

# FEDERALISM IN AUSTRALIAN CONSTITUTIONAL INTERPRETATION: SIGNS OF REINVIGORATION?

SHIPRA CHORDIA\* AND ANDREW LYNCH†

## I INTRODUCTION

In this paper we explore the underlying conception of Australian federalism that originally informed the High Court's landmark decision in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*.<sup>1</sup> The 'Engineers orthodoxy' still prevails to sustain and justify the Court's interpretative approach to the present day.<sup>2</sup> In particular, its resolution of the inherent tension between federalism and responsible government in favour of the latter<sup>3</sup> has been significant in stifling the development of constitutional principles that broadly derive their foundation from the former.<sup>4</sup>

We conduct our analysis primarily through a critique of the very substantial and considered defence of the *Engineers* 'vision' of the structure and function of the Constitution' which was put forward in 2009 by Stephen Gageler SC, then Solicitor-General of Australia and since appointed as a Justice of the High Court. Justice Gageler's observations<sup>5</sup> offer a robust account of federation in Australia as the means through which the political accountability of government to the people was maximised. According to this account, the federal division of power ought to be left largely to the workings of the political process, with judicial intercession warranted only in extraordinary circumstances. Thus, Justice Gageler essentially explains and approves two readily observable (and interrelated) features of the Australian constitutional system: the steady expansion of the powers of the national government to the diminishment of those of the states and the High Court's reluctance to develop a constitutional jurisprudence of federalism that might seriously temper the former development.

Upon this familiar landscape has entered the case of *Williams v Commonwealth* ('*Williams*').<sup>6</sup> The majority judgments in that 2012 decision invoked a number of federal considerations in their invalidation of the Commonwealth's use of its executive spending power to maintain a program supporting the hiring of school chaplains. In this way, they presented a discernible contrast to the traditional conception of Australian federalism accepted by the High Court. In part, this is demonstrated by the mere fact that the majority decided *against* the Commonwealth. Although federal considerations received varying rather than consistent weight across the majority, the opinion of French CJ in particular emphasised features of the *Constitution* in a way

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\* BSc (Hons) (UNSW), LLB (Hons) (Syd); Director, Federalism Project, Gilbert + Tobin Centre of Public Law, Faculty of Law, The University of New South Wales.

† LLB (Hons), LLM (QUT), PhD (UNSW); Professor, Gilbert + Tobin Centre of Public Law, Faculty of Law, The University of New South Wales.

<sup>1</sup> (1920) 28 CLR 129 ('*Engineers Case*').

<sup>2</sup> See, for example, *New South Wales v Commonwealth* (2006) 229 CLR 1, 118-121 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) ('*Work Choices Case*').

<sup>3</sup> *Engineers Case* (1920) 28 CLR 129, 147 (Knox CJ, Isaacs, Rich and Starke JJ).

<sup>4</sup> *Work Choices Case* (2006) 229 CLR 1, 118-121 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ);

<sup>5</sup> Stephen Gageler, 'Beyond the text: A vision of the structure and function of the Constitution' (2009) 32 *Australian Bar Review* 138, 140.

<sup>6</sup> (2012) 288 ALR 410.

that invites careful comparison with the *Engineers* orthodoxy. We therefore adopt his judgment as a contrasting focus for analysis.

Comparison of the views of Justice Gageler and French CJ, as two serving members of the current High Court, on such fundamental issues is of inherent interest. Further, it may assist us to anticipate the likely significance to be placed by the Court on the federal structure of the *Constitution* in future challenges to the scope of executive spending power.<sup>7</sup> To this end, we begin in Part A with an outline and critique of the orthodox conception of the role of federalism in Australian constitutional jurisprudence. Justice Gageler's explanation for the dominance of the Westminster doctrine of responsible government is considered against the historical evidence of the framers' federal vision and the theoretical writings that influenced them. Using these sources, we consider whether the assertion in the *Engineers Case* of a common and indivisible sovereignty across the tiers of Australian government faces a plausible challenge from a rival account that emphasises dual sovereignty within the Australian constitutional system. In Part B, our focus turns to *Williams* in which there appear to be suggestions in French CJ's decision that his vision might align much more closely with the rival account. We consider whether this explains why French CJ employed federalist principles to constrain Commonwealth power when, arguably, the doctrine of responsible government alone might have produced the same result. Finally, in Part C, we consider the implications (including for the Court's conception of its own role) that arise from investing federalism with significance in mapping the scope of executive power. We question whether the Chief Justice's approach in *Williams* might address some of the critical weaknesses of the prevailing '*Engineers* orthodoxy' and whether, for this reason, *Williams* might represent the start of a new era in constitutional interpretation – one in which federalism is emphasised as a feature of the *Constitution* as prominently as responsible government.

#### A Federation and the *Engineers* orthodoxy

It is a well-known feature of the *Australian Constitution* that it embodies a compromise between two fundamental political concepts that inherently conflict: responsible government and federalism.<sup>8</sup> On the one hand, drawing from the British system, the framers of the *Australian Constitution* created a system in which the Ministers of the Crown were to be responsible to the lower house only.<sup>9</sup> On the other hand, drawing from the American model, the Senate was designed to represent the states in the national legislature on an equal basis and was imbued with strong powers approaching parity with those of the House of Representatives. A number of the framers were well aware of the potential for conflict in this design,<sup>10</sup> and predicted that one alternative would ultimately prevail over the other. As bluntly surmised by John Hackett at the 1891 Constitutional Convention, 'either responsible government will kill federation, or federation ... will kill responsible government'.<sup>11</sup>

<sup>7</sup> One such challenge is already imminent before the High Court. In May 2014, the Court is due to hear a second challenge by Ron Williams, the plaintiff in *Williams*, to the scope of the Commonwealth executive's spending power.

<sup>8</sup> *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 275 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Williams* (2012) 288 ALR 410, 431 [58] (French CJ); See further George Winterton, *Parliament, the Executive and the Governor-General* (Melbourne University Press, 1983) 5; John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 706.

<sup>9</sup> See Winterton, *ibid*, 5 – 11; *Williams* (2012) 288 ALR 410, 431 [58] (French CJ); Harrison Moore, *The Constitution of the Commonwealth of Australia*, (Legal Books, 1997) 151.

<sup>10</sup> See Quick and Garran, *above* n 8, 706.

<sup>11</sup> *Convention Debates* (Sydney, 1891) 280.

An arresting feature of the majority's decision in *Engineers* was the manner in which they attempted to reconcile the tension between responsible government and federalism by emphasising the former and disregarding the latter.<sup>12</sup> Quoting Lord Haldane, the majority described the *Constitution* as 'permeated through and through with the spirit of the greatest institution which exists in the Empire ... the institution of responsible government'.<sup>13</sup> The principle pervaded the document to such an extent that, in the majority's view, it could be entirely distinguished from the American *Constitution* in all but its most 'superficial features'.<sup>14</sup> A significant doctrinal shift ensued, which involved the setting aside of the entire weight of existing High Court authority. The majorities in these cases had relied on the decisions of their American counterparts to develop a doctrine of implied immunity of instrumentalities based on the dual sovereignty of the Commonwealth and the states.<sup>15</sup> Instead, emphasis was now to be placed on the two features of the *Constitution* that, in the view of the *Engineers* majority were preeminent: 'common and indivisible sovereignty and responsible government'.<sup>16</sup>

In a famous critique of the majority judgment, Richard Latham noted that, in following the tradition of 'the Empire', the decision had 'declared that the *Constitution* was to be interpreted by its words alone'.<sup>17</sup> Yet in reaching its ultimate conclusion, the Court 'took notice of responsible government, a matter far more extrinsic to strict law, and far less admissible by the English rules of statutory construction than the close verbal correspondence with the *United States Constitution* upon which the early High Court had relied to bring American authorities in point'.<sup>18</sup> Latham speculated that the majority's real preoccupation had been judicial facilitation of the exercise of 'nation building' in a post war era, but express acknowledgment of this would have rendered the decision 'quasi-political'.<sup>19</sup> Other commentators have portrayed the basis for the Court's decision – or at least, the motivation of its key members, such as Isaacs J – similarly.<sup>20</sup>

When he was still Commonwealth Solicitor-General, Stephen Gageler SC offered a more conceptual explanation for the *Engineers* approach, situating it within an overarching theory of the structure and function of the *Constitution*.<sup>21</sup> There are three primary features of the explanation worth highlighting for present purposes. First, the circumstances in which the *Australian Constitution* was created were fundamentally distinct from those that influenced the American founding fathers. In particular, the

<sup>12</sup> Leslie Zines, *The High Court and the Constitution* (Federation Press, 5<sup>th</sup> ed, 2008) 18-9; Cheryl Saunders, 'The National Implied Power and Implied Restrictions on Commonwealth Power' (1984) 14 *Federal Law Review* 267, 267; *Engineers Case* (1920) 28 CLR 129, 146 (Knox CJ, Isaacs, Rich and Starke JJ).

<sup>13</sup> *Engineers Case* (1920) 28 CLR 129, 147 (Knox CJ, Isaacs, Rich and Starke JJ).

<sup>14</sup> *Ibid.*

<sup>15</sup> *D'Emden v Pedder* (1904) 1 CLR 91, 109-110 (Griffith CJ, for the Court); *Municipal Council of Sydney v Commonwealth* (1904) 1 CLR 208, 239-40 (O'Connor J); *Federated Amalgamated Government Railways and Tramway Service Association v New South Wales Railway Traffic Employees Association* (1906) 4 CLR 488 (Griffith CJ, for the Court).

<sup>16</sup> *Engineers Case* (1920) 28 CLR 129, 148 (Knox CJ, Isaacs, Rich and Starke JJ).

<sup>17</sup> Richard Latham, 'The Law and the Commonwealth' in WK Hancock, *Survey of British Commonwealth Affairs: Problems of Nationality 1918-1936* (Oxford University Press, 1937) vol 1, 510, 563-4.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*, 564.

<sup>20</sup> Brian Galligan, 'The Australian High Court's Role in Institutional Maintenance and Development' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions – Theories, Principles and Institutions* (Federation Press, 1996) 184, 200.

<sup>21</sup> Gageler, above n 5, 140.

purpose behind the Australian federation was not to ‘divide and constrain’<sup>22</sup> government, as it had been for the Americans:

There is in our pre-federation history no hint of which I am aware of any intention of giving effect to the dominant American Federalist view that federation should be designed to achieve ‘mutual frustration’: that federalism itself should operate as a mechanism for avoiding majoritarian excesses by setting up rival institutions of government which would make ambition check ambition and thereby secure the ‘rights of the people’.<sup>23</sup>

Instead, the goal of federation had been to ‘enlarge the powers of self-government of the people of Australia’<sup>24</sup> by effecting the transfer of rights and powers from one level of government to another; that is, from the colonies to the newly created federal state. While this involved the diminution of the power of the colonies, there was no surrender of power by the Australian people, ‘only the transfer of those rights and powers to a plane on which they could be more effectively exercised’.<sup>25</sup>

Secondly, according to Justice Gageler, ‘the people who comprise the Commonwealth and the people who comprise the states are one and the same people’.<sup>26</sup> From acceptance of that position, the Commonwealth and the states are cast, not as ‘warring sovereigns’, but as mere ‘institutional functionaries’.<sup>27</sup> Responsible government provides the ‘ordinary constitutional means’ by which those institutional functionaries are ‘in law formally answerable to a unified Crown and each in fact politically answerable to a unified Australian people’.<sup>28</sup> This explains why, in *Engineers*, the majority emphasised that responsible government and common sovereignty were the ‘cardinal features of our political system’ that ought to shape constitutional interpretation, virtually disregarding altogether any importance arising from the federal features of the *Constitution*.<sup>29</sup> Any limitations implied by federalism were superfluous since, ‘[w]hen the people of Australia, to use the words of the Constitution itself, “united in a Federal Commonwealth”, they took power to control by ordinary constitutional means any attempt on the part of the national Parliament to misuse its powers’.<sup>30</sup>

Finally, according to Justice Gageler’s explanation, disputes regarding the demarcation between federal and state powers ought to be resolved through the ‘ordinary constitutional working’<sup>31</sup> of the political process. The role of the constitutional court in adjudicating federal disputes ought to be correspondingly confined to circumstances where ‘political accountability is inherently weak or endangered’.<sup>32</sup> In effect, the High Court would step away from functioning as a

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<sup>22</sup> Ibid, 145.

<sup>23</sup> Ibid.

<sup>24</sup> Gageler, above n 5, 145, citing *Official Report of the National Australasian Convention Debates*, Adelaide, 1897, 17.

<sup>25</sup> Gageler, above n 5, 145, quoting Robert Garran, ‘The Federation Movement and the Founding of the Commonwealth’ in John Rose, Arthur Newton and Ernest Benieans (eds), *The Cambridge History of the British Empire* (Cambridge University Press, 1933) 455.

<sup>26</sup> Gageler, above n 5, 147.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid. The expression ‘ordinary constitutional means’ appears in the majority judgment in *Engineers Case* and is used repeatedly by Justice Gageler in his essay.

<sup>29</sup> *Engineers Case* (1920) 28 CLR 129, 146-7.

<sup>30</sup> Ibid, 151 (Knox CJ, Isaacs, Rich and Starke JJ).

<sup>31</sup> Gageler, above n 5, 152.

<sup>32</sup> Ibid.

'linesman whose only responsibility is to call in or out'<sup>33</sup> and defer almost entirely to the machinations of the political system.

Justice Gageler's explanation accords well with the nationalist sentiment held by some framers of the *Constitution*. Popular amongst nationalists was a conception of 'federation' that emphasised that even a federal state could not accommodate anything more than unitary sovereignty. Federation was simply a utilitarian reorganisation of the common sovereignty of the Crown. Thus, for John Burgess, while a state could employ 'systems of government' that operated on more than one plane, ultimately this served no purpose greater than the mere facilitation of the work of government. That purpose could be achieved through the division of sovereign powers between the planes, but ultimate sovereignty would remain undivided between a 'unified people'. Burgess defined 'federation' as a 'dual system of government under a common sovereignty'.<sup>34</sup> As Professor Nicholas Aroney has observed, this nationalist view was heavily influential on Sir Isaac Isaacs at the time of federation, and it also influenced his later drafting of the majority judgment in *Engineers*.<sup>35</sup>

Nationalists, as liberals, were concerned to promote popular government, but unlike states' righters, they believed that 'the people' should be understood in national rather than regional terms, so that a national majority should have ultimate control over government in Australia. Following writers such as James Wilson, John Burgess and A.V. Dicey, Australian nationalists like H. B. Higgins and Isaac Isaacs accepted that the Australian people might decide to institute a 'dual' system of government, but they wanted to insist that the national government represent an overall majority of Australian voters and that the Constitution should ultimately rest on the Australian people as a whole.<sup>36</sup>

At first glance, the nationalist view successfully explains the factual ascendancy of the 'nation state' within the increasingly globalised context of Australia's economic and political development. In an oft-cited passage in *Victoria v Commonwealth*,<sup>37</sup> Windeyer J described Australia's nationhood as 'in the course of time to be consolidated in war, by economic and commercial integration, by the unifying influence of federal law, by the decline of dependence upon British naval and military power and by a recognition and acceptance of external interests and obligations'.<sup>38</sup> In the face of these developments, Windeyer J noted, it was inevitable that the Commonwealth would enter the domains of competence of the states; that outcome was not only intended but also conveniently suited to the wider circumstances of the 20<sup>th</sup> century.<sup>39</sup> Quoting Windeyer J's passage, Justice Gageler described it as appealing to a 'sense of national destiny' and laden with 'long-term national values with which few Australians, on mature reflection, could disagree'.<sup>40</sup> For him, '[i]t tells us where we have come from and helps us to understand where we might be going'.<sup>41</sup> However, Justice Gageler's quotation of the passage omitted a crucial concluding sentence. In

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<sup>33</sup> Ibid, 152.

<sup>34</sup> Nicholas Aroney, *The Constitution of a Federal Commonwealth* (Cambridge University Press, 2009) 98.

<sup>35</sup> See Richard Latham, above n 17, 510.

<sup>36</sup> Aroney, above n 34, 188.

<sup>37</sup> (1971) 122 CLR 353.

<sup>38</sup> *Payroll Tax Case* (1971) 122 CLR 353, 395. This passage was endorsed by the joint judgment in the *Work Choices Case* (2006) 229 CLR 1, 119 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). For critical analysis, see Jeffrey Goldsworthy, 'Justice Windeyer on the *Engineers Case*' (2009) 37 *Federal Law Review* 363.

<sup>39</sup> Ibid.

<sup>40</sup> Gageler, above n 5, 148.

<sup>41</sup> Ibid.

this sentence Windeyer J noted that Commonwealth expansion, ‘was greatly aided after the decision in the *Engineers’ Case*, which diverted the flow of constitutional law into new channels.’<sup>42</sup> That may be undeniable but it sits in some tension alongside Windeyer J’s earlier observations. Since the expansion of Commonwealth power has been greatly aided by the *Engineers* orthodoxy, it could be seen as somewhat circular to justify that same orthodoxy on the basis that it accords with the course of recent Australian history. Did the High Court decision in *Engineers* merely recognise the inevitability of those developments or was it the midwife of them? Can it logically be both? In any case, the role of the Court as a catalyst for changes in the Australian federation cannot be downplayed.

Further, it is difficult to accept that it was completely absent from the framers’ minds that federation was a system designed at least in part to constrain government. The extent to which the framers were informed in their task by knowledge of American federal theory is contested,<sup>43</sup> but also beside the point. An understanding of the implications of federalism was prevalent even amongst British writers who were undisputedly influential on the framers’ thinking. These writers ‘showed increasing interest in institutional measures to restrict the powers of government’<sup>44</sup> and, to them, ‘[d]ivided sovereignty was seen as an important measure of protection of the rights of minorities’.<sup>45</sup> Thus in 1885, AV Dicey wrote:

Federal government means weak government.

The distribution of all the powers of the state among co-ordinate authorities necessarily leads to the conclusion that no one authority can wield the same amount of power as under a unitarian constitution is possessed by the sovereign.<sup>46</sup>

In 1901, Quick and Garran identified at least four different concepts of the word ‘federation’ that were in use at the time. The fourth concept is not relevant to this discussion and will not be considered here.<sup>47</sup> The crucial distinguishing feature between the remaining three concepts was where the locus of sovereignty was said to lie. Before proceeding further, it is useful to adopt a concrete definition of the concept of ‘sovereignty’ in this context. Influenced by John Burgess,<sup>48</sup> Quick and Garran divided sovereignty into three aspects: legal sovereignty, political sovereignty and titular sovereignty. Again, the last of these is not relevant to our discussion so will not be expounded here. The first two, however, are critical to an understanding of sovereignty in a modern democracy since together they comprise ‘the most essential attribute’ of ‘an independent political community’.<sup>49</sup> The ‘legal sovereign’ is a

<sup>42</sup> *Payroll Tax Case* (1971) 122 CLR 353, 396. See also, *Work Choices Case* (2006) 229 CLR 1, 73 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>43</sup> Contrast Aroney, above n 35, 71 with Brian Galligan and Cliff Walsh, ‘Australian Federalism Yes or No?’ in Gregory Craven (ed), *Australian Federation* (Melbourne University Press, 1992) 196.

<sup>44</sup> James Gillespie, ‘New Federalisms’ in Judith Brett, James Gillespie and Murray Goot (eds), *Developments in Australian Politics* (MacMillan, 1994) 69.

<sup>45</sup> *Ibid*, 70.

<sup>46</sup> Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 1<sup>st</sup> ed., 1885; 10<sup>th</sup> ed., 1959) 171-2.

<sup>47</sup> It is merely the use of ‘federal’ as a descriptor to refer to the organs of national government within a dual system of government; for example, ‘Federal Parliament’ or ‘Federal Executive’. See Quick and Garran, above n 7, 334.

<sup>48</sup> Quick and Garran may also have been influenced by AV Dicey, whose theory of sovereignty also incorporated a dichotomy between the legal sovereign and the political sovereignty of the people: Dicey, above n 46, 39-80.

<sup>49</sup> Quick and Garran, above n 7, 325.

‘determinate body of persons, which possesses, in a State, a power which in the point of law is absolute and unlimited’.<sup>50</sup> The legal sovereignty of the ‘State’ is expressed through Government, which may be divided into various arms. Political sovereignty, on the other hand, is the ‘will which lies behind the power’ – or the general will of the community – of which ‘legal sovereignty’ is the legal embodiment or manifestation.<sup>51</sup>

Returning to the three relevant concepts of ‘federation’ outlined by Quick and Garran, the first was that of a ‘union of states’ under which a number of ‘co-equal societies or states’ were linked together to form ‘one common political system and to regulate and coordinate their relations to one another’.<sup>52</sup> Crucially, in a ‘union of states’, sovereignty was retained by the states that made up the union, with the newly formed union simply acquiring a transfer of power. The second concept was that of a ‘federal state’. Unlike a ‘union of states’, a ‘federal state’ was one in which the union itself formed a new state ‘without destroying the old States’. The essence of this kind of federal concept was ‘a divided sovereignty, and a double citizenship’.<sup>53</sup> The third concept was that of ‘a dual but co-ordinate system of government, under one Constitution and subject to a common sovereignty’.<sup>54</sup> Under this view of federalism, ‘the State employs two separate and largely independent governmental organizations in the work of government’.<sup>55</sup>

With its emphasis on a ‘unified people’ and ‘common sovereignty’ we can see that the *Engineers* orthodoxy, and Justice Gageler’s explanation of it, reflects a view that the *Constitution* embodies the third concept. However, there are a number of aspects of both the history of the framing of the *Constitution* and the text and structure of the *Constitution* itself that sit uncomfortably with that conclusion.

First, Quick and Garran themselves concluded that it was the *second* concept – involving divided sovereignty and dual citizenship – that most closely expressed what had been meant by Edward Freeman, AV Dicey and James Bryce when they spoke of a ‘Federal State’. That summation appears amply supported by the writings of those thinkers. Thus, Edward Freeman spoke of a federal state as having component members that were ‘independent’ or ‘sovereign’ but ‘subject to a common power in those matters which concern the whole body of members collectively’ resulting in a ‘divided sovereignty’.<sup>56</sup> For AV Dicey, the primary feature of a federal state was the division of power. Thus he wrote that ‘the method by which Federalism attempts to reconcile the apparently inconsistent claims of national sovereignty and of state sovereignty consists of the formation of a constitution under which the ordinary powers of sovereignty are elaborately divided’.<sup>57</sup> Finally, James Bryce, who was arguably ‘the most prominent of the influences on the Australian framers’,<sup>58</sup> characterised the American *Constitution* as involving ‘a compromise arrived at by allowing contradictory propositions to be represented as both true, namely national and state sovereignty’.<sup>59</sup> Presumably because of the heavy influence that all three writers had on the framers, Quick and Garran concluded that it was this sense of divided or

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<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid 335. This was distinguished by those authors from the concept of ‘confederation’, which they addressed elsewhere.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> Edward Freeman, *Federal Government in Greece and Italy* (Macmillan, 2<sup>nd</sup> ed, 1898) 1-3, 7-8, cited in Aroney, above n 34, 89.

<sup>57</sup> Dicey, above n 46, 143.

<sup>58</sup> Aroney, above n 34, 78.

<sup>59</sup> James Bryce, *American Commonwealth*, I, 409.

dual sovereignty that the phrase ‘a Federal Commonwealth’ was used in the preamble and covering clause 3 of the *Constitution*.<sup>60</sup>

Second, in *Federalist No 39*, James Madison analysed the American *Constitution* by looking to its formative, representative, operational and amending features for ‘federal’ and ‘national’ characteristics. By ‘federal’ he meant a union of states that preserved the sovereignty of the composite states, similar to Quick and Garran’s first concept.<sup>61</sup> By ‘national’ he meant a ‘consolidation’ of the states into a single entity, similar to the third of the concepts outlined by Quick and Garran. Madison’s overall conclusion was when the critical features of the American *Constitution* were considered, such as its foundation, sources of powers, operation and extent of powers and the authority by which future changes to government were to be introduced, it could be seen that it contained *both* national and federal features. In particular, the assent and ratification of the American *Constitution* by the American people divided into their distinct and respective states; the limits placed on the extent (breadth) of national legislative power; and, the requirement for a proportion of the states to acquiesce to changes to government, were all markedly ‘federal’ features of that system.

A similar analysis could be conducted with respect to the *Australian Constitution*. In its formation, the *Australian Constitution* was assented to and ratified by agreement between the founding colonies. The Australian people in turn provided their consent divided as constituents of each of the colonies. Furthermore, the ratification process required not just the agreement of a *majority* of colonies, but the *unanimous* consent of each founding state. On Madison’s approach, had the will of the majority of colonies, or the majority of Australian people as a whole, been sufficient then the process might have been characterised as one of nationalisation. But that was not the case. The assent and ratification process was not one where the people could be thought of as ‘composing one entire nation’ but rather ‘as composing the distinct and independent States to which they respectively belong’.<sup>62</sup> The colonies were, in this sense, ratifying the *Constitution* each ‘as a sovereign body, independent of all others, and only to be bound by its own voluntary act’.<sup>63</sup> Similarly, the limits placed on Commonwealth legislative power in the *Constitution* and the requirement of s 128 that at least a majority of people in a majority of states support a proposal for constitutional amendment before it is carried suggest that Australia’s constitutional system displays as many ‘federal’ features as its American counterpart.

A complicating factor with respect to the *Australian Constitution*, which is not relevant in the American context, is the role played by the Imperial Parliament in federation. Thus, it could be argued that the *legal sovereignty* of the states flowed not from the will of the people expressing their *political sovereignty* in the process of federation, but rather by delegation from the Imperial Parliament in whom legal sovereignty resided.<sup>64</sup> That analysis weakens however when it is considered that, to a large extent, the colonies were self-governing territories *prior* to federation. By 1850, the Imperial Parliament had passed the *Australian Constitutions Act 1850* (Imp)

<sup>60</sup> Quick and Garran, above n 7, 333.

<sup>61</sup> Madison’s commandeering of the terminology of ‘federal’ is examined in a classic essay by Martin Diamond, in which he says that ‘men we have come to call the ‘anti-federalists’ regarded themselves as the true federalists’: Martin Diamond, ‘The Federalist’s View of Federalism’ in GCS Benson (ed), *Essays on Federalism* (Institute for Studies in Federalism, 1961) 23, 23-24.

<sup>62</sup> James Madison, *Federalist No. 39*.

<sup>63</sup> *Ibid.*

<sup>64</sup> Quick and Garran, above n 7, 929; Geoffrey Lindell, ‘Why is Australia’s Constitution Binding? – The Reasons in 1900 and Now, and the Effect of Independence’ (1986) 16 *Federal Law Review* 29, 30.



granting the colonial legislatures the power to enact and amend their own constitutions, and these steps towards self-governance only accelerated towards the late 19<sup>th</sup> century. Thus, as Justice Gageler has acknowledged:

In respect of the relationship between legislatures and electorates, an extremely rapid expansion of the franchise in each of the Australian colonies was indicative, if anything, of a commitment to rule in accordance with the will of a broadly based democratic majority ... a series of decisions of the Privy Council in the 1870s and 1880s ... established that colonial legislatures were not to be regarded as delegates of the British Parliament but possessed plenary power within their fields of competence. In effect, this meant that colonial legislatures in Australia were confined only to the extent of their territorial jurisdiction. By the 1890s, as the prospect of the control of one democracy by another became increasingly less tolerable, it was clear that the British Parliament would act in relation to Australian colonial affairs only where requested. Effective power lay with colonial legislatures and ultimately with the Australian people.<sup>65</sup>

Running against the conclusion that the legal sovereignty of the colonial legislatures was merely a delegated assignment of power by the Imperial Parliament was the existence of a direct relationship between the political sovereigns in each colony (the electorate) and the colonial legislatures. By contrast, the Imperial Parliament maintained no direct relationship with those being governed. Further, by 1885, the Privy Council had recognised that the New South Wales legislature was ‘not acting as an agent or a delegate’.<sup>66</sup>

In light of these considerations, any claim that the Imperial Parliament possessed legal sovereignty to the entire exclusion of the colonial legislatures is a difficult one to maintain. It must, however, be accepted that the legal sovereignty of the colonial legislatures was not ‘unlimited’ in an Austinian sense, since it was subject to the dormant but potential interference of the Imperial Parliament.<sup>67</sup> However, it has long been recognised that ‘formal restraints’ on the expression of legal sovereignty do not necessarily undermine the existence of sovereignty itself. Thus, with respect to state involvement in the constitutional amendment process, Quick and Garran noted:

There is a formal restraint on the quasi-sovereignty of the Commonwealth in the requirement of ratification of a majority of the people and also by a majority of the States – and also, in some cases, by every State affected. These formal restraints are, strictly speaking, restraints on the mode of exercise of sovereignty, not on the sovereignty itself.<sup>68</sup>

It is perhaps for this reason that the political sovereignty of the people of the states could be said to have ‘co-existed with the proposition of British sovereignty’.<sup>69</sup> In light of these considerations, the conclusion that the self-governing colonies were

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<sup>65</sup> Stephen Gageler, ‘Foundations of Australian Federalism and the Role of Judicial Review’ (1987) 17 *Federal Law Review* 162, 170. (Citations omitted.)

<sup>66</sup> *Powell v Apollo Candle Company* (1885) 10 App Cas 282, 290; see also *R v Burah* (1878) 3 App Cas 889 and *Hodge v The Queen* (1883) 9 App Cas 117 for a similar principle recognised in the Indian and Canadian contexts respectively.

<sup>67</sup> *Colonial Laws Validity Act 1865* (Imp); for a discussion, see *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 AC 453, 498 – 501 (Lord Rodger).

<sup>68</sup> Quick and Garran, above n 7, 326.

<sup>69</sup> Robert French, ‘The Constitution and the People’ in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (Federation Press, 2003), 73.

‘not before [1901] sovereign bodies in any strict legal sense’<sup>70</sup> is arguably of less consequence than it might at first seem.

Preserving the continued sovereignty of the colonial legislatures was a concern of the framers at the outset. Thus, Sir Samuel Griffith emphasised that: ‘the separate states are to continue as autonomous bodies, surrendering only so much of their powers as is necessary to the establishment of a general government to do for them collectively what they cannot do individually for themselves, and which they cannot do as a collective body for themselves’.<sup>71</sup> Similarly, Sir Henry Parkes noted that a precondition of federation would be that: ‘the powers and privileges and territorial rights of the several existing colonies shall remain intact, except in respect of such surrenders as may be agreed upon as necessary and incidental to the power and authority of the National Federal Government’.<sup>72</sup>

The use by both Griffith and Parkes of the notion of a ‘surrender’ of power by the colonies is an important one. It serves to emphasise that these framers did not consider federation a simple exercise of reassignment of delegated power by the Imperial Parliament from the colonial to the national level. The states could only ‘surrender’ such power if it was they who possessed it by way of legal sovereignty. A reassignment of delegated power, on the other hand, would not require the kind of state acquiescence that the use of the word ‘surrender’ presupposes. Further, it is evident that this view entered majoritarian thinking at least by the time of the 1897 Convention in Adelaide. It was here that the framers adopted a preliminary resolution declaring:

the powers, privileges and territories of the several existing colonies shall remain intact, except in respect of such *surrenders* as may be agreed upon to secure uniformity of law and administration in matters of common concern.<sup>73</sup>

This concern of the framers manifested itself in four primary features of the *Constitution* as finally adopted. The first was the limitation of the powers of the newly created Commonwealth. Thus Quick and Garran wrote, ‘[l]ooking down the subsections of sec. 51, we find that in many of them the principle of duality is expressly recognized, and the exclusive domestic jurisdiction of the States expressly reserved’.<sup>74</sup> The second was the preservation, subject to the *Constitution*, of the existing institutions of colonial government through which their legal sovereignty was being expressed. This included preservation of their constitutions, their parliaments and their laws.<sup>75</sup> The third was the requirement for state ratification in the process of constitutional amendment. This feature in particular has been judicially recognised as serving to temper any broad statements regarding the ‘reposition of “sovereignty” in “the people” of Australia’, at least as a legal principle.<sup>76</sup> But perhaps the most telling expression of continued state sovereignty is the composition of the Senate. Equal representation of the states in the Senate was a feature adopted, after careful comparative study, from the *American Constitution*. In *Federalist No. 62*, James Madison remarked with respect to the composition of the American Senate:

the equal vote allowed to each State is at once a constitutional recognition of the portion

<sup>70</sup> *Victoria v Commonwealth* (1971) 122 CLR 353.

<sup>71</sup> *Official Record of the Proceedings and Debates of the National Australasian Convention Debates*, Sydney, 2 March to 9 April 1891 (1891), 31.

<sup>72</sup> *Ibid* 23.

<sup>73</sup> *Official Record of the Proceedings and Debates of the National Australasian Convention Debates*, Adelaide, March 22 – May 5 1897 (1897), 17 (emphasis added).

<sup>74</sup> Quick and Garran, above n 7, 337.

<sup>75</sup> *Australian Constitution*, ss 106-108.

<sup>76</sup> *McGinty v Western Australia* (1996) 186 CLR 140, 275 (Gummow J).

of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty. So far the equality ought to be no less acceptable to the large than to the small States; since they are not less solicitous to guard, by every possible expedient, against an improper consolidation of the States into one simple republic.<sup>77</sup>

It is only by recognising the connection of this feature with state sovereignty that we can understand why it was considered an acceptable compromise to insert it within the structure of the Commonwealth legislature, disrupting what would otherwise have been a perfect expression of the legal sovereignty of the *unified* Australian people. The very purpose of the compromise was to act as a buttress against the ‘consolidation’ of Australia into a unitary state or ‘one simple republic’.

The weight of these historical considerations and the manner in which they are reflected in the constitutional structure itself suggest that the concept of ‘federalism’ adopted in Australia was one that recognised a dual sovereignty of the Commonwealth and the states – the second concept of a ‘federal state’ identified by Quick and Garran. The Australian people in turn each enjoy dual citizenship, expressing their political sovereignty as electors of the Commonwealth Parliament and of a single State Parliament. Judicial emphasis on the features of the *Constitution* that expressly give effect to this type of federal system reinforce it. On the other hand, judgments that downplay the importance of these features tend to veer towards the most nationalistic conceptions of the ‘federal system’, with foundations in a common sovereignty and a dual system of government as a mere administrative arrangement. The *Engineers* orthodoxy obviously reflects the long dominance of the latter in this subtle but important dichotomy. However, the 2012 decision in *Williams* does not. When we consider that case against this conceptual backdrop, we can begin to see that it arguably has significant implications for future developments in constitutional interpretation.

### B *Williams v Commonwealth*

In 2003, when he was still a justice of the Federal Court, French CJ wrote extrajudicially that the ‘idea of popular authority or sovereignty cannot be dismissed as a trivial statement of historical reality which has nothing to say about the construction of the Constitution’.<sup>78</sup> He was, at the time, referring specifically to the potential relevance of the sovereignty of the people of the Commonwealth to issues of constitutional interpretation that might arise in the context of ss 7, 24 or 128.<sup>79</sup> Nothing in that work expressly suggested that French CJ had formed any opinions regarding state sovereignty or its potential relevance to matters of constitutional interpretation. Nevertheless, it is our view that there are a number of features of French CJ’s judgment in *Williams* that align closely with an underlying conception of the federal *Constitution* as founded upon the ‘dual sovereignty’ of the Commonwealth and the states. If this is an accurate characterisation of the motivations behind the decision, then *Williams* could represent the beginning of a departure from the *Engineers* orthodoxy not just in its ostensibly ‘pro-state’ result, but more importantly for issues pertaining to constitutional coherence, in its underlying theoretical foundations.

Prior to the decision of the majority in *Williams*, it had generally been assumed that the ‘breadth of federal executive power [wa]s the same as that of federal legislative power’.<sup>80</sup> It had also been assumed that the Commonwealth executive did

<sup>77</sup> James Madison, ‘The Federalist No. 62’ in Terence Ball (ed), *The Federalist with Letters of Brutus* (Cambridge University Press, 2003) 299, 301.

<sup>78</sup> French, above n 69, 74.

<sup>79</sup> Ibid 74-5.

<sup>80</sup> Winterton, above n 7, 38.

not require any specific statutory authority to engage in activities relating to those subject matters. However, in *Williams*, the High Court dismissed these assumptions. By a 6:1 majority, with Heydon J dissenting, the Court held that Commonwealth executive power is not simply coextensive with Commonwealth legislative power and concluded that, in at least some circumstances, the Commonwealth executive requires statutory authority before it can enter into contracts to expend public monies.

French CJ opened his judgment in *Williams* with a striking quote from Andrew Inglis Clark that described the ‘essential and distinctive feature’ of a ‘truly federal government’ as:

the preservation of the separate existence and corporate life of each of the component States of the commonwealth, concurrently with the enforcement of all federal laws uniformly in every State as effectually and as unrestrictedly as if the federal government alone possessed legislative and executive power within the territory of each State.<sup>81</sup>

French CJ’s reference to Clark is significant for a number of reasons. First, Clark has been described as ‘the predominant influence on the overall design of the Australian constitution’<sup>82</sup> and it is highly likely that his draft *Constitution* was the starting point of the 1891 Convention in Sydney.<sup>83</sup> However, it has been suggested that his work and influence have generally been overlooked due to his non-participation in the 1897-8 Conventions and failure to acquire a significant judicial or political role after federation.<sup>84</sup> Thus, French CJ’s reference to Clark’s relatively uncelebrated conception of the *Constitution* appears more deliberate and considered than a mere passing allusion to well-trodden historical ground.

Second, Clark’s conception of the form of federalism embodied in the *Constitution* was one very clearly based on the idea of the concurrency of *two separate sets of political communities*; one being the ‘comprehensive political community which is constituted by the federation of the separate communities embraced in it’ and the other being ‘the several component communities’.<sup>85</sup> The purpose of the *Constitution* was to protect the continuance of these communities, and in particular the component States, since:

the distinguishing advantage of the federal form of government is the multiplication of adequate arenas and conditions for the political education of the citizens of a common country, and for implanting in them an active patriotism. But the only solid security for the continuance of this advantage is an assiduous preservation of the separate corporate life of each component State in the Federation.<sup>86</sup>

Clark was heavily influenced by the American model of federation<sup>87</sup> on which his original 1891 draft was in large parts based.<sup>88</sup> In particular, he was interested in the

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<sup>81</sup> *Williams* (2012) 288 ALR 410, 412 [1].

<sup>82</sup> Brian Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (University of Queensland Press, 1987) 50.

<sup>83</sup> William G Buss, ‘Andrew Inglis Clark’s Draft Constitution, Chapter III of the *Australian Constitution*, and the Assist from Article III of the Constitution of the United States’ (2009) 33 *Melbourne University Law Review* 718, 726.

<sup>84</sup> Frank Neasey, ‘Andrew Inglis Clark and Australian Federation’ (November 1991) 13 *Papers on Parliament*.

<sup>85</sup> Andrew Inglis Clark, *Studies in Australian Constitutional Law* (Charles F. Maxwell Law Booksellers and Publishers, 2<sup>nd</sup> ed, 1905) 7.

<sup>86</sup> *Ibid* 13.

<sup>87</sup> *Ibid* 8.

manner in which the framers of the American *Constitution* had solved the problem of concurrent jurisdiction described in the passage quoted by French CJ at the beginning of his judgment and reproduced above. He noted that the problem was solved in two separate but related ways. The first way was:

by providing for the existence of *two distinct citizenships*, viz., a citizenship of each component community and a citizenship of the composite community, and defining their mutual boundaries ...<sup>89</sup>

In the reference to ‘citizenship’, we can see here a model resembling and perhaps even deriving directly from the concept of ‘dual sovereignty’ popular amongst the framers of the American *Constitution*. A function of the judiciary within this model was conceived to be to police the ‘boundaries’ between the two sovereigns. Clark viewed the judiciary’s role in this regard as being ‘inseparable from the federal form of political organisation’ in order that ‘its essential features are to be preserved from gradual obliteration by successive encroachments on the part of legislative department of the Federal Government upon the legislative domain of the States’<sup>90</sup> and vice versa.

However, Clark also recognised, once again inspired by the American model, that the judiciary would be incapable of performing this role perfectly, since the ‘verbal limitation of the respective boundaries of the separate jurisdictions of the States and the Nation will not be found always sufficient to enable the judiciary to intervene in every case in which the federal legislature may encroach on upon a sphere of action impliedly reserved to the States’.<sup>91</sup> In those circumstances, the ‘defeat of attempts to make such encroachments’ would be effectively achieved by ‘equal representation of each State in the Senate’.<sup>92</sup> By this, he was referring to the second part of the American solution, which provided:

for the protection of the mutual boundaries of the two citizenships by giving to a majority of the component communities as such, and to a majority of the total population of the composite community, concurrent powers of veto upon any proposed legislation, or any proposed amendment of the constitution.<sup>93</sup>

Thus, Clark’s conception of the manner in which the ‘existence and corporate life of the states’ was to be preserved was not just by judicial review, but also by ‘a system of state and national representation within the federal legislature’ (the Senate) and a ‘method of constitutional amendment that recognised the constitutive status of the peoples of the component states’ (the machinery of s 128).<sup>94</sup> This would give the people of Australia, through their dual citizenship, ‘concurrent powers of veto’ with respect to prospective legislation and constitutional amendments.<sup>95</sup> It was only with the adoption of such features that the *Constitution* could continue to maintain its ‘original character’:<sup>96</sup> one that provided for ‘a truly federal government’ which preserved the concurrent existence of two distinct and separate but overlapping sovereignties.

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<sup>88</sup> See William G Buss, ‘Andrew Inglis Clark’s Draft Constitution, Chapter III of the *Australian Constitution*, and the Assist from Article III of the Constitution of the United States’ (2009) 33 *Melbourne University Law Review* 718.

<sup>89</sup> Clark, above n 85, 9.

<sup>90</sup> *Ibid* 5.

<sup>91</sup> *Ibid* 10.

<sup>92</sup> *Ibid*.

<sup>93</sup> *Ibid* 9.

<sup>94</sup> Aroney, above n 34, 110.

<sup>95</sup> *Ibid*.

<sup>96</sup> Clark, above n 85, 9.

Third, there is considerable alignment with the idea of a ‘truly federal system’ as conceived by Clark, and Quick and Garran’s ‘second concept’ of the notion of federation discussed in Part A above. At the base of each model is a conception of federation in Australia grounded in ‘dual citizenship’ and a corresponding recognition that there are two separate sets of communities or ‘political sovereigns’ that constitute that duality within the federal system. The manner in which the states are protected from encroachment is two-fold. First, it is the unequivocal role of the judiciary to police the ‘boundaries’ between the two sovereigns. Second, and particularly relevant for circumstances where the judiciary is hampered by lack of textual clarity, the Commonwealth’s pure ‘legal sovereignty’ is tempered by a system of state representation in the passage of ordinary legislation and the process of constitutional amendment.

Returning to *Williams*, we can see that critical features of Clark’s underlying concept of Australian federalism and Quick and Garran’s ‘second concept’ are prevalent throughout French CJ’s judgment. They are expressed in three distinct ways: (a) in a repeated concern over Commonwealth encroachment upon the competencies of the state executives; (b) in the emphasis placed on the Senate as a significant federalist feature of the Constitution; and (c) in the distinguishing of previous and persuasive authority, which emphasised the role of responsible government alone.

Immediately after citing Andrew Inglis Clark’s concept of a ‘truly federal government’, French CJ quoted Alfred Deakin’s observation that, ‘As a general rule, whenever the executive power of the Commonwealth extends, that of the States is correspondingly reduced’.<sup>97</sup> The concern was repeated again later in the judgment, when French CJ noted that:

Expenditure by the Commonwealth, in fields within the competence of the executive governments of the states has, and always has had, the potential, in a practical way of which the court can take notice, to diminish the authority of the states in their fields of operation.<sup>98</sup>

Upon quoting George Winterton’s observation that broad governmental capacity to contract ought to be restrained in view of its potential impact on individual liberties, French CJ noted that of relevant concern ‘for present purposes’ was ‘the impact of Commonwealth executive power on the executive power of the states’.<sup>99</sup> The Chief Justice concluded his judgment with the warning that a broad Commonwealth executive power would ‘correspondingly reduce those of the states and compromise what Inglis Clark described as the essential and distinctive feature of a “truly federal government”’.<sup>100</sup>

This repeated emphasis on the potential for broad Commonwealth executive power to diminish the powers of the states is revealing. On the one hand, French CJ acknowledged that this particular concern was ‘not a criterion of invalidity’,<sup>101</sup> in a clear concession that it was not a legal principle upon which the Court could arbitrate the ‘boundaries’ of power between the two polities. On the other hand, the strong emphasis placed upon it in the judgment as an observation of which the Court can ‘take notice’<sup>102</sup> suggests that Andrew Inglis Clark’s concern over the preservation of the distinct political community of the states is one which French CJ in all likelihood shares.

<sup>97</sup> *Williams* (2012) 288 ALR 410, 412[2].

<sup>98</sup> *Ibid* 423 [37].

<sup>99</sup> *Ibid* 423 [38].

<sup>100</sup> *Ibid* 441 -2[83].

<sup>101</sup> *Ibid* 423 [37].

<sup>102</sup> *Ibid*.

It was open to French CJ to decide *Williams* simply on the orthodox basis of emphasising the role of the House of Representatives in responsible government. Indeed, this was the approach taken by Heydon J in dissent. Heydon J held in favour of a broad Commonwealth executive power in part on the ground that the inherent features of representative and responsible government ought to guarantee accountability of executive actions:

the use of executive power can be controlled by the legislature enacting legislation. What is more, use by the executive of its powers in a fashion displeasing to the legislature is likely to lead to the House of Representatives losing confidence in the executive and to an inability on the part of the executive to procure the passage of future Appropriation Bills.<sup>103</sup>

The model of responsible government adopted in Australia ‘necessarily entailed ministerial responsibility only to the lower, popular (or more popular, if both were elected) House of a bicameral legislature’.<sup>104</sup> At the Commonwealth level, and despite some claims of a larger ambit during the constitutional crisis of 1975,<sup>105</sup> ‘there has been recognition from authoritative sources that the government needs to retain the confidence only of the House of Representatives’.<sup>106</sup> There are two explanations for why this model of responsible government was adopted in Australia. The first was that the concept of responsible government was aligned with a common sovereignty; responsibility to more than one house would therefore be excessive and would cause significant hindrance to the operation of the executive. As Professor Harrison Moore explained:

it has been contended that the system of Cabinet Government which was introduced from England to the Colonies, and which the Colonies imposed upon the Commonwealth, is essentially a feature of unitary government and is inapplicable in a federal government; that a Ministry cannot serve two masters – the Senate and the House; that if the weakness of the Executive is one of the greatest dangers to party government with responsibility to one House, responsibility to two Houses would break down the Executive machinery altogether ...<sup>107</sup>

The second reason was the more obvious and fundamental one arising from British constitutional practice – the lower House, being the house ‘closest to the people’, was more representative and thus it was the House that enjoyed the confidence of the people, thereby sustaining common sovereignty. In 1896, Sir Samuel Griffith observed:

The present form of development of Responsible Government is that, when the branch of the Legislature which more immediately represents the people disapproves of the actions of Ministers, or ceases to have confidence in them, the head of the State dismisses them, or accepts their resignation, and appoints new ones. The effect is that the actual government of the State is conducted by officers who enjoy the confidence of the people.<sup>108</sup>

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<sup>103</sup> Ibid 517 [394].

<sup>104</sup> Winterton, above n 7, 6.

<sup>105</sup> Written Advice of Sir Garfield Barwick to Sir John Kerr, 10 November 1975; Winterton, above n 7, 8.

<sup>106</sup> Winterton, above n 7, 7.

<sup>107</sup> Moore, above n 9, 151.

<sup>108</sup> Samuel Griffith, *Notes on Australian Federation: Its Nature and Probable Effects* (1896), 17-8.

For French CJ, however, the principles of responsible government alone were an insufficient check on Commonwealth executive power. In line with the conception of the Australian federal system put forward by Andrew Inglis Clark, French CJ emphasised that Commonwealth executive power to spend must not only be subject to ‘parliamentary control’ but also subject to the scrutiny of the Senate constituted as the ‘States’ house’. Thus, French CJ insisted:

A Commonwealth executive with a general power to deal with matters of Commonwealth legislative competence is in tension with *the federal conception which informed the function of the Senate as a necessary organ of Commonwealth legislative power*. It would undermine parliamentary control of the executive branch and weaken the role of the Senate.<sup>109</sup>

In light of the drafting history of s 53 of the *Constitution*, the Chief Justice’s emphasis on the role of the Senate is even more significant in the specific context of Commonwealth executive spending. Debate regarding s 53 ‘lay at the heart of the 1891 convention’.<sup>110</sup> That was because, although the Senate had some representative character – being an elected house – its predominant role as conceived by the framers was to represent the interests of the states.<sup>111</sup> The question was whether the Senate’s powers should, on this basis, be subordinated to the House of Representatives, whose population-based representative character more closely reflected the political sovereignty of the unified people of the Commonwealth.<sup>112</sup> A compromise was reached such that the Senate would have equal powers with the House of Representatives, *except* with respect to initiating and amending taxation and appropriation bills.<sup>113</sup> The framers’ commitment to that compromise was unshakeable. An amendment moved by Richard Baker in 1891 to give the Senate equal power with the House of Representatives over *all* bills was lost after ‘a long debate by 22 votes to 16’.<sup>114</sup> A similar motion suggested in 1887 by the Legislative Council of Western Australia was lost by a greater margin of 28 votes to 19.<sup>115</sup>

Despite this drafting history, the compromise embodied in s 53 was of considerable concern to the Chief Justice: ‘The inability of the Senate under s 53 to initiate laws appropriating revenue and its inability to amend proposed laws appropriating revenue for “the ordinary annual services of the Government” also point up the relative weakness of the Senate against an executive government which has the confidence of the House of Representatives.’<sup>116</sup> This concern contributed to the conclusion that Commonwealth executive power to contract and spend must be preceded by more than just a mere appropriation; it must in some cases require prior legislative authority. Through the passage of ordinary legislation the Senate would not be constrained by the limitations on its power over appropriations contained in s 53. Instead, it could exercise a broader complement of constitutional powers to scrutinise the executive’s actions.

Such emphasis on the role of the Senate accords strongly with a vision of the *Constitution* as giving effect to a federal system that seeks to reconcile the interests of two separate and at times competing polities. Andrew Inglis Clark was well aware of

<sup>109</sup> *Williams* (2012) 288 ALR 410, 433 [60]. (Emphasis added.)

<sup>110</sup> Aroney, above n 34, 238.

<sup>111</sup> Moore, above n 9, 141.

<sup>112</sup> *Ibid.*

<sup>113</sup> Aroney, above n 34, 238.

<sup>114</sup> Quick and Garran, above n 7, 663.

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

<sup>116</sup> *Williams* (2012) 288 ALR 410, 433 [60] (French CJ); see also 454 [136] and 456 [145] (Gummow and Bell JJ), 548 [532] (Crennan J).



these distinct interests, noting that the ‘collective and corporate life of each State will embrace the influences flowing from historical and geographical and other conditions peculiar to the State, and which make its collective and corporate life a distinct and separate force in the national life of the Commonwealth’.<sup>117</sup> On the other hand, the vision is in direct conflict with the notion put forward by Justice Gageler that ‘in the Australian federal system it is the *same people* and the *same Crown* who constitute the Commonwealth and the States’.<sup>118</sup> We can see, therefore, in French CJ’s judgment in *Williams* what appears to be a significant shift from the conceptual basis that underpins the ‘*Engineers* orthodoxy’.

Doctrinally speaking, one of the most persuasive authorities put before the Court in *Williams* was *New South Wales v Bardolph*.<sup>119</sup> French CJ’s treatment of that case is particularly instructive. *Bardolph* stood as authority for the principle that, even in advance of parliamentary appropriation, an executive government could enter into a contract for the expenditure of money.<sup>120</sup> The basis for the decision, which concerned the executive power of New South Wales, was an emphasis on the accountability to Parliament of an officer of the Crown under the principles of responsible government. Dixon J, in the majority, held:

The principles of responsible government impose upon the administration a responsibility to Parliament, or rather to the House which deals with finance, for what the Administration has done. It is a function of the Executive, not of Parliament, to make contracts on behalf of the Crown. The Crown’s advisers are answerable politically to Parliament for their acts in making contracts. Parliament is considered to retain the power of enforcing the responsibility of the Administration by means of its control over the expenditure of public moneys.

Thus reassured by the control over expenditure that could be enforced by Parliament, Dixon J concluded in *Bardolph* that it was not necessary to require statutory authority before the executive could enter into contracts.<sup>121</sup>

It might have been straightforward enough for French CJ to distinguish *Bardolph* purely on the basis that it was a case that involved an exercise of executive power ‘in the ordinary course of administering a recognised part of the government of the State’<sup>122</sup> and was thus more analogous to an exercise of Ministerial power derived from s 64 than the power in question in *Williams*, which was s 61.<sup>123</sup> However, French CJ noted that Professors Enid Campbell and Leslie Zines had each considered it an artificial distinction to confine the exercise of power in *Bardolph* to the equivalent of s 64 and not s 61.<sup>124</sup> Professor Zines, in particular found it ‘hard to see how the supposed distinction between types of contracts leads to any significant bolstering of responsible government’.<sup>125</sup>

Instead, in distinguishing *Bardolph*, the aspect upon which French CJ appeared to place most reliance was that it had been decided with respect to the executive power of a ‘unitary’ government – New South Wales – rather than a federal government. As he explained:

<sup>117</sup> Andrew Inglis Clark, above n 85, 12.

<sup>118</sup> Gageler, above n 65, 187.

<sup>119</sup> (1934) 52 CLR 455 (‘*Bardolph*’).

<sup>120</sup> *Williams* (2012) 288 ALR 410, 438 [74].

<sup>121</sup> *Bardolph* (1934) 52 CLR 455, 509.

<sup>122</sup> *Ibid* 508.

<sup>123</sup> *Williams* (2012) 288 ALR 410, 438 [74] (French CJ); see also, *Williams* [532] (Crennan J).

<sup>124</sup> *Ibid*, 438-9 [75] – [76].

<sup>125</sup> Zines, above n 11, 169.

it is necessary to bear in mind that that case concerned the power of the Executive in a setting analogous to that of a unitary constitution. It was not a case about the relationship between Commonwealth and State Executives and their contractual and spending powers under a federal constitution.<sup>126</sup>

There are two interpretations that might be applied to this extract. The first is that it simply distinguishes between a unitary constitution in its simplest form and a federal constitution that embodies a duality. Under this interpretation, whether that duality exists in a strong form (i.e. as a ‘dual sovereignty’) or weak form (i.e. as ‘common sovereignty’ with dual government operating as administrative or ‘institutional functionaries’) is irrelevant. It is merely the existence of a duality which demarcates one from the other. However, the problem with this interpretation is that it provides an insufficient basis for distinguishing *Bardolph*. This is because it is only the strong form of duality – a duality of *sovereignty* – which has the potential to create tension in ‘the relationship between Commonwealth and State Executives’. Where both sets of executive government are operating under a ‘common sovereignty’, there can be no such tension. Since French CJ has repeatedly expressed concern for the potential for Commonwealth executive power to impact upon state executive power, the better interpretation of the passage is one in which the phrase ‘federal government’ is used to refer to a much stronger form of duality – that between two sets of political community, each independent of the other but with overlapping territorial jurisdiction.

Under this second interpretation, the emphasis placed in *Bardolph* on accountability based on responsible government alone ceases to be a sufficient ground on which to decide *Williams*. This is because emphasis on responsible government gives no weight to the federal features in the *Constitution* that were specifically designed to resolve the tension in the relationship between the Commonwealth and the states. Those features, as envisaged by Andrew Inglis Clark, were equal representation of the states in the Senate and state representation in the process of amending the *Constitution*. It is in this context that we must understand French CJ’s view that Commonwealth executive power should be ‘understood by reference to the “truly federal government”... which, along with responsible government, is central to the Constitution’.<sup>127</sup>

The conceptual underpinnings of French CJ’s judgment in *Williams* seem to come to life when they are placed against the backdrop of Andrew Inglis Clark’s vision of ‘a truly federal government’, which in turn aligns with Quick and Garran’s ‘second concept’ of a federal system. However, the same insights cannot be attributed to the other majority justices in *Williams*. While Crennan J placed some reliance on the absence of the involvement of the Senate to distinguish *Bardolph*,<sup>128</sup> her reasoning was not in any way expounded or situated within the broader context of the relationship between the Commonwealth and the states. Gummow and Bell JJ and Hayne J made only fleeting references to the limited role of the Senate with respect to appropriations,<sup>129</sup> and Kiefel J did not mention the Senate at all. While some of the majority justices raised federal concerns with respect to the potential bypassing of s 96 of the *Constitution*,<sup>130</sup> by and large the emphasis of their judgments was on the parliamentary control of the Commonwealth executive as can be understood through the ordinary principles of responsible government.

It therefore appears that the underlying concept of federation evident in French CJ’s judgment has not yet gained a wider following within the Court. Nonetheless, we

<sup>126</sup> *Williams* (2012) 288 ALR 410, 440-1 [79].

<sup>127</sup> *Ibid* 433 [61] (French CJ).

<sup>128</sup> *Ibid* 548 [532].

<sup>129</sup> *Ibid* 456 [145] (Gummow and Bell JJ); 475 [220] (Hayne J).

<sup>130</sup> *Ibid* 455 [143] (Gummow and Bell JJ); 542 [501], [503] (Crennan J).

submit that the Chief Justice's opinion is highly significant for two reasons: (1) because it appears to depart quite dramatically from the underlying conceptual basis for the *Engineers Case*; and (2) it is the first time since *Engineers* that a majority justice has diverged from its orthodoxy.

### C *The implications of the rival account*

We now turn to identify and briefly consider three broad areas upon which the conceptual dichotomy discussed above may have an important bearing. The first is in the perceived role of the judiciary in adjudicating federal disputes, the second is the notion of 'a federal balance' as underpinned by reserved powers reasoning, and the third concerns the scope of intergovernmental immunity.

#### *The role of the judiciary*

Justice Gageler's account of the impetus and ambitions of federation supports the notion that deference to interplaying political forces rather than judicial interference is the most appropriate means for dealing with 'inexpedient or undesirable exercises of power'.<sup>131</sup> Judicial deference to parliamentary sovereignty has a long history in the Westminster system and its familiarity thus makes it an appealing proposition with respect to federalism also. What is more, Justice Gageler's explanation supports the view that it is not a legitimate function of the Court to 'fix' a balance of power between the Commonwealth and the states since such balance ought to respond to changing circumstances:

Beyond necessarily involving the continued existence of the Commonwealth and the States as separate governmental entities, federalism is a concept in search of a meaning. The federal balance is in a constant state of change. Its freezing by the Court at a particular moment in history, if justifiable at all, can be so only by reference to criteria drawn from outside the Constitution.<sup>132</sup>

In *Commonwealth v Tasmania (Tasmanian Dam)*, Brennan J argued that the *Engineers* methodology gives the *Constitution* 'a dynamic force which is incompatible with a static constitutional balance' and which permits the Court to recognise a connexion between Commonwealth heads of power and an expanding range of 'modern commercial, economic, social and political activities'.<sup>133</sup> Quite aside from its attractions as a constitutional method in a strongly positivist legal culture, such an approach is appealing since it has practical and contemporary resonance in the fast-paced environment of modern life.

What is suggested, and arguably demonstrated by the approach taken by French CJ in *Williams*, is that the *Engineers* orthodoxy, as conceptually explained by Justice Gageler, disregards considerations which might render the portrayal of Australian constitutionalism rather more complex. For example, it remains difficult to reconcile Justice Gageler's conception of the limited role of the judiciary with evidence of the framers' intentions and the very structure of the *Constitution* itself. Professor Aroney draws on the historical record to dispute the one-sided nature of such accounts:

While some of the framers looked primarily to the High Court, and others placed more emphasis and reliance upon what have been called 'the political safeguards of federalism' (the role of the people of the states in the composition of the Federal

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<sup>131</sup> Zines, above n 12, 13.

<sup>132</sup> Gageler, above n 65, 180.

<sup>133</sup> *Commonwealth v Tasmania* (1983) 153 CLR 1, 221 (Brennan J).

Parliament and executive government), what actually emerged from the convention debates was a Constitution in which both safeguards – the political *and the judicial* – were regarded as vital to the integrity of the federal system.<sup>134</sup>

This historical perspective aligns strongly with Andrew Inglis Clark's views regarding the role of the constitutional court in a federation:

A federal constitution will always include a distinctive body of constitutional law, under which numerous questions that never could arise under a unitary constitution will from time to time be raised in reference to the powers and functions of the different government organs exercising governmental powers within the territory over which the federal Constitution extends. In the case of the Constitution of the Commonwealth of Australia, the ultimate decision of these questions will be made by the federal Judiciary of the Commonwealth.<sup>135</sup>

Further, seminal cases such as *Commonwealth v Cigamatic Pty Ltd (In Liquidation)*<sup>136</sup> and *Melbourne Corporation v Commonwealth*<sup>137</sup> have demonstrated that the Court must at times impose direct limits on power to protect principles that 'go deep into the nature and operation of the federal system'.<sup>138</sup>

In the face of these historical perspectives and the manner in which the Court has, even in the post-*Engineers* era, been required to demarcate the limits of power, the conclusion that the proper role of the Court is to leave this issue almost entirely to the political process is a difficult one to accept. Rather, it is French CJ's perspective that more closely accords with what appears to have been the intended and actual function of a constitutional court in a federal system. As appears implied from the following extra-judicial remark, the Court's proper function must be to determine the implied and express limitations on Commonwealth power such that they do not 'impair or affect' the 'Constitution of a State':

[E]very constitutional power has its limits. They may be expressed or implied in the Constitution. The *Engineers'* case did not presage the conversion of Australia into a unitary state. The joint judgment foreshadowed implied limitations on Commonwealth legislative powers. While such powers were to be broadly interpreted, they could not be used to 'impair or affect the Constitution of a State'.<sup>139</sup>

### **Federal balance**

At the start of his judgment, French CJ cited Alfred Deakin's suggestion that 'wherever the executive power of the Commonwealth extends, that of the States is correspondingly reduced'.<sup>140</sup> He then went on to observe later in his judgment the practical manner in which this plays out:

There are consequences for the federation which flow from attributing to the Commonwealth a wide executive power to expend moneys, whether or not referable to a head of Commonwealth legislative power, and subject only to the requirement of a parliamentary appropriation. Those consequences are not to be minimised by the

<sup>134</sup> Aroney, above n 34, 368. (Emphasis added).

<sup>135</sup> Andrew Inglis Clark, above n 85, 5-6.

<sup>136</sup> (1962) 108 CLR 372 ('*Cigamatic*').

<sup>137</sup> (1947) 74 CLR 31.

<sup>138</sup> *Cigamatic* (1962) 108 CLR 372, 377.

<sup>139</sup> Chief Justice Robert French, 'If they could see us now — what would the founders say?'

John Curtin Prime Ministerial Library 2013 Anniversary Lecture, 18 July 2013, Perth.

<sup>140</sup> *Williams* (2012) 288 ALR 410, 412 [1].

absence of any legal effect upon the laws of the states. Expenditure by the executive government of the Commonwealth, administered and controlled by the Commonwealth, in fields within the competence of the executive governments of the states has, and always has had, the potential, *in a practical way of which the court can take notice*, to diminish the authority of the states in their fields of operation.<sup>141</sup>

He referred to it again in the closing paragraph of his judgment, in justifying why the ‘nationhood’ aspect of executive power was not applicable to this exercise of executive spending in question in *Williams*:

The character of the Commonwealth Government as a national government does not entitle it, as a general proposition, to enter into any such field of activity by executive action alone. Such an extension of Commonwealth powers, would, in a practical sense, as Deakin predicted, correspondingly reduce those of the states and compromise what Inglis Clark described as the essential and distinctive feature of a ‘truly federal government’.<sup>142</sup>

It is possible that this reasoning ‘sails uncomfortably close to adopting a view of state [executive] power of the kind that provided a platform for the doctrine of reserved state powers’.<sup>143</sup> In the *Work Choices Case*,<sup>144</sup> the Court reiterated its view that implications from federalism – at least insofar as they were widely cast around the notion of ‘federal balance’ – had no place in Australian constitutional interpretation. This reasoning has its origins in the rejection of the reserved powers doctrine in the *Engineers* case due to their being implied by reference to nothing more than ‘a vague, individual conception of the compact’.<sup>145</sup> The majority prefaced their own stated reluctance to entertain the question of ‘federal balance’ by referring to Dixon J’s famous observations in *Melbourne Corporation* that the ‘position of the federal government is necessarily stronger than that of the States’ and that the framers ‘conceived the States as bodies politic whose existence and nature are independent of the powers allocated to them’.<sup>146</sup> They concluded that there was thus no basis upon which a ‘federal balance’ could be determined:

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? It cannot be identified from any of the considerations mentioned thus far in these reasons, and no other basis for its identification was advanced in argument.<sup>147</sup>

However, there are a couple of points to be made regarding French CJ’s particular approach. First, and as has been noted earlier in this paper, French CJ was careful not to brand this observation as a criterion of invalidity.<sup>148</sup> He merely regarded it as a practical consideration of which the Court could be mindful. Second, in the case of legislative powers there is a proper order of inquiry suggested by the structure of the *Constitution* itself. Thus, it is appropriate to construe the enumerated powers of the

<sup>141</sup> Ibid 423 [37]. (Emphasis added.)

<sup>142</sup> Ibid 442 [83].

<sup>143</sup> David Hume, Andrew Lynch and George Williams, ‘Heresy in the High Court? Federalism as a Constraint on Commonwealth Power’ (2013) 41 *Federal Law Review* 71, 77.

<sup>144</sup> (2006) 229 CLR 1.

<sup>145</sup> *Engineers Case* (1920) 28 CLR 129, 145.

<sup>146</sup> *Melbourne Corporation* (1947) 74 CLR 31, 82 (Dixon J).

<sup>147</sup> *Work Choices Case* (2006) 229 CLR 1, 120 [195] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>148</sup> *Williams* (2012) 288 ALR 410, 423 [37].

Commonwealth with all the width that the words permit before going on to consider the residue of powers remaining to the states. But there is no equivalent 'proper order of inquiry' for executive power. Section 61 was drafted in broad terms that deliberately left ambiguous the contours of the Commonwealth executive authority.<sup>149</sup> Furthermore, in the absence of legislation, there is no constitutional mechanism for resolving inconsistencies between Commonwealth and state executive action. In such circumstances, 'the limits of executive power of the Commonwealth must be ascertained relative to both the powers of the states and the powers of the other branches of the federal government'.<sup>150</sup> Thus, cognisance of the pre-existing practice of state executive capacity is not only helpful, but arguably necessary in carrying out the exercise of interpreting s 61.

Although he did not deploy the loaded terms 'federal balance' or 'reserved state powers' in his judgment in *Williams*, French CJ has arguably reignited the debate as to whether, in the appropriate circumstances, these are useful concepts for the interpretation of the executive powers of the Commonwealth and states under the *Constitution*. While it appears that the enduring legacy of the *Engineers* case is likely to mean that these concepts will struggle to ever regain acceptance as relevant to determining the breadth of legislative powers, this does not appear to be the case for executive powers.<sup>151</sup> This divergence may at first appear to lack coherence, since the necessary but somewhat paradoxical result is broad Commonwealth legislative powers but confined Commonwealth executive powers. However, it is possible to find theoretical coherence if one accepts that what is being expressed in each case is the dual sovereignty of the Commonwealth and the states.

Construing grants of legislative powers broadly in favour of the Commonwealth accords with the manner in which the *Constitution* is drafted and also, to some extent, its federal structure. By the latter, we draw attention to the particularly 'federalist' aspect of the design of the legislature in which the Senate enjoys a crucial, and importantly, *equal* role to that of the House of Representatives in the passage of ordinary legislation. It is this aspect which puts to rest any federalist concerns that might otherwise arise. Commonwealth executive power might also have been construed broadly, leaving the necessary accountability to fall on the shoulders of the principles of responsible government; specifically, to ministerial responsibility to the lower house alone. Since this was not the path chosen by the majority in *Williams*, the conclusion must be that there is some additional store in requiring legislative authority before executive action. That must be the role of the Senate (and therefore, in theory, the states) in assenting to Commonwealth executive action through the passage of ordinary legislation. And because the Senate is one of the primary features of the *Constitution* that embodies the sovereignty of the states, the dichotomy set up by interpreting Commonwealth legislative powers broadly but Commonwealth executive powers narrowly can only be explained by understanding that the dual sovereignty of the Commonwealth and the states is the underlying principle being given effect.

If that is the case, then the notion of a 'federal balance' might conceivably find a new theoretical grounding utterly divorced from reserved powers reasoning. This would see it expressly founded on the recognition that the *Constitution* embodies not just the sovereignty of the unified people but also the people divided into their distinct

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<sup>149</sup> Winterton, above n 7, 27. Hume, Lynch and Williams suggest that this 'generality begets constriction' in a way that is simply inapplicable to legislative power in s 51, see Hume, Lynch and Williams, above n 144, 91.

<sup>150</sup> Winterton, above n 7, 29.

<sup>151</sup> The degree to which the approach evident in *Williams* may actually reach beyond the confines of interpretation of executive power is debated fully in Hume, Lynch and Williams, above n 144, 90-2.

regional communities also. Of course, that would be an insufficient principle to overturn the weight of authority that dismisses any particular ‘functions’ or ‘fields’ as reserved to the states, but it could instead be the foundation for an interpretive methodology that recognises that non-legislative expressions of Commonwealth power may, if unlimited, impermissibly encroach upon the sovereignty of the people of a state.

### *The scope of intergovernmental immunity*

The early cases concerning the implied immunity of instrumentalities relied heavily on the concept of dual sovereignty. Thus in *D’Emden v Pedder*,<sup>152</sup> Griffith CJ held (for the Court):

In considering the respective powers of the Commonwealth and of the States it is essential to bear in mind that each is, within the ambit of its authority, a sovereign State, subject only to the restrictions imposed by the Imperial connection and to the provisions of the Constitution, either expressed or necessarily implied.<sup>153</sup>

The controversy in *Engineers* directly concerned the validity of this implication – with the Court electing to dispatch the associated doctrine of reserved state powers on the same occasion. The majority’s emphatic assertion of the ‘common and indivisible sovereignty’ of the Crown under the *Australian Constitution* obviously removed any ground upon which the immunity of instrumentalities might rest. But while the Court has ever since been on guard against any revival by stealth of the discredited reserved state powers doctrine,<sup>154</sup> it did, largely through the efforts of Sir Owen Dixon, reinstate a modest measure of immunity to be enjoyed by both levels of Australian government against the actions of the other through the *Melbourne Corporation* and *Cigamic* doctrines. As is well recognised, these are both distinct from each other and also much more limited than the pre-*Engineers* reciprocal immunity. The nationalistic account of Australian constitutionalism has managed to accommodate those newer, more limited forms of intergovernmental immunity, without allowing them to upset the unitary sovereignty upon which so much of that account depends. But they unquestionably amount to a constitutional foothold (far more than could possibly be said to exist for the notion of ‘federal balance’) from which the significance of the underlying federal principles might be further developed.

So much is apparent from the judgment of Dixon J in *Melbourne Corporation* itself. He insisted that the immunity of the states recognised by that decision stems ‘not from the character of the powers retained by the States but from their position as separate governments in the system exercising independent functions’.<sup>155</sup> In this way, he avoided any charge that he was reserving power to the states, but was able to emphasise their distinct constitutional existence as ‘bodies politic’. It might be thought that this presents no disharmony with the third conception of federation identified by Quick and Garran (as exemplified by *Engineers*) since it aims to preserve a dual system of government, albeit one that is viewed as subject to a common sovereignty. But just as the acceptance of indivisible sovereignty in *Engineers* destroyed the basis for the immunity of instrumentalities, it is hard to deny that Dixon J’s recognition of a

<sup>152</sup> (1904) 1 CLR 91.

<sup>153</sup> *D’Emden v Pedder* (1904) 1 CLR 91, 109. See also *Municipal Council of Sydney v Commonwealth (Municipal Rates Case)* (1904) 1 CLR 208, 239 (O’Connor J).

<sup>154</sup> For a recent example see *Fortescue Metals Group Ltd v Commonwealth* [2013] HCA 34, [120] (Hayne, Bell and Keane JJ), [217] (Kiefel J).

<sup>155</sup> (1947) 74 CLR 31, 83.

minimum protection owing to the states correspondingly amounts to an acknowledgment of the latter's possession of sovereignty.

In other words, *Melbourne Corporation*, despite the cautious expression utilised by Dixon J, must ultimately depend upon a conception of the federal system in which the governments are each sovereign. Otherwise, from where does the protection derive? The third and nationalistic conception of federalism is purely organisational in nature – its unitary sovereignty can in no way account for the placing of limits such as those crafted by the Court in *Melbourne Corporation*. There is nothing in that conception to brake the slide towards a unitary state as a matter of fact and reflecting the nature of government sovereignty in such a model. This view of *Melbourne Corporation* is not, of course, the dominant one. But with *Williams* adding a contemporary perspective on the existence of textual bases for dual sovereignty that were overlooked in *Engineers* we wonder whether a richer notion of intergovernmental immunity than the Court has been prepared to articulate may now come to pass.

Despite the latent potential in *Melbourne Corporation* itself, we acknowledge that *Williams* is a case not just of possibilities but also limitations. The Court's commitment to a broad and largely unfettered understanding of the scope of Commonwealth legislative power was in no way challenged by *Williams* and, as we have argued, may even be rationalised alongside that recent decision. It was not mere verbiage that saw the majority judgment in *Engineers* emphasise the superiority of Commonwealth power, as made explicit by s 109 of the *Constitution*, in ejecting both the reserved state powers and immunity of instrumentality doctrines from the constitutional landscape. The recent decision of *Fortescue Metals Group Ltd v Commonwealth*<sup>156</sup> provides an example of the unifying force of Commonwealth superiority as a 'basal principle' of the *Constitution*. In that decision, arguments that sought to enlarge the substantive operation of the anti-discrimination clause in s 51(ii) so as to constrain the scope of Commonwealth power under that provision and, in the alternative, to rely on the *Melbourne Corporation* principle were both rejected as a subversion of the principle from *Engineers* and the text of s 109.<sup>157</sup> It is clear that the two doctrines of reserved state powers and intergovernmental immunities remain strongly linked in the Court's view. Accordingly there may be little scope for the reinvigoration of the latter, whatever signals we might discern of deeper federalist understandings in *Williams*, so long as the approach to legislative power remains in step with the orthodox conception of Australian federalism.

## II CONCLUSION

*Williams* may be said to reflect the twin principles of federalism and responsible government. In this way, the approach taken by the majority in *Williams* may be viewed as reconciling the two divergent theories of government at the core of the *Constitution*, by giving them distinctive functions in the context of executive power. That in itself contrasts with the orthodox view that, aside from extraordinary instances of intergovernmental interference, federalism plays a minimal role in constitutional interpretation and the *Constitution* is instead to be understood by the pervasive operation of responsible government as its central underpinning idea.

Our purpose here was to further explore the conceptual understanding of the *Constitution* which may have motivated the majority in *Williams* to take this approach. There appear to be strong suggestions that the underlying conceptual basis for French CJ's views in *Williams* regarding the role of federalism in constitutional interpretation

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<sup>156</sup> [2013] HCA 34.

<sup>157</sup> *Ibid* [131] (Hayne, Bell and Keane JJ).



is fundamentally different to that which underpins the *Engineers* orthodoxy. In particular, one is given the impression that his views are closely aligned with a concept of a 'truly federal system' which embraces dual sovereignty between the Commonwealth and the states. This, of course, represents a marked divergence from the conceptual underpinning of the *Engineers* orthodoxy, which is based on common sovereignty and the 'unification' of the Australian people. Crucially, the approach French CJ appears to have taken in *Williams* corresponds with historical sources that suggest that a number of the framers of the *Constitution* envisaged a strong form of duality, or a 'duality of sovereigns', as underpinning the *Constitution* they were drafting.

Finally, there are potential implications of this divergence for the perceived role of the constitutional court in a federal system and in critical areas of doctrinal importance, such as the relevance and application of the concept of 'a federal balance' and the scope of the immunity of instrumentalities. If a conceptual understanding of the *Constitution* as one based on dual sovereignty gains ascendancy within the Court, it may be that in time the ongoing dominance of the *Engineers* orthodoxy might be challenged, at least in these areas.

