SPHERES OF POWER: THE HIGH COURT AS CUSTODIAN OF CO-ORDINATE FEDERALISM

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I INTRODUCTION

Federalism is known as the 'great theme' of the *Australian Constitution*.[1] The framers of the *Constitution* intended Australia to be a true federation. Indeed, federalism was of 'utmost concern to the framers, evidenced by both the constitutional conventions of the 1890s and the text and structure of the *Constitution* they drafted.' [2] Included in this was that the Commonwealth and the States were to operate in their own spheres without interference of one another, maintaining a federal balance.[3] The structure of the *Constitution* itself provides for a federal balance by providing 'checks and balances on the exercise of power' [4] and specifically providing for the States in Chapter V. Accordingly, the High

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1 Greg Craven, 'The High Court of Australia: A Study in the Abuse of Power' (1999) 22(1) *University of New South Wales Law Journal* 216, 221.

2 Michelle Evans, *The Use of the Principle of Subsidiarity in the Reformation of Australia's Federal System of Government* (PhD Thesis, Curtin University, 2012) 26-7.

3 Michelle Evans, 'Rethinking the Federal Balance: How Federal Theory Supports States' Rights' [2010] *The Western Australian Jurist* 14, 14, 16.

4 *Wilson v Minister for Aboriginal Affairs* (1996) 189 CLR 1, 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

Court, created in Chapter III, 'was to be the custodian of this co-ordinately federal vision'.[5]

In early cases heard before the High Court, Commonwealth legislative power was interpreted extremely cautiously, so as 'to avoid any corresponding reduction in the powers of the States which would be inconsistent with the Constitution's broader federal vision'.[6] This was achieved by the Court employing an interpretative approach called 'originalism', which interprets the *Constitution* in accordance with its original meaning.[7]

Over time the new judges added to the bench brought with them not only differing opinions, but also other interpretive approaches. One approach that was consistently used was 'literalism'. Literalism interprets the constitutional text according to its plain and natural meaning. As a result of this, the Commonwealth was allowed to expand its legislative power at the expense of that of the States, contrary to what was originally intended by the framers. Federalism then diminished and centralism took its place. This culminated in the landmark decision of *Engineers*[8] which has laid interpretational groundwork that the High Court has followed for nearly 100 years.

As Professor Craven argues, the High Court drove the Australian Constitution away from the federal nature that the framers intended,

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5 Craven, above n 1; see *Constitution* s 76(i) '*The Parliament may make laws conferring original jurisdiction on the High Court in any matter arising under this Constitution, or involving its interpretation.*'

6 Greg Craven, 'The Crisis of Constitutional Literalism in Australia' (1992) 30(2) *Alberta Law Review* 492, 496.

7 Jennifer Clarke, Patrick Keyzer and James Stellios, *Hanks Australian Constitutional Law: Materials and Commentary* (LexisNexis Butterworths, 9th ed, 2013) 120 [1.8.13].

8 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129. ('*Engineers*').

which '[steered] the Commonwealth's legislative to [invade that] of the realms of the States'.[9] This article discusses the Court's failure to protect the federal balance of power since *Engineers*, thus allowing a more centralised Commonwealth. Whilst I acknowledge that many constitutional powers may be examined to illustrate this effect, the discussion focuses on the corporations power which is found in section 51(xx) of the Australian Constitution.

II THE ORIGIN OF FEDERATION: FEDERALISM AND ORIGINALISM

The Commonwealth of Australia was created to be truly federal. There was to be a central government to be called Commonwealth and the Colonial governments were to continue as State governments. The framers were against the Commonwealth having more power than the States. Great effort and careful drafting of the *Constitution* was the result of this intention, ensuring that the States retained the bulk of legislative power. Thomas Playford, as quoted in the Convention debate of 1891, stated the necessity to 'lay down all such powers as are necessary for the proper conduct of the federal government, and not interfere with the slightest degree with any other power of the local legislatures'.[10] The first High Court, consisting of Griffith CJ and Barton and O'Connor JJ, interpreted the *Constitution* how it was originally designed: to 'maintain states' rights and [reserve] state autonomy over local issues wherever possible',[11] as provided for in Chapter V.[12]

As stated in the introduction to this article, the approach used during the first years of the Court's existence was originalist. This approach drew

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9 Craven, above n 1.

10 *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 13 March 1891, 328 (Thomas Playford).

11 Evans, above n 2, 14.

12 See *Constitution* ss. 106-8.

'from the nature (rather than the text) of the *Constitution* as an embodiment of a co-ordinate and strongly *decentralised federalism*'.[13]

To aid this interpretative approach, two doctrines were adopted. The first was the doctrine of implied intergovernmental immunities. It was first mentioned in the case of *D'Emden v Pedder*[14] and it prevented the laws enacted by the State parliaments from interfering with the instrumentalities of the Commonwealth.[15] This doctrine then evolved in the *Railway Servants Case*[16] in order to prevent Commonwealth laws from interfering with State instrumentalities.[17]

The second approach adopted by the early Court was known as the States' reserved powers doctrine. This doctrine provided that the States reserved as much power as possible to themselves, in accordance with section 107, in that 'grants of law making power to the Commonwealth must be narrowly construed so as not to encroach on these traditional powers of the States'.[18] The judgment of Griffith CJ in *Peterswald v Bartley*[19] illustrates the narrow approach taken when interpreting the *Constitution* with regard to the legislative power of the Commonwealth, which, among other cases[20], aimed to preserve State legislative power.

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13 Craven, above n 6, 494 – emphasis added.

14 *D'Emden v Pedder* (1904) 1 CLR 91.

15 Ibid 109 (Griffith CJ).

16 *Federated Amalgamated Government Railway and Tramway Association v New South Wales Railway Traffic Employees Association* (1906) 4 CLR 488.

17 Ibid 637 (Griffith CJ).

18 Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 4th ed, 2006) 303.

19 *Peterswald v Bartley* (1904) 1 CLR 497.

20 See, eg, *D'Emden v Pedder* (1904) 1 CLR 91.

III FROM ORIGINALISM TO LITERALISM

A *The Changing Judiciary*

As judicial composition began to change,[21] so too did the judgments produced by the Court. In particular were the unanimous verdicts concerning the interpretation of the *Constitution* with regard to legislative power. The addition of Higgins and Isaacs JJ developed a 3:2 split. This broke the unanimity of the Court regarding both the doctrines of implied intergovernmental immunities and reserved powers.[22] Between 1906 (the addition of Higgins and Isaacs JJ to the bench) and 1918, dissent grew and a more centralist approach began to take form.

Justice Isaacs's initial acceptance of the doctrine of implied intergovernmental immunities in *Federated Engine Drivers'*[23] was held on narrow interpretation.[24] This initial interpretative approach grew into dissent in both *Baxter*[25] and also in *Attorney-General (Qld) v Attorney-General (Cth)*[26], where Isaacs J stated that a Commonwealth power should be '*given its full natural meaning*'.[27] Justice Higgins, however, was 'outspoken in his criticism of the implied immunities doctrine,'[28] joining Isaacs J in his dissent in *Baxter*.[29] Further, Higgins J rejected the Court's view in *Deakin v Webb*[30] in favour of the view of the Privy

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21 See: *Judiciary Amendment Act 1906* (Cth) – increasing the number of High Court Justices from three to five.

22 Clarke, Keyzer and Stellios, above n 7, 498 [5.2.20].

23 *Federated Engine Drivers' and Firemen's Association of Australia v Broken Hill Proprietary Co Ltd* (1911) 12 CLR 398.

24 Ibid 451-3 (Isaacs J).

25 *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087, 1160-1 (Isaacs J).

26 *Attorney-General (Qld) v Attorney-General (Cth)* (1915) 20 CLR 148.

27 Ibid 171-2 (Isaacs J).

28 Clarke, Keyzer and Stellios, above n 7, 499 [5.2.23].

29 *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087.

30 *Deakin v Webb* (1904) 1 CLR 585 (Griffiths CJ, Barton and O'Connor JJ).

Council in *Webb v Outrim*[31] 'that there was no constitutional immunity for Commonwealth payments.'[32] Both Justices 'were less equivocal of their condemnation of the implied prohibitions [reserved powers] doctrine'.[33] Regardless, they were still critical of the doctrine.[34]

The balance of opinions continued to shift when the founding Justices retired and new Justices were appointed.[35] In the 1919 case of *Federated Municipal Employees*,[36] the centralist approach was taking hold as the majority favoured the Commonwealth when interpreting the scope of legislative power.[37] The interpretative method of the Court had now shifted. Dramatic change was on the horizon.

B *The Beginning and Rise of Literalism: Engineers*

Engineers changed the method in which the High Court interpreted the *Constitution*, resulting in a dramatic expansion of Commonwealth power. *Engineers* 'rejected both doctrines of reserved powers and implied intergovernmental immunities in favour of an expansive, rather than a restrictive, characterisation of federal powers.'[38] The majority[39] overruled all precedent, holding it to be their '*manifest duty*' to give '*earnest attention*' to the interpretation of the *Constitution* in order '*to give true effect to the relevant provisions*'.[40] In a separate judgment, but in agreement with the majority, Higgins J described the new approach: to

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31 *Webb v Outrim* [1907] 1 AC 81.

32 Clarke, Keyzer and Stellios, above n 7, [5.2.24].

33 Ibid.

34 See, eg, *R v Barger* (1908) 6 CLR 41, 84-5 (Isaacs J), 113 (Higgins J).

35 Clarke, Keyzer and Stellios, above n 7, 499 [5.2.25].

36 *Federated Municipal and Shire Council Employees Union of Australia v The Lord Mayor, Alderman, Councillors and Citizens of Melbourne and Others* (1918-1919) 25 CLR 508.

37 See: Ibid 533-4 (Isaacs and Rich JJ).

38 Evans, above n 3, 16-7.

39 *Engineers* majority: Knox CJ, Isaacs, Rich, and Starke JJ.

40 *Engineers*, 142 (Knox CJ, Isaacs, Rich and Starke JJ).

give the words their ordinary and natural meaning, that is, their broadest possible meaning; not limited by implications, only limited by the express words of the *Constitution*.[41]

The majority held that the *Constitution* was to be read as it was, that is, an act of British Parliament so that interpretative methods applied by the courts in England according to the principle of parliamentary sovereignty should prevail. Accordingly, the legislative power of the Commonwealth was interpreted to be as '"*plenary*" and "*ample*" … as the *Imperial Parliament in the plenitude of its power possessed and could bestow*.'[42] This consigned 'the old doctrines to oblivion'.[43] In doing so, it 'provided the High Court with an interpretative creed to the effect that the powers of the Commonwealth are to be interpreted with all the broadness that their words allow and without reference to some notional residue of State power or federal balance'.[44]

IV THE FAILURE TO PROTECT THE FEDERAL BALANCE

The result of *Engineers* was a '[new] literalist banner […] unfurled by the Court, on most occasions at which an important federal division of powers case is decided in favour of the Commonwealth'.[45] Many commentators have criticised the approach, believing that the Court failed in its 'fundamental and positive role to protect federalism'.[46] For example, Professor Craven argues that the High Court is not a '*protector*

41 Ibid 162 (Higgins J).

42 *Hodge v The Queen* (1883) 9 App Cas 117, 132 (Lord Fitzgerald) cited in *Engineers*, 163 (Knox CJ, Isaacs, Rich and Starke JJ).

43 Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17 *Federal Law Review* 162.

44 Greg Craven, 'Industrial Relations, the Constitution and Federalism: Facing the Avalanche' (2006) 29(1) *University of New South Wales Law Journal* 203, 204.

45 Craven, above n 6, 495.

46 Craven, above n 1.

of federalism', but has pursued a 'centralist agenda'.[47] Professor Walker concurs with Professor Craven, and adds that the approach allows the 'widest (that is, most centralist) meaning that the words can possibly bear'.[48] Finally, Professor Ratnapala has discussed how the approach allows the Commonwealth Parliament to extend its powers 'to matters over which it has no express constitutional authority'.[49]

A *The Expansion: An Ever-Broadening Corporations Power*

As discussed above, Commonwealth legislative power expanded significantly in the aftermath of *Engineers*, allowing interference of the Commonwealth in matters originally contained within the States.[50]

This section of the article discusses the expansion of the Commonwealth legislative power, illustrating the effect of *Engineers* through the jurisprudence and academic commentary on the corporations power. The corporations power, at section 51(xx) of the *Constitution*, provides the Commonwealth with legislative power with respect to foreign, trading and financial corporations formed within the limits of the Commonwealth.[51]

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47 Ibid 222.

48 Geoffrey de Q Walker, 'The Seven Pillars of Centralism: Engineers' Case and Federalism' (2002) 76 *The Australian Law Journal* 678, 688.

49 Suri Ratnapala, 'Government Under the Law: The Ebb and Flow of Sovereignty in Australia' (2001) 24(3) *University of New South Wales Law Journal* 670, 674.

50 See, eg, *Victoria v Commonwealth* (1971) 122 CLR 353 ('*Payroll Tax Case*); *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dams*'); *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 193 ('*Queensland Electricity Commission*').

51 *Constitution* s 51(xx): 'The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.'

The following discussion includes the approaches taken when interpreting the corporations power both before and after *Engineers*.

1 *The Early High Court: A Restricted Approach*

The originalist approach adopted by the early High Court saw that the corporations power was read restrictively, with a view to protect the States. First seen in the case of *Huddart, Parker & Co.*[52] the reserved powers doctrine was applied. In doing so, the Court held that the narrowest interpretation of Commonwealth power was to apply,[53] by confining that description to corporations whose essential character was defined by trade.[54]

In *Huddart, Parker & Co.*, the Comptroller-General of Customs in Victoria believed that Huddart, Parker & Co. had contravened rules in sections 5(1)(a) and 8(1) of Part II of the *Australian Industries Preservation Act 1906* (Cth).[55] The plaintiffs contested the validity of the legislation but the Commonwealth argued that these sections were valid and on a broad interpretation of the corporations power and that this should be held.

The High Court considered the depth of the corporations power; whether it could be used to regulate intrastate corporations legislation through the *Australian Industries Preservation Act 1906* (Cth). The majority[56] interpreted the corporations power narrowly, restricting the legislative power of the Commonwealth, holding that '*The Constitution contains no*

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52 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330. ('*Huddart, Parker & Co*').

53 Nicholas Aroney, 'Constitutional Choices in the *Work Choices Case*, or What Exactly is Wrong with the Reserved Powers Doctrine?' (2008) 32 *Melbourne University Law Review* 1, 16.

54 Craven, above n 44.

55 *Huddart, Parker & Co*, 332

56 Griffith CJ, Barton, O'Connor and Higgins JJ.

provision for enabling the Commonwealth Parliament to interfere with the private or internal affairs of the States…'[57] Although Griffith CJ acknowledged both broad and narrow constructions,[58] His Honour's reasoning took the view that the narrower construction be adopted, as the power '*ought not to be construed as authorising the Commonwealth to invade the field of State law as to domestic trade*'.[59]

True to originalist intent as a founder himself, Griffith CJ believed the *Constitution* should be interpreted as a whole, emphasizing sovereignty of the States against Commonwealth interference as a relevant consideration when determining the parameters of Commonwealth legislative power.[60]

2 *Post Engineers: The Expansion of the Corporations Power*

As established in the above discussion, the literal approach adopted in *Engineers* expanded Commonwealth legislative power. The following discussion analyses the key cases that expanded the corporations power.

The case of *Strickland v Rocla Concrete Pipes Ltd*[61] was the first case in modern law relating to the scope of the corporations power.[62] The Court held that the then *Trade Practices Act*[63] was valid in defining Rocla Concrete Pipes as a constitutional corporation for the purpose of submitting an examinable contract.[64] In applying *Engineers*, with the

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57 *Huddart, Parker & Co*, 353 (Griffith CJ).
58 Ibid 354 (Griffith CJ).
59 Ibid 352 (Griffith CJ).
60 Evans, above n 2, 196-7.
61 *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 486.
62 Gabriel A Moens and John Trone, *Lumb Moens & Trone: The Constitution of the Commonwealth of Australia Annotated* (LexisNexis Butterworths, 8th ed, 2012) [289].
63 *Trade Practices Act 1965-1969* (Cth).
64 Evans, above n 2, 232.

intergovernmental immunities and reserved powers doctrines rejected, the way was laid for an expansive reading on exploitation of the Commonwealth's powers.

This exploitation is illustrated further below, discussing key cases.

(a) Tasmanian Dams

Tasmania established a statutory corporation, the Hydro-Electric Commission, to build a dam on the Franklin River to generate saleable electricity. In an effort to stop construction, the Commonwealth enacted the *World Heritage Properties Conservation Act 1983* (Cth), which prohibited '*foreign and trading corporations*' from damaging World-Heritage listed land if their activities were undertaken for trading purposes. Tasmania challenged the legislation on the grounds that, inter alia, the *Constitution* did not authorise federal intervention,[65] and that the Commonwealth was unduly interfering with a State government body.

The majority[66] held that the Hydro-Electric Commission was a trading corporation, and thus was within legislative scope.[67] Gibbs CJ, though not in the majority, agreed that 'the scope of the corporations power extended to allowing the federal parliament to regulate the pre-trading activities of the corporation'.[68] *Tasmanian Dams* gave the Court the opportunity to comment on the scope of the corporations power. Of particular note are the separate comments by Deane and Murphy JJ. Deane J stated that'*[it is*

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65 James Allan and Nicholas Aroney, 'An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism' (2008) 30(2) *Sydney Law Review* 245, 257.

66 *Commonwealth v Tasmania* (1983) 158 CLR 1. ('*Tasmanian Dams*'). Majority: Murphy, Brennan, Deane and Mason JJ.

67 Evans, above n 2, 236.

68 *Tasmanian Dams*, 148 (Gibbs CJ).

a] well established principle that constitutional grants of legislative power should be construed expansively rather than pedantically'.[69]

Additionally, in the words of Murphy J:

> …the power under s 51(xx) extends to any command affecting the behaviour of the corporation and is not restricted to commands about the trading activities of trading corporations or about the financial activities of financial corporations.[70]

Effectively, the view of the High Court was that the corporations power could regulate *any* activity of a corporation.

(b) The Effect of Re Dingjan

The view of the majority in *Tasmanian Dams* was considered in *Re Dingjan; Ex parte Wagner*[71] where the issue before the Court was the validity of the 1992 amendment of the *Industrial Relations Act 1988* (Cth), which gave the Industrial Relations Commission the power to examine unfair contracts imposed on independent contractors. The Court had to consider whether the Commonwealth could legislate with respect to contracts that relate to the business of a corporation. The issue in *Re Dingjan* was that the party to the contract was not a corporation. By a narrow majority (4:3), consisting of Toohey, McHugh, Dawson and Brennan JJ, a narrower approach was adopted. The opinion of the Court was that it was necessary to have '*relevance to or connection with*' the legislation and the corporation.[72]

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69 Ibid 269 (Deane J) – emphasis added.
70 Ibid 179 (Murphy J).
71 *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323.
72 Ibid 368 (McHugh J).

(c) The Nail in the Coffin: WorkChoices

WorkChoices[73] was the confirmation that the literalist approach was and is the approach to be taken when interpreting Commonwealth powers. As a result, the corporations power has been construed more broadly than ever before.[74]

WorkChoices was the transformation of Australian workplace relations law by the Commonwealth.[75] This was done by amending the *Workplace Relations Act*[76] with the *Work Choices Act*.[77]The amendment expanded the legislation's reach under the corporations power[78] by defining an employer in section 6(1) as 'a constitutional corporation, so far as it employs, or usually employs, an individual.'[79] Section 4 of the *Work Choices Act* was written to define a 'constitutional corporation' as a corporation to which section 51(xx) of the *Constitution* applies.[80] The objective of the amendment was to 'introduce a national workplace relations system which applies to the majority of employees throughout Australia'.[81]

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73 *New South Wales v Commonwealth* (2006) 229 CLR 1 ('*WorkChoices*').
74 Evans, above n 2, 229.
75 Aroney, above n 53, 6.
76 *Workplace Relations Act 1996* (Cth).
77 *Work Choices Act 2005* (Cth).
78 Evans, above n 2, 329.
79 Aroney, above n 53, 6.
80 Ibid.
81 Ibid 7.

Five States and many trade unions[82] challenged the constitutional validity of the *Work Choices Act*, their main ground being that the corporations power did not support an entire industrial relations regime of this kind.[83]

The majority held that the corporations power extends 'to any law which alters the rights, powers or duties of a constitutional corporation, as well as to laws which have a less direct but nonetheless sufficiently substantial connection to constitutional corporations'.[84] The approach taken by the Court was that of the dissent of Gaudron J in *Re Pacific Coal*,[85] holding:

> I have no doubt that the power conferred by section 51(xx) of the Constitution extends to the regulation of the activities, functions, relationships and the business of a corporation […] the creation of rights, and privileges belonging to such a corporation, the imposition of obligations on it and, in respect of those matters, to the regulation of the conduct of those through whom it acts, its employees and shareholders and, also, the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or businesses.[86]

It was this and previous decisions which the majority relied upon to expand the scope of the corporations power.[87] According to Professor Aroney 'the majority's reasoning encapsulates the succession of fundamental constitutional choices which the High Court has made in the

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82 *WorkChoices* Plaintiffs: New South Wales; Western Australia; South Australia; Queensland; Australian Workers' Union and others; Unions New South Wales and others; Victoria.

83 Aroney, above n 53, 7. See also *WorkChoices*, 4 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

84 Aroney, above n 53, 9.

85 *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346.

86 Ibid 375 (Gaudron J).

87 Aroney, above n 53, 9.

cases decided since the *Engineers Case*'.[88] The majority affirmed that the 'starting point' in interpretation must be on the 'constitutional text',[89] giving 'the particular words of section 51(xx) their widest possible meaning'.[90] Following this, it is clear why Professor Craven contends that '[n]ot since the 1920s [sic] has the Court struck such a devastating blow against Australian federalism.'[91]

V CONCLUSION

This article explained why it is generally said that the High Court has failed to protected the federal balance of power effected under the Constitution.[92] Although the intentions of the framers for an authentic federalism was protected by the founding Justices of the High Court, subsequent appointments to the bench saw dissent in cases that argued over the federal balance of power, with judgments focusing on expanding, rather than limiting, Commonwealth legislative power.

Indeed, as the founding Justices were replaced, the dissents of the minority became the majority view. Culminating in *Engineers*, this landmark decision rejected 20 years of precedent and began an interpretative approach of the *Constitution* in a way polar opposite to the framers' original intent.

Over time, the High Court has kept the *Engineers* approach. New cases expanded Commonwealth legislative power, invading further and further into the legislative sphere of the States. In this context, the affirmation of

88 Ibid 26.
89 Ibid.
90 Greg Craven, 'How the High Court Failed Us', *Australian Financial Review* (Melbourne) 24 November 2006, 82. Cited in Nicholas Aroney, 'Constitutional Choices in the *Work Choices Case*, or What Exactly is Wrong with the Reserved Powers Doctrine?' (2008) 32 *Melbourne University Law Review* 1, 3.
91 Craven, above n 1.
92 Ibid.

the approach in *WorkChoices* epitomises the High Court's failure to protect the federal balance, promoting the centralist regime by affording near limitless legislative power to the Commonwealth, so long as the legislation in question can, in a minute way, be affixed to a head of power under section 51.