DOES THE *AUSTRALIAN CONSTITUTION* MANDATE A FEDERAL BALANCE?

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I INTRODUCTION

The framers of the *Australian Constitution* in the 1890s intended that the *Constitution* was a 'federal compact' between the States so that power would be balanced between the Commonwealth and the States. The Commonwealth would have powers in certain specified matters but in other specified matters the States would share power. The course of decision making by the High Court since the *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*[1] has led to an expansion of Commonwealth power and authority that had not been contemplated by the original drafters of the *Constitution*. In a strong dissenting judgement in the *New South Wales v Commonwealth*,[2] Callinan J invoked the original intention of the framers of the *Constitution* to strike a federal balance for the continuation and independence of the States in political power and function. This article addresses the question of whether the High Court has adequately maintained that original intention. An analysis of the High Court cases shows that in practice, the High Court has failed to strongly support the concept of a federal balance.

II JUSTICE CALLINAN'S JUDGEMENT

A *Work Choices Case*

The *Work Choices* case was a defining point of the High Court's position on the breadth of the Commonwealth powers to override the position of the States. The High Court had to determine the validity of the *Workplace Relations Amendment (Work Choices) Act 2006* (Cth), which would introduce a new system of employment agreements outside of the established industrial awards system. This required a consideration of whether such legislation was authorised under the 'corporations' head of power of s 51(xx) of the *Constitution* in addition to the powers of arbitration and conciliation under s 51(xxxv). The

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[1] (1920) 28 CLR 129 ('*Engineers*').

[2] (2006) 229 CLR 1 ('*Work Choices*').

breadth of the Work Choices legislation gave rise to the question of the Commonwealth's power to bind the States in relation to industrial legislation.

The majority of the High Court in *Work Choices* embraced the broad interpretation of the *Constitution* in favour of Commonwealth powers that had been evident since *Engineers*. The majority frequently referred to the *Engineers* case as a starting point of interpretation to rely on the words of the Constitutional text rather than to interpret that text in a wider context (such as the framing of the *Constitution*).[3] The majority emphasised that this was a matter of long-standing principles of Constitutional Interpretation and held that the *Constitution* is not to be interpreted by reference to any pre-conceived concepts such as some 'particular division of governmental or legislative power' or to any notion that the *Constitution* conserves some kind of 'static equilibrium' or 'federal balance'.[4]

B *Justice Callinan's Dissenting Judgement*

In a long and detailed dissenting judgment, Callinan J challenged the orthodoxy of the line of High Court decisions that has developed since *Engineers*.[5] He characterised the *Engineers* case as an early example of 'judicial activism',[6] and questioned the soundness of the reasoning of the majority, criticising it as 'less than satisfactory'.[7] Callinan J argued for an approach in interpretation of the *Constitution* which accorded with the original federalist structure and purposes as originally drafted.[8] He held that such an approach did not require adherence to some 'static equilibrium' but favoured a construction that would give best effect to the underlying purposes and fundamental structures of the *Constitution*.[9]

Justice Callinan was correct in his originalist interpretation of the *Constitution* which can be observed through his references to the original intentions of the States in forming a 'federal balance'.[10] The intention of those who wrote the *Constitution* was that power should be shared between the Commonwealth and the States, the States would share power in areas that were not given exclusively to the Commonwealth under the *Constitution* so that the States

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[3] *New South Wales v Commonwealth* (2006) 229 CLR 1, 71, 73, 118, 119 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
[4] Ibid 72-3 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
[5] Ibid 235-400 (Callinan J).
[6] Ibid 382-3 (Callinan J).
[7] Ibid 307-8 (Callinan J).
[8] Ibid 237 (Callinan J).
[9] Ibid 317-8 (Callinan J).
[10] Ibid 268-325 (Callinan J).

had 'reserved powers' to the extent not exclusively conferred on the Commonwealth.[11] There were accordingly two types of legislative powers namely, exclusive powers and concurrent powers. Concurrent powers are listed under s 51 of the *Constitution* and are available to both the Commonwealth and the States. In respect of some other matters the Commonwealth has exclusive power.[12]

The intention of the delegates at the constitutional conventions was to limit the federal power and 'put the preservation of State rights beyond the possibility of doubt'.[13] In the first 20 years after federation the High Court gave effect to this view.[14] The early High Court considered each of the States to continue to possess essential powers of autonomous self-government which would continue under the *Constitution*, only subject to specified powers conferred upon the Commonwealth (ss 51 and 52 of the *Constitution*).[15] In cases of validity of Commonwealth laws the High Court would adopt an interpretation that would preserve the reserved powers of the States.[16] The intergovernmental immunity of instrumentalities doctrine refers to whether and when State actors would be bound by Commonwealth laws and vice versa. The doctrine rested on the concept that both the Commonwealth and States each possessed their own sovereignty which required an immunity from external interference by the other.[17] The doctrine was first discussed by Griffith CJ in *D'Emden v Pedder*[18] and was exemplified in further early High Court cases.[19]

III THE DEPARTURE FROM THE ORIGINAL POSITION

The interpretive approach of the early High Court was brought to a sudden halt by the differently constituted High Court in *Engineers*. The basic approach of the joint judgement in *Engineers* was that the powers conferred on the Commonwealth by the *Constitution* were to

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[11] Dan Meagher et al, *Hanks Australian Constitutional Law: Materials and Commentary* 10th edition (LexisNexis Butterworths) 38.
[12] *Constitution* ss 51(xii), 52, 90, 114, 115.
[13] Dan Meagher et al, *Hanks Australian Constitutional Law: Materials and Commentary* 10th edition (LexisNexis Butterworths) 40: referring to Alfred Deakin in 1891.
[14] See, eg, *Tasmania v Commonwealth* (1904) 1 CLR 329; *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330.
[15] *R v Barger* (1908) 6 CLR 41, 67.
[16] Nicholas Aroney et al*, The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (Cambridge University Press, 2015) 119.
[17] Ibid 132-3.
[18] *D'Emden v Pedder* (1904) 1 CLR 91, 109 (Griffith CJ).
[19] See, eg, *Federated Amalgamated Government Railway and Tramway Service Association v New South Wales Railway Traffic Employees Association* (1906) 4 CLR 488; *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087.

be interpreted with as much breadth as the words of the *Constitution* would permit.[20] Such an interpretive position did not have regard to the earlier doctrines of reserved powers or intergovernmental immunity of instrumentalities. *Engineers* involved a challenge to the Commonwealth's Conciliation and Arbitration Court in relation to its application to employees of State trading concerns.

The majority judgment in *Engineers* formally rejected both doctrines of reserved powers and intergovernmental immunity of instrumentalities, holding that the interpretation of the breadth of Commonwealth legislative power should not be limited or undermined by notions of some underlying policy or principle which had not been clearly stated in the *Constitution* itself.[21] The majority judgement held that the proper approach was to simply interpret the legislative heads of power in terms of ordinary rules of construction established by English law. In support of its approach, the High Court majority in *Engineers* relied on decisions of the Privy Council which gave the Commonwealth legislative powers to be 'as plenary and ample' as the powers of the British Parliament.[22] The *Engineers* approach to interpretation of the Commonwealth's powers was a radical departure from the concepts that underpinned the 'federal balance' that was revisited by Callinan J in the *Work Choices* case.

IV THE WIDENING OF POWERS FOR THE COMMONWEALTH

The expansive approach of the *Engineers* case to the interpretation of the Commonwealth's powers has led to a considerable expansion in the scope and extent of legislation covered by the Commonwealth. This is evident from a number of important cases leading to up to the *Work Choices* case. This has meant an increasingly compromised position for the States in terms of fiscal autonomy and many other areas. Although the States may conceptually have concurrent power to legislate on the same matters of the Commonwealth, in reality the Commonwealth's powers are usually exercised to override States laws (given the operation of s 109 of the *Constitution*).

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[20] Nicholas Aroney et al*, The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (Cambridge University Press, 2015) 134-5.
[21] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 141-54.
[22] Ibid 153.

A *Qualified Immunities for the States*

In some instances later High Court decisions have qualified the extent of reach of Commonwealth laws in relation to the States. In *Melbourne Corporation v Commonwealth*[23] the judges of the High Court took individual approaches to the limits of Commonwealth powers impacting the States, but did not endorse a coherent principle of States immunities.[24] Other cases have held that the essential question is whether the Commonwealth law impairs the capacity of a State to function autonomously.[25] Notwithstanding these qualifications, in reality this has done little to limit the operation of Commonwealth laws upon State's interests.[26]

B *The Vertical Fiscal Imbalance*

The powers and autonomy of the States have been further compromised by the increasing Commonwealth control over government revenue and allocation of government finances. The Commonwealth's power to impose income tax was confirmed by the High Court in the two Uniform Tax cases of 1942 and 1957,[27] which upheld the virtual Commonwealth take-over of the income tax system. The Commonwealth uses its powers in relation to financial grants to the States to impose conditions on the use of monies so granted.[28] The allocation of grants as between the States has become an annual event where State governments are forced to compete with each other in negotiating with the Commonwealth over such monies. The allocations to the States under the GST system has also led to an imbalance of revenues for States most recently evidenced by the low rate of return of GST revenues to the State of Western Australia. As a requirement of the GST arrangement States have had to abolish many existing taxes and have become even more reliant upon the Commonwealth.[29] Attempts

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[23] (1947) 74 CLR 31.
[24] Dan Meagher et al, *Hanks Australian Constitutional Law: Materials and Commentary* 10th edition (LexisNexis Butterworths) 637.
[25] *Austin v Commonwealth* (2003) 215 CLR 185, [217] (McHugh J).
[26] See, eg, *Fortescue Metals Group Ltd v Commonwealth* (2013) 250 CLR 548.
[27] *South Australia v Commonwealth* (1942) 65 CLR 373, *Victoria and New South Wales v Commonwealth* (1957) 99 CLR 575.
[28] Lorraine Finlay, 'The Power of the purse: an examination of fiscal federalism in Australia/Il potere della borsa: un esame del federalism fiscal in Australia' 24 (2012) *Journal of Constitutional History* [*Giornale di Storia Constituzionale*] 86-7.
[29] Ibid 88.

have been made to equalise the GST like that of a review committee,[30] however this has done little to help Western Australia.

C *Asymmetrical Doctrine of Intergovernmental Immunities*

Engineers held that both the Commonwealth and the States had reciprocal authority to make laws binding upon the other, which the High Court affirmed soon after.[31] However, the subsequent course of High Court decisions steadily eroded that proposition to the point where in *Commonwealth v Cigamatic Pty Ltd (in liq)* ('*Cigamatic*'),[32] it was held that the States did not have constitutional power to make laws binding upon the Commonwealth. This has led to an asymmetrical relationship of intergovernmental immunities where the States have only limited and highly qualified immunities from federal interference and on the other hand the Commonwealth has enjoyed supremacy with near complete immunity from any legislative reach by the States.[33] The *Cigamatic* doctrine of Commonwealth immunity has been qualified in *Re Residential Tenancies Tribunal of NSW v Henderson; Ex parte Defence Housing Authority*,[34] where the majority held that, although the States did not have power to legislate to affect the capacities and functions of the Commonwealth, the State laws could apply to Commonwealth actions done pursuant to the Commonwealth's capacities and functions. Although the qualifications in *Henderson* have clarified to some extent the role of State laws in relation to Commonwealth capacities and functions, the fundamental imbalance of the Commonwealth/State powers remains.

D *Supremacy of the Commonwealth under the Inconsistency Rule*

The Inconsistency Rule, as imposed by s 109 of the *Constitution*, applies where a valid Commonwealth and valid State Law are inconsistent, the Commonwealth law shall prevail and State law to the extent of the inconsistency will be invalid. The High Court has held many instances where Commonwealth and State laws are inconsistent both directly and indirectly and have applied s 109 in a way that considerably extends the Commonwealth's legislative reach. This is particularly the case in its approach to the 'Covering the Field'

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[30] Ibid 89.
[31] See, *Pirrie v McFarlane* (1925) 26 CLR 170.
[32] (1962) 108 CLR 372.
[33] Nicholas Aroney et al*, The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (Cambridge University Press, 2015) 280-1.
[34] (1997) 190 CLR 410 ('*Henderson*').

doctrine,[35] where Sir Harry Gibbs observed that this principle ensures the predominance of the Commonwealth's power at the expense of that of the States.[36]

V CONCLUSION

The original intention of the framers of the *Constitution* was, as observed by Callinan J in the *Work Choices* case, to mandate a 'federal balance' as between the Commonwealth and the States. This intention however, had been rejected in the seminal case of *Engineers* and since that time the Commonwealth's powers have been expanded at the expense of States rights. The sovereignty of the States in terms of fiscal independence and policy making have been severely compromised by the intervention of Commonwealth legislation. The majority decision in *Work Choices* is an outstanding recent example of the breadth of Commonwealth power permitted by the High Court, and the principle of federal balance is unlikely to be given support in future decisions of the High Court.

[35] See, *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466, 489-90 (Isaacs J).
[36] Sir Harry Gibbs, 'The Decline of Federalism?' (1993) 18 *University of Queensland Law Journal* 3.