

BEYOND A FEDERAL STRUCTURE: IS A CONSTITUTIONAL COMMITMENT TO A FEDERAL RELATIONSHIP POSSIBLE?

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I INTRODUCTION

The galvanising purpose of Federation was the creation of the Commonwealth and the distribution of power between it and the former colonies, simultaneously elevated to Statehood.¹ But beyond this simple fact, consensus about Australian federalism has traditionally been elusive and is, if anything, only increasingly so. While the contemporary political debate over federal reform proceeds from a shared sense that our existing arrangements have manifest shortcomings, there is far from unanimity as to which of its particular features are strengths, and which are deficiencies. More broadly, disagreement over how and to what extent Australian federalism requires ‘fixing’ often stems from differences as to the emphasis to be given to the promotion of administrative and economic efficiency relative to ensuring mechanisms of democratic accountability and engagement. Consequently, proposals for reform range from those with a strong centralising tendency² through to a far greater dispersal of power via the creation of regional authorities.³ There are also spirited defences of the existing federal structure, but

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1 ‘The foundation of the *Constitution* is the conception of a central government and a number of State governments separately organised’: *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 82 (Dixon J) (*‘Melbourne Corporation’*).

2 Business Council of Australia, *Reshaping Australia’s Federation: A New Contract for Federal–State Relations* (2006) <<http://www.bca.com.au/Content/100802.aspx>> at 23 July 2008.

3 A J Brown, ‘Reshaping Australia’s Federation: The Choices for Regional Australia’ (2007) Iss 13 *Public Administration Today* 5, 5–17; A J Brown, ‘Federalism, Regionalism and the Reshaping of Australian Governance’ in A J Brown and Jennifer A Bellamy (eds), *Federalism and Regionalism in Australia: New Approaches, New Institutions?* (2006).

subject to a reallocation of powers and responsibilities accompanied by the improvement of existing mechanisms.⁴

Our aim is not to add yet another competing perspective to this range of alternatives. Instead, this article is written with an eye on reform which would enhance federal governance in Australia regardless of precisely how it might be reconfigured. In particular, we consider the possibility of supplementing the constitutional structure of governance with formal recognition of the *relationship* that the Commonwealth and State governments should have with each other. A development of this sort is just as relevant to modest federal reform which leaves our basic arrangements and institutions intact, as it is to other more ambitious proposals. While the issue of how different levels of government might conceive of their connection to each other would seem of crucial importance to models geared towards the creation of stronger regional entities, this question is in fact at the heart of any federal system and is certainly one that may usefully be explored in respect of Australia's existing constitutional commitment to a two-tiered federal structure across the Commonwealth and the six States.

What is the significance of suggesting that greater attention might usefully be paid in present debates to the federal relationship, as opposed to simply its structure? Certainly our position is not that structure is unimportant – it is obviously central to how power is distributed. But having settled on a federal structure⁵ is an incomplete answer to how governments will relate to each other and exercise power in respect of their responsibilities. What is more, as the experience of Australian federalism so readily demonstrates, this is a matter susceptible to great change over time as factors such as technological innovation, shifts in national economic activity, increased internationalisation, and, not least, judicial decisions operate to produce a much altered landscape.⁶

The course of High Court decisions since *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*⁷ in 1920 has demonstrated the limitations of structural design in the preservation of intended allocations of power across the system. The retort might be that dividing power in a federal system is premised on the fundamental virtue of depriving governments of absolute sovereignty.⁸ However, it seems more than a little counterproductive to attain the protection

4 Anne Twomey and Glenn Withers, *Federalist Paper 1 – Australia's Federal Future*, Report for the Council for the Australian Federation (2007); see also Anne Twomey, 'Reforming Australia's Federal System' (2008) 36 *Federal Law Review* 57.

5 This must always be a result more of historical and cultural circumstances coupled with political pragmatism than a deliberate decision taken in the abstract. So, while keen to portray the Framers as not unthinking in their support for a federal model, Craven has admitted that 'it is certainly undeniable that any non-federal proposal for Australian union would have been doomed to ignominious failure': Greg Craven, 'A Liberal Federation and a Liberal Constitution' in J R Nethercote (ed) *Liberalism and the Australian Federation* (2001) 62.

6 Note, however, Galligan's caution against exaggerating the extent to which centralism has eroded State power, particularly the degree to which this is attributed to the judicial decisions of the High Court: Brian Galligan, *A Federal Republic: Australia's Constitutional System of Government* (1995) 171.

7 (1920) 28 CLR 129 ('Engineers' Case').

8 '[A] limitation and division of sovereign legislative authority is of the essence of federalism': *Spratt v Hermes* (1965) 114 CLR 226, 274 (Windeyer J).

this brings through such cumbersome and expensive governance as Australia now possesses.⁹ Additionally, the present levels of inconvenience, waste and duplication in Australia can hardly be said to be offset by a federal system in which each tier significantly checks the power of the other. The ironic effect of the High Court's interpretative methodology has been both to enormously empower and enrich the Commonwealth at the expense of the States while also managing not to fully deliver the full benefits of centralisation.¹⁰

The immediate solution to Australia's federal dysfunction, currently gaining renewed momentum, is to revisit the allocation of powers across the system and bring those up to date with modern conditions and needs. However, although the achievement of the Framers of the *Commonwealth Constitution* offers an inspirational example, it is only too apparent that securing agreement on a redistribution of federal powers and responsibilities is bound to prove challenging. More importantly, whatever adjustments are made, it seems reasonable to anticipate that any newly minted constitutional settlement will be vulnerable to distortion due to two factors. First, as experience has shown, a multitude of developments over time may inevitably lead to a change to the division of powers. Second, and more particularly in the Australian context, it seems remiss to overhaul the allocation of federal and State powers without also addressing the method by which these are interpreted by the High Court. There is no reason to expect that the strongly centralising effect of the High Court's approach would not act quickly to undermine a reconfigured division of power.

These concerns are not reasons to avoid the necessary national conversation about how power should best be shared between the governments of the Australian federation in its second century. They do, however, suggest that proposals for reform need to think beyond simply shifting pieces of the puzzle around or creating new cooperative institutions. In particular, is there a way of ameliorating the inflexibility of a federal division of power while also ensuring that the tiers of government enjoy significant autonomy and remain accountable to their respective electorates?

The approach considered in this paper is whether the *Commonwealth Constitution* might go beyond a preoccupation with the structure of Australia's

9 Business Council of Australia, above n 2, 7–15, app 2 'The Costs of Federalism'; David Solomon, *Pillars of Power* (2007) 29–50; Neil Warren, *Benchmarking Australia's Intergovernmental Fiscal Arrangements – Final Report* (2006). Even those who argue that Australia has financially benefited by being a federation argue that improvements to our existing arrangements would generate increased prosperity: Twomey and Withers, above n 4, 5.

10 The Court's interpretation of the power to make laws with respect to corporations in s 51(xx) of the *Constitution* is an obvious example. Despite that power having received expansive interpretation, the denial to the Commonwealth of law-making capacity in respect of incorporation (*New South Wales v Commonwealth* (1990) 169 CLR 482 ('*Incorporation Case*')) necessitated extremely complex power-sharing between it and the States. Similarly, although the use of the power to regulate the employment conditions of workers in *New South Wales v Commonwealth* (2006) 229 CLR 1 ('*Work Choices*') was a notable victory for the Commonwealth, it was still left with inadequate powers to fully regulate industrial relations: George Williams, *Working Together – Inquiry into Options for a New National Industrial Relations System – Final Report to the New South Wales Government* (2007) 18–20.

federal system so as to explicitly promote a new dynamic to the relationship between the arms of government which could restore the standing of the States while also facilitating constructive political solutions to national problems. We explore this question with a commitment to any such relationship being couched primarily as one of cooperation, while still recognising that in any federal system the prospect of co-ordinate or competitive behaviour between governments must be possible and may, in any number of circumstances, be desirable.¹¹ Some areas do not require the attention of more than one level of government, and that level which should be responsible, best determined through the principle of subsidiarity whereby the central authority's powers are limited to only those functions which cannot be effectively exercised by a lower level of government, may already possess sufficient powers.¹² Where this is not the case, there also exist a number of ways in which the necessary authority can be provided by the other tier of government (such as by a referral of State power under section 51(xxxvii) of the *Constitution* or by the Commonwealth 'clearing the field' for the States)¹³ without the need for ongoing collaboration. But as the growth of intergovernmental agreements in recent years has shown, there are many problems which are best served by a concerted approach across governments.

There seems little to lose in the way of constitutional principle by investigating whether the Australian federation would be better served by articulating an ideal of cooperation between the levels of government. Indeed, there are several attractions to 'constitutionalising' the federal relationship as being of this character. The first is that it would reflect in the *Constitution* a culture which has, in many senses and however imperfectly, already arisen around it. Since the First World War, and increasingly in recent decades, the Commonwealth and States have frequently shown themselves willing to act cooperatively with each other, especially through bodies such as the Commonwealth Grants Commission.¹⁴ In recent times, there has been a rapid growth in powerful extra-constitutional machinery created in this spirit,¹⁵ most notably the Council of Australian Governments ('COAG') in 1992 – though admittedly this may not always be reflected in its deliberations and outcomes.¹⁶

11 Galligan, above n 6, 201; Cheryl Saunders, 'Collaborative Federalism' (2002) 61(2) *Australian Journal of Public Administration* 69, 69. As Hill warns, the debate or choice between competing views of the nature of Australia's federal system should not take place at the extremes but rather on the middle ground: Graeme Hill, 'Revisiting *Wakim* and *Hughes*: The Distinct Demands of Federalism' (2002) *Public Law Review* 205, 226.

12 Twomey, above n 4, 59–62.

13 Anne Twomey, 'Australian Federalism – Options for Reform' (Paper presented at the 2007 National IR Conference, Brisbane, 11 September 2007).

14 Russell Lloyd Mathews, 'The Development of Australian Federalism' in Russell Lloyd Mathews (ed), *Federalism in Australia and the Federal Republic of Germany* (1980) 9–11.

15 Martin Painter, 'Multi-Level Governance and the Emergence of Collaborative Federal Institutions in Australia' (2001) 29 *Policy and Politics* 137.

16 The Business Council of Australia is particularly unimpressed by COAG's record: Business Council of Australia, above n 2, 8.

Second, depending upon whether it is framed as a bare authorisation for the conferral of State powers upon the Commonwealth¹⁷ or as a more sophisticated platform,¹⁸ an express constitutional recognition of cooperative efforts between governments would provide a more secure foundation than exists currently present for the validity of laws implementing intergovernmental agreements. At the same time, this presents the opportunity to significantly enhance the capacities for parliamentary oversight and effective judicial review of the powers exercised pursuant to such schemes – the major qualm which has been voiced in respect of cooperative endeavours in the past.¹⁹

Third, the addition to the *Constitution* of a provision which more broadly sought to promote a cooperative federal relationship would reinvigorate constitutional interpretation on questions of federal power generally, not simply to the benefit of cooperative schemes. The objection to which appeals to the ‘federal balance’ has always been vulnerable is that it involves resort to a vague standard existing outside the terms of the *Constitution*.²⁰ But a constitutional commitment to ‘mutual consideration’²¹ and ‘respect’²² – or more precisely, the principle of subsidiarity²³ – might provide the means by which these arguments could be developed with more sophistication. This might revitalise the constitutional capacities and position of the States and prevent the centralising trend of the Court’s present methodology from frustrating the aims behind a new settlement of powers. Such a provision would provide a better basis for an interpretative approach consistent with the principle that ‘the *Constitution* was certainly not intended to inhibit cooperation between the Commonwealth and the States and their respective agencies’.²⁴ Although there are already indications in the existing constitutional provisions in this vein, these fall short of promoting and enabling governments to work harmoniously with their respective powers to attain the best outcomes.

The structure of this paper is as follows. In Part II, the range of understandings as to the character of the federal relationship between Australian governments is canvassed. Consideration is given to the views of the *Constitution*’s Framers and commentators, but most centrally to members of the High Court since these have brought about great change in federal arrangements. The significance of the Court’s marked preference for adhering only to constitutional structure and its inability or unwillingness to develop ‘a federal jurisprudence’²⁵ is examined in two respects. First, the effect of the Court’s arid *Engineers’ Case* methodology

17 George Williams, ‘Cooperative Federalism and the Revival of the Corporations Law: *Wakim* and Beyond’ (2002) 20 *Company and Securities Law Journal* 160, 170.

18 Saunders, above n 11, 75.

19 See generally Cheryl Saunders, ‘Administrative Law and Relations Between Governments: Australia and Europe Compared’ (2000) 28 *Federal Law Review* 263; Geoffrey Sawer quoted in Hill, above n 11, 220.

20 *Engineers’ Case* (1920) 28 CLR 129, 145.

21 *Federal Constitution of the Swiss Confederation*, art 44(2).

22 *Constitution of the Republic of South Africa, 1996*, s 41(1)(e).

23 *Constitution of the Republic of South Africa, 1996*, s 146(2)(a).

24 *R v Humby; Ex parte Rooney* (1973) 129 CLR 231, 240 (Gibbs J).

25 Campbell Sharman, ‘Federalism and the Liberal Party’ in Nethercote, above n 5, 301.

has been to reject any suggestion that fidelity to a concept of ‘federal balance’ is consistent with both the contents and purpose of the *Constitution* and also the principles of divided government. Particular consideration is given to the limitations of a commitment to federalism in only a structural sense, as revealed by the judicial reasons of the majority and dissenting judges in the recent case of *New South Wales v Commonwealth*.²⁶ Second, the tension between competing assumptions of the kind of federal system established by the *Commonwealth Constitution* has produced an unstable and uncertain environment for the development of cooperative schemes between the Commonwealth and States. In Part III we consider how an attempt to ‘constitutionalise’ the relationship between the tiers of government as one underpinned by cooperation and respect would impact on the Court’s approach. Drawing on foreign constitutions, and adapting these in light of Australia’s politico-legal conditions and history, we suggest how a commitment to cooperative federalism might best be shaped for possible inclusion in the *Commonwealth Constitution*.

II THE FEDERAL RELATIONSHIP

A Original Conceptions of Australian Federalism

Although Alfred Deakin came quickly to the view after Federation that the course was set for the Commonwealth to enjoy ‘general control over the States’,²⁷ in the 1890s he and the other Framers of the *Australian Constitution* certainly did not envisage the rapid and substantial expansion of Commonwealth power at the expense of the States. Indeed, on the whole, their efforts were directed to averting just such an outcome. Such was the confidence of Deakin that the draft *Constitution* succeeded in this aim that he had asserted just five years earlier that ‘so far from our Federal Government over-awing the States, it is more probable that the States will over-awe the Federal Government’.²⁸ That the intended ‘balance’ between Commonwealth and State powers has not been borne out by judicial interpretation has been attributed particularly to the Framers’ strategy of seeking to contain Commonwealth legislative power through an enumerated list of subject matters and purposes for which laws might be enacted, while preserving the ‘residue’ for the States.²⁹ Even so, it seems an understandable mistake to commit³⁰ – rendered only more so by the Framers’ suspicious aversion to the Canadian model of a federal division of powers which they saw as promoting centralisation through the granting of the residue to the

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

27 Deakin quoted in David Solomon, *The Political Impact of the High Court* (1993) 77.

28 *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 30 March 1897, 298–9 (Alfred Deakin).

29 Michael Crommelin, ‘Federalism’ in P D Finn (ed) *Essays on Law and Government Volume 1 – Principles and Values* (1995) 168, 172; Haig Patapan, *Judging Democracy – The New Politics of the High Court of Australia* (2000) 16.

30 Craven counter balances derision of the founders’ work by saying ‘their scheme hardly was unsophisticated’: Craven, above 5.

national government.³¹ In hindsight, we can appreciate that as the scope of the listed powers of one tier of government can only develop – particularly at the hands of an interpretative methodology which insists on giving words their wide and ‘natural’³² meaning – the level of government holding the vast but amorphous residue can only see its powers steadily eroded.³³

The Convention Debates show that this course was set quite early on with the major voices determined on setting ‘such [a] distinct limitation of federal power as would put the preservation of state rights beyond the possibility of doubt’.³⁴ But this erroneous assumption and its impact upon structural design was perhaps as far as the Framers were prepared to conceive of the relationship between the parties to Federation. Zines has said that while the Convention delegates were ‘fairly familiar’ with the models of the American and Canadian *Constitutions*, they did ‘not engage in theorising about the nature of the federation they were creating’.³⁵

Others have disagreed with this portrayal of the Framers, Craven arguing instead that they ‘had a solid appreciation of the more theoretical benefits to be offered by American-style federalism ... [and] their influence within Australia’s own constitutional settlement was profound’.³⁶ Amongst these he lists an appreciation of the ability of regional government to be more responsive to local interests, increased democratic accountability and the denial of absolute power to a single government.³⁷ Within those broad merits of a federal system, Aroney has carefully connected the leading lights of the Federation movement with their particular intellectual influences, concluding that Madison’s *Federalist Papers* ‘provides the most empirically accurate basis upon which to understand the nature of the “federal commonwealth” embodied in the *Australian Constitution*’.³⁸ Brown has gone further back to show that ‘coherent theoretical options for national constitutional development’ were circulating well before the

31 Helen Irving, *To Constitute a Nation* (1999) 63–7.

32 *Engineers’ Case* (1920) 28 CLR 129, 149. In rejecting the apparent neutrality of this method, Walker has argued that the ‘ordinary’ reading of constitutional terms ‘is often contingent on the production of the desired result, namely, the expansion of the powers of the Commonwealth’: Geoffrey de Q Walker, ‘The Seven Pillars of Centralism: *Engineers’ Case* and Federalism’ (2002) 76 *Australian Law Journal* 678, 688. For renewed criticism of the *Engineers’ Case* methodology in the wake of *Work Choices* see James Allan and Nicholas Aroney, ‘An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism’ (2008) 30 *Sydney Law Review* 245.

33 *Huddart Parker Ltd v Commonwealth* (1931) 44 CLR 492, 526–7 (Evatt J).

34 *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 5 March 1891, 82 (Alfred Deakin).

35 Leslie Zines, ‘Changing Attitudes to Federalism and its Purpose’ in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (2003) 86, 86. See also Brian Galligan and Cliff Walsh, ‘Australian Federalism: Yes or No?’ in Greg Craven (ed) *Australian Federalism: Towards the Second Century* (1992) 193, 195–6.

36 Craven, above n 5, 62.

37 *Ibid.*

38 Nicholas Aroney, ‘Imagining a Federal Commonwealth: Australian Conceptions of Federalism, 1890–1901’ (2002) 30 *Federal Law Review* 265, 294.

middle of the 19th century, though much of the flavour of these ideas was overwhelmed by the later debates.³⁹

In contrast to the approach more usually attributed to the Framers – a simple determination to contain Commonwealth intrusion upon State areas of power hitched to a mistaken strategy as to how the components of the federal system were likely to interact – it is revealing that the contemporary analysis of Quick and Garran was that the *Constitution* incorporated both nationalist and federalist forces, but that the former were likely to dominate over time.⁴⁰ Not only was this inevitable, but desirable:

Nations are made only by great occasions, not by paper constitutions. But the energy will be there, and in the fullness of time, when the opportunity comes, the nation will arise like a bridegroom coming forth from his chamber, like a strong man to run a race. This change will not necessarily imply any conflict with the States, because the people of the States, who are also the people of the nation, will throb with the new life, and will be disposed to yield to the irresistible pressure of nationhood. In the adaptability of the *Constitution*, and (should need arise) in the power of amending the *Constitution* ... there is ample room for the growth and development of such tendencies as may assert themselves in the present or the distant future of the Commonwealth. The *Constitution* will come into operation under the fair and well-distributed influence of two forces [nationalism and federalism].⁴¹

As prescient as they were about the rise of the Commonwealth, the authors' optimism about the avoidance of clashes between the 'irresistible pressure of nationhood' and the States has obviously not been borne out by later experience. Nevertheless, the suggestion from the *Constitution's* original scholars that the federal relationship it established need not, even when under pressure, be marked by hostility is significant. Zines has suggested that the new constitutional arrangements would have been understood against a significant backdrop of intergovernmental cooperation over the colonial era, so that 'to say that dual federalism is created by the *Constitution* does not in itself lead to any 'principle' that the *Constitution* forbids the two to cooperate or to have joint schemes'.⁴² While that may be so, it must be acknowledged that amongst the Framers support for the idea that each level of government is to be 'within a sphere, co-ordinate

39 A J Brown, 'One Continent, Two Federalisms: Rediscovering the Original Meanings of Australian Federal Ideas' (2004) 39 *Australian Journal of Political Science* 485, 501.

40 See Aroney's discussion of the factors which led the authors to this 'tension between the strictly compactual and nationalist conceptions of federalism': Aroney, above n 38, 285–91.

41 John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (1901, 1976 reprint) 340–1.

42 Zines, above n 35:

The need for federal-State cooperation exists and has been manifested in all federations so far as I know. Indeed, there was a long practice of the Australian colonies meeting together to formulate policy and to attempt uniform legislation and common institutions to deal with a variety of matters that spilt over into other jurisdictions. It is therefore extraordinarily unlikely that the *Australian Constitution* would have been framed on an assumption that joint federal-State legislation or administrative machinery was to be impossible: at 99.

and independent',⁴³ was clearly significant and probably underpinned a lot of the support for Federation generally.⁴⁴

The picture becomes less, rather than more, clear when one considers the several provisions of the *Constitution* which speak to an interactive federal relationship. For instance, amongst the express conferrals of legislative power in section 51 are six in this vein:

- (xxiv): the service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States;
- (xxxiii): the acquisition of a State's railways with the State's consent and on terms agreed between the Commonwealth and the State;
- (xxxiv): the construction and extension of railways in a State with the State's consent;
- (xxv): the recognition throughout the Commonwealth of the judicial proceedings of the States;
- (xxxvii): referrals of legislative power from the States; and
- (xxxviii): the exercise of power only exercisable at Federation by the United Kingdom Parliament or the Federal Council of Australasia at the request or with the concurrence of the Parliaments of all the States directly concerned.

Particular provisions, on matters of varying levels of importance, in later chapters of the *Constitution* also point to some cooperation between the tiers of government:

- section 73(ii): confers upon the High Court an appellate jurisdiction with respect to judgments of State Supreme Courts;
- section 77(iii): enables State courts to be invested with federal jurisdiction;
- section 84: concerns the transfer of officers from the public service of a State to the Commonwealth, including the obligation of States to remunerate the Commonwealth for any employment entitlements existing at the time of transfer;
- section 91: provides that States can grant aid to or bounty on the production or export of goods with the consent of both Houses of the Parliament of the Commonwealth expressed by resolution;

43 Kenneth Clinton Wheare, *Federal Government* (4th ed, 1963) 10.

44 This view has been attributed, at the least, to the High Court's original three members: Tony Blackshield and George Williams, *Australian Constitution Law and Theory – Commentary and Materials* (4th ed, 2006) 245. Additionally, it is the predominant portrayal of the American federation offered by James Bryce's *The American Commonwealth* (1888), which has been described as 'serv[ing] as the main written authority for delegates at the Federation Conventions (especially 1891), and was quoted more frequently than any other source': Helen Irving (ed), *The Centenary Companion to Australian Federation* (1999) 341.

- section 105: grants the Commonwealth the power to assume a State's public debt;
- section 105A (added by referendum in 1929): enables agreements to be made with States regarding their public debts and confers power to make laws with respect to the validation and enforcement of those agreements;
- section 111: under which States are empowered to surrender State territory to the exclusive jurisdiction of the Commonwealth;
- section 114: with the Commonwealth's consent, the States may raise naval or military forces and tax Commonwealth property;
- section 119: imposes an obligation upon the Commonwealth to protect the States from invasion and, on the application of its executive government, protect each State from domestic violence; and
- section 120: imposes an obligation upon the States to provide for the detention and punishment of federal prisoners, and for the detention of federal accused.

Considered together, these lists accord with Justice Deane's remark that 'cooperation between the Parliaments of the Commonwealth and the States is in no way antithetic to the provisions of the *Constitution*'.⁴⁵ But it may be a step too far for many to then share in his conclusion that 'to the contrary, [cooperation] is a positive objective of the *Constitution*'.⁴⁶ In Saunders' view, subsequently cited with approval by members of the High Court,⁴⁷ 'while some provisions in the *Constitution* provide for cooperation, they do not fundamentally alter its dualist character; indeed, if anything, they reinforce it'.⁴⁸ In other words, we should be wary of viewing these sections of the *Constitution* as determinative of the character of the federal relationship which it establishes overall.

However, on this view, the problem of attributing any particular character to Australian federalism remains. It is one thing to highlight the dualist nature of the federal system – at its simplest, so much is a given. It was Dixon J who said a 'federal system is necessarily a dual system'.⁴⁹ But Saunders' description of Australian federalism as 'dualist' means more than simply two-tiered government. Rather, it refers to federalism 'in the common law sense ... in which

45 *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535, 589 (Deane J) ('*Duncan*'). See also the comment made by Kirby J in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 ('*Cross-vesting Case*');

There is nothing inherent in the *Australian Constitution* which forbids the cooperative sharing and combination of governmental powers within the federation. On the contrary, the constitutional text expressly contemplates various forms of inter-governmental cooperation and cooperation between the Parliaments of the Commonwealth and of the States: at 604.

46 *Duncan* (1983) 158 CLR 535, 589 (Deane J).

47 *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, 572 (Gleeson CJ, Gaudron and Gummow JJ).

48 Saunders, above n 19, 290.

49 *Re Richard Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508, 529 ('*Uther's Case*').

each sphere of government is *institutionally* complete in itself', in contrast to the arrangements under some European constitutions.⁵⁰ Elsewhere, Saunders has been clear that this is not simply synonymous with co-ordinate federalism and thus 'automatically in opposition to "cooperative" federalism'.⁵¹ That would seem to emphasise the structural, rather than relational, qualities of a 'dualist' classification, still leaving significant room to consider how this should impact upon our reading of constitutional powers and the extent to which such a federal system might accommodate positive interaction between governments. Until one has a clear sense of that, insisting that 'the nature of the Australian constitutional system needs to be borne in mind in designing cooperative procedures',⁵² while certainly correct, poses a significant challenge.⁵³

A further perspective to be considered is offered by Galligan who has argued that the textual provisions listed earlier make it evident that, if not 'cooperative', Australia's federal design may certainly be characterised as concurrent in nature.⁵⁴ He presents this as a more definite rejection of ascribing a coordinate character to the *Constitution* than is perhaps suggested by 'dualism', but the extent to which it advances a particular relational understanding is just as open to question. How much does 'concurrency' reach beyond structure? Galligan does say that its consequences are 'likely to be competition, accommodation and compromise between governments rather than cooperation',⁵⁵ which gives some sense of how the parties to the federal system interact with each other.⁵⁶ A greater willingness on the High Court's part to embrace the different elements of this portrayal of Australian federalism has the potential to support a reappraisal of those sections of the *Constitution* through which it has tended to promote Commonwealth exclusivity at the expense of 'accommodation' of the States.⁵⁷ But it is unlikely that greater recognition of the concurrent character of the federation would have any particular impact in securing the means by which the Commonwealth and States can better secure the constitutional validity of cooperative schemes. A less equivocal sense of the nature of Australia's federal system would seem necessary to that end.

50 Saunders, above n 19, 282 (emphasis added). See also Thomas O Hueglin and Alan Fenna, *Comparative Federalism – A Systematic Inquiry* (2006) 69–76.

51 Saunders, above n 11, 76 fn 9.

52 Saunders, above n 19, 290.

53 See Hill, above n 11, 217–18.

54 Galligan, above n 6, 192–3, 199.

55 Ibid 201.

56 But as a warning against reliance on labels, consider the similarity between this description and that offered by Kirby J as 'dualism' in *O'Donoghue v Ireland* [2008] HCA 14 (Unreported, Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ, 23 April 2008):

An insistence on this attribute of federal 'dualism' is not only necessary because of the terms of the constitutional text. It is also more likely to achieve the dual objectives of federation: cooperation upon agreed matters under appropriate terms and conditions and diversity, disagreement and experimentation where that is lawful and appropriate: at [205].

57 For example, the expansive operation invested in s 109 by the 'cover the field' test would seem difficult to square with a true commitment to concurrency: see Walker, above n 32, 694.

Ultimately, the search for some definite character arising from the *Commonwealth Constitution* is an elusive one, leading one to concede that nothing in its text or history ‘points strongly one way or the other’ as to different conceptions of federalism – cooperative, co-ordinate or otherwise.⁵⁸ This limitation is all too well demonstrated by the contrasting judicial perspectives which have been brought to bear upon interpretation of the *Constitution* and what it may or may not allow governments to achieve. It is to these contrasting opinions we now turn.

B Competing Visions of the Australian Federal System in the High Court

Across the High Court’s existence as the chief interpreter of the terms of the *Commonwealth Constitution*, its members have readily acknowledged that the primary purpose and principle of federalism is to divide power in order that it be limited.⁵⁹ That a number of advantages and disadvantages ensue from such an arrangement is also accepted as being ‘self-evidently true’.⁶⁰ But distinct differences have emerged in respect of the usefulness of federalism as a factor in constitutional interpretation. This is in two senses. The first is the significance or otherwise of Australia’s federal system in determining the scope of Commonwealth powers, with the ascendant view since 1920 firmly against according it much importance at all. The second, and more specific context, concerns the extent to which the Court has been prepared to find that Australian governments may work in unison so as to overcome some of the inevitable deficiencies of power which a federal division creates.

1 The ‘Federal Balance’

While it might be thought unnecessary to revisit the unsuccessful attempts to influence judicial interpretation of constitutional powers by having regard to a concept of ‘federal balance’, the opinions given by the High Court in the recent *Work Choices* case demonstrate that this issue retains contemporary relevance. Those judgments highlight the difficulties in supporting – and also challenging – a constitutional methodology in which the standard position is professed equanimity, except in the most extreme cases,⁶¹ as to the consequences for the balance of power between the tiers of government.⁶²

The orthodox rule, laid down by the Court in the *Engineers’ Case* of 1920, is that the *Constitution* is not to be interpreted according to ‘a vague, individual conception of the spirit of the compact’.⁶³ Consequently, that decision led to the

⁵⁸ Hill, above n 11, 219.

⁵⁹ ‘A federal system of government involves a distribution of legislative power between a central and regional governments with the result that no government has the same legislative authority as a government in a unitary system of government’: *Austin v Commonwealth* (2003) 215 CLR 185, 276–7 (McHugh J) (*‘Austin’*).

⁶⁰ *Cross-vesting Case* (1999) 198 CLR 511, 574 (Gummow and Hayne JJ).

⁶¹ *Melbourne Corporation* (1947) 74 CLR 31.

⁶² ‘Retirement of Chief Justice Sir Garfield Barwick’ (1981) 148 CLR v.

⁶³ *Engineers’ Case* (1920) 28 CLR 129, 145 (Knox CJ, Isaacs, Rich and Starke JJ).

abandonment of the two implied doctrines – reserved state powers and intergovernmental immunity – which had, up to that time, protected the States from incursions by the newly created national government. In dismissing these implications as derived, not from the text of the *Constitution* itself, but from ‘political necessity’, the Court simultaneously embraced a constitutional methodology in step with standard British rules of statutory interpretation⁶⁴ and made plain that the character of Australia’s federal relations was not a matter for its determination.⁶⁵ Although a few of the Court’s members have expressed disquiet about its consequences from time to time, the methodology of the *Engineers’ Case* has been unassailable since first propounded. Consider, for example, its resounding echo in the opinion of Brennan J in *Queensland Electricity Commission v Commonwealth*:

It is impermissible to construe the terms of the *Constitution* by importing an implication from extrinsic sources when there is no federation save that created by the express terms of the *Constitution* itself. In particular there is no room for an implication derived from shadowy political constructs of a federation in which the specific powers granted to the Commonwealth are not permitted to encroach on the residue of powers available for exercise by the States.⁶⁶

The widely acknowledged apotheosis of the reasoning in the *Engineers’ Case* is found in the opinion of Latham CJ in the decision upholding the Commonwealth’s takeover of income taxation from the States in the war-time case of *South Australia v The Commonwealth*.⁶⁷ After stating that it was undeniable that Commonwealth legislation may be valid ‘though it does in fact weaken or destroy, and even is intended to weaken or destroy, some State activity’,⁶⁸ Latham CJ went on to say that the remedy for an abuse of Commonwealth power which rendered the States wholly dependent upon the former ‘is to be found in the political arena and not in the Courts’.⁶⁹ In short, not even the federal structure – never mind any attempt at ‘balance’ – provided a constitutional constraint upon the legislative power of the national government.

That extreme view has since been curbed through the qualification which insists that the plain and ordinary meaning of Commonwealth powers must still be limited by the ‘federal nature of the *Constitution*’.⁷⁰ Five years after the *First Uniform Tax Case*, Dixon J led the Court in recognising that ‘the federal system itself is the foundation of the restraint upon the use of the power to control the

64 Chief Justice Barwick supported ‘the approach of the Court in the *Engineers Case* to the construction of the *Constitution* as an Act of the Imperial legislature’: *Victoria v Commonwealth* (1971) 122 CLR 353, 372 (*‘Payroll Tax Case’*).

65 Galligan has described the decision as ‘made by a coalition of nationalists, like Isaacs and Higgins, who were intent on expanding central powers, and technical legalists, who were professionally committed to such a method’: Brian Galligan in Charles Sampford and Kim Preston, *Interpreting Constitutions – Theories, Principles and Institutions* (1996) 200.

66 *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192, 231.

67 (1942) 65 CLR 373 (*‘First Uniform Tax Case’*). See also Jeffrey Goldsworthy, ‘Conclusions’ in Jeffrey Goldsworthy (ed), *Interpreting Constitutions* (2006) 329.

68 *First Uniform Tax Case* (1942) 65 CLR 373, 423–4.

69 *Ibid* 429.

70 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 216 (Stephen J) (*‘Koowarta’*).

States'.⁷¹ The *Melbourne Corporation* principle, as it is known, is not generally portrayed as a break from or tempering of the *Engineers' Case* approach, which Mason J described as 'not hostile to the existence of such implications as are to be necessarily derived from the federal nature of the *Constitution* and are consistent with its terms'.⁷² It is worth noting that the majority in *Melbourne Corporation v Commonwealth* did not use the federal structure to directly constrain the manner in which the Commonwealth's express powers were interpreted.⁷³

The precise form of the *Melbourne Corporation* limitation has varied across the few decisions in which it has been applied – most notably on the last such occasion, *Austin v Commonwealth*,⁷⁴ where a majority of the Court collapsed its two limbs into a general principle, seemingly removing any stand-alone prohibition on Commonwealth laws discriminating against a particular State or the States collectively. While this appears to further narrow the scope by which the 'federal nature' affects the interpretation of constitutional powers, it does not amount to a rejection of the central importance of 'the underlying conception concerning the nature of the Australian federation'.⁷⁵ Lest expressions of this sort be apt to mislead, it is as well to acknowledge that the crucial thing inhibiting Commonwealth power is merely the *fact* of a federal structure, rather than any particular 'nature' or 'character'.

That point explains very neatly the strictly limited role which the *Melbourne Corporation* principle, however presently formulated, plays in constitutional interpretation. Despite the apparently innocuous quality of the law which gave rise to its most recent application, the principle exists for those exceptional cases where the impact of Commonwealth legislation is to strike at the very heart of the independence or integrity of the States as partners in the *Commonwealth Constitution*. Australia's federal relationships have not been seen, importantly for present purposes, as playing any more substantial a role in the interpretation of constitutional powers.⁷⁶ 'So much and no more can be distilled from the federal nature of the *Constitution*', said Mason J of the *Melbourne Corporation* principle.⁷⁷ Nevertheless, several Justices *have* attempted to extract more from the federal structure. Leaving aside the original trio of High Court Justices whose efforts to this end were swept aside by the later *Engineers' Case* majority, more contemporary appeals to 'federal balance' were revived in a number of decisions in the early 1980s which saw dramatic expansions of the corporations and

71 *Melbourne Corporation* (1947) 74 CLR 31, 81 (Dixon J).

72 *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192, 212 (Mason J).

73 *Melbourne Corporation* (1947) 74 CLR 31. Cf the views of Latham CJ in *Melbourne Corporation* (1947) 74 CLR 31, 61 and Barwick CJ in the *Payroll Tax Case* (1971) 122 CLR 353, 372.

74 *Austin* (2003) 215 CLR 185.

75 *Ibid* 301 (Kirby J).

76 Zines, above n 35, 88.

77 *Commonwealth v Tasmania* (1983) 158 CLR 1, 129 (Mason J) ('*Tasmanian Dam Case*').

external affairs powers.⁷⁸ It is worth noting that one explanation for the scarcity of such views in the intervening decades is that the full impact of the *Engineers' Case* was itself delayed until the last quarter of the century.⁷⁹ Those members of the Court who advocated respect for a federal balance in the interpretation of Commonwealth powers were primarily Gibbs CJ and Wilson and Dawson JJ. In two major decisions handed down on the same day, the Chief Justice invoked the importance of 'federal balance'. In *Actors and Announcers Equity Association v Fontana Films Pty Ltd* Gibbs CJ insisted that an incremental approach to determining the scope of legislative power would ensure the 'proper reconciliation between the apparent width of s 51(xx) and the maintenance of the federal balance which the *Constitution* requires'.⁸⁰ In *Koowarta v Bjelke-Petersen* he claimed that 'in determining the meaning and scope of a power conferred by section 51 it is necessary to have regard to the federal nature of the *Constitution*'.⁸¹ In the landmark decision of *Commonwealth v Tasmania*, a clear majority endorsed a reading of the external affairs power with no qualification attached as to the subject matter of international treaties which might enliven the power over the protestations of these judges.⁸² Justice Dawson, who remained on the Court after the departure his like-minded colleagues, never resiled from criticism of the broad reading 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 of our federal system in particular'.⁸³

The relatively low number of cases in recent years requiring the Court to consider the scope of federal legislative powers meant that *Work Choices* was the first opportunity for some time to revisit these debates. The outcome of the case,

78 In his reasons in *Work Choices*, Callinan J includes in his survey of supporters of the 'federal balance' as an aid to interpretation, several opinions of Starke J: (2006) 229 CLR 1, 322–3. But while the quoted material at this point is certainly defensive of the constitutional position of the States, it is difficult to see it as extending broadly beyond an objection to Commonwealth laws threatening the integrity or independent existence of the States; that is, the principle later enshrined in *Melbourne Corporation*. The tendency to elide these two concepts is, as discussed later, a crucial weakness in Justice Callinan's attempts to respond to the majority's opinion.

79 David Solomon, 'Federalism, impact of Court's decisions' in Tony Blackshield, Michael Coper and George Williams, *Oxford Companion to the High Court of Australia* (2001) 275, 276; Zines, above n 35, 88–9.

80 (1982) 150 CLR 169, 182.

81 *Koowarta* (1982) 153 CLR 168, 198–9 (Gibbs CJ); see also 251–2 (Wilson J). Additionally, Stephen J, the fourth member of the majority, arrived at his own solution to the problem of the width of the external affairs power mindful of the need to ensure its exercise 'will not destroy the federal character of the polity': at 213.

82 *Tasmanian Dam Case* (1983) 158 CLR 1, 99–100 (Gibbs CJ), 302–03 (Dawson J).

83 *Victoria v Commonwealth* (1996) 187 CLR 416, 564–73 ('*Industrial Relations Act Case*'). It should be noted that Dawson J did, however, accept the widest operation of the 'geographical externality' aspect of s 51(xxix) in *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 632 ('*War Crimes Act Case*'). This did not involve him discarding his usual concern for the federal balance (despite Justice Kirby's suggestion in *XYZ v Commonwealth* (2006) 227 CLR 532, 559), since his view was that legislative capacity for purely external matters was essential for the Commonwealth and any limitation upon the power of the Commonwealth to legislate with respect to matters outside the country would leave a gap in the totality of legislative power which the *Constitution* bestows upon the Commonwealth and the States: at 638.

with its confirmation of an expansive interpretation of the power in section 51(xx) of the *Constitution* to make laws with respect to corporations is well known.⁸⁴ The wide interpretation of section 51(xx) was resisted by two dissenters – Kirby and Callinan JJ – on a number of grounds. While the former argued that the Court ‘needs to give respect to the federal character of the *Constitution*’, which he described as ‘a liberty-enhancing feature’,⁸⁵ Callinan J directly attacked the precedent of *Engineers’ Case*⁸⁶ and insisted that the ‘maintenance of the federal balance is a powerful’ constitutional implication.⁸⁷ He rejected the criticism of the *Engineers’ Case* joint judgment that an interpretative method mindful of the federal relationship was ‘a matter of political or social preference’, describing it instead as a ‘constitutional imperative’ to be ‘closely and carefully kept in mind when construing the *Constitution*’.⁸⁸

The difficulty with Justice Callinan’s opinion, as with the attempts of his predecessors, is its lack of clarity as to where the balance is to be found and how it might operate – both in respect of the corporations power and as a curb on Commonwealth power more generally. This was most apparent from his assertion that ‘the *Constitution* mandates a federal balance’.⁸⁹ Although the *Constitution* unquestionably establishes a federal system and divides power across it, it is hard to see how the relationship between the two levels of government is otherwise ‘mandated’ by the terms of the *Constitution* so as to protect the States from broad readings of Commonwealth power. Justice Callinan himself appeared to have trouble articulating why this was the case:

Let me make clear what I mean by the ‘federal balance’ before I continue. It is, essentially, a sharing of power, even of power which the Commonwealth can monopolise under a specific constitutional grant if and when it chooses to do so, and can successfully invoke s 109 of the *Constitution*, and the exercise of different powers of varying importance by each of the Commonwealth and the States, but not so that, relevantly for present purposes, the essential functions and institutions of the States, for example, internal law and order, their judiciaries, and their Executives are obstructed, impeded, diminished, or curtailed. Even when the Commonwealth does have the relevant power, the exercise of it may be unconstitutional.⁹⁰

This does not seem to take us any further from the idea that ‘as much as can legitimately be extracted’⁹¹ from the federal nature of the *Constitution* is that the methodology of the *Engineers’ Case* is impliedly limited by the constitutional requirement that the States are not to be abolished by striking at their essential components or capacities. It fails to respond to – indeed, appears almost to share – the majority’s agreement with Justice Dixon’s assessment that the drafters ‘conceived the States as bodies politic whose existence and nature are

84 See generally Andrew Stewart and George Williams, *Work Choices – What the High Court Said* (2007).

85 *Work Choices* (2006) 229 CLR 1, 229.

86 *Ibid* 305–08.

87 *Ibid* 319.

88 *Ibid* 332.

89 *Ibid* 333.

90 *Ibid* 321.

91 *Tasmanian Dam Case* (1983) 158 CLR 1, 129 (Mason J).

independent of the powers allocated to them'.⁹² Hence, despite a lengthy extrapolation of his objections to the constitutional basis of the Commonwealth's *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) and disdain for the expansion of central government power facilitated by the *Engineers' Case* methodology, Callinan J failed ultimately to significantly advance the conception of the federal balance as an aid to interpretation of the *Constitution*. It seems fair to suggest that Justice Callinan's argument turns in on itself as the inevitable result of the interpretative vacuum to which a general appeal to 'federal balance' must lead. His attempt to explicitly provide meaning to this idea does not meet the challenge laid down by the majority's question:

when it is said that there is a point at which the legislative powers of the federal Parliament and the legislative powers of the States are to be divided lest the federal balance be disturbed, how is that point to be identified?⁹³

At the critical moment, Callinan J avoided this question by reverting to a concern only with adherence to the structure of federalism rather than how the levels of government might better share power between them. In their joint judgment the majority made clear that their objection to being guided by considerations of federal balance is that it 'stops well short of asserting [merely] that the favoured construction must be adopted lest the States could no longer operate as separate governments exercising independent functions'.⁹⁴ It is, at the end of the day, a concept which requires some attempt at articulating where the Commonwealth and the States stand in relation to each other beyond the guaranteed existence of the latter.

The majority's claimed aversion to a 'federal balance' is that it is essentially an idea without 'content'.⁹⁵ This deficiency, far more than misgivings as to whether it is a political rather than legal principle, about which they appeared relatively sanguine, prove insurmountable.⁹⁶ But we might ask whether this adequately justifies the High Court's traditional reluctance since the *Engineers' Case* to interpret the *Constitution* with an eye on the consequences for federal relations and power sharing. We can readily accept the difficulty of stating with certainty how according weight to the federal balance will affect interpretation – either in a particular case or generally, but this does not equate to saying it is a concept devoid of meaning. Revealingly, the majority do not make this claim. Their stated requirement that the idea have 'content' is rather more exacting – what they are calling for is clarity as to how the concept (which is itself quite straightforward) will apply in practice.

⁹² *Work Choices* (2006) 229 CLR 1, 120 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

⁹³ *Ibid* 120–1 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

⁹⁴ *Ibid*. Their Honours went on to say:

Instead it is advanced by proposing particular limitations to the connection which must be established to demonstrate that a law is a law with respect to constitutional corporations and is advanced in that form on the basis that the result is said to be evidently desirable, even necessary: at 120.

⁹⁵ *Ibid* 120–1.

⁹⁶ *Ibid*.

But elusiveness cannot by itself be a sufficient justification for declining to engage with a constitutional requirement.⁹⁷ Courts, particularly in constitutional matters, are regularly called upon to apply ideas abstracted at a high level of generality. To take just one example, the High Court has managed, particularly in recent years, to develop a sizeable and complex body of jurisprudence concerning the separation of federal judicial power. In his *Work Choices* dissent, Kirby J highlighted the intrinsic subjectivity in judicial characterisation of legislation which the majority's rejection of 'federal balance' is so obviously determined to avoid. When he called for reasoning which is transparent as to the effect of each decision-maker's 'experience and constitutional values'⁹⁸ it is clear that it is through these considerations that 'content' may be provided to the concept of 'federal balance'. Justice Kirby went on to demonstrate how agreed constitutional values might be extended to sustain reasoning along these lines:

In applying the doctrine in the *Engineers Case*, this Court has repeatedly given effect to reasoning that has confined the ambit of express grants of federal legislative power so that they could not be used to control or hinder the States in the execution of their central governmental functions. Once such an inhibition on the scope of federal legislative powers is acknowledged, derived from nothing more than the implied purpose of the *Constitution* that the States should continue to operate as effective governmental entities, similar reasoning sustains the inference that repels the expansion of a particular head of power (here, s 51(xx)) so that it would swamp a huge and undifferentiated field of State lawmaking, the continued existence of which is postulated by the constitutional language and structure ... If, consistently with the decision in the *Engineers Case*, such inhibitions on lawmaking may be drawn from the design and structure of the *Constitution*, its provisions and purposes, so may the limitations on the ambit of s 51(xx), urged by the plaintiffs in these proceedings. The test for all such implications is necessity. Here, necessity is established because, if s 51(xx) is not construed and limited as the plaintiffs submit, the ambit and operation of that paragraph is potentially distorted and blown out of all proportion.⁹⁹

The segue by Kirby J from the narrow federal implication inhibiting Commonwealth power to a broader constraint reflects Saunders' exasperation when she asked,

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 unpredictable range of functions or the revenue resources to meet those functions?¹⁰⁰

But the difficulty with convincing a majority of the Court to extend the operation of the federal implication beyond its limited focus is the apparent incompatibility of doing so with the *Engineers' Case's* condemnation of those illegitimate implications formed on a 'vague, individual conception of the spirit

97 Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 11.

98 *Work Choices* (2006) 229 CLR 1, 203.

99 *Ibid* 227–8.

100 Cheryl Saunders, 'The National Implied Power and the Implied Restrictions on Commonwealth Power' (1984) 14 *Federal Law Review* 267, 275. A slightly different version of this question is posed, and answered, by Leslie Zines, 'Engineers and the "federal balance"' in Michael Coper and George Williams (eds), *How Many Cheers for Engineers?* (1997) 81, 91–2.

of the compact'.¹⁰¹ Hence, the *Work Choices* majority's insistence that the correct starting point for constitutional interpretation must always be 'the constitutional text, rather than a view of the place of the States that is formed independently of that text',¹⁰² must be the real basis of their objection to recourse to 'federal balance', rather than their complaint that the idea is without content.¹⁰³

Many have scoffed at the suggestion that the constitutional text cannot support a more robust federal implication to limit the powers of the central government.¹⁰⁴ Even so, it seems an overstatement to declare 'it is unnecessary to find an implied theory of federalism when one is clearly expressed in the *Constitution*'.¹⁰⁵ This can only be true in the broadest sense – but then, that may be all that is required. A convincing demonstration of this was offered by Crommelin who made the case for protection of State 'political power' on the grounds that the limitation of power is central to all federalist theory; to do so was clearly the intention behind the Framers establishment of a federal system; and, in step with the point made with great force by both *Work Choices* dissenters, possessing political power 'is linked inextricably to the maintenance of the States as viable political entities'.¹⁰⁶

As strong those arguments are, it seems that the weight of precedent will prevent the High Court departing anytime 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, except in the most exceptional cases falling within the *Melbourne Corporation* principle. While we agree that the States have not served their cause well by timidity in attacking the *Engineers' Case* directly, we seriously doubt that the Court would be receptive to such a challenge if one were now to be made.¹⁰⁷ Although Craven is surely correct to identify the Commonwealth's exclusive power of judicial appointment as a factor in the High Court's centralist tendencies,¹⁰⁸ we have little faith that lobbying for the appointment of more Justices from 'smaller' states,¹⁰⁹ or even giving the States a greater stake in appointments to the High Court,¹¹⁰ would lead to the *Engineers' Case* being dislodged. Instead, it seems more realistic to attempt marshalling the *Engineers' Case* methodology itself in support of a more sophisticated federal interpretation.

101 *Engineers' Case* (1920) 28 CLR 129, 145 (Knox CJ, Isaacs, Rich and Starke JJ).

102 *Work Choices* (2006) 229 CLR 1, 118–19.

103 Hill also draws attention to the repeatedly stated necessity of textual or structural support before the Court will have recourse to theories such as cooperative federalism, before noting the now familiar objection that it is impossible to construe the *Constitution* without regard to theories external to it: Hill, above n 11, 223.

104 Not least Callinan J in *Work Choices* (2006) 229 CLR 1, 321–2. See also Walker, above n 32, 690.

105 Sharman, above n 25.

106 Crommelin, above n 29, 181.

107 Cf Allan and Aroney, above n 32, 288–9.

108 Craven, above n 5, 64.

109 Allan and Aroney, above n 32, 290–1.

110 Sharman, above n 25.

At present, federal balance is not, despite all the indicators to the contrary, viewed as a constitutional value sufficiently ‘anchored in the text’¹¹¹ of the *Constitution* to cast on the Court the obligation to navigate by reference to this concept. The lack of objective ‘content’ to the value of respect for the distinct areas of operation of State laws is not a sufficient reason for its eschewal. What is lacking, in light of the demands made by the methodology of the *Engineers’ Case*, is a clear signal that some attempt at federal balance is, to borrow Justice Callinan’s expression, a constitutional mandate.

The solution which we consider in Part III of this paper involves constitutional amendment. Until the *Constitution* itself reflects that the relationship between the Commonwealth and State Governments should be of a character conducive to respect and cooperation between the tiers of government, the existing jurisprudence will continue to dismiss any idea of ‘federal balance’. It would seem prudent to ensure that any overhaul of the *Constitution* starts with an explicit commitment to a balanced and cooperative federal relationship.

2 *The Validity of Federal Cooperation*

Beyond its limited role in the interpretation of Commonwealth powers, the particular context in which the High Court’s vision of Australian federalism has been manifest is in its consideration of Commonwealth–State cooperative schemes. Although intergovernmental cooperation has occurred to some degree since the early years of the Commonwealth’s existence and is, as pointed out earlier, reflected strongly in particular constitutional provisions, a burgeoning of agreements between the tiers of government, frequently underpinned by legislation, has been a feature of the later decades of the last century.¹¹²

The cornerstone of judicial support for these initiatives was provided by the decision of *R v Duncan*,¹¹³ in which the Court confirmed that there was no general prohibition on such cooperative schemes. In that case, the Court approved the creation, by complementary federal and state Acts, of the Coal Industry Tribunal. It was clear that neither level of government acting alone could have legislated to establish a body which enjoyed the range of powers and capacities conferred by the Commonwealth and the States upon the Tribunal. The essence of the decision is contained in Chief Justice Gibbs’ statement that:

There is no express provision in the *Constitution*, and no principle of constitutional law, that would prevent the Commonwealth and the States from acting in cooperation, so that each, acting in its own field, supplies the deficiencies in the power of the other, and so that together they may achieve, subject to such limitations as those provided by s 92 of the *Constitution*, a uniform and complete legislative scheme.¹¹⁴

111 *McGinty v Western Australia* (1996) 186 CLR 140, 232 (McHugh J).

112 Hueglin and Fenna, above n 50, 226.

113 *Duncan* (1983) 158 CLR 535.

114 *Duncan* (1983) 158 CLR 535, 552 (Gibbs CJ). This was far from a new idea, with Starke J having made essentially the same point much earlier: *Deputy Commissioner of Taxation (NSW) v WR Moran Pty Ltd* (1939) 61 CLR 735, 774.

Justice Mason perhaps went slightly further in articulating collaboration as central to the federal relationship when he stated that the *Constitution's* division of 'legislative powers between the Parliaments of the Commonwealth and the States, necessarily contemplates that there will be joint cooperative legislative action' to deal with matters lying beyond the competence of either.¹¹⁵ But this was mild compared to Justice Deane's ringing claim, quoted earlier, that cooperation between Australian governments was a 'positive objective' of the *Constitution*.¹¹⁶ The effect of *R v Duncan*¹¹⁷ was, Saunders has suggested, to foster a perception that cooperation provided a 'shield against constitutional invalidity'.¹¹⁸

The accuracy of that assessment is borne out by the dismay which greeted the decision in *Re Wakim; Ex parte McNally*¹¹⁹ to strike down the cross-vesting of judicial power. Although the scheme had been upheld months earlier (admittedly only by virtue of a statutory device resolving an even deadlock between the Court's Justices in favour of the lower court's decision),¹²⁰ the second challenge found favour with six members of the bench, who took the view that the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) and the *Jurisdiction of Courts (Cross-vesting) Act 1987* of each of the States were constitutionally invalid to the extent they purported to give the Federal Court of Australia jurisdiction to exercise State judicial power. While investing State courts with federal jurisdiction is expressly condoned by the *Commonwealth Constitution*,¹²¹ the majority found the converse was not permissible on two grounds. First, there was a 'negative implication' against conferral of State jurisdiction, in part because it would undermine the list of 'matters' in sections 75 and 76 over which the federal courts were permitted to have jurisdiction, and also as a consequence of the Commonwealth's express power to invest State courts with federal jurisdiction.¹²² Second, the ability of the Commonwealth to legislate its consent to a conferral of State jurisdiction upon its courts was found to be unsupported by any legislative power, including that to make laws 'incidental' to the execution of federal judicial power.¹²³ As unexpected as was the majority's view of the strictures of Chapter III, it was the second aspect which had wider ramifications for cooperative schemes more generally, since the difficulty it raised was not isolated to attempts to transfer judicial power.

Further uncertainty over the rigidity of cooperative structures and conferrals was fanned by the High Court's decisions in *Byrnes v The Queen*¹²⁴ and *Bond v*

115 *Duncan* (1983) 158 CLR 535, 563 (Mason J) (emphasis added).

116 *Ibid* 589.

117 *Duncan* (1983) 158 CLR 535.

118 Saunders, above n 11, 74.

119 *Cross-vesting Case* (1999) 198 CLR 511.

120 *Gould v Brown* (1998) 193 CLR 346.

121 Sections 71 and 77(iii).

122 *Cross-vesting Case* (1999) 198 CLR 511, 558 (McHugh J).

123 *Ibid* 546 (Gleeson CJ).

124 (1999) 199 CLR 1 (*Byrnes*).

*The Queen*¹²⁵ that the Commonwealth Director of Public Prosecutions lacked the power to appeal against sentences obtained in respect of prosecutions by his or her office of persons for offences under State laws. But the wider precariousness of the existing corporate regulatory scheme was not made fully apparent until the case of *R v Hughes*,¹²⁶ wherein, as had been suggested by the *Cross-vesting Case*, the Court made clear its requirement that the Commonwealth's consent to the conferral of State power upon a federal agency was ineffective without a clear source of constitutional authority. On the facts of the case, two relevant legislative powers were available to support the prosecution of Mr Hughes by the Commonwealth DPP – the powers with respect to trade and commerce (section 51(i)) and external affairs (section 51(xxix)).¹²⁷ But it was a near miss and Kirby J probably spoke for all the Court when he warned that 'the next case may not present circumstances sufficient to attract the essential constitutional support' and pointed out the prudence of urgent attention being given to the constitutionality of the national scheme for corporate regulation as a whole – a view widely shared by commentators on the decision.¹²⁸ This was achieved soon after with the States making a referral of legislative power so as to enable the Commonwealth to support the national law.¹²⁹

This saving of that law through the referral package did nothing to remedy the fact that the *Constitution*, as interpreted by the High Court, simply no longer provides an adequate framework for federal–State cooperation on national legislative schemes.¹³⁰ The decisions in the *Cross-vesting Case* and *Hughes* may have arisen in the field of corporate law, but their impact extends far beyond that. They effectively re-asserted the Framers' more fragmented vision of Australia's

125 (2000) 201 CLR 213 (*Bond*).

126 (2000) 202 CLR 535 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne, Callinan JJ) (*Hughes*). An important distinction between *Byrnes* and *Bond* on one hand and *Hughes* on the other was that the latter concerned what the Court called the 'national scheme', which was agreed upon by the Commonwealth, States and Northern Territory after the Commonwealth's attempt to replace the 'cooperative scheme' (under which the other two cases were decided) by legislating alone had been ruled invalid in the *Incorporation Case* (1990) 169 CLR 482.

127 *Hughes* (2000) 202 CLR 535, 556. Faced with conflicting submissions from the Commonwealth Attorney-General and his West Australian counterpart, the Court declared it unnecessary to decide the extent to which the Commonwealth's power to legislate with respect to corporations could support prosecution of the relevant offences.

128 Ibid 584. For academic attention to the problem see Marion Hetherington, 'Resolving the Company Law Crisis after the High Court's Decision in *The Queen v Hughes*' (2000) 28 *Australian Business Law Review* 364, 373; Dennis Rose and Geoffrey Lindell, 'A Constitutional Perspective on *Hughes* and the Referral of Powers' (2000) 3 *Constitutional Law and Policy Review* 21; and Jan Wade, 'Re *Wakim* – A Way Forward' (2000) 11 *Australian Journal of Corporate Law* 273.

129 The political and legal aspects of this remedy are described by Williams, above n 17, 165–8.

130 This was explicitly recognised by the Parliamentary Joint Statutory Committee on Corporations and Securities, 'Report into the Provisions of (a) the *Corporations (Commonwealth Powers) Act 2001* (NSW); and (b) the Corporations Bill 2001 and the Australian Securities and Investments Commission Bill 2001' (May 2001) 15–16.

federal system.¹³¹ In approaching the *Constitution* in this way, the High Court revealed (or created) a structural weakness that continues to blight cooperative endeavours by the States and the Commonwealth, including any attempt to create a more efficient and just judicial system through the cross-vesting of matters.

Similar problems to those which affected the *Corporations Law* arise in regard to other cooperative schemes¹³² and in other fields, including price monitoring of the Goods and Services Tax ('GST') by the Australian Competition and Consumer Commission, competition law,¹³³ and in new fields such as the regulation of gene technology.¹³⁴ The effect of the *Cross-vesting Case* upon the cross-vesting regime generally also extends to areas such as intellectual property and beyond the Federal Court to other Commonwealth judicial bodies. The *Cross-vesting Case* has been described as 'a serious blow for the powers of the Family Court when it exercises jurisdiction in relation to children',¹³⁵ particularly in regard to orders involving children not of a marriage.¹³⁶

Why was this the case? Despite not overruling *Duncan* in any respect,¹³⁷ the effect of *Hughes* was nevertheless to place a significant limitation upon the utility of cooperative schemes. In the earlier decision, the Court had recognised that while it might be 'no argument against the validity or efficacy of cooperative legislation that its object could not be achieved or could not be achieved so fully by the Commonwealth alone',¹³⁸ constitutional limits must still be respected in the construction of the final product. In particular, Mason J insisted:

It is an integral element in joint legislation for a cooperative purpose that a legislature, whether Commonwealth or State, can give its authority or office holder a capacity to receive additional powers and functions as may be conferred by another legislature.¹³⁹

The limitation on the Commonwealth's ability to receive powers from the States that Mason J had in mind is open to debate. The predominant examples of constitutional limits which members of the Court raised in *Duncan* were the guarantee of freedom of trade in section 92 and the need to navigate the possible

131 As Aroney argued: 'at the heart of *Re Wakim* lies a conception of the Australian federation as consisting of separate, distinct "sovereigns" governing distinct "spheres"': Nicholas Aroney, 'The Constitutional Demise of the Cross-vesting Scheme' (1999) 7 *Insolvency Law Journal* 116, 130.

132 See Cheryl Saunders, 'In the Shadow of *Re Wakim*' (1999) 17 *Company and Securities Law Journal* 507, 515–16.

133 See Brendan Sweeney, 'The Constitutional Basis of the Competition Code' (2001) 27 *Monash University Law Review* 78.

134 For a list of schemes that might be affected see *Hughes* (2000) 202 CLR 535, 580 fn 194 (Kirby J).

135 Dorothy Kovacs, 'Proceedings in Relation to Children in the Post Cross-Vesting Era' (2000) 28 *Federal Law Review* 105, 106.

136 *Ibid* 120–3.

137 During hearings for the recent decision of *O'Donoghue v Ireland* [2008] HCA 14 (Unreported, Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ, 23 April 2008), the Solicitor-General of Victoria attempted to clarify that the central point from *Duncan* had not been overruled by later decisions: Transcript of Proceedings, *O'Donoghue v Ireland* (High Court of Australia, Pamela Tate, 6 December 2007). Neither at the hearings nor in the judgments since handed down was there any confirmation to the contrary.

138 *Duncan* (1983) 158 CLR 535, 580 (Brennan J).

139 *Ibid* 563.

operation of section 109. But in the *Cross-vesting Case* and *Hughes*, the Gleeson Court took a more expansive view as to the limitations on power which cannot be cured by cooperation. In part, this appeared to be motivated by a desire to signal to the Australian governments that they may not collude in the effective amendment of the *Constitution* outside of the process stipulated by section 128.¹⁴⁰

So far as this approach reflects the weight given to federal cooperation, its tenor might be described as ambivalence, veering to outright dismissal, of this as any kind of constitutional value. The Chief Justice's declaration in the *Cross-vesting Case* that the 'most that can be said is that, as *Duncan* shows, federalism and cooperation are not inconsistent, and is a legitimate consideration to take into account'¹⁴¹ is representative. Justice McHugh, in the same case, was more definite. In a familiar passage, he stated:

[C]ooperative federalism is not a constitutional term. It is a political slogan, not a criterion of constitutional validity or power ... It records a result reached as the result of a State and the Commonwealth legislating *within the powers* conferred on them by the *Constitution*.¹⁴²

In its requirement that constitutional limits be observed, this is, of course, entirely consistent with the stance taken in *Duncan*. But Justice McHugh's further claim that the Commonwealth and States, even acting together, may not be fully sovereign and that this is 'the price and consequence of federalism'¹⁴³ seemed to indicate a particularly unhelpful approach to the interpretation of a federal constitution in modern times. Justice McHugh supported his argument that there were some things neither government could lawfully do by reference to the guarantee of free interstate trade in section 92. As that is an express constitutional prohibition which applies to both levels of government, he was surely correct and nothing said in *Duncan* would dispute this. But it is not clear why the inability to overcome such a prohibition is due to 'federalism' – nor why this example verifies Dicey's claim that 'federal government means weak government'.¹⁴⁴ The litigation in the *Cross-vesting Case* did not, of course, concern section 92 in any way; it dealt with a far less evident restriction – one which had failed to convince Brennan CJ and Toohey J just months earlier in *Gould v Brown*.¹⁴⁵ In that case they had insisted that

140 'The Parliaments of the Commonwealth, the States, and the Territories cannot, by cooperation, amend the *Constitution*': *Cross-vesting Case* (1999) 198 CLR 511, 540 (Gleeson CJ). In the same case, Gummow and Hayne JJ stated:

[N]o amount of cooperation can supply power where none exists. To hold to the contrary would be to hold that the Parliaments of the Commonwealth and the States could, by cooperative legislation, effectively amend the *Constitution*: at 577.

141 *Cross-vesting Case* (1999) 198 CLR 511, 545 (Gleeson CJ).

142 *Ibid* 556 (McHugh J) (emphasis in original).

143 *Ibid*.

144 *Ibid*.

145 *Gould v Brown* (1998) 193 CLR 346.

if a combination of the legislative powers of the Commonwealth and the States is ineffective to vest State jurisdiction in the Federal Court, the reason must be found, if anywhere, in some restriction or limitation contained in the *Constitution*.¹⁴⁶

They would have agreed that an express prohibition such as section 92 met this requirement, but were of the view that there was nothing of that order to deny validity to the laws upon which cross-vesting of judicial power depended.¹⁴⁷

The scope for differing judicial attitudes to intergovernmental cooperation is further demonstrated by contrasting *Hughes* with the central idea of *Duncan*. In requiring a legislative source of power to support the Commonwealth's imposition upon its officers or instrumentalities of 'powers coupled with duties adversely to affect the rights of individuals',¹⁴⁸ *Hughes* substantially curtailed the usefulness of cooperation in many instances. If the Commonwealth must have the legislative authority to support those powers conferred by the States operating as positive administrative obligations upon its officers, and a suitable power can be found, then, ironically, the Commonwealth may already have the means to legislate to this end without any need for State cooperation. If, conversely, no Commonwealth power can be sourced, then no agreement with the States can make good the deficiency. Any prospect that the impact of this approach on the viability of cooperative schemes could be overcome through general reliance on the Commonwealth's express incidental power in section 51(xxxix) was frustratingly left unresolved and subject to doubt by the judgments in *Hughes*.¹⁴⁹

To be clear, the reasoning in *Hughes* does still leave room for transfers of power from the States to the Commonwealth without requiring the latter support its exercise through its own powers. The Court distinguished the imposition of a duty to use conferred State power from a mere consent or permission to do so.¹⁵⁰ Attempts by the Commonwealth and Western Australia to argue that the Coal Industry Tribunal, upheld in *Duncan*, had also been charged with positive obligations to exercise State powers without direct support from Commonwealth legislative power were swiftly rebuffed. To the extent that such duties were imposed on the Tribunal, the *Hughes* joint judgment found a majority of four Justices in *Duncan* had been prepared to find sufficient support amongst the Commonwealth's powers in section 51 of the *Constitution*.¹⁵¹

146 Ibid 374 (Brennan CJ and Toohey J).

147 A more intriguing example, which McHugh J might have considered, is an express restriction on only one level of government and the ability of a cooperative (or even coercive) arrangement to overcome that. This issue was something considered in obiter by Gibbs CJ in relation to s 116 in *Attorney-General (Vic); Ex rel Black v Commonwealth* (1981) 146 CLR 559, 592-3 ('*DOGS Case*').

148 *Hughes* (2000) 202 CLR 535, 558.

149 Ibid 555 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne, Callinan JJ), 582 (Kirby J). See also the *Cross-vesting Case* (1999) 189 CLR 511, 579 (Gummow and Hayne JJ). Cf Graeme Hill, 'Reviewing decisions by Commonwealth bodies made under State or Territory legislation' (2006) 17 *Public Law Review* 112, 116.

150 *Hughes* (2000) 202 CLR 535, 550, 553. The joint judgment suggested that it might not have been necessary for the State functions in question to be cast as duties upon the Commonwealth officer but that having occurred, support under an appropriate head of power was rendered necessary: at 553.

151 Ibid 557. Although Murphy and Deane JJ were direct on this point, the position of Mason and Brennan JJ was not quite as emphatic. For example, Brennan J said:

Even so, it is apparent that *Hughes* is a narrower decision than *Duncan* and also that much now turns on drawing a distinction as to whether the powers derived from State jurisdiction and conferred upon Commonwealth bodies are to be exercised as a matter of positive obligation or something more discretionary. The distinction hardly appears to have a strong basis in constitutional text; nor will it always be clear in practice.¹⁵² The recent division of the Court in *O'Donoghue v Ireland* over whether the *Extradition Act 1988* (Cth) imposed a duty on State Magistrates in respect of such proceedings is a good demonstration of the variety of factors which can point to opposing views on whether a power is in the nature of a positive obligation.¹⁵³

The *Duncan* Court did not, despite what the *Hughes* majority said about their satisfaction as to the reach of Commonwealth power, appear to insist on the need for this as part of whether State powers were to be exercised as duties or not. When its members spoke of being mindful of constitutional limits, their statements about the permissibility of and need, let alone desirability, for federal cooperation suggest that the requirements raised by the Court in the *Cross-vesting Case* and *Hughes* as essential to 'constitutional integrity'¹⁵⁴ impose an excessive and unnecessary impediments to this end. Where the cases are consistent is in recognising that cooperative federalism per se can never be a source of constitutional validity; where they diverge is the extent to which the Court was prepared to develop constitutional jurisprudence which was hostile to, rather than facilitative of, cooperative schemes of the sort under consideration.¹⁵⁵

If the demands of *Hughes* seem unduly constrictive of Commonwealth–State ingenuity, it might be argued that the Court's approach is supported by the existence of a clear mechanism for the constitutional transfer of State power to the Commonwealth – the referrals power in section 51(xxxvii).¹⁵⁶ But while this provision offers a solution largely free of the complexity and insecurity which attaches to legislative packages in which the particular powers of State

It is within the competence of the Commonwealth Parliament to permit such a tribunal to have and to exercise State powers where the vesting and exercise of State is conducive to or consistent with the achievement of the object which the vesting and exercise of federal powers is intended to achieve: *Duncan* (1983) 158 CLR 535, 579.

This could be read in fact as providing support for the Commonwealth authorisation of a conferral by the States without requiring strict connection to a particular head of federal power.

152 Hill, above n 11, 222; Saunders, above n 19, 276.

153 [2008] HCA 14 (Unreported, Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ, 23 April 2008). The joint judgment found no duty was imposed by reading the relevant section of the *Extradition Act 1988* (Cth) in conjunction with s 4AAA of the *Crimes Act 1914* (Cth), while Kirby J dissented for a range of reasons.

154 Justice McHugh cited Ronald Dworkin's view of interpretation as integrity in the *Cross-vesting Case* (1999) 198 CLR 511, 554. McConvill and Smyth took issue with Justice McHugh's clear prioritising of constitutional integrity over cooperative federalism: James McConvill and Darryl Smyth, 'Interpretation and Cooperative Federalism: *Bond v R* from a Constitutional Perspective' (2001) 29 *Federal Law Review* 75, 83–90.

155 Scott Guy, 'Overcoming the Institutional and Constitutional Constraints of Australian Federalism: Developing a New Social Democratic Approach to the Federal Framework' (2006) 34 *Federal Law Review* 319, 337; Hill, above n 11, 218.

156 Saunders, above n 11, 75.

authorities are conferred on the Commonwealth for its use, it is something the States have proved far less willing to use. In an environment in which their powers have been substantially diminished to the benefit of the Commonwealth, it is not surprising that only the most drastic of needs will prompt the States to surrender further areas of their legislative control to the national government. In any event, referral of legislative power is surely just one (fairly extreme) form of federal cooperation.¹⁵⁷ It would seem strange to argue that its possibility justifies narrowing other means by which the tiers of government can collaborate.

Quite evidently, the lack of a clear constitutional value being ascribed to intergovernmental cooperation has the potential to produce inconsistency and uncertainty in this area. Justice McHugh's rejection of cooperative federalism as a 'political slogan' is difficult to reconcile with the opinions in *Duncan* that it is 'necessarily contemplated' or a 'positive objective' of the *Constitution*. In a sign that debate over this core question is likely to continue, French J of the Federal Court, in remarks last year which highlight the hardline of Justice McHugh's comments about cooperative federalism, said:

No doubt it has been used as a political slogan but it is also descriptive of a range of legal mechanisms either permitted or expressly contemplated by the *Constitution*. Indeed it would not be going too far to say that the *Constitution*, while marking out the boundaries of legislative power between the components of the Federation, rests upon an assumption of cooperation between them.¹⁵⁸

C Conclusion

The purpose of this part of the paper has been to examine the extent to which the *Commonwealth Constitution* embodies a particular model of federal arrangements beyond its structural design. While the latter is obviously important, the lack of clarity over what kind of federal relationship might be supported by the *Constitution* is a major deficiency which has hampered harmonious and effective federal relations and power-sharing.

As unsatisfactory as we believe this state of affairs to be, it is not due simply to capriciousness on the part of the High Court's judges. The hole we have identified at the heart of Australia's constitutional arrangements is the lack of express recognition of the type of federal state we are to have; this consequently requires provisions which support and further that articulated conception of governance. The existence of constitutional provisions directed to this end in other prominent and comparable instruments indicates that this is not an abstract indulgence but a serious and vital part of future reform. We turn now to consider how this might be accomplished.

¹⁵⁷ Williams, above n 17, 168.

¹⁵⁸ Justice Robert French, 'Horizontal Arrangements – Competition Law and Cooperative Federalism' (Paper presented at the Competition Law Conference, Sydney, 5 May 2007).

III A REVISED COMMITMENT TO FEDERALISM

The widely shared view that action is necessary to improve the quality and effectiveness of Australian federalism is capable of a range of responses. However, it is clear that an attempt to reinstate a system of governance in which the States are as dominant as the Framers had intended is insupportable. Australia and the world around it have changed too much to ever return to that vision. The Framers could not have been expected to anticipate the effect of globalisation or the creation of a truly national economy, but we must certainly recognise the huge significance of these developments. Today, the economy does not consist of discreet sectors of commerce within each State or even within Australia, but exists within a world of global markets. In order to compete effectively on this scale in light of our small population and geographical location, Australia requires national rather than a multiplicity of State laws in key areas of business regulation.¹⁵⁹

On the other hand, the arguments as to why Australia should maintain a federal system that divides power between at least two tiers of government remain strong¹⁶⁰ – it is notable that few contributors to the national debate suggest that the States should be abolished. This division of power should account for the importance of contemporary challenges facing the nation in areas like climate change, water scarcity and an ageing population, which may be best met by concerted yet differentiated government action at varying levels of closeness to the community. Crucially, it should also be a division not subject to destabilisation by the ongoing flow of almost all legislative power to the top tier of government due to judicial decision making. Paradoxically, ensuring mechanisms for greater flexibility in our federal arrangements, rather than a simple faith in constitutional rigidity, is more likely to prevent a sharp skewing in favour of one tier over the other in federal disputes concerning the scope of their respective powers. This is especially important if the Commonwealth and the States are ever to agree on a realignment of their powers. As stated earlier in this paper, there is little point in such an exercise if in the longer run the interpretative principles that underlie the *Constitution* will continue to produce a drift of power to the Commonwealth.

Reform of Australia's federal system appears, then, to be necessary at two levels (though not, we hasten to add, in two stages). At the first level, the specific problems of federalism need to be addressed through legislative and constitutional change. This might include a reallocation of powers, fixing dysfunctional financial relations and restoring the scope for intergovernmental cooperation. These changes are necessary, but are not by themselves sufficient to provide a long term solution to Australia's federal problems. At the second, macro, level the *Constitution* ought to be amended to expressly align it, as a

159 See, eg, Business Council of Australia, *Towards a Seamless Economy: Modernising the Regulation of Australian Business* (2008) <<http://www.bca.com.au/Content101371.aspx>> at 23 July 2008.

160 See generally Twomey and Withers, above n 4.

matter of purpose and principle, with the desired model of federalism. These reform ideas are explored below with reference to the problem of ensuring that the *Australian Constitution* promotes and enables Commonwealth–State cooperation.

A Specific Reform to Enable Commonwealth–State Cooperation

The bluntness of the *Constitution's* existing means of enabling referrals of power from the States to the Commonwealth was remarked on earlier. While this was the ultimate solution to the uncertainty generated by the High Court's decisions in the *Cross-vesting Case* and *Hughes*, it is far from unproblematic. In part this is due to lingering uncertainty over several aspects of the operation of the Commonwealth's power under section 51(xxxvii) to legislate with respect to matters referred to it by the States.¹⁶¹ Additionally, while the States may understandably attempt to narrow the scope of the referral, as was the case with the 2001 references to support the Corporations Law and the *Australian Securities and Investments Commission Act 1989* (Cth), such a guarded approach creates its own problems in other swiftly evolving areas requiring legislative action and high degrees of legislative and policy flexibility. But the opposite approach – to refer power in the most general of terms – might be thought to give rise to constitutional challenge as to what exactly are the limits of the power upon which the Commonwealth's enactment rests.¹⁶² More generally, the referral of power by the States to the Commonwealth has the potential, if extended to other areas, to undermine the long-term position of the former as partners in the Australian federation. Such transfers not only refer legislative power, but may also cause a long-term (and perhaps politically irrevocable) shift in political responsibility and policy leadership from the States to the Commonwealth.

Realistically, there is a limit to the extent to which States can be expected to or will cede their power to the Commonwealth.¹⁶³ It is unlikely indeed that the Framers would have intended the power of referral to be used as a routine solution to the difficulty of supporting cooperative arrangements under the *Constitution*. But, as was shown in the preceding Part of this paper, it is highly unlikely that the Framers intended cooperation to be as hamstrung as it has become through recent judicial interpretation.

In short, referrals of State power are neither sufficient nor suitable as a means of generally achieving beneficial federal governance. More sophisticated mechanisms enabling governments to work together or allocate responsibilities are required. In particular, the restrictive effects of the *Cross-vesting Case* and *Hughes* need to be undone so that the Commonwealth's courts and officers are able to exercise powers in respect of State matters. The amendment to the

161 Twomey, above n 4, 69–71.

162 This was essentially the question with respect to use of the referral power to support Commonwealth anti-terrorism laws under challenge in *Thomas v Mowbray* (2007) 237 ALR 194.

163 There is, of course, a constitutional one; presumably the States are not able to connive in their own effective destruction by referring all essential functions and powers to the Commonwealth by virtue of the *Melbourne Corporation* principle constraining such a course: see Hill, above n 11, 226.

Constitution would actually be quite straightforward. In itself, it need not grant the Commonwealth more power nor would it effectuate the transfer of any power from the States to the Commonwealth. These would be important points to stress in campaigning for public support for the amendment at referendum, in order that it does not suffer the backlash which saw the defeated 1984 power-transfer amendment portrayed as a tool for Commonwealth hostility to the States which politicians would use in order to effect constitutional change without the approval of the electorate.¹⁶⁴

Essentially, the specific reform which would better support Commonwealth–State cooperative arrangements is a constitutional amendment entrenching two legal propositions:

- State Parliaments may, with the consent of the Commonwealth Parliament, empower federal courts to determine matters arising under State law; and
- State Parliaments may, with the consent of the Commonwealth Parliament, empower federal agencies to administer State law and impose duties in the administration of that law.

The desirability of creating a complementary conferral mechanism of judicial power from the States to federal courts has long been acknowledged and was in fact recommended by the Constitutional Commission in 1988. Its concern (well-founded as it turned out) that the cross-vesting of court matters between different courts might not be constitutionally possible led it to suggest that the following provision be inserted into the *Constitution*:

77A The Parliament of a State or the legislature of a Territory may, with the consent of the Parliament of the Commonwealth, make laws conferring jurisdiction on a federal court in respect of matters arising under the law of a State or Territory, including the common law in force in that State or Territory.¹⁶⁵

Proposals of this kind have had the support of governments across Australia for several years. In 2002 the Standing Committee of Attorneys-General agreed that the Commonwealth and States would draft a constitutional amendment to this end. This did not emerge, but may now receive renewed attention as federal reform gathers pace as a political priority. The existence of support for such a step from other stakeholders can only assist this. For example, in its 12 point plan of 2006 titled *Reshaping Australia's Federation*, the Business Council of Australia listed as one of its action points:

ACTION 8 The Commonwealth and state governments should work together to initiate and support an amendment to the Constitution to include an express provision that the states may choose to allow Commonwealth courts to determine matters under state laws and to allow Commonwealth agencies to administer state laws.¹⁶⁶

There already exists unanimous, cross-party support of the House of Representatives Standing Committee on Legal and Constitutional Affairs for

164 See Twomey, above n 4, 64.

165 Constitutional Commission, *Final Report of the Constitutional Commission* (1988) vol 1, 373.

166 Business Council of Australia, above n 2, 34.

reform of this nature. The first recommendation in the Committee's 2006 report on *Harmonisation of Legal Systems* provides that:

- The Australian Government seek bipartisan support for a constitutional amendment to resolve the limitations to cooperative legislative schemes identified by the High Court of Australia in *Re Wakim* and *R v Hughes* decisions at the Standing Committee of Attorneys-General as expeditiously as possible;
- The Australian Government draft this constitutional amendment so as to encompass the broadest possible range of cooperative legislative schemes between the Commonwealth and the States and Territories;
- A dedicated and wide-ranging consultation and education process should be undertaken by the Australian Government prior to any referendum on the constitutional amendment; and that
- Any referendum on the constitutional amendment should be held at the same time as a federal election.¹⁶⁷

Further support for federal reform in this vein can be found in the constitutional provisions of other nations which are designed to facilitate cooperation across different levels of government. Although one must always be mindful of the different historical, cultural and structural underpinnings across different federations, it is just as appropriate and worthwhile to examine other constitutional models today as it was for the Framers in the course of designing the *Commonwealth Constitution* in the 1890s. For example, the *Basic Law for the Federal Republic of Germany* ('*Basic Law*') provides in article 91a for cooperation with respect to 'joint tasks'. The article was introduced in 1969, in part to give constitutional recognition to cooperative arrangements that were already in place between the nation's two tiers of government. The power in article 91a has been used extensively, such as to establish joint research and training institutions like the German Academy for Administrative Sciences and the German Academy of Judges.¹⁶⁸ In 2006 reforms, the area of universities and research was removed from the list of those joint tasks recognised by the *Basic Law*.¹⁶⁹ This does not prevent cooperation by the Federation and the Länder in this area but enables greater flexibility and negotiation regarding the conditions contained in the federal law and the financial contribution of each level of government.¹⁷⁰

The *Constitution of India* expressly provides the conditions which must be met for the transfer of executive functions between the two tiers of government.

167 Commonwealth, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Harmonisation of Legal Systems: Within Australia and between Australia and New Zealand* (November 2006) 26.

168 Markus Ogorek and Tian Pu, 'The Allocation of Cultural Policy Powers in the Federal Republic of Germany' (2005) 6 *German Law Journal* 10.

169 This is now dealt with specially in art 91b, leaving in art 91a(1), 'improvement of regional economic structures' and 'improvement of the agrarian structure and of coast preservation' as areas still subject to the previous approach to 'joint tasks'.

170 Ranier Arnold, 'The Federalism Reform in Germany' (2007) 1 *Revista General de Derecho Público Comparado* 155, 168–9.

Article 258 empowers the central government to confer powers on the States, while article 258A achieves the converse. The provisions:

- require the consent of the level of government receiving the function;
- permit the conferral of functions either conditionally or unconditionally;
- only permit the conferral of functions ‘to which the executive power of the [conferring government] extends’;
- permit the central government to impose duties on States, but only permit the States to confer functions; and
- provide, where a function is conferred by the central government on a State, that the central government must compensate the State for an amount either agreed or determined by arbitration.

Article 258A was inserted after article 258 by the *Constitution (Seventh Amendment) Act, 1956*. The Statement of Objects and Reasons appended to that Act provided the following rationale for the insertion of the article:

While the President is empowered by article 258(1) to entrust Union functions to a State Government or its officers, there is no corresponding provision enabling the Governor of a State to entrust State functions to the Central Government or its officers. This lacuna has been found to be of practical consequence in connection with the execution of certain development projects in the States. It is proposed to fill the lacuna.

Comparative models such as these assist in thinking about the ways in which the mechanism for State transfers of judicial or executive power to the Commonwealth might be best articulated in constitutional text. Ultimately, they can only be a guide to the design of something which reflects an Australian political and legal consensus and furthers our particular constitutional aspirations. So, for example, it is interesting that in its prohibition on the conferral of duties by States upon the central government, the *Constitution of India* actually replicates the troubling limitation recognised by the High Court of Australia in *Hughes*.

While brevity is a desirable attribute in the drafting of constitutional provisions, thought should be given to whether particular issues with the potential to complicate mechanisms for co-operative power-sharing should be addressed in the text. For instance, in the *Cross-vesting Case*, one of the reasons the majority rejected the ability both of the States to confer and the Commonwealth to accept State jurisdiction in federal courts was that the latter are subject to an implication of strict separation of judicial power in Chapter III of the *Constitution*.¹⁷¹ The majority objected to the idea that federal courts, limited to the exercise of a federal jurisdiction which is purely judicial in character, could be the recipients of State jurisdiction which does not respect clear lines between judicial and non-judicial powers and functions.¹⁷² Although it

¹⁷¹ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

¹⁷² *Cross-vesting Case* (1999) 198 CLR 511, 559–60 (McHugh J).

was not convincingly explained why this could not be avoided through use of an implied limitation that would restrict the transfer of State jurisdiction to federal courts over only those matters involving State judicial power,¹⁷³ such a limitation should be made explicit in any text accompanying a provision enabling federal courts to determine matters arising under State law. It is unlikely, in our view, that this would seriously impair the usefulness of the broader change.

An additional issue – and one on which the Constitution Commission took a clear position – is that of which branch of the Commonwealth Government should be empowered to consent to federal courts and officers receiving non-federal functions. A clear expression of parliamentary consent would seem far preferable to this power residing with the Commonwealth executive. It is implicit in the results of *Duncan* and *Hughes* that State legislative power extends to conferring functions on organs of the Commonwealth Government. However, the advantage of providing express authority to the national legislature to consent to a conferral of State power is that it would overcome uncertainty as to where the limits of this lie. In certain circumstances, it would be arguable that the imposition of ‘duties’ on Commonwealth officers might be viewed as an attempt by the States to ‘bind’ the Commonwealth – in which case it may be constitutionally vulnerable to the constraints of the so-called *Cigamatic* doctrine.¹⁷⁴ It is unclear from the Court’s last substantial consideration of *Commonwealth v Cigamatic Pty Ltd (in liq)*¹⁷⁵ in *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority*¹⁷⁶ whether affecting the executive functions of the Commonwealth in this way a curtailment upon the capacity of State legislative power¹⁷⁷ or an immunity enjoyed by the Commonwealth.¹⁷⁸ The fact that *Cigamatic* was not an issue in *Duncan*, the *Cross-vesting Case* or *Hughes* would strongly support its conception as an immunity which had been effectively waived by the Commonwealth legislation in those cases. Even if that is so, it is still not entirely clear what is required for waiver to avoid the effect of this doctrine. While it has been said that the ‘implied powers [of any body politic] include a power for ... the assertion or waiver of its immunities’,¹⁷⁹ is this a power of the legislative or executive branch? An express requirement of parliamentary consent to permit the conferral of State functions

173 Ibid. It was telling that the majority was unable to point to this jurisdictional contradiction having manifested itself in any corruption of federal jurisdiction in the 12 years the cross-vesting scheme had by then been in operation.

174 See *Commonwealth v Cigamatic Pty Ltd (in liq)* (1962) 108 CLR 372 (*‘Cigamatic’*). The doctrine has its origins in the dissenting opinion of Dixon J in *Uther’s Case* (1947) 74 CLR 508 where he distinguished a law for the peace order and good government of a State from a law ‘which, under colour of such a purpose, is really a law intended to interfere with the essential governmental functions of the Commonwealth’: at 529.

175 *Cigamatic* (1962) 108 CLR 372.

176 (1997) 190 CLR 410 (*‘Henderson’s Case’*).

177 Ibid 440 (Dawson, Toohey and Gaudron JJ).

178 Roderick P Meagher and William MC Gummow, ‘Sir Owen Dixon’s Heresy’ (1980) 54 *Australian Law Journal* 25, 29.

179 *Chamber of Commerce and Industry v Commonwealth* (1987) 163 CLR 329, 357 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

would provide certainty while also providing the means for scrutiny of the arrangements by the people's elected representatives.

It remains an open question whether a State executive can consent to a conferral of federal function on the officers of the State. Although this was potentially an issue in *O'Donoghue v Ireland*, the majority upheld those provisions of the *Extradition Act 1988* (Cth) which conferred powers on State Magistrates in their personal capacity without needing determining this conclusively (the majority found that no duty was imposed due to the operation of other Commonwealth legislation enabling magistrates to decline to exercise the function).¹⁸⁰ Only the Chief Justice went on to identify a legislative basis for the State's acceptance of the Commonwealth function.¹⁸¹ Justice Kirby dissented on all these issues, finding a duty cast by the Commonwealth upon the magistracy and without adequate State consent. He held that State executive consent, without positive legislative sanction, was insufficient to negate the operation of the *Melbourne Corporation* principle's constitutional prohibition against Commonwealth interference with State institutions. He said:

It would be contrary to fundamental principle for the State executive government to presume to a power, under its own authority, to vary or alter, in a material way, the 'functions' of State magistrates, as established by State Parliament.¹⁸²

It is unclear whether this objection is shared by a majority of the Court. To the contrary, Gleeson CJ confessed

it is not easy to see why the making of such an agreement would not fall within the ordinary executive power of deployment of State officials; a power which lies at the very centre of executive authority.¹⁸³

In light of this uncertainty, it would be wise for any proposal of constitutional amendment enabling the conferral of State jurisdiction and powers upon the Commonwealth to also address the process by which the States may consent to federal powers being cast upon its officers.

Whatever the textual change in Australia, it ought to be placed in a new chapter to the *Constitution*, perhaps styled as 'Chapter VI.A – Cooperation between the Commonwealth and the States'. But a clause of this kind alone, while remedying specific federal problems, would not sufficiently address the larger issues that have arisen from High Court interpretation and the incoherence of Australia's federal model when it comes to Commonwealth–State cooperation. To meet this, we would also argue that the new Chapter should include a general statement about the objects and principles that underlie the federal system brought about by the *Constitution*.

180 [2008] HCA 14 (Unreported, Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ, 23 April 2008) [21] (Gleeson CJ); [75] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ). The law in question was s 4AAA of the *Crimes Act 1914* (Cth).

181 *Ibid* [27]–[29] (Gleeson CJ).

182 *Ibid* [176] (Kirby J).

183 *Ibid* [19] (Gleeson CJ).

B Writing Cooperation into the *Constitution*

Australia's federal system is based on a range of assumptions and practices, many of which cannot be found in the text of the *Constitution*. As we argued earlier these have often been frustrated, ignored or given minimal weight by a High Court committed to a legalistic methodology, under which it is 'impermissible to construe the terms of the *Constitution* by importing an implication from extrinsic sources'.¹⁸⁴ This is particularly evident in decisions like the *Cross-vesting Case* and *Hughes*, but it pervades the interpretation of powers under the *Constitution* more generally. This does not necessarily mean that the High Court has been in error in such cases, only that if doctrines like cooperative federalism are to have an impact they need to be transformed from assumption and aspiration into constitutional text – as occurs in the constitutions of many other nations. In explaining her support for the majority view in the *Cross-vesting Case*, Saunders concluded, 'comparison with other federal models suggests that cooperation can be described as an objective of the *Australian Constitution* only in a superficial sense'.¹⁸⁵

The best way then to remedy this is through amendment to the text of the *Constitution* to make principles like cooperative federalism explicit in the document and intrinsic to how it is understood by governments and the courts. The aim would not be to revive discredited doctrines like reserved state powers, but to set down a foundation for a sustainable, contemporary approach cooperative federalism in Australia. In particular, the aim would be to effect constitutional change so that cooperative federalism can be invoked as a positive, even decisive principle of interpretation. The amendment should promote judicial interpretation of the *Constitution* along the lines spoken of by Kirby J in *Hughes*:

The national importance of the legislation under scrutiny, the way in which it attempts to achieve its objectives by cooperation amongst the constituent governments of the Commonwealth and the presumption that such cooperation is an elemental feature of the federal system of government which the *Constitution* establishes, make it appropriate to approach this matter in a way that gives the *Constitution* and the legislation in question, to the full extent that their language and structure allow, an operation that is rational, harmonious and efficient. This Court should be the upholder, and not the destroyer, of lawful cooperation between the organs of government in all of the constituent parts into which the Commonwealth of Australia is divided.¹⁸⁶

This is not to argue that factors of convenience or the political support attaching to a measure should be determinants of constitutional validity.¹⁸⁷ The

184 *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192, 231 (Brennan J).

185 Saunders, above n 19, 266.

186 *Hughes* (2000) 202 CLR 535, 560–1.

187 Justice Kirby made this very clear in *O'Donoghue v Ireland* [2008] HCA 14 (Unreported, Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ, 23 April 2008):

Chief Justice was correct in the *Cross-vesting Case* when he insisted that ‘approval of the legislative policy is irrelevant to a judgment as to constitutional validity; just as disapproval of the policy would be irrelevant’.¹⁸⁸ However, the significance of a challenged law as a collaboratively devised and supported solution to a problem of broad public importance should mean that a decision by the Court to overturn it must be strongly based on clear constitutional authority. This is not even to favour cooperative federalism creating some kind of presumption of validity – it is merely to argue against judicial indifference to this when interpreting the lawful capacities of the institutions of our federal system.

To entrench a principle of cooperation or federal respect in Australia would be far from unique. While older constitutions, like those of Australia, Canada and the United States, typically leave much to implication at the hands of superior courts, there are more recent constitutions that do set down express principles to regulate inter-governmental relations and shape constitutional interpretation. If Australian governments are serious about embarking on major federal reform consideration of these possibilities should take place. However, we concede that drawing inspiration from some sources may, as it was for the original Framers in the 1890s, prove too discordant with our political and cultural frames of reference.¹⁸⁹ The question then, is to what extent we can sensibly import a cooperative theory of federalism into the *Commonwealth Constitution* without having to radically redefine and reconstitute our basic constitutional institutions?

As an example of how differently the relationship between the levels of government may be in a federal constitution, consider that of Switzerland which, after substantial revision, now contains a part entitled ‘Cooperation between the Confederation and the Cantons’. This part of the *Federal Constitution of the Swiss Confederation* provides:

44 Principles

- 1 The Confederation and the Cantons shall collaborate, and shall support each other in the fulfillment of their tasks.
- 2 They owe each other mutual consideration and support. They shall grant each other administrative and judicial assistance.
- 3 Disputes between Cantons, or between Cantons, and the Confederation shall, to the extent possible, be resolved through negotiation or mediation.

Inter-governmental and inter-jurisdictional cooperation is often desirable. However, such cooperation must be attained within the framework of the *Constitution*, under which the Parliaments of the States (representing all State electors) enjoy functions and powers that cannot be exercised solely by executive governments without specific legislative authority. An insistence on this attribute of federal ‘dualism’ is not only necessary because of the terms of the constitutional text. It is also more likely to achieve the dual objectives of federation: cooperation upon agreed matters under appropriate terms and conditions and diversity, disagreement and experimentation where that is lawful and appropriate: at [205].

188 *Cross-vesting Case* (1999) 198 CLR 511, 540 (Gleeson CJ); see also 548–9 (McHugh J).

189 Irving, above n 31, 72–3.

45 Participation in Federal Decision Making

- 1 In the cases foreseen by the Federal Constitution, the Cantons shall participate in the decision making process on the federal level, in particular in federal legislation.
- 2 The Confederation shall inform the Cantons timely and fully of its plans; it shall consult them if their interests are affected.

46 Implementation of Federal Law

- 1 The Cantons shall implement federal law in conformity with the Constitution and the statute.
- 2 The Confederation shall leave the Cantons as large a space of action as possible, and shall take their particularities into account.
- 3 The Confederation shall take into account the financial burden that is associated with implementing federal law by leaving sufficient sources of financing to the Cantons, and by ensuring an equitable financial equalisation.

47 Autonomy of the Cantons

The Confederation shall respect the autonomy of the Cantons.

Chapter 3 of the *Constitution of the Republic of South Africa, 1996* is entitled 'Cooperative Government'. It requires the spheres of government to cooperate, requires the enactment of legislation to facilitate this cooperation and establishes a system of dispute resolution between the spheres. Section 40 requires each sphere to 'observe and adhere to the principles in this Chapter and [to] conduct their activities within the parameters that the Chapter provides'. Section 41, entitled 'Principles of cooperative government and intergovernmental relations', states:

1. All spheres of government and all organs of state within each sphere must: ...
 - e. respect the constitutional status, institutions, powers and functions of government in the other spheres;
 - f. not assume any power or function except those conferred on them in terms of the *Constitution*;
 - g. exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
 - h. cooperate with one another in mutual trust and good faith by
 - i. fostering friendly relations;
 - ii. assisting and supporting one another;
 - iii. informing one another of, and consulting one another on, matters of common interest;
 - iv. co-ordinating their actions and legislation with one another;
 - v. adhering to agreed procedures; and
 - vi. avoiding legal proceedings against one another.

2. An Act of Parliament must

- a. establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and
- b. provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.

These provisions reflect particular model of federalism not reflective of Australia's constitutional or political history. Both the Swiss and South African constitutional models have been strongly influenced by the 'integrated federalism' of which Germany offers the most direct example and which is Europe's marked contribution to the design of modern federal systems.¹⁹⁰ In particular, this grants lower levels of government a formal participatory role in the construction of national laws while then dividing the power to administer and implement – producing a form of 'executive federalism'. This is quite distinct from the dual structure of governance in older federal systems. The significance of the difference is revealed by Hueglin and Fenna's observation that, when discussing such a system, it 'may not even be appropriate to speak of intergovernmental relations ... because both levels of government are integrated into one unit of governance'.¹⁹¹

Change on that scale is highly unlikely in the case of the Australian federation, and may not be desirable for any number of reasons. Nevertheless, maintaining our existing institutional arrangements while providing a textual basis to establish cooperation as a positive object and to facilitate relations should not be controversial or unachievable. Specifically, an amendment in Australia might recognise:

- that the Commonwealth and the States will cooperate to achieve joint objects;
- a non-exclusive list of means of achieving cooperation and exercising powers in relation to each other, such as by intergovernmental agreement, joint administration of laws and programs and common judicial and other enforcement;
- specific forums of joint decision-making, such as the Council of Australian Governments;
- the autonomy of each level of government;
- the existence of and a role for local government; and
- the need for respect between the tiers of government as to their respective institutions, powers and functions.

Text of this kind not only has the potential to change the operation of the *Constitution* and Australia's federal system, but to divert the High Court into more productive paths of constitutional interpretation. It might, admittedly, open

¹⁹⁰ Hueglin and Fenna, above n 50, 235–43.

¹⁹¹ *Ibid* 235.

up a range of new possibilities for High Court litigation, perhaps not all of them desired. Hence, it would be appropriate for some parts of the amendment, such as any provision regarding 'respect' between the tiers of government, to be used in the interpretation of other parts of the *Constitution* but not to give rise to judicially enforceable obligations. This should be achieved by express words so that there is no doubt as to which parts of any amendment are for interpretive use only. An example of ensuring that a constitutional change would have no legal effect, and no use even in interpretation, are the words that would have been added had the 1999 referendum to insert a new preamble into the *Constitution* been successful:

125A Effect of preamble:

The preamble to this *Constitution* has no legal force and shall not be considered in interpreting this *Constitution* or the law in force in the Commonwealth or any part of the Commonwealth.¹⁹²

Removing justiciability in respect of our proposed constitutional amendment seems a sensible step, but of course it would defeat much of the benefit of the change if the Court was also barred from referring to the new provision in interpreting the *Constitution* as a whole. Examples of such clauses providing the judicial arm with interpretative principles can be found in the constitutions of other countries. They can affect not only judicial decision-making, but have a major political impact in creating new expectations and conventions when it comes to the conduct of government.¹⁹³ Indeed, much of the text we are proposing could best facilitate cooperation at the level of interpretative principle rather than legal obligation.

Even so, the anticipated significance of an amendment of this sort to judicial interpretation prompts consideration of a possible criticism. Does a major change such as this empower the judicial arm at the expense of the more directly representative and accountable executive and legislature? Does inviting the High Court to develop 'a federal jurisprudence' upon a constitutional platform such as the proposed amendment hand over too much power on what are fundamentally political matters? Our answer to this is to point out that the Court, despite its traditional rhetoric of legalism, has already been exercising power of this magnitude. While the *Engineers' Case* methodology purports to sustain nothing more than the extension of the neutral technique of statutory interpretation to the *Constitution*, it quite obviously has been of central importance in shaping the Australian polity as one in which the national government enjoys significant dominance over the States. To the extent that the Court has been prepared to

192 Constitution Alteration (Preamble) 1999 (Cth) s 4.

193 For example, Pt IV of the *Constitution of India*, entitled 'Directive Principles of State Policy', gives constitutional status to important social aspirations and values ranging from the free education of children to the separation of the judiciary from the executive. Article 37 states that '[t]he provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws'.

For a further drafting example, see ss 6 and 7 of the *Constitution of the Republic of the Fiji Islands*.

recognise the importance of Federation as establishing a relationship, this has been limited to acknowledging the need for *some* constitutional constraint upon the damage or impact which either level of government can inflict upon the other. It has devised implications with this in mind, but unguided by any clear statement as to the federal relationship – with the consequence that both the *Melbourne Corporation* principle and the *Cigamatic* doctrine are widely viewed as unsatisfactorily obscure in principle and operation. In addition, when the political process has formulated effective cooperative solutions to shared problems, the Court has struck these down or suggested their future is precarious.

In short, there seems no reason to be suspicious of the potential effect of amending the *Constitution* so that High Court interpretation is guided by a clear statement of the nature of the federal relationship. Indeed, far from granting the Court an abundance of new power, this could better direct the power it already possesses. In recognising the capacity of Commonwealth and State governments to work cooperatively and the autonomy of each to pursue their goals and fulfil responsibilities, an amendment of this sort provides the means for a reinvigoration of the political power which underpins executive and legislative government.

IV CONCLUSION

Australian federalism is beset by a range of new and old problems. These include practical issues relating to the division of power. We have sought to show that these problems must also be appreciated as existing at a higher level due to the incoherence at the heart of Australia's constitutional system as to how the components of the federal structure should relate to each other. Of course, no federal system is ever purely dualist, coordinate or cooperative, but the defects which have emerged in Australian federalism have been particularly potent given the lack of clarity and lack of any commitment to a particular federal dynamic as the optimal way in which power should be divided and shared.

The consequences are readily apparent. The division of power between the tiers of government has eroded to the point that it has become almost meaningless, while on the other hand new limitations have been read into the document that prevent some forms of cooperation. These are not only a function of High Court decision-making, the also result from the silence in the text of the *Constitution* as to many fundamental questions of federal policy and design.

Australia should aspire to a better federal system. This can be achieved in part by specific constitutional amendment and legislative reform in areas like the allocation of power and the facilitation of federal–State cooperation. However, this by itself is insufficient. Lest the weaknesses in structure and interpretative doctrine reassert themselves, reform must also address Australia's federal system at the level of principle and values. The *Constitution* should be amended to establish a constitutional commitment to cooperative federal relationships. This could enable the political arms of government in Australia to pursue a sustainable and flexible model of federalism in the decades to come.