

COMMONWEALTH OF AUSTRALIA*

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The constitutional distribution of powers and responsibilities in the Australian federation has proved to be exceptionally flexible. Originally conceived as a decentralized federation with the bulk of powers remaining in the hands of the states, in fact there has been a steady accretion of power to the Commonwealth government since shortly after federation in 1901. Although formal amendment of the constitution has been limited, changing interpretation by the High Court and the exercise of financial control by the Commonwealthⁱ have resulted in growing power and responsibility being exercised by the Commonwealth government.

The Constitution of the Commonwealth of Australia came into force on 1 January 1901. The creation of “one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland” was the result of protracted negotiations throughout the 1890s between the framers of the Constitution, the colonial parliaments, the people, and, ultimately, the Imperial Parliament.ⁱⁱ The result was a constitution that brought together the two themes that have since dominated Australian governance: responsible government and federalism. These twin aspects of the Constitution captured Australia’s comfortable constitutional inheritance from the United Kingdom together with the less familiar constitutional solution of a federal system. The latter dimension was an obvious solution to the need to retain the political integrity of the Australian colonies. The system was informed by comparative constitutional research that focused primarily on the United States and, to a lesser degree, on Canada and Switzerland.ⁱⁱⁱ

As Cheryl Saunders has made clear, the “distinctive characteristic” of the Constitution’s growth, including the development of the powers and responsibilities within the federal structure since 1901, has been one of evolution *not* revolution.^{iv} To achieve the union, the Constitution built on what was largely known, and what was needed, in 1901. Not surprisingly, the imperatives for federation - defence, uniformity of economic policy, freedom of interstate trade, and uniformity in immigration policy - form central parts of the constitutional compact. In a way that was consistent with their understanding of extant models, the framers trusted in parliamentary government and thus saw no need to adopt a bill of rights.

Since federation, the development of the Constitution has continued along an evolutionary path. In the 105 years since the Constitution’s adoption, there have been only eight formal amendments, of which only three relate directly to the distribution of powers.^v This is a reflection of both the procedural difficulty to effect such change and the cautious approach with which Australian electors approach reform. Yet, notwithstanding the lack of formal change, the Constitution, inasmuch as it relates to the distribution of powers and responsibilities between the states and the Commonwealth, is now read in different terms than it was in 1901. Several factors account for this. The assertion of Australia’s legal sovereignty vis-à-vis Great Britain shows an incremental shift despite the formal links to the British monarch still in place.^{vi} More significantly, it is the High Court, rather than formal constitutional amendment, that has presided over the significant centralization of authority in the hands of the Commonwealth. The role and function of the states have, consequently, reflected this change.

Moreover, an overview of the drafting, management, and development of the distribution of powers and responsibilities in the Australian system is reflective of a federal system founded on concurrency. Despite the limited number of expressly exclusive powers of the Commonwealth, contemporary governance has seen the Commonwealth come to dominate the states. This has been the result of changing interpretation and national sentiment.

THE FEDERAL CONSTITUTION IN HISTORICAL-CULTURAL CONTEXT

In the 1890s, on the eve of the federation of the colonies, a popular slogan for proponents of the union was “a nation for a continent, and a continent for a nation.”^{vii} The Commonwealth of Australia is now one of the world’s oldest parliamentary democracies and is the only nation-state that occupies the whole of a continental landmass. Australia comprises a land area of 7,692,024 square kilometres and has a population of approximately 20 million people.^{viii} The bulk of the population is concentrated in the five state capital cities on the coastal regions of the mainland: Sydney (capital of New South Wales), Melbourne (Victoria), Adelaide (South Australia), Brisbane (Queensland), and Perth (Western Australia). The other principal cities are Hobart (capital of the island state of Tasmania), Canberra (Australian Capital Territory), and Darwin (Northern Territory).

The predominant language of the Australian population is English. A feature of contemporary Australia is a multicultural population that is a result of a large influx of immigrants from

Continental Europe after the Second World War and subsequent waves of migration from Asia and Africa since the 1970s. The indigenous Aboriginal and Torres Strait populations are estimated to be about 2.2 percent of the overall population. Christianity is the predominant religion in Australia.

Historically, the Australian economy was based on primary production, supplemented after the Second World War by a manufacturing industry supported by high external tariffs. These traditional industries have declined in more recent times. Today’s economy, now relatively free from tariffs and other trade barriers, is largely based on services. The GDP in 2002 was US\$411.9 billion and the GDP per capita in 2001 was US\$18,900.^{ix}

The process of federation had its origins in the colonization of Australia. The settlement of Australia by the British began in 1788 with the establishment of a penal colony at Sydney in New South Wales. The British Crown’s audacious claim was for title of more than half of the landmass of the continent.^x The story of the European settlement of Australia and movement to federation by 1901 is well known and does not need to be retold in detail. In short, the federation of the Australian colonies progressed slowly through a number of stages. The development of the colonies’ self-government and greater legislative independence was a crucial part of this process. By the late nineteenth century the social and political identity of the colonies matured to a point where their federation as a union (the purpose being to overcome disparate policies and administrative inconvenience) became irresistible. Moreover, the importance of uniformity of immigration, defence, customs, and tariff policy had become a pressing political issue.

The final stage of federation was completed at a convention elected to draft the Constitution. The convention met in Adelaide, Sydney, and Melbourne during 1897-98. By mid-1898 a draft constitution was put to the electors in each of the participating colonies. While receiving majority support in each colony that voted, the bill failed to reach a threshold of 80,000 affirmative votes in New South Wales. A further round of negotiations between the premiers saw a number of concessions made to New South Wales, and a second vote, this time with Queensland participating, was held in 1899. By the close of 1899 all the colonies except Western Australia had passed referenda in support of the proposal, which was then forwarded to the British Parliament in London for consideration. Given the fact that the Australian Constitution required passage as an act of the Imperial Parliament, a delegation was sent from Australia in 1900 to assist in the passing of the bill. In July 1900 Western Australia also voted to be included in the federation.

New Zealand made submissions to London to be allowed to keep open the option to

join the federation as an “Original State.” This was not granted, though New Zealand is still mentioned in covering clause 6 in the definition of a “colony.” Ultimately, distance, racial policy, New Zealand nationalism, and domestic politics precluded a broader Australasian federation.^{xi}

The negotiations in London were protracted, with the ultimate stumbling block being the retention of appeals to the Judicial Committee of the Privy Council in the United Kingdom (hereafter “Privy Council”).^{xii} The resulting compromise retained appeals to the Privy Council but qualified the grounds upon which they were to be made. So-called “inter se” questions, involving the interpretation of the distribution of constitutional powers between the Commonwealth and the states, were to remain with the High Court (unless the Court certified the appeal to the Privy Council). However, the compromise did not prevent appeals from state supreme courts or limit, at that time, the prerogative of the Crown to grant special leave. The ending of these appeals was completed in a number of stages starting in 1968 and ending in 1986.^{xiii}

The federation has been remarkably stable, with only one threatened secession. In the early 1930s a secession movement established itself in Western Australia. Dissatisfied with the Commonwealth Constitution and, in particular, with the perceived economic disadvantages that it had brought to their state, Western Australians voted to leave the Commonwealth.^{xiv} They petitioned the Imperial Parliament, which referred the matter back to the Commonwealth. Ultimately, there was no secession, though low-level discontent with Canberra remains a feature of Western Australian politics.

The other significant development has been the evolution of the Northern Territory towards statehood. At federation, the Northern Territory formed part of South Australia. In 1908 South Australia surrendered the Northern Territory to the Commonwealth and it was accepted.^{xv} The Northern Territory was granted self-government in 1978, and in 1999 there was an unsuccessful referendum on statehood, with the defeat being attributed to dissatisfaction with the proposed constitutional arrangements.^{xvi} The issue remains a live one and is likely to be revisited within the decade.

CONSTITUTIONAL DISTRIBUTION OF POWERS AND RESPONSIBILITIES

As with all federal systems, there are tensions between the constituent parts. This tension is most evident in the distribution of rights and responsibilities. As is the case with the United States Constitution, the Australian Constitution clearly articulates the powers of the Commonwealth Parliament (Sections 51 and 52).^{xvii} The residue is left for the states. In practice, as a result of shifting financial and political authority and constitutional interpretation, the Commonwealth has come to dominate the federal landscape. This situation was predicted by one of the framers, Alfred Deakin, who was later to become the second prime minister of Australia, when he said:

“As the power of the purse in Great Britain established by degrees the authority of the Commons, it will ultimately establish in Australia the authority of the Commonwealth. The rights of self-government of the States have been fondly supposed to be safeguarded by the Constitution. It left them legally free, but financially bound to the chariot wheels of the central Government. Their need will be its opportunity.”^{xviii}

Under the express terms of the Constitution, it can be reasonably said that Australia is best described as a “cooperative” federal system, although the academic literature has seen some debate as to whether or not this provides an accurate description. There is further debate over

the precise meaning of phrases such as “coordinate,” “concurrent,” and “cooperative” federalism.^{xix} Indeed, in Australia the literature on federalism has generally tended towards highlighting its perceived inefficiency.^{xx} As Brian Galligan notes, the literature is based on “old prejudices and presuppositions about federalism being an immature, transitional, inefficient and even perverse form of government.”^{xxi} Notwithstanding its bad press, the federal system in Australia is predicated on the ability of the states and the Commonwealth to enter into cooperative schemes such as uniform consumer-credit codes and aspects of corporation law. Before leaving this point, it should be noted that at least one member of the High Court is adamant that “cooperative federalism” is not a “constitutional term” but, rather, a “political slogan,” and it is clear that a number of constitutional limitations to cooperation do exist.^{xxii} This, however, does not diminish the operative concurrency of Australian federalism.

Structurally, the federal system is “cooperative”, but it also exhibits both vertical and horizontal “competitive” attributes; that is, there is competition between the states and territories to secure comparative advantages in the areas of policy settings. The most conspicuous of these competitions have been the enticing, or sometimes bidding for, investment from neighbouring states or from overseas. This has occurred when states have offered taxation holidays for investment or paid for infrastructure costs. This competition may also take the form of competition with the Commonwealth for policy settings. This is seen in such areas as industrial relations, where competing policies have been evident during a decade of reform. For instance, in 1995, with a conservative state government in Victoria restructuring the workforce, many unions sought to bring themselves within the more advantageous Commonwealth system of industrial regulation (based on the existence of interstate industrial disputes).^{xxiii}

The drift of political authority to the centre has significantly departed from the outcomes envisioned by the framers. For example, the growth of the Commonwealth’s scope, seen especially in the added responsibilities after the First and Second World Wars, changed the relative authority of the states as the Commonwealth increasingly funded major welfare and infrastructure programs and also increased regulation of the economy.

The Constitution gives few exclusive powers to the Commonwealth Parliament (see Sections 51 and 52). These include aspects of defence, external affairs, coinage, and Commonwealth places. The external affairs power allows the federal government to enter into treaties and conventions and allows the Commonwealth Parliament to introduce into domestic law the terms of those international instruments. The bulk of the legislative authority under the Constitution is held concurrently between the Commonwealth and the states. In practice, however, once the Commonwealth has determined to exercise its capacity, it will have coverage of the area to the extent of the scope of the legislative power. For instance, the Commonwealth has established comprehensive legislative schemes in the areas of citizenship, immigration, and telecommunications, thus leaving very little, if anything, for determination by the states.^{xxiv} Due to the express limitations on some Commonwealth powers, for instance the limitation of “interstateness,” the states have authority over purely intrastate activities such as trade and commerce, “state banking,” and “state insurance” (Sections 51 [I, xii, xiv]).

Historically, several powers have been exercised predominantly by the states. They include land management, agriculture, the environment, health care, education, and criminal law. In recent years, the Commonwealth has come to play an increasingly significant role in shaping policy and legislative regimes in these areas. Primarily, this has been either a product of the implementation of Australia’s international obligations (such as the protection of world-heritage areas) or the result of the direct financial support of the Commonwealth. In the latter category, the Commonwealth, through its grant power (Section 96 of the

Constitution), has, arguably, dictated policy outcomes in the areas of education, health, competition policy, and housing. At federation, the Constitution included the power of the Commonwealth to provide “invalid and old-age pensions.” As part of the country’s post-Second World War reconstruction, the Commonwealth Constitution was amended to include a new section dealing with a broader range of pensions and benefits.^{xxv}

Aboriginal Rights

The Aboriginal (and Torres Strait Islander) populations, like the populations of all colonial societies, suffered with the arrival of Europeans. The latter’s advances were too often at the cost of the former. At federation the drafters of the Constitution held a distinctly Darwinian sentiment: they assumed that the indigenous population would die out. The Constitution, in a provision dealing with “people of any race,” expressly excluded the “people of the Aboriginal race,” thus leaving the latter’s affairs to the states. In 1967 Australians voted to amend this section of the Constitution by removing reference to Aboriginals and Torres Strait Islanders together with one other discriminatory section. The legal effect of the change may be open to argument,^{xxvi} but it is clear that its intention was to secure the rights and interests of indigenous Australian peoples.

Representation and Federal Institutions

The Australian federation allows for a large degree of autonomy in the operational powers of the two spheres. Parliamentary representation is the province of each jurisdiction. In the Commonwealth realm, the Senate is representative of the states to the extent that an equal number of senators is elected from within the boundaries of each state. Originally, six senators were elected, though due to population growth this number has since grown to twelve. The Constitution draws a nexus between both houses of the Parliament, whereby it is required that the number of members from each state in the House of Representatives be as “nearly as practicable” twice the size of the number of members in the Senate (Section 24). The elected senators are not representatives of the state government but, rather, of the electors of that state. Moreover, in practice, with the advent of major political parties, the Senate does not really represent the states as such, although senators may be effective, at least in the party room and in government deliberations, in protecting the smaller states from discrimination. When they occur, casual vacancies in the Senate are filled with the approval of the state parliament or the governor on the advice of the government of the relevant state. Since a 1977 amendment to the Commonwealth Constitution, vacancies must be filled by persons “publicly recognized by a particular political party as being an endorsed candidate of that party.”^{xxvii}

The people of the Australian states remain united “under the Crown of the United Kingdom.” The enduring monarchical link to the British Crown means that Her Majesty now appoints the governor general and the state governors on the advice (given in accordance with the conventional rules relating to responsible government) of the Australian prime minister and each of the state premiers, respectively. Formerly, they were appointed on the advice of British ministers advising the monarch on matters relating to the British Empire. In the case of the appointment of the governor general, this change has had the effect of increasing the independence of the Commonwealth government.^{xxviii}

Within the architecture of the Constitution, the governor general and the state governors have important roles. The governor general or the governors make judicial appointments on the advice of the governments of the respective jurisdiction. There is a statutory requirement that the states be consulted about the appointment of judges to the High

Court.^{xxix} The vesting of federal judicial power by the Commonwealth Constitution in the courts of the states means that there is a degree of judicial oversight of the ability of the states to regulate the jurisdiction of the state courts.^{xxx}

The Constitution includes a mechanism for the establishment of new states or the changing of the boundaries of existing states (Sections 121-124). Depending on the particular change, this requires the approval of the parliaments and/or the electors of the states concerned. In fact, the constitutional landscape has been remarkably stable since federation, and while two mainland territories have been created, no new states have been established since federation in 1901.

Fiscal Powers

The fiscal arrangements in the Constitution were one of the key aspects of the movement towards federation. The economic union created by the Commonwealth Constitution has, as the framers envisaged, allowed the Commonwealth to establish a single, uniform tariff policy (Section 90). This policy prevents the states from imposing protectionist burdens on interstate trade and commerce.^{xxxi} Although the Commonwealth and states both have power over taxation, the former has exercised its authority in a manner that has come to effectively prevent the latter from levying an income tax.^{xxxii} This was a result of the emergency of the Second World War. Despite an invitation by the Commonwealth to re-enter the field in the 1970s, the states have shown no interest in imposing a state-based income tax. As it has been famously stated, the “only good tax is a Commonwealth tax.”^{xxxiii} Thus, a hallmark of Australian fiscal federalism, likely more severe than in most federations, is the so-called “vertical fiscal imbalance,” whereby the states have the legislative responsibility for the regulation of such things as hospitals and schools without the financial capacity, while the Commonwealth holds the effective powers of revenue but lacks the legislative authority to implement policy.^{xxxiv}

The overall taxation situation has changed quite profoundly since federation. The states have generally seen their tax base eroded through a combination of the abandonment of certain tax streams (e.g., death duties)^{xxxv} and a declaration of unconstitutionality (e.g., levies on tobacco and alcohol) due to the fact that the Commonwealth has exclusive powers over taxation on goods.^{xxxvi} This has left the states highly dependent on a limited number of tax sources, including the stamp duty, land taxes, registration fees, payroll taxes, and (increasingly) gambling taxes. In 1999 the Commonwealth Parliament passed a goods and services tax act that levied a consumption tax at 10 percent. The proceeds of this tax are distributed to the states in return for which they eliminated several minor, but inefficient, transaction taxes.

At the time of federation financial settlement proved to be one of the most difficult issues on which to find agreement.^{xxxvii} The concerns of the framers related to both the ultimate economic settings of the new Commonwealth and the relinquishment of certain income that the colonies had derived from their own taxes. Coupled with this was an added concern that related to the level of debt that the colonies had accumulated for the provision of large infrastructure, such as railways. A significant proposal at the time was for the Commonwealth to take over some of the debt of the new states. Although this proposal was not agreed to, by the mid-1920s it had become clear that a measure of national control was appropriate. In 1928 the Constitution was amended by referendum to give effect to this change, and a subsequent intergovernmental agreement established the Loan Council to coordinate and oversee national borrowings (Section 105A). The agreement provided for Commonwealth borrowing on behalf of the states in accordance with the Loan Council’s decisions. By the end of the century a combination of new international financial

arrangements, and changes in the means by which states funded investment, meant that revisions were made to the scheme.^{xxxviii} Since 1995 each government has had the authority to borrow in its own name (subject to disclosure and surveillance by the Loan Council). Beyond these formal requirements, it must also be recognized that the capacity of government to borrow is tempered by the rigorous scrutiny of money markets and the international ratings agencies.

As noted above, the major revenue of the states (customs and excise duties) was yielded to the Commonwealth at federation. At that time transitional provisions enabled the return of any surplus to the states on the basis of what was deemed “fair” by the Commonwealth Parliament. This requirement was effectively rendered meaningless by the ability of the Commonwealth to structure its financial arrangements in such a way as to avoid generating a surplus and, consequently, to avoid the substance of the provision.^{xxxix}

Federal Grants (Spending) Power

Chapter 4 of the Commonwealth Constitution contains the financial sections. The Constitution requires that all federal revenues or money raised or received form one Consolidated Revenue Fund and that all appropriations must be by law (Sections 81 and 83). Because the Commonwealth Parliament may appropriate monies for the “purposes of the Commonwealth,” there is no limit to which it may appropriate funds; however, the expenditure of those funds *is* limited. The High Court has held that the expenditure must be for the enumerated heads of the legislative power in the Constitution or, in addition, those things that are for the “national” benefit (such as scientific research).^{xl}

The limitation on the Commonwealth’s spending power does not affect the ability of the Commonwealth to make available to the states grants to undertake certain activities. These grants, made under Section 96 of the Constitution, can be on such terms and conditions as the Commonwealth sees fit. The Commonwealth thus has the authority to offer conditional funding to the states.

It is clear that the legislative limits on the Commonwealth have not prevented it from playing a significant role in the formation of policy outcomes in areas historically seen as within the province of the states. Section 96 is the basis of this power. The use of tied grants in the areas of health and education has provided the Commonwealth operational authority in areas within which it lacks legislative authority. For instance, Australian universities (with the exception of those in the territories) owe their legislative existence to the states,^{xli} yet it is the Commonwealth and not the states that funds their operation. Under Section 96, however, the Commonwealth is required to use the states as a conduit through which it may provide funding. In recent times, this has been achieved by the Commonwealth bypassing the states and making direct grants to the universities through Section 81 of the Constitution. Using this example, the Commonwealth has proposed changes to the size and composition of university governing councils, their fee structures, their industrial-relations practices, the numbers of students placed, and the courses taught. In short, through the use of almost irresistible fiscal control the Commonwealth can drive its policy agenda in a myriad of areas where it lacks formal legislative authority.

Beyond the use of tied grants and intergovernmental agreements, there are few areas where the Constitution expressly requires one order of government to undertake specific operational or functional duties on behalf of the other. Indeed, there may be certain constitutional limits to such schemes.^{xlii} There are provisions allowing the states to refer their legislative authority over certain matters to the Commonwealth, with the latter’s agreement.^{xliii} In particular, in Section 51 (xxxvii), the Commonwealth Parliament may legislate on matters referred to it by the parliament of a state or states. Similarly, the

Constitution makes provision for the vesting of federal judicial power in any court of a state (Section 77 [iii]). Section 119 places an obligation on the Commonwealth to “protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.” Perhaps the most commonly exercised obligation of the states is that they “shall make provision for the detention in its prisons of persons, accused or convicted of offences against the laws of the Commonwealth” (Section 120).^{xliv}

The Constitution does have an approximation of the “necessary and proper” power expressed in Article I, Section 8, Para. 19 of the United States Constitution. The Commonwealth Constitution provides for an “incidental” power to facilitate the execution of the executive, legislative, or judicial powers of the Commonwealth (Section 51 [xxxix]).^{xliv} In combination with the express executive power of the Commonwealth, it is said to give rise to an implied “nationhood power.”^{xlvi} This power has been held to empower the Commonwealth “to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation.”^{xlvi}

The Evolution of Constitutional Interpretation

The interpretation of the Constitution has, not surprisingly, changed over time. The concept of “reserve powers” belonging to the states had currency in the first two decades of the federation. Influenced by U.S. jurisprudence, the High Court developed twin implications that limited the reach of the Commonwealth and the states and their ability to interfere with each other. Consistent with this view of federalism, the High Court highlighted the common assumption that certain areas of authority were reserved to the states.^{xlvi} Coupled with this implication was the express structure of the Constitution that limits the Commonwealth to the legislative power mentioned in Sections 51 and 52. Since 1920 the High Court has abandoned a fulsome view of this implication.^{xlvi} The states’ constitutional existence is guaranteed by the Commonwealth Constitution (Sections 106 and 107). Relying on this guarantee, the High Court has prevented the Commonwealth from taking legislative actions that would discriminate against the states or place burdens on them that would curtail or destroy their capacity to operate as polities.^l However, it has not protected all those areas that have traditionally been seen to be within their jurisdiction. For instance, the Commonwealth’s entrance into the Convention for the Protection of the World Cultural and Natural Heritage empowered the Commonwealth Parliament to legislate using the external affairs power to prevent Tasmania from building a dam.^{li}

A feature of recent constitutional litigation has been the determination that Australia has a single common law. The Constitution provides that the High Court is not only the final court of appeal in constitutional disputes but also the final arbiter (since the ending of appeals to the Privy Council) of the general law of Australia. Thus, unlike that of the United States of America, the Australian legal system is said to incorporate a single common law, with the High Court at its apex as the final interpreter of this law. Thus, for example, in the area of defamation law, the common law, as applied in the states, must conform to the Commonwealth Constitution.^{lii} Also, as noted above, the federal government is limited to enumerated legislative powers, with areas such as civil and criminal law generally not being seen to be within its ambit. However, recent pressures in the area of tort law have prompted the Commonwealth to seek greater intervention as a means of lowering costs to the health-care system and insurance.^{liii}

LOGIC OF THE CONSTITUTIONAL DISTRIBUTION OF POWERS AND RESPONSIBILITIES

The distribution of powers in Australia's federal system does not exhibit an immediate logic. In 1987 the Advisory Committee to the Constitutional Commission on the Distribution of Powers noted that the "division of powers in any federal country is likely to depend upon historical factors, judicial interpretation and what tends to represent the greatest measure of agreement between the conflicting political interests which exist in that country at any given time."^{liv} These general parameters provide what logic there is for the distribution of powers in Australia.

The drafting of the Australian Constitution was (in effect) based on concessions made by colonial politicians and, ultimately, by colonial voters to the new Commonwealth. During these negotiations in the 1890s there were framers who were vigilant to restrict the authority of the Commonwealth. Even those framers who were more favourably disposed to a national authority disagreed with the minimalists over democratic issues rather than over the powers of the Commonwealth.^{lv}

The historical context is significant. The framers were well aware of the distributions within the United States Constitution and the British North America Act (1867). The fact that the Australian Constitution has many of the same powers as does the U.S. Constitution is indicative of the influence that the latter document had on the Australian drafters and the deliberate decision not to adapt the Canadian constitutional model, which they felt to be too centralizing.

Likewise, many of the powers reflect what could be seen as the minimum requirements for the establishment of the Commonwealth. Defence, interstate trade and commerce, quarantine, immigration, naturalization, and currency, for instance, were obvious national powers and were seen as such by the drafters. Other powers were those that any government must have - powers to create courts, to establish and control a public service, to impose taxation, and so on. Further powers were, on the balance of convenience, deemed to be granted to the federal Parliament. These included telecommunications, postage, weights and measures, and similar matters.

In short, the basic logic behind the Constitution is seen in those things that prompted the colonies to federate: national security, economic union, immigration control, and the convenience of uniformity of regulation. Not included in this list is the imperative to secure basic human rights or place limits on the Commonwealth Parliament. Such limitations are a product of a general distrust of a government not known to the political culture within which the framers operated. Thus, the Constitution, with very few exceptions, does not contain a bill of rights.^{lvi}

The Australian Constitution is an example of a symmetrical distribution of powers. At the establishment of the federal polity the "original states" included all of the current six states of Australia. These original states now have the same relationship to the Commonwealth and with each other. In the first five years after federation Western Australia was granted some customs concessions (Constitution, 1901, Section 95).^{lvii} Presently, there are two mainland territories, the Northern Territory (NT) and the Australian Capital Territory (ACT). Since 1927 the ACT has been the seat of the federal government. Currently, statehood is being considered for the Northern Territory. The Constitution provides for the admission of new states on such terms and conditions as the Commonwealth may impose. This extends to representation in either house of the Commonwealth Parliament. It is unclear whether this would include the exclusion of those plenary functions held by the original states, and to this date it remains a hypothetical issue.

The Commonwealth, through both express and implied limitations on its authority, must legislate uniformly with respect to the states in such areas as taxation and the granting of bounties (other than on mining for gold, silver, and other metals) as well as being required not to place a discriminatory burden on them.^{lviii} Thus, the Commonwealth and the states, as

with the distribution of generally concurrent powers, share responsibilities in many areas of policy delivery. This, of course, is subject to a paramountcy granted to the Commonwealth within its enumerated powers. There remains some debate as to the extraterritorial powers of the states and to what degree they can bind each other and the Commonwealth.^{lix}

As noted above, the modern welfare state was in its infancy in Australia at the time of federation. Thus, the Constitution contains few powers that can be classified within this area. The assumption in 1901 was that welfare provision was to be left to the states. At federation one of the framers, James Howe, was insistent that the Commonwealth should have the power over invalid and old-age pensions.^{lx} Similarly, the convention narrowly endorsed the inclusion of a power over industrial “conciliation and arbitration beyond the limits of one State.”^{lxi} After the Second World War the Constitution was amended to empower the Commonwealth to legislate for “maternity allowances, widow’s pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances” (Section 51 [xxiiiA]).

With regard to welfare (i.e., direct assistance to the poor) responsibilities are shared. Within their respective jurisdictions, there is plenary authority, though in many policy areas (such as child protection, guardianship, mental health, and hospitals) the states have the principal legislative authority.^{lxii}

An amendment that has had profound importance in terms of race relations is the 1967 amendment to Aboriginal power, noted above. Until that year the Commonwealth power, which was included to deal primarily with races that the framers saw as inferior, expressly did not include “the aboriginal race in any State.” In 1967 the Australian electorate voted overwhelmingly to remove those words and thus provided a moral imperative for the Commonwealth to take over the area of Aboriginal affairs.^{lxiii}

EVOLUTION OF THE CONSTITUTIONAL DISTRIBUTION OF POWERS AND RESPONSIBILITIES

The amendment provision in the Constitution is contained in Section 128 and provides for initiation of amendments by the Commonwealth Parliament by way of legislation. The proposed amendments are then submitted to the electors of the states and territories for their consideration. If a majority of the voters overall, and a majority of voters in a majority of the states (i.e., four of the six), agree, then the amendment is presented to the governor general for assent. Since 1901 there have been forty-four attempts at change, with only eight being successful. The Constitution was last amended in 1977. The complex process of double majorities has been seen as an overly burdensome mechanism. Yet rarely has a proposal secured “one of the majorities” but then been rejected because it failed to achieve both.

The lack of formal amendment of the Constitution has been the subject of much commentary.^{lxiv} Generally, those amendments that attempt to increase the power of the Commonwealth at the expense of the states have been unsuccessful. Similarly, those amendments that do not have bipartisan political support have not been approved by the electorate. For example, the 1988 amendments that proposed, among other things, fair elections and the extension of certain basic rights to the states, and to a lesser degree the 1999 republican referendum, became subjects of partisan political debate and were each defeated at a referendum.^{lxv}

Of the eight changes that have been made, the majority of them have been procedural in substance. In brief, they changed the date of the rotation of senators (1907),^{lxvi} authorized the Commonwealth to take over and manage state debts in existence after federation (1910) and (1928), extended social-security legislative power to the Commonwealth (1946),

extended the direct legislative power of the Commonwealth with respect to Aboriginal people (1967), amended the filling of casual vacancies in the Senate (1977), set a compulsory retirement age of seventy for the federal judiciary (1977), and included the citizens of the NT and the ACT in voting for constitutional amendments.

By far, the more significant changes in the distribution of responsibilities have come as a result of judicial interpretation of the Constitution. The High Court has been responsible for the interpretation of the Constitution and, since 1986, has been the ultimate final court of appeal.^{lxvii} At federation, as a result of a compromise between the Colonial Office in London and the Australian delegation, the Privy Council was the initial final court of appeal in non-constitutional matters. This situation was ended by a series of legislative actions by the states, the Commonwealth, and the United Kingdom starting in 1968 and concluding in the passage of the Australia Acts, 1986 (Cth and UK).^{lxviii} There has also been a change in the relationship with the Imperial Parliament. The move towards Australia's legal sovereignty saw a diminution, leading to the ultimate extinction, of the authority of the Parliament in London.

The general approach of the High Court to constitutional interpretation has involved a concentration and focus on textualism.^{lxix} In this form of analysis, the text and structure of the Constitution, viewed in light of its history and logic, are deemed to provide a foundation for its application to legal controversies. However, this has not prevented the Court from developing the Constitution over time. The change in the distribution of powers has been realized by constitutional jurisprudence that, after the *Engineers'* case of 1920, placed an emphasis on the text of the Constitution and eschewed any implication that limited the reach of the Commonwealth Parliament or that upheld a notion of federalism.^{lxx} While the High Court was to revive certain implications based on federalism, the pre-*Engineers'* methodology of protecting states rights was not to return.^{lxxi} The emphasis on the text meant that the Commonwealth Parliament was to be given greater reach in areas such as industrial relations, corporations, and taxation.

This trend to centralization became especially pronounced in fiscal matters, for example during the Second World War when the High Court held valid a scheme that allowed the Commonwealth to take over the income taxation power of the states.^{lxxii} Similarly, the Court's interpretation of the meaning of "excise" in Section 90 of the Constitution has dramatically undermined the finances of the states - depriving the latter of levying the most important forms of consumption taxes.^{lxxiii}

Australia's relationship with the world, first through the Empire and then as an independent nation, has also had an impact on the distribution of powers and responsibilities in the federal system. Through the external affairs power, the Commonwealth has been able to increase its legislative capacity in a way that is seen to be at the expense of the states. As the Commonwealth took its place in the community of nations, the implementation of treaty and conventions obligations into domestic law allowed it to legislate in areas that were traditionally seen as being within the jurisdiction of the states (e.g., the environment, industrial relations, and race relations). While some members of the High Court saw this as unsettling the "federal balance," the majority of the Court was not prepared to rely on such an imprecise and static implication.^{lxxiv}

In general, the changes in the distribution of powers have been the result of a number of factors. Specifically, the emergence of a greater political role for the Commonwealth after the First World War, as Justice Victor Windeyer noted, meant that "the Constitution was read in a new light, a light reflected from events that had, over twenty years, led to a growing realization that Australians were now one people and Australia one country and that national laws might meet national needs."^{lxxv} More generally, there has traditionally been a centralizing tendency within the Australian Labor Party (ALP), which has historically had a

platform that sought to involve the Commonwealth in state policies (though this tendency is not limited to the ALP).

In summary, the High Court interpretation post-1920 has in general terms profited the Commonwealth over the states. In particular, certain sections, such as the external affairs power, the corporations power, taxation power, and Section 90 (covering excise taxes), have allowed the Commonwealth to exploit its already dominant constitutional position.

MAINTENANCE AND MANAGEMENT OF THE DISTRIBUTION OF POWERS AND RESPONSIBILITIES

The maintenance and management of the distribution of powers and responsibilities in the Australian federal system is one of collective responsibility. Lines of responsibility are rarely clear and, indeed, are often deliberately blurry. There remain various descriptors that may be used to understand the nature of federal relations in Australia; however, these terms may only have meaning in a comparative sense. Consequently, it may be meaningful to say that the Australian federation is more “cooperative” or “collusive” than are the American and Canadian federal systems but that it is perhaps more “competitive” than the German federation. Yet even that analysis may be very much dependent on the political cycle, on history, and on the policy issue at hand.

Like those of many federations, Australia’s constitutional structure is based on cooperative assumptions. The limited legislative power of the Commonwealth presupposed that, in many areas, national schemes would only be created with the states and the Commonwealth acting in concert. The Constitution expressly allows for cooperative schemes and joint programs;^{lxxvi} that is, where the Commonwealth and the states, acting in concert, focus their respective legislative, executive, and judicial powers on a particular joint policy.

Notwithstanding the sharing of authority, it is also the case that there are conflicts between the Commonwealth and the states. The Commonwealth, with its legislative paramountcy, has used its authority to invalidate state schemes and policy. For instance, in the areas of industrial relations and environmental protection, the Commonwealth, pursuant to international obligations, has displaced state policy.^{lxxvii} These conflicts are not limited to areas where the Commonwealth has direct legislative capacity. Another example is that, through the use of Section 96 grants, the Commonwealth can, to the point of coercion, “buy” the compliance of the states with the offer of funding.^{lxxviii} Thus, in competition policy and in health policy, the Commonwealth fiscal muscle has been used to establish Commonwealth views.^{lxxix}

The fact that responsibility vis-à-vis policy formation and service delivery is rarely clear results in accountability problems. It is open to speculation whether the Commonwealth and the states are in fact anxious to define with certainty the lines of authority and responsibility, and a corollary of this is ambiguity: it is often difficult for the citizens to determine accurately where policy authority lies and to ensure the accountability of the appropriate order of government. Even beyond such areas as health and education there are public policy matters where responsibility is diffuse. For instance, transport matters may be seen as having aspects that are Commonwealth, state, and local in jurisdiction. Although the Constitution does not mandate cooperation, common practice has seen a level of cooperation sufficient to facilitate appropriate policy outcomes.

Where conflicts do exist over the distribution of powers and responsibilities, they emerge over the application of policy to particular instances. For example, in recent years the Commonwealth has sought to assert authority over such matters as industrial-relations practices. The effect of this has been to provoke jurisdiction “shopping” on the part of

employees and, alternatively, legislative responses by the Commonwealth and the states. Such disputes over policy have been regularly determined by recourse to litigation that have often raised constitutional points.^{lxxx}

While the discussion above has outlined a picture of accountability that is obscured by concurrent and overlapping jurisdiction between the Commonwealth and the states, it should be acknowledged that there is a hierarchy in the practical (as distinct from solely legal) means of resolving issues arising from ambiguity. In the first instance, recourse is made to the executive government in the Commonwealth and state arenas. Beyond this, in diminishing order of importance, are the courts, political parties, interest groups, and established intergovernmental institutions. Ironically, legislative bodies (because of the dominance of the executive in the Westminster system) are often the weakest actors when it comes to resolving disputes within the federation concerning where responsibilities and powers lie.

There are two types of formal intergovernmental agencies to be found in the Australian governmental system. The first type has certain statutory obligations and independence. For example, the Australian Securities Investment Commission and the Australian Competition and Consumer Commission have limited authority to oversee the distribution of powers and responsibilities. While independent and largely free of day-to-day government influence or pressure, they have no binding authority beyond that which is granted by the establishing government.^{lxxxi} A second form of intergovernmental agency is found in the informal cooperative executive agencies. The preeminent example of such agencies is the Council of Australian Governments (COAG), comprising the prime minister, the state premiers, the chief ministers of the two self-governing territories, and the president of the Australian Local Government Association. This body, which has no express constitutional standing, nevertheless plays a significant role in maintaining and managing the distribution of powers and responsibilities in the federation, providing, as it does, a forum for negotiations between the political leaders of the Commonwealth. In addition, and reporting loosely to the COAG, there are more than twenty Commonwealth-state ministerial councils that deliberate and consult on specific policy areas.^{lxxxii}

Despite the existence of a range of collaborative and cooperative agencies, there are no formal constitutional mechanisms for one government to monitor the operations of another. That being said, the Commonwealth can, through the operation of Section 96 grants, place stringent reporting regimes upon the receiver of the grant. Similarly, there are no formal means by which the federal executive or Parliament can give binding directions to any of the state governments or parliaments. Indeed, there is constitutional authority to suggest that there are implied limitations on the manner to which the Commonwealth and the states may each bind the other in their operations.^{lxxxiii}

Finally, the High Court has original jurisdiction over a variety of specified matters, including the actions of officers of the Commonwealth and legal proceedings involving the Commonwealth. It also has original jurisdiction in some proceedings where a state is a party. In such proceedings, the Court may make binding orders upon the Commonwealth and the states and their officers.^{lxxxiv} The High Court also has general appellate jurisdiction from federal and state courts and is at the apex of the Australian judicial system. The Constitution provides for the vesting of federal judicial power in state courts. The result, with some qualification, is a coordinated and largely unified judicial system involving both federal and state judicial power. In Australia, the separation of judicial power from executive and legislative usurpation is constitutionally entrenched in the Commonwealth's governmental structure. Thus, the federal government or Parliament cannot order courts to perform their functions in ways inconsistent with the exercise of judicial power.^{lxxxv}

ADEQUACY AND FUTURE OF THE DISTRIBUTION OF POWERS AND

RESPONSIBILITIES

One of the pitfalls of discussing the adequacy of, and future distribution of, powers is that it tends towards idealization, towards the projection of a perfect federal arrangement. With regard to Australia, the actual distribution of powers and responsibilities reflects the assumptions about the appropriate role of government held by the framers in the late 1890s. From the perspective of the twenty-first century, the adequacy of the Constitution should not be seen solely in terms of its original design. Modification, usually by judicial interpretation and the changing national focus, has meant that lines of responsibility and accountability are not always clear. For some observers, this is a criticism not only of Australian federalism but also of federalism in general. Others see the constructive ambiguity more positively in that it allows for the flexibility needed to adapt to changing economic and social circumstances.

In short, questions of the adequacy of the distribution of powers and responsibility will often depend on the perspective of the participants and policy makers. Australia has made spasmodic attempts (especially over the past thirty years) at what has generally been described as “new federalism”^{lxxxvi} - that is, at attempting to refocus the role of the states in the federal compact. Notwithstanding the rhetoric, very little may be said to have come out of this.

One of the enduring features of Australian federalism, and one that helps to facilitate the intended coordination of the two spheres, has been regular premiers and Commonwealth-state ministerial meetings. These gatherings, which have no express formal constitutional basis, are intended to facilitate coherence in national policy development. In terms of the premiers conferences (renamed the Council of Australian Governments), the main debate has frequently been focused on the distribution of revenue. Since the introduction of the Goods and Services Tax, there has been a change of emphasis, with a more predictable share of revenue coming to the states.

As noted above, Australian federalism has witnessed a dramatic movement towards the centre in terms of fiscal authority. Through the operation of the Grants Commission, the states and the territories are provided with funding by the Commonwealth for the provision of significant services. Vertical fiscal imbalance remains a hallmark of the Australian system. Thus, while the states do have the administrative capacity to execute their constitutional responsibilities, it remains the case that the Commonwealth has the economic power. Australia is one of the oldest democratic federal systems in existence. Its success may be assessed not only by its longevity but also by its ability to meet unforeseeable challenges and changing circumstances. As we have seen, the history of the Australian Constitution is one of shifting authority. In 1901 the fledgling Commonwealth came into existence with the states being the predominant site of political and financial authority. A century later the tables have turned. Through a procession of gradual and, at times, imperceptible shifts, the authority of the Commonwealth has come to the fore.

While formal constitutional amendment has proved to be an elusive achievement, this has not stopped many proposed initiatives. Of these, the most notable recent example was a sustained campaign to replace the Queen as the head of state and to reconstitute the Commonwealth as a federal republic. Although this proposal was defeated in 1999, it is inevitable that it will return to the political agenda.

Another likely amendment within the next decade will concern the conferring of statehood on the Northern Territory. This would make it the first new state in the history of the Commonwealth. The terms and conditions of its admission, especially in relation to political representation in the Commonwealth Parliament, are likely to be asymmetrical - that is, not equal to the original six states. At present, there is no realistic move towards the creation of a new state from the existing states.

Unlike many democracies, Australia has no statutory or constitutional bill of rights. There will continue to be debate on the need for such an addition to the constitutional architecture. If such a change is made at the Commonwealth level, it will inevitably have the effect of revising the existing distribution of powers and responsibilities. Despite the limited formal constitutional guarantee, it should be noted that many legislative protections, such as anti-discrimination laws, have been brought into Australian domestic law as a result of Australia's international obligations.^{lxxxvii}

In common with other nation-states, Australia's formal constitutional distribution of powers and responsibilities is also increasingly subject to the informal demands of global pressures. For instance, the World Trade Organization, the United Nations, and even the U.S. financial rating agencies all challenge the autonomy of the constituent parts of the Australian polity. Australian governmental institutions and Australian citizens have experienced difficulties in understanding the competing challenges and objectives of globalization, of nationalism, of federalism, and of regionalism.^{lxxxviii}

The Australian federal system has been dynamic in its evolution. Through economic crises and two world wars the Constitution has evolved to meet the changing needs of the social, economic, and political circumstances. The realignment of federal relations would astonish its framers, who conceived of a stronger federal instrument. Yet, overall, the Constitution has served Australia well. The past century has seen a centralization of power at the expense of the federal principle. Whether or not this trend continues, or whether there is a return to a more dispersed federal structure, is unclear. One thing, however, is clear: at present, there is no evident call for radical change or for abandoning the federation. If nothing else, this can be seen as a measure of its success.

* This chapter benefited from the advice and support of Brad Selway (1955-2005) and is dedicated to his memory.

ⁱ Depending on the context, the term "Commonwealth" refers to the national (federal) government or (less frequently) to the federation as a whole.

ⁱⁱ See John A. La Nauze, *The Making of the Australian Constitution* (Carlton: Melbourne University Press, 1972).

ⁱⁱⁱ Richard C. Baker, *A manual of reference to authorities for the use of the members of the National Australasian Convention, which will assemble at Sydney on March 2, 1891, for the purpose of drafting a constitution for the Dominion of Australia* (Adelaide: W.K. Thomas and Co., 1891); and T.C. Just, *Leading Facts connected with Federation. Compiled for the information of the Tasmanian Delegates to the Australasian Federal Convention 1891* (Hobart: The Mercury Office, 1891). See also, John S.F. Wright, "Anglicizing the United States Constitution: James Bryce's Contribution to Australian Federalism," *Publius: The Journal of Federalism* 31 (Fall 2001): 107-129.

^{iv} Cheryl Saunders, "Australia," *Handbook of Federal Countries 2002*, ed. Ann Griffiths (Montreal: McGill University Press, 2002), citing *McGinty v. Western Australia* (1996) 186 C.L.R. 140.

^v Enid Campbell, “Southey Memorial Lecture: Changing the Constitution - Past and Future,” *Melbourne University Law Review* 17 (1989): 1; and Cheryl Saunders, “Future Prospects for the Australian Constitution,” *Reflections on the Australian Constitution*, eds., Robert French, Geoff Lindell, and Cheryl Saunders (Sydney: Federation Press, 2003), pp. 220-221.

^{vi} Geoff Lindell, “Why Is Australia’s Constitution Binding? The Reasons in 1900 and Now, and the Effect of Independence,” *Federal Law Review* 16 (1986): 29; George Winterton, “The Acquisition of Independence,” in French, Lindell, and Saunders, *Reflections on the Australian Constitution*, p. 31; and Geoff Lindell, “Further Reflections on the Date of the Acquisition of Australia’s Independence,” in French, Lindell, and Saunders, *Reflections on the Australian Constitution*, p. 51. See also *Sue v. Hill* (1999) 199 C.L.R. 462.

^{vii} Edmund Barton, Speech to Australasian Federation League, Ashfield, April 1898. See G.C. Bolton, *Edmund Barton* (Sydney: Allen and Unwin, 2000), pp. 172-173.

^{viii} For the statistical details of Australia, see the Australian Bureau of Statistics, <<http://www.abs.gov.au/>> (accessed 1 October 2003).

^{ix} Department of the Parliamentary Library, *Research Note*, 1 October 2003, <<http://www.aph.gov.au/library/pubs/rn/2001-02/02rn21.pdf>>; and OECD, GDP per capita, 2001 at current prices, in U.S. dollars, <<http://www.oecd.org/dataoecd/48/5/2371372.pdf>> (accessed 1 October 2003).

^x Alex C. Castles, *An Australian Legal History* (Sydney: Law Book Co., 1982), pp. 24-25.

^{xi} Philippa Mein Smith, “New Zealand,” *The Centenary Companion to Australian Federation*, ed., Helen Irving (Melbourne: Cambridge University Press, 1999), pp. 400-405.

^{xii} Brian de Garis, “The Colonial Office and the Commonwealth Bill,” *Essays in Australian Federation*, ed., Alan W Martin (Melbourne: Melbourne University Press, 1976), p. 94.

^{xiii} Gerard Brennan, “The Privy Council and the Constitution,” *Australian Constitutional Landmarks*, eds., H.P. Lee and George Winterton (Melbourne: Cambridge University Press, 2003), pp. 328-329.

^{xiv} For an account of the legal issues, see Greg Craven, *Secession: The Ultimate State Right* (Melbourne: Melbourne University Press, 1986), chap. 3.

^{xv} *Northern Territory Surrender Act 1908* (SA) and *Northern Territory Acceptance Act 1910* (Cth). (Here and throughout “Cth” stands for “Commonwealth.”)

^{xvi} *Northern Territory (Self-Government) Act 1978* (Cth). For statehood, see Northern Territory Government, <http://www.nt.gov.au/ocm/media_releases/20030522_statehood.shtml> (accessed 1 October 2003).

^{xvii} All section numbers in the text refer to Australia, *Constitution* (1901).

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- ^{xviii} Alfred Deakin, *Federated Australia: Selections from Letters to the Morning Post, 1900-1910*, ed., John A. La Nauze (Melbourne: Melbourne University Press, 1968), p. 97.
- ^{xix} See Brian Galligan, *A Federal Republic: Australia's Constitutional System of Government* (Melbourne: Cambridge University Press, 1995), chap. 8.
- ^{xx} Gordon Greenwood, *The Future of Australian Federalism* (Melbourne: Melbourne University Press, 1946); Bill Brugger and Dean Jaensch, *Australian Politics: Theory and Practice* (Sydney: George Allen and Unwin, 1985); and Graham Maddox, *Australian Democracy: In Theory and Practice* (Melbourne: Longman Australia, 1991).
- ^{xxi} Galligan, *A Federal Republic*, p. 59.
- ^{xxii} *Re Wakim; Ex Parte McNally* (1999) 198 C.L.R. 511, 556 (McHugh J).
- ^{xxiii} *Re Australian Education Union; Ex parte Victoria* (1995) 184 C.L.R. 188.
- ^{xxiv} For example, *Australian Citizenship Act 1948 (Cth)*, *Migration Act 1958 (Cth)*, and *Telecommunications Act 1991 (Cth)*.
- ^{xxv} *Constitutional Alteration (Social Services) Act* (1946) (Cth).
- ^{xxvi} *Kartinyeri v. The Commonwealth* (1998) 195 C.L.R. 337.
- ^{xxvii} *Constitutional Alteration (Referendums) Act 1977 (Cth)*, *Constitutional Alteration (Retirement of Judges) Act 1977 (Cth)*, *Constitutional Alteration (Senate Casual Vacancies) Act 1977 (Cth)*, s. 15.
- ^{xxviii} See generally, George Winterton, *Monarchy to Republic* (Melbourne: Oxford University Press, 1994).
- ^{xxix} *High Court of Australia Act 1979 (Cth)*, s. 6.
- ^{xxx} *Kable v. Director of Public Prosecutions (NSW) (1996) 189 C.L.R. 51* and *A-G (Qld) v. Fardon* [2003] QCA 416.
- ^{xxxi} *Cole v. Whitefield* (1988) 165 C.L.R. 360.
- ^{xxxii} *South Australia v. Commonwealth* (1942) 65 C.L.R. 373 (*First Uniform Tax Case*) and *Victoria v. Commonwealth* (1957) 99 C.L.R. 575 (*Second Uniform Tax Case*). See generally, Cheryl Saunders, "Uniform Income Tax Cases," in Lee and Winterton, *Australian Constitutional Landmarks*, chap. 3.
- ^{xxxiii} Cited in D. James, "Federal-State Financial Relations: The Deakin Prophecy," Research Paper 17, Department of the Parliamentary Library, 2000.
- ^{xxxiv} Galligan, *A Federal Republic*, chap. 9. See also Cheryl Saunders, "Government Borrowing in Australia," *Melbourne University Law Review* 70 (1989): 187.
- ^{xxxv} *Succession and Gift Duties Abolition Act 1976*.

^{xxxvi} *Ha v. NSW* (1997) 189 C.L.R. 465.

^{xxxvii} Cheryl Saunders “Hardest Nut to Crack: The Financial Settlement in the Commonwealth Constitution,” *The Convention Debates 1891-1898 Commentaries, Indices and Guide*, ed. Greg Craven (Sydney: Legal Books, 1986), p. 149.

^{xxxviii} Cheryl Saunders, “Budgetary Federalism: Balancing Federalism and Responsible Government,” *Mensch und Staat: Festschrift for Thomas Fleiner*, ed. Peter Hanni (Universitätsverlag Freiburg Schweiz, 2003), pp. 175-199.

^{xxxix} *New South Wales v. Commonwealth* (1908) 7 C.L.R. 179. See generally, Brad Selway, “The Federation: What Makes It Work and What Should We Be Thinking about for the Future?” *Australian Journal of Public Administration* 60, 4 (2001): 116-22.

^{xl} *Victoria v. The Commonwealth and Hayden* (1975) 134 C.L.R. 338.

^{xli} For instance, *University of Adelaide Act* 1971 (SA) and *Melbourne University Act* 1958 (Vic).

^{xlii} *Austin v. Commonwealth* (2003) 195 C.L.R. 321.

^{xliii} Section 51 (xxxvii). See *Re Wakim; Ex Parte McNally* (1999) 198 C.L.R. 511.

^{xliv} Section 120. See *Leeth v. Commonwealth* (1992) 174 C.L.R. 455.

^{xliv} *Australia, Constitution*, Section 51 (xxxix). See *Le Mesurier v. Connor* (1929) 42 C.L.R. 481.

^{xlvi} Jeremy Kirk, “Constitutional Implications (I): Nature, Legitimacy, Classification, Examples,” *Melbourne University Law Review* 24 (2000): 669-670.

^{xlvi} *Victoria v. The Commonwealth and Hayden* (1975) 134 C.L.R. 338.

^{xlvi} *King v. Barger* (1908) 6 C.L.R. 41.

^{xlvi} *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd.* (1920) 28 C.L.R. 129.

^l *Austin v. Commonwealth* (2003) 195 C.L.R. 321.

^{li} *Commonwealth v. Tasmania* (1983) 158 C.L.R. 1.

^{lii} *Lange v. Australian Broadcasting Corporation* (1997) **Error! Reference source not found.**

^{lii} *Review of the Law of Negligence*, [Ipp Report], <<http://revofneg.treasury.gov.au/content/home.asp>> (accessed 1 October 2003).

^{liv} Report of the Advisory Committee to the Constitutional Commission, *Distribution of Power* (Canberra: AGPS, 1987), p. 2.

^{lv} Henry B. Higgins being the most obvious.

^{lvi} Owen Dixon, *Jesting Pilate: And other Papers and Addresses* (Melbourne: The Law Book Co., 1965), pp.

101-102.

^{lvii} Australia, *Constitution*, Section 95.

^{lviii} *Austin v. Commonwealth* (2003) 195 C.L.R. 321.

^{lix} *Mobil Oil Australia Pty Ltd. v. Victoria* [2002] HCA 27, *Re Residential Tenancies Tribunal (New South Wales)*; *ex parte The Defence Housing Authority* (1997) 190 C.L.R. 410; and Brad Selway, “The Australian ‘Single Law Area,’” *Monash University Law Review* 29 (2003): 30-48.

^{lx} Quick and Garran, *The Annotated Constitution of the Commonwealth of Australia*, pp. 612-613.

^{lxi} For an account of the operations, see Henry B. Higgins, *A New Province for Law and Order* (Sydney: Constable and Co., 1922).

^{lxii} See, for example, *Children’s Protection Act* 1993 (SA) and *Guardianship and Administration Act* 1986 (Vic).

^{lxiii} *Kartinyeri v. Commonwealth* (1998) 195 C.L.R. 337. See Robert French, “The Race Power: A Constitutional Chimera,” in Lee and Winterton, *Australian Constitutional Landmarks*, p. 180.

^{lxiv} See above n. 5.

^{lxv} *Constitution Alteration (Local Government) Bill*, 1988 (Cth), *Constitution Alteration (Parliamentary Terms) Bill*, 1988 (Cth), *Constitution Alteration (Rights and Freedoms) Bill*, 1988 (Cth), *Constitution Alteration (Fair Elections) Bill*, 1988 (Cth) and *Constitution Alteration (Establishment of a Republic) Bill*, 1999 (Cth).

^{lxvi} The Senate is a body of fixed existence, with half the members normally facing the voters every three years.

^{lxvii} It should be noted that, oddly, the interpretation of the Australian Constitution is not part of the original jurisdiction. See Section 75.

^{lxviii} *Privy Council (Limitation of Appeals) Act* 1968 (Cth), *Privy Council (Appeals from High Court) Act* 1975.

^{lxix} See references in Brad Selway, “Constitutional Interpretation in the High Court of Australia,” *Queensland Judges on the High Court*, eds., Michael White and Aladin Rahemtula (Brisbane: Supreme Court of Queensland Library, 2003), pp. 1-20.

^{lxx} Leslie Zines, *The High Court and the Constitution* (Sydney: Butterworths, 1997), pp. 1-15.

^{lxxi} *Re Australian Education Union; Ex parte Victoria* (1995) 184 C.L.R. 188.

^{lxxii} *South Australia v. Commonwealth (First Uniform Tax Case)* (1942) 65 C.L.R. 373.

^{lxxiii} *Ha v. NSW* (1997) 189 C.L.R. 465.

^{lxxiv} *Koowarta v. Bjelke-Petersen* (1982) 153 C.L.R. 168, 192 (Gibbs CJ) and 241 (Murphy J).

^{lxxv} *Victoria v. Commonwealth* (1971) 122 C.L.R. 353, 396.

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- ^{lxxvi} *The Queen v. Public Vehicles Licensing Appeal Tribunal (Tas.); Ex parte Australian National Airways Pty. Ltd.* (1964) 113 C.L.R. 207 and *Port Macdonnell Professional Fishermen's Association Inc. v. South Australia* (1989) 168 C.L.R. 340.
- ^{lxxvii} *Commonwealth v. Tasmania* (1983) 158 C.L.R. 1.
- ^{lxxviii} *Victoria v. Commonwealth (Federal Roads Case)* (1926) 38 C.L.R. 399.
- ^{lxxix} K. Wheelwright, "Commonwealth and State Powers in Health: A Constitutional Diagnosis," *Monash University Law Review* 21 (1995): 53-83.
- ^{lxxx} *Queensland Electricity Commission v. Commonwealth* (1985) 159 C.L.R. 192 and *Re Australian Education Union; Ex parte Victoria* (1995) 184 C.L.R. 188.
- ^{lxxxi} *Australian Securities and Investments Commission Act* 2001 (Cth) and *Trade Practices Act* 1974 (Cth).
- ^{lxxxii} See <Error! Reference source not found.> (1 October 2003). See also Glyn Davis, "Carving Out Policy Space for State Government in a Federation: The Role of Coordination," *Publius: The Journal of Federalism* 28 (Fall 1998): 147-164.
- ^{lxxxiii} *Re The Residential Tenancies Tribunal of New South Wales: ex parte The Defence Housing Authority* (1997) 190 C.L.R. 410; and *Victoria v. Commonwealth (Industrial Relations Case)* (1996) 187 C.L.R. 416.
- ^{lxxxiv} *Mewett v. Commonwealth* (1997) 191 C.L.R. 471; and *British American Tobacco Australia Ltd. v. Western Australia* [2003] HCA 47.
- ^{lxxxv} *Wilson v. The Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 198 C.L.R. 1.
- ^{lxxxvi} Alan Peachment and Gordon S. Reid, *New Federalism in Australia: Rhetoric or Reality?* (Bedford Park: Australasian Political Studies Association, 1977); and Galligan, *A Federal Republic*, pp. 203-206.
- ^{lxxxvii} *Racial Discrimination Act* 1975; and *Koowarta v. Bjelke-Petersen* (1982) 153 C.L.R. 168.
- ^{lxxxviii} Cheryl Saunders, "Dividing Power in a Federation in an Age of Globalisation," *Beyond the Republic: Meeting the Global Challenges to Constitutionalism*, eds., Charles Sampford and Tom Round (Sydney: Federation Press, 2001), pp. 129-145; and Brian Opeskin, "Australian Constitutional Law in a Global Era," in French, Lindell, and Saunders, *Reflections on the Australian Constitution*, pp. 171-191.