

Wither Federalism: The Consequences and Sustainability of the High Court's Interpretation of Commonwealth Powers

Angus J. O'Brien¹

ABSTRACT

Although by no means novel, the recent decisions of the High Court ('Court') in *New South Wales v The Commonwealth* (2006) 229 CLR 1 ('*Work Choices Case*') and *Attorney General for Victoria v Andrews* (2007) 230 CLR 369 ('*Andrews*') have breathed new life into the debate concerning the consequences of and intellectual justification for the Court's approach to interpreting Commonwealth powers. The paper seeks to contribute to this debate by critically analysing the Court's approach. It argues that the Court's approach has severely undermined Australia's federal structure. Moreover, although the Court was right to abandon the reserved powers doctrine, a complete disregard for federalist principles in interpreting the Constitution cannot be justified. In particular, the latter approach misunderstands the basis of Australia's federation. This is further borne out by the false distinction drawn between the protection of the States' existence and the protection of their powers.

Undeniably, Ch III courts play a vital role in upholding the federal compact. I see little point in repeated declarations about the vital need to protect the integrity of Ch III courts and federal jurisdiction under the Constitution if, whenever an appeal is made to this Court to fulfil that role, the party making that appeal is rebuffed and seemingly never-ending accretions to federal legislative power are upheld and enhanced. (Kirby J, *Attorney General for Victoria v Andrews* (2007) 230 CLR 369 at 413)

As the fundamental law of Australia, the *Commonwealth of Australia Constitution Act 1900* ('Constitution') has a profound influence on Australian politics setting the boundaries within which Parliament may legislate to affect the rights and

¹ BA/LLB Student, University of Queensland. I am indebted to Associate Professor Paul Reynolds, Reader in Political Science, School of Political Science and International Studies and Dr Nicholas Aroney, Reader in Law, TC Beirne School of Law, for their comments on this paper in draft. All errors remain my own. This paper has been fully refereed.

obligations of subjects and the powers of the judiciary to restrain steps outside those boundaries. Arguably federalism, the division of sovereignty between the Commonwealth and the States, is the most basic feature of our fundamental law. As Kirby J recently explained in *Attorney General for Victoria v Andrews* (2007: 410) ('*Andrews*'), 'By dividing governmental power, federalism reinforces representative democracy and tends to protect liberty, to encourage experimentation and reform and to promote local decisions on issues of local importance.'

The High Court ('Court') as the adjudicator of constitutional disputes is charged with defending the federal features of the Australian polity. However the centrality of federalism to the Australian political system has received very little, and almost no positive, attention from the majority decisions of the Court in recent years. Although the consequences of the Court's interpretation of Commonwealth powers has been extensively examined by political scientists and academic lawyers alike, the recent decisions of the Court in *New South Wales v The Commonwealth* ('*Work Choices Case*') (2006) and *Attorney-General for Victoria v Andrews* (2007) have renewed interest in, and the importance of, this debate. This paper seeks to add to the debate by critically examining the impact that the Court's interpretation of Commonwealth power has had on federalism in Australia. It argues that the Court's interpretive approach has undermined Australian federalism by eroding the States' powers. Further it contends that whilst the Court validly rejects the reserved powers doctrine, its complete disregard of federal concepts in interpreting Commonwealth powers ignores and indeed denies the text of the Constitution. This paper seeks first to analyse the fundamentally federal nature of the Constitution and the High Court's role within this federal system. Secondly, it explains the Court's expansive approach to interpreting Commonwealth powers. Thirdly, it argues that this expansive approach has undermined the powers of the States and the federal balance envisaged in the Constitution. Finally, it challenges the validity of the Court's interpretive approach.

The Constitutional Imperative and the Role of the High Court

Federalism aims to reconcile national unity with states' rights in order to bind a group of States into a nation without destroying their individual identity as states (Garran 1897: 15–16). It links together a number of co-equal societies or states so as to form one common political system (Quick and Garran 1901: 333; Holmes and Sharman 1977: 37). This is achieved by a division of sovereignty entailing a demarcation of legislative and executive powers so that the national and state governments are each, within a sphere, co-ordinate and independent (Inglis Clark 1901: 3; Wheare 1963: 10; Galligan 1995: 33; Lane 1995: 4). In a truly federal system, each national and state government must possess real powers which are not subordinate to, and cannot be rendered inoperative by, the powers of the other governments in the federation (Zines 1989: 16–17; Gibbs 1995: 1–2; Hamill 2005: 55).

Federalism is manifest in both the history behind the Constitution's adoption and its structure and text (Sawer 1967: 121; Gibbs 1995: 1; Galligan 2001: 5; Winterton 2004: 197). Historically the autonomous and self-governing colonies predated the national government. The adoption of a federalist, as distinct from unitary, system was considered necessary to achieve unification (Reynolds 1958: 31–32; Holmes and Sharman 1977: 12; Aroney 2002a: 267; Joseph and Castan 2006: 12). Moreover, the constitutional founders, heavily influenced by Montesquieu, de Tocqueville, Dicey and Madison, considered federalism to be philosophically preferable to a unitary system as a means of safeguarding against an over-powerful federal government (Aroney 2002a: 268). History aside, the structure of the Constitution mirrors the United States' federalist model (Aroney 2002a: 269). Further the federal concept appears at least 28 times throughout the Constitution (Lane 1997: 6, 10). For example, at the outset the preamble unites Australia in 'one indissoluble Federal Commonwealth'. Thereafter the 'Federal Parliament' is created including the Senate composed of Senators 'for each State'. These features amongst others, establish that federalism is one of the most dominant, if not the most dominant, characteristics of the Australian Constitution (Zines 1989: 16–17; Cooray 1992; Craven 1995; Galligan 1995: 34; Lane 1995: 5, 1997: 10).

The Constitution adopts an 'enumerated powers doctrine', whereby the Commonwealth government is conferred with specific enumerated powers, primarily contained in sections 51 and 52, and may not pass laws without specific constitutional authority. In contrast, the States, by sections 106 and 107, retain residual general legislative powers over all powers other than those vested exclusively in the Commonwealth (Zines 1989: 18; Lane 1995: 8–9; Joseph and Castan 2006: 12). Thus, if Commonwealth power is not explicitly or implicitly exclusive, the States and the Commonwealth may concurrently legislate with respect to a subject matter. By virtue of section 109, the Commonwealth law will prevail to the extent of any inconsistency with the State law (Joseph and Castan 2006: 13; Ratnapala 2007: 206). In this way, the Commonwealth is denied general legislative authority, whilst the States are left with a mass of exclusive powers which may not be invaded or interfered with by the Commonwealth (Quick 1919: 13, 269). Craven (1995) has argued that the founders were united behind the intention that the States should be more powerful than the Commonwealth. For present purposes, it is not necessary to assess the merits of this argument. It is sufficient to note that the enumerated powers doctrine is fundamental to Australia's Constitution, being one means by which the founders chose to give effect to federalism (Higgins 1900: 100; Sawer 1967: 121; Aroney 2002a: 292; Ratnapala 2007: 204). For this reason, the maintenance of the separate and autonomous powers of the federal and state governments is essential to Australian federalism.

An indispensable aspect of such a federal polity is the existence of institutions to ensure the continued operation of the federal structure. Australian federalism is protected by three such institutions: the doctrine of responsible government (Sawer 1961: 585; Gageler 1987: 183); the political process, particularly the Senate (Craven 1995); and most importantly for present purposes, the Court. Section 71 of

the Constitution establishes the Court and vests it with the judicial power of the Commonwealth. Although the Court acts as Australia's highest appellate court, its most essential function is the adjudication of constitutional disputes (Galligan 1995: 160; Irving 2002: 17). In his Second Reading Speech for the *Judiciary Act 1903* (Cth), Attorney-General Alfred Deakin set out his vision for the Court by saying its, '... first and highest function – not its first in point in time, but its first in point of importance – will be exercised in unfolding the Constitution itself' (Australia 1902: 10965). Thus, the Court is responsible for the preservation of Australia's system of government, particularly its federal features (Sawer 1967: 82; Irving 2002: 17; Patapan 2002: 47; Kirby J 2007: 410). Andrew Inglis Clark (1901: 123), one of Australia's constitutional founders, observed:

Dependence on the judiciary for the restraint and practical abrogation of legislation by the Federal Parliament or by the Parliament of a State in excess of the limitations imposed upon its powers by the Constitution is inseparable from the federal form of political organisation if its essential features are to be preserved ...

Similarly John Quick (1919: 14), another founding father, stated, '... the Court is the keystone of the arch of the Federal system. Without such a judicial arbitrator, the whole scheme of government would crumble to ruin and end in chaos'. For this reason, the Court's approach to the interpretation of Commonwealth power is fundamental to Australia's political system. This approach and its consequences remain to be assessed.

The Court's Approach to Interpreting Commonwealth Power

In the first two decades after federation, the Court interpreted Commonwealth power narrowly. The jurisprudence of the early Court reflected the strong federalist agenda of the Constitution's drafters, the judges seeking to interpret provisions in light of the federal arrangement that they considered was intended (Joseph and Castan 2006: 55–56; Ratnapala 2007: 204). In doing so, the Court conceptualised the Constitution as an enduring instrument of government to be interpreted by reference to history and the intentions of the founders (de Walker 2002: 678–679). This is hardly surprising since the first three justices of the Court were Sir Samuel Griffith, Sir Edmund Barton and Richard O'Connor, three of the most influential figures at the Constitutional Conventions (Galligan 1995: 172–173; Aroney 2002a; Ratnapala 2007: 214).

The concern for federalism manifested itself in the 'reserved powers doctrine'. This doctrine emerged tentatively in *Peterswald v Bartley* (1904) and was given full expression in *R v Barger* (1908: 67), which was affirmed in *Attorney General (NSW) v Brewery Employees Union (NSW)* (1908) ('*Union Label Case*') and *Huddart Parker v Moorehead* (1908). According to this doctrine, certain legislative powers were reserved to the States. Thus, Commonwealth laws were read narrowly so as to ensure the preservation of the maximum area for unimpeded State regulation (Sawer 1967: 127; Hanks, Keyzer and Clarke 2004: 579). The grant of

legislative power to the Commonwealth had to be clear, and in the absence of clarity, the power belonged to the States (Ratnapala 2007: 214). In *Huddart Parker v Moorehead* (1908: 351), Griffith CJ stated the position in the following terms:

... it should be regarded as a fundamental rule in the construction of the Constitution that when the intention to reserve any subject matter to the States to the exclusion of the Commonwealth clearly appears, no exception from that reservation can be admitted which is not expressed in clear and unequivocal words.

Plainly, by presupposing the existence of a mass of powers for the States and allowing Commonwealth infringement of those powers only where the wording of the Constitution necessitated it, the Court gave effect to federal principles which demanded a strong, if not dominant, role for the States.

However, in the seminal case of *Amalgamated Society of Engineers v The Adelaide Steamship Company Ltd* (1920) ('*Engineers Case*'), the Court overturned the reserved powers doctrine and replaced it with an expansive interpretation of Commonwealth powers. The Court was primarily concerned with the implied immunities doctrine rather than the interpretation of Commonwealth heads of power (Aroney 2002b; de Walker 2002: 682). This doctrine, as developed in *D'Emden v Pedder* (1904), *Deakin v Webb* (1904) and *Baxter v Commissioner of Taxation* (1907), forbid either the Commonwealth or the States from fettering, interfering with or controlling the exercise of legislative power by the other. Nonetheless, the Court saw fit, in a statement that was not strictly authoritative, to reject the reserved powers doctrine in the following terms:

... it is a fundamental and fatal error to read sec. 107 as reserving any power from the Commonwealth that falls fairly within the explicit terms of an express grant in sec. 51, as that grant is reasonably construed, unless that reservation is as explicitly stated (Knox CJ, Isaacs, Rich and Starke JJ 1920: 154).

The majority replaced the reserved powers doctrine which was designed to uphold Australia's uniquely federal Constitution, with a general rule of statutory interpretation labelled 'literalism':

...it is the chief and special duty of this Court faithfully to expound and give effect to [the Constitution] according to its own terms, finding the intention from the words of the compact and upholding it throughout precisely as framed (Knox CJ, Isaacs, Rich and Starke JJ 1920: 142).

The Court justified its preference for literalism over the reserved powers doctrine on the basis that the Constitution is an Act of the Imperial Parliament and should be interpreted similarly to any other statute (1920: 142). In particular, the Constitution was to be read in accordance with British exegetical methods, rather than American federal theories and precedents (Gageler 1987: 173; Aroney 2008: 22). Thus, Commonwealth powers were to be given their literal and expansive meaning, subject only to express limitations found in the Constitution's text. This left no room for implied limitations on Commonwealth power drawn from a general theory of federalism (Sawer 1967: 131; de Walker 2002: 687; Ratnapala 2007: 204).

Although many aspects of the *Engineers Case* have been doubted or reversed (Meale 1992: 27; Williams 1995: 63), its approach to interpretation of Commonwealth powers has become an established rule of Australian constitutional law (Aroney 2002b; Winterton 2004: 202). That rule is that Commonwealth power should be interpreted without regard to the impact on the remaining legislative capacity of the States (Zines 1989: 26, 1997: 12; Aroney 2002b). Barwick CJ stated the rule in the following terms in *Strickland v Rocla Concrete Pipes* (1971: 489):

[Commonwealth power] will be determined by construing the words of the Constitution by which legislative power is given to the Commonwealth irrespective of what effect the construction may have upon the residue of power which the States may enjoy.

This view is echoed in numerous subsequent judgments, including Windeyer J in *Victoria v Commonwealth* (1971), the majority in *The Commonwealth v Tasmania* (1983) ('*Tasmanian Dams Case*'), Deane J in *Richardson v Forestry Commission* (1987-88), the joint majority in the *IR Act Case* (1996) and the joint majority in the *Work Choices Case* (2006). The starting point for this view, that the Constitution is an Act of the Imperial Parliament, also remains well-supported. In the recent case of *Roach v Electoral Commissioner* (2007), Gleeson CJ reaffirmed in the first paragraph of his judgment that, 'Although [the Constitution] was drafted mainly in Australia, and in large measure approved by a referendum process in the Australian colonies, and by the colonial Parliaments, it took legal effect as an Act of the Imperial Parliament.'

Aroney (2002b) has explained that the rule that Commonwealth power is to be interpreted without regard to the impact on States' powers operates through three principles of interpretation. First, Commonwealth power is to be defined before the States' powers, the States retaining the mere 'residue' after federal power is given full effect. For example, in *Airlines of NSW Pty Ltd v NSW (No. 2)* (1964-65: 79) ('*Airlines (No. 2)*'), Barwick CJ stated:

... the nature and extent of State power or of the interests or purposes it may legitimately seek to advance or protect by its laws do not qualify in any respect the nature or extent of Commonwealth power. On the contrary, the extent of that power is to be found by construing the language in which power has been granted to the Commonwealth by the Constitution ...

Similarly, in the *Work Choices Case* (2006), the joint majority stated:

s107 of the Constitution... reserves to the parliaments of the states only those powers not exclusively vested in the Federal Parliament or withdrawn from the parliaments of the states. The relevant question presented by s107 thus is what legislative power the Constitution grants to the Federal Parliament, not what the Constitution prohibits or reserves (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ, 2006: 85).

Evidently, the post-*Engineers* approach seeks to give effect first to Commonwealth power and then secondly to the mere residue of power retained by the States.

Secondly, each grant of federal legislative power under sections 51 and 52 is to be construed independently. In other words, no head of power implies a limitation on the scope of another. For example, in *Strickland v Rocla Concrete Pipes Ltd* (1971) ('*Concrete Pipes Case*'), the Court held that the federal parliament could regulate intrastate trade, a power expressly denied under s51(i) (the *interstate* trade and commerce power), so long as the Act was valid under another head of power. Similarly, in *Pidoto v Victoria* (1943), the Court held that the power under section 51(vi) (the defence power) was not limited by s51(xxxv) (the conciliation and arbitration power). Most recently, in the *Work Choices Case*, the joint majority held that the fact that the *Workplace Relations Amendment (Work Choices) Act 2005* did not fall within the conciliation and arbitration power did not prevent it from being enacted under s51(xx) (the corporations power), even though the narrow wording 'conciliation and arbitration' was deliberately designed to narrow the Commonwealth's power over industrial relations (Blackshield 2007: 1145–1155). To be fair, there are exceptions to the rule that each head of power is to be read independently, such as in *Bourke v State Bank of NSW* (1990), where the Court interpreted the power in Section 51(xiii) to legislate with respect to 'banking, other than State banking' as precluding the Commonwealth from legislating on the subject of State banking under any head of power. However, even this exception has been neutered by the recent decision in *Andrews* (2007: 406), where the joint judgment of Gummow, Hayne, Heydon and Crennan JJ emphasised that the phrase 'other than state banking' did not prevent the Commonwealth from legislating in a way that touches or affects State banking (Dias-Abey 2007; Guthrie et al. 2007: 134; Richardson 2008). The interpretation of each head of power as independent thus allows the Commonwealth to legislate over subject matters indirectly and in a manner contrary to the intentions of the Constitution's drafters.

Thirdly, each head of power is to be read as broadly as the words permit. That is, Commonwealth powers are not just given their literal meaning, but the widest literal meaning the words can possibly bear (de Walker 2002: 683). This principle was first enunciated by O'Connor J in *Jumbunna Coal Mine, NL v Victorian Coal Miners' Association* (1908) ('*Jumbunna Coal Mine*') and Higgins J in the *Union Label Case* (1908), although in *Jumbunna Coal Mine* this rule was subject to an exception where, '... there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose' (O'Connor J 1908: 368). Since *Engineers*, it has become the dominant rule of interpretation, having been applied in numerous decisions, including *R v Public Vehicles Licensing Appeal Tribunal (Tas)* (1964), *Reg v Coldham* (1983), the *Tasmanian Dam Case* (1983) and *Victoria v The Commonwealth* (1996) ('*IR Act Case*'). Plainly, this interpretive approach could not be more dissimilar to the initial, federalism-motivated reserved powers doctrine.

Wither Federalism

The operation of these post-*Engineers* principles significantly eroded the States' powers. The first principle, the 'residue theory' of State power, holds that the States retain only that power which does not belong to the Commonwealth. The second and third principles, by adopting an expansive approach to interpreting Commonwealth power, significantly reduce the power which does not belong to the Commonwealth. Thus, there is an inverse relationship between Commonwealth and State powers and the major accretions of power to the Commonwealth, if unchecked, may result in the effective destruction of the States as independent actors (Gibbs 1995: 2; Ratnapala 2007: 218). As Cooray (1992) states, '... the Constitution has undergone a transformation which has resulted in the translocation of substantial powers from the States to the central government'. Similarly, Galligan (1995: 17) has observed that, '... the dominant pattern in the High Court's interpretation of Australian federalism has been the ever-increasing centralization of power at the national level of government'. Remarking on the consequences of this, Jackson (1984: 447) has stated, '... in the future, the issue between States and Commonwealth Governments is more likely to be whether the Commonwealth power should be exercised, rather than whether it exists'. In this way, the Court's interpretation of Commonwealth powers has undermined the States powers and thus the federal balance established by the Constitution.

The erosion of the States' powers through an expansive reading of Commonwealth powers is exacerbated by the Court's interpretation of section 109. As explained above, section 109 provides that if Commonwealth and State laws are inconsistent, the Commonwealth laws prevail to the extent of the inconsistency. The Griffith Court's test of inconsistency, as established in *Australian Boot Trade Employees Federation v Whybrow & Co* (1910) ('*Whybrow's Case*'), was narrow. A Commonwealth and State Act were inconsistent to the extent that it was impossible for a citizen to obey both. However, two subsequent tests of inconsistency have been adopted. First, the 'modification of rights' test was adopted in *Clyde Engineering v Cowburn* (1926), under which there is inconsistency if one law permits or confers some right, power or privilege, whilst the other prohibits, deprives or modifies it. Secondly, the 'covering the field' test, adopted in *Ex parte McLean* (1930), under which there is inconsistency if there is some overlap or duplication between two laws in a situation where the Commonwealth law was intended to be the only law on the subject. The covering the field test, in particular, makes it more likely that a State and Commonwealth law will be 'inconsistent' under section 109 (Zines 1995: 338; Joseph and Castan 2006: 153). Consequently, once a Commonwealth law is held to have been validly enacted under a head of power, State laws on the subject are invalid. Thus, the Commonwealth can do indirectly what it cannot do directly, namely, either override an existing State law or prevent the States from legislating afresh on a particular subject matter (Gilbert 1986: 153; de Walker 2002: 694). For this reason, the Court's expansionist reading of Commonwealth heads of power undermines the States' powers to an alarming extent.

The consequences of the Court's interpretation of Commonwealth power on federalism can be illustrated by developments in the interpretation of section 51(xxix), the external affairs power. Quick and Garran's (1901: 631) comment in their *Annotated Constitution* that the external affairs power '... may hereafter prove to be a great constitutional battle-ground' has proven prescient indeed. Broadly, the external affairs power has been interpreted to have three aspects: first, a power to legislate with respect to matters external to Australia; secondly, a power to legislate for international comity; and thirdly, a power to implement treaty obligations (Joseph and Castan 2006: 110–118). It is the third aspect that poses the greatest threat to the States' powers. In particular, the issue has been whether the power to implement treaties is a power to implement treaties of any nature or whether federalist implications restrict the power to implementing treaties which are either 'international in character' or of 'international concern'.

The treaty implementation aspect of the power was first discussed in *R v Burgess* (1936). In this case, the Court unanimously agreed that the Commonwealth had power to implement the *Convention for the Regulation of Aerial Navigation 1919*, but differed in their views as to the precise scope of the external affairs power. Latham CJ, McTiernan and Evatt JJ considered that the power permitted implementation of any bona fide treaty obligation. Starke J took a narrower view, considering the power existed only when the subject matter of the treaty was of sufficient international concern. Dixon J's view was narrower again. His Honour considered that the subject matter of the treaty must be international in character. The issue arose for re-consideration in *Koowarta v Bjelke-Petersen* (1982). In this case, the majority of Mason, Murphy and Brennan JJ took the broadest view from *Burgess*, namely that the Commonwealth Parliament could implement legislation to enact any bona fide treaty. Stephen J, who was also in the majority, took the middle view, considering that the subject matter of the treaty had to be of international concern. Gibbs CJ, Aickin and Wilson JJ, who were in dissent, took the narrowest view that the subject matter of the treaty had to be international in character. After *Koowarta*, therefore, the Court was split 3:3, with Stephen J balanced precariously in the middle.

The task of resolving this dispute arose in the *Tasmanian Dam Case*, which concerned the validity of a Commonwealth legislative scheme to prevent the Tasmanian Government from constructing a dam on the Gordon River. The Court held the scheme to be valid. In doing so, a majority of Mason, Murphy, Deane and Brennan JJ held that the external affairs power enabled the Parliament to implement any treaty, regardless of its subject matter. The dissenting judges, Gibbs CJ, Wilson and Dawson JJ, adopted the middle view of Stephen J in *Koowarta*. The issue has been put to rest in the cases of *Richardson v Forestry Commission* (1987–1988) and the *IR Act Case* (1996), where the Court unanimously upheld the broadest reading of the power.

The consequences of this reading of the external affairs power on federalism are alarming. Section 61 confers an unfettered power to enter treaties on the

Commonwealth executive. (Cooray 1995; Charlesworth et al. 2003: 431). The number of international treaties has expanded exponentially in recent years. Cooray (1995) has remarked, '... a United Nations treaty or covenant exists on almost every conceivable subject on which Parliament may wish to legislate'. Thus, the Executive has unlimited power to enter into treaties on almost any subject, and the broad reading of the external affairs power allows the legislature to enact any law to bona fide implement the obligations thereby assumed. Hamill (2005: 79) has remarked:

...Australia's national government has extended its legislative capability into areas that were within the legislative capability of the States and Territories. By enhancing its legislative capability in this way, the Commonwealth has effectively secured additional areas of concurrent jurisdiction...

Similarly, Cooray (1995) comments that, '... the Commonwealth Parliament has power to legislate on the subjects covered by the treaty even though under the constitution power to legislate does not exist'. Of course Commonwealth legislation must conform to the treaty, that is, reasonably appropriate and adapted to the implementation of the obligations assumed under the treaty. However, this is a necessary but not sufficient restriction on this aspect of the power, particularly in light of the narrow role carved out for the restriction in cases such as *Horta v The Commonwealth* (1994). To re-iterate, the Court's interpretation of the external affairs power potentially threatens federalism by allowing the Commonwealth to legislate in respect of matters traditionally reserved to the States.

A Narrow Approach?

The Court's approach to interpretation depends on a particular theory of the Constitution's origins. There are two competing theories of the Constitution's origins: federal compact theory and nationalist theory. First, the federal compact theory holds that a pure federation is a compact between pre-existing sovereign states and that states retain this fundamentally sovereign status within the federation (Calhoun 1853: 111; Madison 1961: 23). Thus, in the Australian context, the compact theory conceives of federation as a compact between the separate Australian colonies (Aroney 2008: 14). The pre-*Engineers* cases were founded on this conception. For example, in *Federated Amalgamated Governmental Railway and Tramway Service Association v NSW Railway Traffic Employees Association* (1906: 534), the joint majority (Griffith CJ, Barton and O'Connor JJ) stated, 'The Constitution Act is not only an Act of the Imperial legislature, but it embodies a compact entered into between the six Australian Colonies which formed the Commonwealth'. Similarly, in *Baxter v Commissioners of Taxation (NSW)* (1907: 1104), the joint majority (Griffith CJ, Barton and O'Connor JJ) stated, '[the Constitution] partakes both of the character of an Act of Parliament and of an international agreement made between the people of the several self-governing Australian Colonies ...'. On this view, there is an important sense in which the governmental powers of the Commonwealth were derived from the original

colonies (Aroney 2002b). The continuing powers of the States were undefined, not because they were mere 'residue' to be identified only after the prior and more important powers of the Commonwealth had been ascertained, but because, '... it made no sense to define the powers of the States when the very emergence of the Constitution had been dependent upon the exercise of the political capacities of the States in the first place' (Aroney 2002b). Compact theory therefore preserved a full role for the States in Australia's governance.

On the other hand, the nationalist theory understands the Constitution not as the result of a federal compact among original states, but as an essentially unitary state in which the ordinary powers of sovereignty are elaborately divided between federal and state governments (Burgess 1890: 131, 1895: 406). A federal system of government derives its being from a superior or sovereign political entity that confers power on both the federal and State governments (Burgess 1890: 131, 1895: 406). In the context of Australia's Constitution, a reference to such a sovereign entity is a reference to the Imperial Parliament (Aroney 2002b). The nationalist theory is evidenced in the *Engineers* approach, which gave prominence to the fact that the Constitution was technically an Act of the Imperial Parliament and held that, accordingly, it was to be interpreted according to the British rule of statutory interpretation, 'literalism'.

The Court's approach to interpreting Commonwealth powers implies that the federal nationalist theory explains the Constitution's origins more accurately than compact theory. An examination of the 'Federal' Parliament, the method of constitutional amendment and the division of legislative powers reveals that Australia's Constitution is, in truth, both nationalistic and 'compactual' in many respects (Aroney 2002b). However, the Constitution remains more 'compactual' than nationalist (Gibbs 1995: 1; Lane 1997: 10; Aroney 2002b). That federation was predicated on the agreement of the people of each of the Colonies could not be clearer from the Constitution's preamble, which states '... the people of New South Wales, Victoria, South Australia, Queensland and Tasmania ... have agreed to unite in one indissoluble Federal Commonwealth ...' The compact theory is also more consistent than the nationalist theory with the view emerging from implied freedom of political communication cases such as *Australian Capital Television Pty Ltd v The Commonwealth* (1992) ('ACTV') and *Nationwide News v Wills* (1992) that the Constitution is based on popular sovereignty. The Court's expansive interpretation of Commonwealth power is therefore based on a narrow, and challengeable, theory of Australia's constitutional origins.

The nature of the Court's interpretation of Commonwealth powers is further borne out by the distinction drawn by the Court between the need to preserve the *existence* of the States and the need to preserve the States' *powers*. As has been illustrated, the Court has not used federal theory to imply limitations on Commonwealth powers. However, the Court has not entirely jettisoned drawing implications from the federal nature of the Constitution (Galligan 1995: 179). In cases such as the *Melbourne Corporation v The Commonwealth* (1947) ('*State Banking Case*'),

Queensland Electricity Commission v The Commonwealth (1985), *Re Australian Education Union; Ex parte Victoria* (1995) and *Austin v The Commonwealth* (2003), the Court has preserved the implied immunities doctrine. This doctrine prohibits the Commonwealth from legislating in a manner that affects the nature and existence of the State body politic by burdening the States' capacity to function as a government (Irving 2002: 18). In *Queensland Electricity Commission v The Commonwealth*, the foundation of this doctrine was said to be, '... the constitutional conception of the Commonwealth and the States as constituent entities of the federal compact having a continuing existence reflected in a central government and separately organised State governments' (Mason J 1985: 218). The Court has drawn the distinction between the implied immunities doctrine and any limitation on the Commonwealth's powers quite openly, holding in the *State Banking Case* that:

The Constitution predicates [the States'] continued existence as independent entities... The framers of the Constitution do not appear to have considered that power itself forms part of the conception of a government. They appear rather to have conceived the states as bodies politic whose existence and nature are independent of the powers allocated to them (Dixon J 1947: 82).

Thus the Court has implied from the federal nature of the Constitution that the States must continue to *exist*, but has not used federal theory to protect the States' *powers*.

To assess the adequacy of, on the one hand, implying the need for the continued *existence* of the States but, on the other hand, refusing to imply limitations on Commonwealth power to protect the States' *powers*, it is necessary to identify what 'kinds' or 'orders' of implication can be discerned from the authorities. In his work *Freedom of Speech in the Constitution*, Aroney (1998: 97–100) identifies three types of 'necessary implications': first, implications that are logically necessary, that is, where a certain concept *by definition* presupposes another concept; secondly, implications that are practically necessary, that is, that create the enabling circumstances necessary for a concept to have *bare practical effect*; and thirdly, implications that are necessary, not just to ensure a bare practical effect, but aimed at a *desirable effect*. Aroney (1998: 100) distinguishes these from a fourth notion, not properly called an implication, which involves the direct application of what is 'good' or 'appropriate', completely extraneous to the text of the document being interpreted. Each of the four categories is progressively more removed from the actual text of the Constitution.

Although the Court's findings have not been expressly couched in these terms, the distinctions drawn by Aroney, albeit in a different context, are a useful framework for analysing the Court's approach to federalism. As explained above, the Court's distribution of powers jurisprudence has been dominated by literalism, an approach that is not without criticism. (Allan and Aroney 2008: 251–257; Craven 1992: 557–564). However, for present purposes, the author is content to assume its continued operation and the merits of its intellectual justification and to argue that, even on a

literalist approach, the distinction drawn by the Court between the States' powers and existence is questionable.

As Aroney (1998: 103) notes, the literalist approach adopted post-*Engineers* instructs the Court to renounce fourth order 'implications' and suggests that it should be wary of third order implications. The implied immunities doctrine is certainly justified by this framework. Since federalism by definition *means* the States and Commonwealth exist as separate bodies politic and exercise independent powers of government, the implied immunities doctrine is best characterised as a first order implication and is at least a second order implication (Aroney 1998: 104).

It is suggested that a doctrine which implies limitations on Commonwealth power to protect the States' powers is also not only permissible but necessary within this framework. At the very least (de Walker 2002: 681), implying restrictions on Commonwealth power from the federal nature of the Constitution is a second order implication. The combined effect of section 109 and the Court's expansive interpretation of Commonwealth powers threatens to effectively, though not formally, eradicate the States' powers and the independence of whatever feeble powers may remain. Federalism is manifest in the very text of the Constitution. Whilst extraneous evidence such as the Constitution's history provides strong support for federalism, such extraneous evidence only supports what is clear from the constitutional document itself. Federalism *means* that the States' have powers which they can exercise independently. It is senseless to maintain the existence of the States as hollow shells, unable to exercise real power. For federalism to have a *bare practical effect* or operation in the Australian polity, the States must be able to exercise real powers of government independently from the Commonwealth. This being the case, the distinction drawn by the Court between the implied immunities doctrine and the appropriate approach to interpreting Commonwealth powers is at best weak and confusing, and at worst without merit.

This view is strongly reflected in a number of dissenting judgments. As early as the *Tasmanian Dam Case* (1983: 197), Wilson J remarked, 'Of what significance is the continued formal existence of the States if a great many of their traditional functions are liable to become the responsibility of the Commonwealth?' Writing extrajudicially, Gibbs CJ (1995: 5), who dissented in *State of NSW v The Commonwealth* (1975) ('*Seas and Submerged Land Act Case*'), *Koowarta* (1982) and the *Tasmanian Dams Case* (1983) stated, 'The doctrine that the Commonwealth cannot legislate in a way that is inconsistent with the continued existence of a State becomes rather a mockery if the Commonwealth nevertheless has power to legislate in a way that will enable it if it wishes to render most or all States powers ineffective.' Recently, both the dissenting judges in the *Work Choices Case* also made this point. Kirby J stated:

Once [the implied immunities doctrine] is acknowledged, derived from nothing more than the implied purpose of the Constitution that the states should continue to

operate as effective governmental entities, similar reasoning sustains the inference that repels the expansion of a particular head of power so that it would swamp a huge and undifferentiated field of state lawmaking, the continued existence of which is postulated by the constitutional language and structure (2006: 227).

Callinan J most clearly highlighted the inadequacy of the distinction, interpreting the implied immunities cases *themselves* as establishing a principle that the States must not only exist, but must also function, continuing that, 'to function in a real sense a polity must be able to function in a substantial and independent way' (2006: 229–230). The inadequacy of the distinction between these two doctrines highlights the Court's error in permitting Commonwealth powers to so substantially undermine the States' powers.

Finally the Court's consideration of arguments for using federalist principles to limit Commonwealth powers has been unduly dismissive. It has become commonplace for the Court to dismiss arguments involving the federal balance as reinvigorating the ghosts of the long-disregarded reserved powers doctrine (Winterton 2004: 214; Aroney 2008: 31). For example, in *Theophanous v Herald and Weekly Times Ltd* (1994: 171–172), Deane J ridiculed a revival of the reserved powers doctrine as calling upon the 'dead hands' of the Constitution's founders, reaching from their graves, for interpretative assistance. Similarly, in *Work Choices* (2006: 84–85, 89, 97), the majority pejoratively opined that the plaintiffs' submissions contained 'more than faint echoes' of the reserved powers reasoning.

Although many aspects of the reasoning in *Engineers* are unsatisfactory, it is generally accepted, and the author agrees, that the Court was right to reject the reserved powers doctrine (Zines 1989: 21; Winterton 2004: 206). Whilst sections 106 and 107 of the Constitution preserve the existence and functions of the States, the reservation of absolute and definite powers to the States is not supported by the Constitution's text (Zines 1989: 21; Winterton 2004: 206; Aroney 2008: 51). The joint majority in *Work Choices* (2006: 119) was therefore on strong ground when it described the reserved powers doctrine as, '... formed independently of the text of the Constitution'. The reserved powers doctrine is at best a third order 'implication', and more likely a fourth order implication, and cannot be sustained.

However, to dismiss any suggestion of limiting Commonwealth power as reinvigorating the reserved powers doctrine overlooks that there are more subtle and sophisticated interpretive models for preserving the federal balance. Rejecting the reserved powers doctrine does not foreclose federal considerations in interpreting Commonwealth power (Winterton 2004: 205). Professor Lumb (1984 pp. 138–139) argues for a more balanced approach which does not attempt to define a list of exclusive State powers, but simply recognises that grants of Commonwealth power are to be read in conjunction with States' powers. He labels this a 'federal balance' theory, as distinct from a reserved powers theory, an approach which is championed by de Walker (2002: 691). In a recent paper, Aroney (2008) argues similarly, adopting an 'interpretive' version of the reserved powers doctrine, which

emphasises that interpretive *choices* are inevitable in constitutional law and that the federal purposes and structure of the Constitution give the Court a *reason* to consider the consequences for the States when deciding which interpretation of Commonwealth power is to be preferred. He contrasts this with the 'absolutist' version of the reserved powers doctrine adopted by the Griffith Court which asserts that there are definite powers reserved to the States and an unqualified prohibition upon federal laws entering that field. Unlike Lumb, Aroney (2008: 52) continues to use the discourse of the 'reserved powers' doctrine, but states that, '... when understood in this way, it might be doubted whether the label 'reserved powers' is entirely apposite'. Where the label remains appropriate, however, is that on an 'interpretive' approach, the boundaries of one head of power can inform the interpretation of, and thereby limit the scope of, others. Whichever of Lumb's and Aroney's approaches are adopted, they both highlight the inadequacy of dismissing all suggestions that Commonwealth power should be limited on the basis that they revive pre-*Engineers* ghosts.

How precisely, then, would a 'federal balance' or an 'interpretive' reserved powers doctrine manifest itself in the Court's distribution of powers jurisprudence? If application of the Griffith Court's reserved powers doctrine is to remain 'constitutional treason', how can the Court draw on federal principles in a disciplined and objective manner to decide constitutional disputes relating to the distribution of powers? That it cannot is perhaps the main charge levelled at federalists by supporters of the Court's literalist approach. As Blackshield (2007: 1139) notes, a significant part of the joint judgment in the *Work Choices Case* is devoted to rejecting the notion that there is an ascertainable balance in the federal distribution of power. This is an aspect of the Court's reasoning with which Blackshield himself agrees:

Unless we abandon the *Engineers' Case* by reverting to the discredited doctrine of reserved state powers (which Callinan J denies he is doing), there is no apparent way of drawing a line between state and Commonwealth legislative powers such that any Commonwealth trespass over that line can objectively be described as disturbing 'the federal balance'. (2007: 1140)

The problem with this criticism is its assumption that the alternative does not suffer from the same fault. Whether the Court continues to abandon consideration of federal principles in its interpretation of Commonwealth powers or adopts a 'federal balance'/'interpretive' reserved powers doctrine, there will be 'hard cases' at the fringe resulting in disputed, borderline judgments. At the present time, the former approach may appear more objective since the widest of its outer limits have not yet been reached. But surely, even on the widest view, there are limits to the scope of each head of power. A time will come where the majority of the Court will have to find those limits, and literalism provides no surer way of doing so than the approach advocated here. This is particularly true where, as Allan and Aroney note (2008, 252–255), constitutions, including Australia's, are often deliberately general and abstract in their language; if the language of constitutions is overwhelmingly vague,

at least when compared to the language of statutes, a strict application of that language is likely to raise more questions than it answers.

Certainly, an application of a 'federal balance' / 'interpretive' reserved powers doctrine would be novel in the judicial context, requiring fine judgments to be made. However, a degree of objectivity and discipline is achieved once the Court lays down a body of case law which marks out the precise boundaries to be attributed to section 51's words. Over time, the limits of each head of power can be defined and federalism provides just one reason for striking down laws which strain against the Constitution's distribution of powers. In this sense, it is important to recall that the approach advocated here does not seek, as the Griffith Court did, to carve out a definitive and absolute set of powers for the States. The approach, therefore, is not a monolithic one, undifferentiated and characterised by uniformity. Rather, it advocates for a consistent body of case law with respect to each head of power, arising through individual consideration of each head and the consequences of the proposed legislation for the States. The potential for arbitrariness is therefore reduced and is certainly no greater than a purported strict application of language which is deliberately general and often vague.

Conclusion

The Court's interpretation of Commonwealth power, as with its interpretation of any provision of the Constitution, has a profound impact on Australian politics and society. The Constitution arguably establishes federalism as the most fundamental feature of our political system. The Court was granted the role of upholding this federal balance. In a line of cases over 88 years, the Court's interpretation of Commonwealth powers has undermined Australian federalism by eroding the States' powers. If the Court's interpretive approach does not change, the States' powers will continue to erode. Whilst the Court was right to reject the reserved powers doctrine, it is suggested that its further choice to wholly abandon federalism as an interpretive consideration in defining Commonwealth powers is questionable. In the absence of a change of heart by the Court, dark days for Australian federalism lie ahead indeed. ▲

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