading of the *Constitution* and the interpretation of the

152 Western Australian Government, 'Western Australia Short Changed in Grant Commission Report' (Media Release, 26 February 2010), quoting Premier of Western Australia Colin Barnett.

153 Ibid.

154 Colin Barnett, 'Flawed System Must Be Changed after \$311 Million Revenue Cut to WA' (Media Release, 11 March 2009).

155 Lyndal Curtis, 'Tax Review Stokes WA Secession Whispers', *ABC News* (online), 30 April 2010.

156 Ibid.

respective powers of the different levels of government. For example, Gibbs CJ recognised in *Koowarta v Bjelke-Petersen* that ‘in determining the meaning and scope of a power conferred by s 51 it is necessary to have regard to the federal nature of the *Constitution*’.<sup>157</sup> That view was also expressed in the same case by Stephen J.<sup>158</sup> In *Queensland Electricity Commission v Commonwealth* Gibbs CJ recognised that ‘the purpose of the *Constitution* was to establish a Federation’ and, again, concluded that ‘the federal nature of the *Constitution*’ imposed limits upon the powers granted by s 51.<sup>159</sup> Cooperation between the Commonwealth and state governments was considered by Deane J to be ‘a positive objective of the *Constitution*’ in *R v Duncan; Ex parte Australian Iron & Steel Pty Ltd*.<sup>160</sup>

The dissenting judges in the *Work Choices* case also emphasised the federal nature of the *Constitution*. Kirby J stated that the High Court ‘needs to give respect to the federal character of the *Constitution*’.<sup>161</sup> In a similar vein, Callinan J concluded that ‘the *Constitution* mandates a federal balance’,<sup>162</sup> calling this a ‘powerful’ ‘constitutional implication’.<sup>163</sup>

There is, however, considerable evidence suggesting that federalism is *not* generally accepted as an entrenched constitutional principle that necessarily informs the interpretation of the *Constitution*. The majority judges in *Work Choices* emphasised that the starting point when interpreting the *Constitution* will necessarily be ‘the constitutional text, rather than a view of the place of the States that is formed independently of that text’.<sup>164</sup> This reflects the earlier statement of the Court in the *Engineers’* case that the *Constitution* should not be interpreted by reference to ‘a vague, individual conception of the spirit of the compact’.<sup>165</sup> More expressly, in *Re Wakim; Ex parte McNally*, McHugh J emphasised that ‘co-operative federalism is not a constitutional term. It is a political slogan, not a criterion of constitutional validity or power’.<sup>166</sup>

Lynch and Williams have argued that federalism is not ‘viewed as a constitutional value sufficiently “anchored in the text”’<sup>167</sup> and have suggested that an express ‘constitutional mandate’ is required before the principle will be formally recognised as a factor properly to be applied in the task of constitutional interpretation.<sup>168</sup> As they have observed:

157 (1982) 153 CLR 168, 199.

158 *Ibid* 216.

159 (1985) 159 CLR 192, 205.

160 (1983) 158 CLR 535, 589.

161 *Work Choices* (2006) 229 CLR 1, 229 [558].

162 *Ibid* 333 [797].

163 *Ibid* 320 [772].

164 *Ibid* 118–19 [191].

165 (1920) 28 CLR 129, 145.

166 (1999) 198 CLR 511, 556 [54].

167 Lynch and Williams, above n 42, 414, quoting *McGinty v Western Australia* (1996) 186 CLR 140, 232 (McHugh J).

168 Lynch and Williams, above n 42, 414.

it seems that the weight of precedent will prevent the High Court departing any time soon from the orthodoxy that the *Constitution's* establishment of a federal system does not provide a sufficient basis for consideration of the relationship between the Commonwealth and States as a factor in the interpretation of their respective powers.<sup>169</sup>

A 'constitutional mandate' could be achieved by inserting into the *Constitution* express recognition of federalism as a guiding constitutional value and of the maintenance of the federal balance as a factor that must be applied when interpreting the *Constitution* and (in particular) the scope of Commonwealth powers. An express reference in the constitutional text would go some way to redressing the significant expansion of Commonwealth powers that has been facilitated by the generally centralist approach of the High Court towards constitutional questions. It would help to ensure that federalism is 'transformed from assumption and aspiration into constitutional text'<sup>170</sup> and to address the current problem of the federal character of the *Constitution* being too readily ignored in the interpretation of this foundational document.

## 2 The Appointment of High Court Justices

As the 'keystone of the federal arch',<sup>171</sup> the High Court of Australia is charged with being the final arbiter in constitutional disputes, including disputes between the states and Commonwealth as to the limits of their respective powers. Under s 72(i) of the *Constitution*, the High Court Justices are appointed by the Governor-General in Council. With all High Court appointments being made by the Commonwealth government, it is entirely unsurprising that the High Court has, over time, been broadly sympathetic towards the expansion of Commonwealth powers. The appointment of the neutral umpire by one of the two competing teams would never be allowed in any of our professional sporting codes. It is difficult to see why it should be allowed to occur in relation to the much more important task of appointments to the High Court of Australia.

There have been periodic calls for states to be given a role in the appointment of High Court Justices, with a variety of mechanisms being suggested. The issue has been acknowledged to an extent by s 6 of the *High Court of Australia Act 1979* (Cth), which provides:

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

While s 6 acknowledges the need to provide the states with some input into the appointment process, it is nothing more than a symbolic gesture. There is nothing

169 Ibid 413.

170 Ibid 429.

171 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10967 (Attorney-General Alfred Deakin).

requiring the consultation process to be anything other than cursory, and nothing to guarantee the states any substantive input into the eventual outcome.

It is difficult to argue against the general proposition that both Commonwealth and state governments should have some role in the appointment of High Court Justices. Under the *Constitution*, neither level of government is ‘superior’ to the other, and with the Court granted original jurisdiction in all matters of constitutional dispute between the Commonwealth and the states<sup>172</sup> and exercising appellate jurisdiction over the state Supreme Courts,<sup>173</sup> the states have as much of a direct interest as the Commonwealth government in appointments to the Court. Three primary objections that seem to have been raised most frequently against this general proposition, with each of these being directly addressed by Craven in his paper ‘Reforming the High Court’<sup>174</sup>

The first is that ‘it would lead to an orgy of political horse-trading behind closed doors’.<sup>175</sup> Craven argues that while this may be true to some extent, it can surely be no different to what occurs at the moment within the Cabinet and party rooms.<sup>176</sup>

The second is that the involvement of the states would inevitably produce compromise candidates. Regarding this, Craven observes:

This may be true, but it is not clear why it is undesirable. It may well be that the best candidates in practice are those who enjoy a significant degree of confidence among a wide range of Governments and their Attorneys, rather than those who arouse the unbridled passion of the Commonwealth government alone.<sup>177</sup>

The third is that involving the states ‘would give undue prominence to regional considerations’.<sup>178</sup> In response, Craven states:

one could be forgiven for believing that ‘regional considerations’ should be given a very greater prominence in the appointment of High Court Justices, on the grounds that the States and the Commonwealth in reality have a roughly equal interest in the operation of the Court.<sup>179</sup>

If we accept that the states, as a matter of general principle, should be granted a substantive voice in the appointment of High Court Justices, the question then becomes one of the appropriate mechanism. The challenge here is to find a system of appointment that allows the states a substantive role whilst still maintaining the overall integrity of the appointment process. One such proposal has been put forward by the Queensland government in 1983 to the Australian Constitutional

172 *Constitution* s 75(iii).

173 *Ibid*.

174 Greg Craven, ‘Reforming the High Court’ (Paper presented at the Seventh Conference of the Samuel Griffith Society, Adelaide, 7–9 June 1996).

175 *Ibid* 34.

176 *Ibid*.

177 *Ibid*.

178 *Ibid*, citing Constitutional Commission, *Final Report of the Constitutional Commission* (Australian Government Publishing Service, 1988) 401.

179 Craven, above n 174, 34.

Convention. This proposal has subsequently been endorsed by Gabriël Moens, who described it as follows:

upon a vacancy occurring on the High Court bench, the Commonwealth Attorney-General asks the State Attorneys-General for suggestions of possible appointees. The Commonwealth itself may then submit suggestions of potential appointees to the scrutiny of State Attorneys-General. From this consultation the Commonwealth would gain a clear idea about which candidates met with State approval or disapproval. High Court vacancies could only be filled by prospective appointees of whom the Commonwealth government approved and of whom three (or more) State governments had expressed positive approval or had not expressed an opinion upon.<sup>180</sup>

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

the general point must be that it is far from clear why we should be so eager to rely upon the judgment of a single government in choosing a High Court Justice as the best guarantee of quality, rather than the collected wisdom of a number of governments.<sup>181</sup>

### 3 Proposing Constitutional Amendments

A similar issue has been raised in relation to the initiation of referenda proposing constitutional amendments. Under the present amendment procedures only the Commonwealth Parliament has the power to initiate a referendum regarding a proposed constitutional amendment.<sup>182</sup> Given this, it is hardly surprising to note that of the 44 amendment proposals put forward under s 128 of the *Constitution*, over half of them (23 to be exact) have attempted to expand Commonwealth powers. Further, these proposals have proven consistently unpopular amongst the Australian people, with only two of the 23 proposals being approved.<sup>183</sup> As Jeffrey Goldsworthy has noted: ‘No Commonwealth government has ever sponsored a

180 Gabriël A Moens, ‘The Role of the States in High Court Appointments’ (Paper presented at the Eighth Conference of the Samuel Griffith Society, Canberra, 7–9 March 1997) 25.

181 Craven, above n 174, 34.

182 Section 128 of the *Constitution* provides that a proposed amendment shall be submitted to the people where it has been passed by an absolute majority of each House of Parliament. It is also possible for the proposed amendment to be submitted to the people when it has been passed by an absolute majority by one House and rejected by the other, and it is again passed by an absolute majority by the first House after a three month interval.

183 Parliamentary Library, *Parliamentary Handbook of the Commonwealth of Australia (43<sup>rd</sup> Parliament)* (32<sup>nd</sup> ed, 2011) pt 5 <<http://www.aph.gov.au/library/handbook/index.htm>>.



constitutional amendment to reduce Commonwealth powers, and none is ever likely to do so'.<sup>184</sup>

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

although each State may represent only part of the nation, they are all very important parts, and together they constitute almost all of it. Moreover, the whole point of a federation is that its parts have constitutional standing, and guaranteed rights and powers. The parts no less than the whole are legitimate stakeholders in any federal Constitution. If a majority of those parts believe that the *Constitution* could be improved, why should they not be able to put their case directly to the people?<sup>185</sup>

The proposal to amend the *Constitution* to allow states to initiate referenda has been previously endorsed. It formed one of the recommendations of the *Final Report of the Constitutional Commission*<sup>186</sup> and has been approvingly referred to by academics such as Goldsworthy<sup>187</sup> and Twomey.<sup>188</sup> To prevent a sudden rush of frivolous amendment proposals, and recognising the significant costs involved in holding a referendum, it is generally acknowledged that a minimum number of state Parliaments should be required to approve the proposed amendment in identical terms before it is put to the people for approval. The *Final Report of the Constitutional Commission* put this recommendation in the following terms:

A proposal to alter the *Constitution* would be required to come from Parliaments of not fewer than half the States. There should be an additional requirement that the State Parliaments concerned represent a majority of Australians overall. It would be a requirement that the proposed alteration be passed in identical terms by the State Parliaments concerned within a 12 month period. The proposed alteration would be required to be put to referendum not less than two months nor more than six months after this requirement was satisfied.<sup>189</sup>

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

184 Jeffrey Goldsworthy, 'A Role for the States in Initiating Referendums' (Paper presented at the Eighth Conference of the Samuel Griffith Society, Canberra, 7–9 March 1997) 31.

185 *Ibid* 35.

186 Constitutional Commission, above n 178, 29–32.

187 Goldsworthy, above n 184.

188 Twomey, above n 111, 77–8.

189 Constitutional Commission, above n 178, 856.

Allowing the states to initiate referenda is a reform that addresses the overwhelmingly centralist-tendency of past referenda, strengthens the Federation, and would ‘enhance the right of the people to determine the content of their Constitution’.<sup>190</sup> As noted by Goldsworthy:

The States as well as the Commonwealth make up the federal system, and have an equal stake in its proper functioning and an intimate knowledge of its day to day operations. They are as well placed as the Commonwealth to detect structural deficiencies which need reform, deficiencies which for reasons of its own the Commonwealth might not want to rectify. To prevent the people from rectifying such deficiencies is unfair to them even more than it is unfair to the States.<sup>191</sup>

## VIII CONCLUSION

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

190 Goldsworthy, above n 184, 35.

191 Ibid 36.