THE FEDERAL BALANCE: THE AUSTRALIAN CONSTITUTION AND ITS IMPLIED POWER, IMPLIED PROHIBITION AND INCIDENTAL POWERS

BY D. S. K. ONG*

[The Constitution of Australia is on its face part of a British Statute, subject to familiar rules of statutory interpretation. By its very nature, however, it has required different treatment by the courts. One feature which has led to perhaps the most litigation is the balance between the powers of the Commonwealth and those of the States. The author looks at four sources of judicial flexibility in this area. Only one, the express incidental power, is embodied in the Constitution; the other three have been implied by the High Court. The 'implied power' arises from the creation of the Commonwealth itself, and its need for preservation against, for example, seditious libel. The implied incidental power is put in context both with the express incidental power and with the other powers implied by the High Court. These powers are to some extent balanced by the implied prohibition which suggests that the Commonwealth cannot act in a way which would destroy the federal balance of the Constitution.]

The purpose of this paper is to assess the balance between the authority of the Commonwealth, on the one hand, and, on the other hand, the authority of the States, in the Australian Federation.

The assessment of this federal balance will be attempted through an examination of the implied power, implied prohibition, implied incidental power, and express incidental power embodied in the Australian Constitution.

1. *The Implied Power*

Does the establishment of the Commonwealth of Australia confer implied powers on the entity thus federated, namely, the federated entity, as distinct from the federating entities? Expressed in another way, are the powers of the Commonwealth (the federated entity) limited to those which have been conferred on it by the express words of the Constitution of the Commonwealth of Australia (the Australian Constitution)?

If a federated entity does possess powers by dint of its mere establishment, then how extensive are such powers? Are such powers limited to the imperative of preserving the federated entity or do such powers extend to the promotion of its welfare beyond that of mere preservation? Again, if the powers of the federated entity (the federated entity powers) do extend beyond the compass of its mere preservation, then what are the restraints on such powers in the light of the circumscriptive circumstance that these powers, if they exist, are powers of a federated entity and not the powers of a unitary polity?

* Senior Lecturer in Law, Macquarie University.

In *R. v. Kidman and Others*[1] (hereinafter *Kidman*), Isaacs J. explained that there existed a common law of the Commonwealth independently of the common law of its constituent States. Isaacs J. declared:

> It has been urged, however, that an offence at common law is not a Commonwealth offence — that is, it is not an offence against the King in right of his Commonwealth, but against the King in right of his State in the place where the offence was committed. It is inconceivable that the Commonwealth — which, within its own sphere of power, is supreme — can be left dependent for the effective exercise of its functions upon the permissive action of any State or all of them. The Commonwealth carries with it — except where expressly prohibited — all necessary powers to protect itself and punish those who endeavour to obstruct it. The common law of England was brought to Australia by the first settlers, and remains, as the heritage of all who dwell upon the soil of this continent, in full force and operation, except so far as it has in any portion of the land been modified by a competent Legislature. For State purposes and jurisdiction State laws may provide differently. But they cannot restrict the operation of the Constitution, and whatever it implies is the law of Australia, as much as if it were expressly so written. The necessary implication of unrestrictable right to perform its functions as a sovereign power — because in law it is the King who acts — carries with it the corollary that obstruction to the King in the exercise of his Commonwealth powers is, at common law, an offence with reference to the Constitution, and not with reference to any State law or the State Constitution. It is entirely outside the domain of the States . . . So here, there is a peace of the Commonwealth, not because there is a special common law of the Commonwealth, but because the common law of Australia recognizes the peace of the King in relation to his Commonwealth, by virtue of the Constitution, just as it recognizes the peace of the King in relation to each separate State.[2]

Isaacs J. proceeded to emphasize his opinion, thus:

> If, then, by the common law, as applied to the new fact or combination, in this case the sovereignty created by the Constitution Act, which the King exercises by new representatives in right of the new Commonwealth, it appears that any person in Australia has obstructed or taken any step towards obstructing His Majesty, the Commonwealth, as representing the King in that sovereignty, has a justiciable matter of complaint — a matter capable of judicial solution, according to a settled legal standard.[3]

Thus, Isaacs J. in *Kidman* explicitly implied into the Australian Constitution the concept of a Commonwealth common law, a common law that is *not* 'special'[4] in its incidents, but a common law that attached itself to the federated entity of the Commonwealth in the same way that it had already formed part of the legal systems of the federating entities (the States). Equally importantly, Isaacs J. also asserted that one incident of this system (the common law) was the inherent power of any polity of whose legal framework it formed a part 'to protect itself'[5].

It is thus apparent that in *Kidman* Isaacs J. introduced an *implication* into the Australian Constitution, and asserted that this implication enabled the Commonwealth to take measures to protect itself — measures capable of being restricted only by *express prohibitions*[6] in the Constitution. The power to preserve the 'peace of the Commonwealth'[7] was given *by implication* 'by virtue of the Constitution'[8]. The common law thus conferred on both the Commonwealth and the States the power of preserving their respective polities.

[1] (1915) 20 C.L.R. 425.
[2] *Ibid.* 444-5.
[3] *Ibid.* 446.
[4] *Supra* n. 2.
[5] *Ibid.*
[6] *Ibid.* The doctrine of *implied* prohibition had not, then, been propounded.
[7] *Ibid.*
[8] *Ibid.*

This *implied* power was also propounded by Griffith C.J. in *Kidman*, who observed:

> I entertain no doubt that it was an offence at common law to conspire to defraud the King as head of the Realm, that on the settlement of Australia that part of the common law became part of the law of Australia, that on the establishment of the several Colonies it became an offence to conspire to defraud the King as head of the Colony, and that on the establishment of the Commonwealth the same law made it an offence to conspire to defraud the Sovereign as head of the Commonwealth. Such a law, or to put it in other words, such a right to protection, seems, indeed, to be an essential attribute to the notion of sovereignty.[9]

It should be stressed that neither Griffith C.J. nor Isaacs J. were basing this constitutional implication on Section 61 of the Constitution. Section 61 confers the *executive* power of the Commonwealth on the Queen, but this executive power does not enable the Commonwealth Executive to create an offence at common law, and it was to an offence at common law that both Griffith C.J. and Isaacs J. adverted in *Kidman* in the passages extracted above.

In *Burns v. Ransley*[10], Dixon J. said:

> Our institutions may be changed by laws adopted peaceably by the appropriate legislative authority. It follows *almost necessarily from their existence* that to preserve them from violent subversion is a matter within *the*[11] legislative power. But the power must extend *much beyond* inchoate or preparatory acts directed to the resistance of the authority of government or forcible political change. I am unable to see why it should not include the suppression of actual incitements to an antagonism to constitutional government, although the antagonism is not, and may never be, manifested by any overt acts of resistance or by any resort to violence.[12]

Thus the implied constitutional power to preserve the federated entity of the Commonwealth was once more judicially affirmed.

Dixon J. reiterated his affirmation of the existence of the implied power to preserve the Constitution in *R. v. Sharkey*[13] (hereinafter *Sharkey*). His Honour said:

> I do not doubt that *the legislative power* of the Commonwealth extends to making punishable any utterance or publication which arouses resistance to the law or excites insurrection against the Commonwealth Government or is reasonably likely to cause discontent with and opposition to the enforcement of Federal law or to the operations of Federal government. *The power is not expressly given but it arises out of the very nature and existence of the Commonwealth as a political institution*, because the likelihood or tendency of resistance or opposition to the execution of the functions of govenment is a matter that is incidental to the exercise of all its powers. But *the legislative power* is in my opinion *still wider*. The *common law* of seditious libel recognizes that the law cannot suffer publications the purpose of which is to arouse disaffection against the Crown, the Government or the established institutions of the country, although they stop short of counselling or inciting actual opposition, whether active or passive, to the exercise of the functions of government.[14]

In the passage above, Dixon J. adverted to 'the legislative power'[15] and specified that this power was 'not expressly given'[16] in the Constitution, but was

[9] (1915) 20 C.L.R. 425, 436.
[10] (1949) 79 C.L.R. 101.
[11] Since Dixon J. did *not* refer to any *express* power in the Constitution, his Honour's use of the definite article could only have been intended by him to designate the *implied* power in the Constitution for the preservation of the organs of government.
[12] (1949) 79 C.L.R. 101, 116. Emphasis added.
[13] (1949) 79 C.L.R. 121.
[14] *Ibid.* 148. Emphasis added.
[15] *Ibid.*
[16] *Ibid.*

implied from 'the very nature and existence of the Commonwealth'[17] as recognized by the 'common law'[18]. It is evident that Dixon J. in *Burns v. Ransley*[19] and *Sharkey* expressed a view of the implied Commonwealth power which was in complete conformity with the view of such a power elucidated earlier by Griffith C.J. and Isaacs J. in *Kidman*. In *Kidman* the relevant incident of this implied power was legislation to *declare* the common law against conspiracies to defraud the Crown in right of the Commonwealth, and in *Burns v. Ransley*[20] and *Sharkey* the relevant incident of this implied power was legislation to *declare* the common law's prohibition of sedition against the Crown in right of the Commonwealth.

However, it is of critical importance to note that the implied power of the Commonwealth to protect its organs of government is fundamentally different from an implied power of the Commonwealth to legislate against activities which the Crown in right of the Commonwealth merely thinks, but does not have to establish objectively, to be prejudicial to the Commonwealth's organs of government: *The Australian Communist Party and Others v. The Commonwealth and Others*[21] (hereinafter *Australian Communist Party*). *Australian Communist Party* established that there was no power (express or implied) in the Australian Constitution to legislate with respect to organizations or activities which the Crown in right of the Commonwealth merely *subjectively* considered to be prejudicial to the federated entity of the Commonwealth, as distinct from a power to legislate with respect to organizations and activities which are *objectively* prejudicial to this federated entity. Nothing in *Australian Communist Party*, therefore, impairs the existence of the implied power of the Commonwealth to protect itself as a federated entity. Indeed, in *Australian Communist Party*, Dixon J. confirmed his belief in the existence of such an implied power in the Constitution, saying:

> As appears from *Burns v. Ransley* and *R. v. Sharkey*, I take the view that the power to legislate against subversive conduct has a source in principle that is deeper or wider than a series of combinations of the words of s 51 (xxxix) with those of other constitutional powers.[22]

Fullagar J. was no less definite about the existence of this implied power in the Constitution, observing:

> But it cannot, in my opinion, be doubted that there exists also a legislative power in the Parliament, which it is not easy to define in precise terms, to make laws for the protection of itself and the Constitution against domestic attack.[23]

The existence of the implied power of the Commonwealth to protect itself was also recognized by Kitto J.[24]

However, the possibility that this implied power may extend beyond the mere preservation of the Commonwealth was entertained in *The State of Victoria and*

[17] *Ibid.*
[18] *Ibid.*
[19] *Supra* n. 10.
[20] *Ibid.*
[21] (1951) 83 C.L.R. 1.
[22] *Ibid.* 188.
[23] *Ibid.* 259.
[24] *Ibid.* 275.

Another v. The Commonwealth of Australia and Hayden[25] (hereinafter *A.A.P.*). In *A.A.P.* Barwick C.J. said:[26]

> No doubt some powers, legislative and executive, may come from the very formation of the Commonwealth as a polity and its emergence as an international state. Thus it may be granted that in considering what are Commonwealth purposes, attention will not be confined to ss 51[26] and 52.[27] The extent of powers which are inherent in the fact of nationhood and of international personality has not been fully explored. Some of them may readily be recognized: and in furtherance of such powers money may properly be spent. One such power, for example, is the power to explore, whether it be of foreign lands or seas or in areas of scientific knowledge or technology . . . But, to anticipate a submission with which I must later deal, to say that a matter or situation is of national interest or concern does not, in my opinion, attract any power to the Commonwealth. Indeed, any student of the Constitution must be acutely aware of the many topics which are now of considerable concern to Australia as a whole which have not been assigned to the Commonwealth. Perhaps the most notable instance is in relation to the national economy itself. There is but one economy of the country, not six: it could not be denied that the economy of the nation is of national concern. But no specific power over the economy is given to the Commonwealth. Such control as it exercises on that behalf must be effected by indirection through taxation, including customs and excise, banking, including the activities of the Reserve Bank and the budget, whether it be in surplus or in deficit. The national nature of the subject matter, the national economy, cannot bring it as a subject matter within Commonwealth power.[28]

Barwick C.J. added:

> But, as I have already pointed out, to describe a problem as national, does not attract power. Though some power of a special and limited kind may be attracted to the Commonwealth by the very setting up and existence of the Commonwealth as a polity, no power to deal with matters because they may conveniently and best be dealt with on a national basis is similarly derived. However desirable the exercise by the Commonwealth of power in affairs truly national in nature, the federal distribution of power for which the Constitution provides must be maintained.[29]

These statements of Barwick C.J. in *A.A.P.* expose inconsistencies in the concept of the implied Commonwealth power.[30] Barwick C.J. emphasized[31] that this implied power, although created by virtue of 'the very formation of the Commonwealth as a polity'[32] and was 'inherent in the fact of nationhood'[33], was of a 'special and limited kind'[34] and did *not* 'attract any power to the Commonwealth'[35] which had 'not been assigned to the Commonwealth'[36] by the Australian Constitution because 'the federal distribution of power for which the Constitution provides must be maintained'[37]. Barwick C.J. appeared to assert that this implied Commonwealth power would infringe the federal distribution of power established by the Constitution if such an implied power were employed to extend the powers expressly assigned to the Commonwealth by the Constitution. But, with respect, such a restricted view of the implied power would make the power redundant. There would be absolutely no use for an implied power which

[25] (1975) 134 C.L.R. 338.
[26] Section 51 of the Australian Constitution.
[27] Section 52 of the Australian Constitution.
[28] (1975) 134 C.L.R. 338, 362.
[29] *Ibid.* 364.
[30] Gibbs J. opined to similar effect: (1975) 134 C.L.R. 338, 378. Mason J. was of a similar view: (1975) 134 C.L.R. 338, 398.
[31] *Supra* nn. 28-9.
[32] *Supra* n. 28.
[33] *Ibid.*
[34] *Supra* n. 29.
[35] *Supra* n. 28.
[36] *Ibid.*
[37] *Supra* n. 29.

added nothing to the powers expressly assigned to the Commonwealth by the Constitution. In order for the implied power to be a power at all, such a power must *add* to the express heads of Commonwealth power, and *not* be restricted to those express heads. It is a self-contradiction to assert that the Commonwealth possesses express as well as implied powers but that the implied power cannot be exercised over a subject matter which has not been expressly assigned to the Commonwealth. To assert, as Barwick C.J. does, that to add implied subject matters to the express heads of Commonwealth power is to infringe 'the federal distribution of power'[38] is, with respect, to attempt to resurrect the doctrine of reserved State powers denounced by the High Court in the *Amalgamated Society of Engineers v. The Adelaide Steamship Company Ltd and Others*[39] (hereinafter *Engineers*). It is impossible to use the federal distribution of power to restrict (indeed, to remove) the implied Commonwealth power because no particular legislative powers have been assigned to the States to effectuate such a restriction. By virtue of Section 107 of the Constitution the States possess the exclusive residue of legislative authority after the ascertainment of the exclusive and concurrent (with the States) legislative powers of the Commonwealth. It is therefore illogical to say, as does Barwick C.J. in *A.A.P.*, that the legislative powers of the States operate to confine the ambit of the Commonwealth's implied (nationhood) power.

Since the implied power, if it exists, cannot be otiosely confined to the express heads of Commonwealth legislative power, and since the legislative powers of the States, being concurrent and residual, cannot be used to limit the scope of a Commonwealth legislative power, what is the nature of the restraint on the implied (nationhood) power? It is submitted that as the *express* prohibitions in the Constitution are few, the only substantial restraint on the implied power of the Commonwealth is the doctrine of implied prohibition.[40] The doctrine of implied prohibition will be examined in the next section of this paper.

But, apart from the curtailing effect of the doctrine of implied prohibition, what is the scope of the implied Commonwealth power? The authorities from *Kidman* to *Australian Communist Party* seem to restrict it to the taking of such measures as are essential to the preservation of the federated entity of the Commonwealth. But is the implied power so inflexibly confined? Mason J. in *A.A.P.* suggests that the implied power may well *exceed* the need of the Commonwealth to protect itself, saying:

> The Commonwealth enjoys, apart from its specific and enumerated powers, *certain implied powers* which *stem from its existence and its character as a polity* . . . So far it has not been suggested that the implied powers extend beyond the area of internal security and protection of the State against disaffection and subversion. But in my opinion there is to be deduced from the existence and character of the Commonwealth *as a national government* and from the presence of ss 51 (xxxix) and 61 a capacity 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.[41]

[38] *Ibid.*
[39] (1920) 28 C.L.R. 129.
[40] See *Melbourne Corporation v. The Commonwealth and Another* (1947) 74 C.L.R. 31.
[41] (1975) 134 C.L.R. 338, 397. Emphasis added.

Mason J. continued:

> The functions appropriate and adapted to a national government *will vary from time to time*. As time unfolds, as circumstances and conditions alter, it will transpire that particular enterprises and activities will be undertaken if they are to be undertaken at all, by the national government.[42]

It is submitted, in agreement with Mason J., that the implied Commonwealth power, conferred on the Commonwealth by virtue of its mere formation, should not be confined to the imperative of preserving the Commonwealth, but should extend to the promotion of its particular welfare, as distinct from the particular welfare of the States. However, it is submitted, in disagreement with Mason J.[43], that the implied Commonwealth power is *solely* to be confined by the prohibitions of the Constitution itself, namely, but to a very small extent, by the express prohibitions therein, and, principally, by the doctrine of implied prohibition. By contrast, Mason J. would seek to confine the implied power by the federal 'distribution of legislative powers'[44]. With respect, it is circular to seek to define the scope of the implied power by reference to the distribution of legislative powers because the implied power is part of that distribution: the implied power is not external to that distribution, and therefore it cannot be restricted by such a distribution. Logically, the distribution of legislative powers cannot be known until the scope of all the legislative powers (both Commonwealth and State) — including that of the implied power — has been determined.

2. *The Implied Prohibition*

Section 9 of the Commonwealth of Australia Constitution Act (hereinafter the Constitution Act) provides (*inter alia*):

> The Constitution of the Commonwealth shall be as follows: . . .

The imperative words 'shall be as follows' make it clear that the Constitution of the Commonwealth shall not be otherwise.

However, what does Section 9 of the Constitution Act mean by 'the Commonwealth'? The answer is to be found in section 6 of the Constitution Act which, *inter alia*, provides:

> "The Commonwealth" shall mean the Commonwealth of Australia as established under this Act.

But what is 'the Commonwealth of Australia as established under this Act'? The answer is supplied by Section 3 of the Constitution Act, which provides:

> It shall be lawful for the Queen . . . to declare by proclamation that . . . the people of New South Wales, Victoria, South Australia, Queensland . . . Tasmania, and . . . Western Australia . . . shall be united in a *Federal Commonwealth* under the *name of the Commonwealth of Australia* . . .[45]

It is thus evident that 'the Commonwealth' in Section 9 of the Constitution Act means 'the Commonwealth of Australia as established under this Act' (as provided

[42] *Ibid*. 397-8. Emphasis added.
[43] *Ibid*. 398.
[44] *Ibid*.
[45] Emphasis added.

by Section 6 of the Constitution Act), which, in turn, means 'a Federal Commonwealth under the name of the Commonwealth of Australia' (as provided by Section 3 of the Constitution Act).

Thus, the prefatory words of Section 9, when read epexegetically, will be seen to provide:

> The Constitution of the *Federal Commonwealth of Australia* shall be as follows: . . .[46]

Thus, it is submitted, the Constitution Act itself expressly establishes a *Federal* Commonwealth of Australia. It is submitted, further, that because the prefatory words of Section 9 do *not* form a part of the ensuing written Constitution, these prefatory words cannot be amended by Section 128 of the Constitution. As the Constitution is created by, it is subordinate to, the prefatory words of Section 9 of the Constitution Act. Because the Constitution is subordinate to the prefatory words of Section 9 of the Constitution Act, no provision of the Constitution may be construed in such a manner as to undermine the federal nature of the Commonwealth as established by the Constitution Act.

In *Engineers*[47], in a joint judgment, Knox C.J., Isaacs, Rich and Starke JJ. held:

> It is undoubted that those who maintain the authority of the Commonwealth Parliament to pass a certain law should be able to point to some enumerated power[48] containing the requisite authority. But we also hold that, where the affirmative terms of a stated power would justify an enactment, *it rests upon those who rely on some limitation or restriction* upon the power, *to indicate it in the Constitution*.[49]

It is submitted that in declaring that limitations on a Commonwealth head of power had to be indicated 'in the Constitution'[50], their Honours did not purport to exclude indications in the Constitution *Act*. It is submitted that nothing was said by their Honours in *Engineers*, in regard to the interpretation of the Constitution, to exclude from that interpretation the imperative words in the Constitution Act (Section 9 of the Act) which enacted the Constitution itself. It is suggested that, in accordance with *Engineers*, the Constitution is subject to an overriding limitation in Section 9 of the Constitution Act. This limitation, that nothing in the Constitution may be construed to allow any impairment of the federal system in Australia, is implied therein by superior law, namely, by the express reference in the Constitution Act to a Federal Commonwealth of Australia.

That *Engineers* is entirely consistent with the implied prohibition against the Constitution being construed so as to undermine the federal system, emerges lucidly from the judgment of Evatt J. in *West v. The Commissioner of Taxation (New South Wales)*[51] (hereinafter *West*). In *West*, Evatt J. explained:

[46] Emphasis added.
[47] *Supra* n. 39.
[48] Their Honours had indicated earlier that the Constitution should be read in the light of, *inter alia*, the common law: (1920) 28 C.L.R. 129, 152.
[49] (1920) 28 C.L.R. 129, 154. Emphasis added.
[50] *Supra* n. 49.
[51] (1937) 56 C.L.R. 657.

It must at least be *implied* in the Constitution, as an instrument of *Federal* Government, that neither the Commonwealth nor a State legislature is at liberty to direct its legislation toward *the destruction of the normal activities* of the Commonwealth or States. Such a principle is *not inconsistent* with the rejection by the *Engineers' Case*[52] of the earlier doctrine of 'immunity of instrumentalities', though it *is*[53] inconsistent with the *unqualified dogma* that the Constitution *leaves no room whatever for implications* arising from the co-existence side by side of seven legislatures each of which is . . . sovereign within the limits fixed by the distribution of constitutional functions.[54]

However, the decision that established the doctrine of implied prohibition was *Melbourne Corporation v. The Commonwealth and Another*[55] (hereinafter *Melbourne Corporation*). *Melbourne Corporation* raised the issue of the validity of Section 48 of the Banking Act 1945 (Cth). Section 48(1) provided:

Except with the consent in writing of the Treasurer, a bank shall not conduct any banking business for a State or for any authority of a State, including a local governing authority.
Penalty: One thousand pounds.

The purported effect of section 48 was concisely described by Latham C.J. thus:

If s. 48 is valid, a State and a State authority can, in the absence of any available State bank, be compelled to do all its banking business with the Commonwealth Bank.[56]

The High Court[57] declared Section 48 of the Banking Act 1945 (Cth) to be void. Latham C.J. said:

The giving of a monopoly of governmental banking business to a particular bank selected by a Government is a not abnormal feature of legislation with respect to banking, but this statement does not cover the case of one Government seeking to select a bank to do all the banking business of another Government, both governments being subject to a federal constitution.[58]

Latham C.J. proceeded to say:

Thus, in my opinion, though the argument that s. 48 is not legislation with respect to banking should not be accepted, the rejection of this argument still leaves open for consideration the question of the validity of such a provision under a constitution establishing not only a federal Government with specified and limited powers, but also State Governments which, in respect of such powers as they possess under the Constitution, are not subordinate to the federal Parliament or Government.[59]

So, Latham C.J., although at this stage leaving open the validity of Section 48, specifically held that the section was legislation *with respect to banking*. Subsequently, Latham C.J. *also* held that Section 48 was *not* legislation with respect to *State* banking.[60] So, Latham C.J. clearly held that Section 48 was legislation with respect to banking, other than State banking. Section 51 (xiii) of the Constitution gives the Commonwealth power to legislate with respect to '*Banking, other than State banking*; . . .'[61]

Why, then, did Latham C.J. ultimately hold that Section 48, although constituting legislation with respect to banking, other than State banking, was *void* because it was *not* 'Banking, other than State banking; . . .'?

Latham C.J. supplied the following answer:

[52] Evatt J.'s emphasis.
[53] Evatt J.'s emphasis.
[54] (1937) 56 C.L.R. 657, 687-8. Emphasis added.
[55] (1947) 74 C.L.R. 31.
[56] *Ibid.* 54.
[57] The majority comprised Latham C.J., Rich, Starke, Dixon and Williams JJ.; the dissentient was McTiernan J.
[58] (1947) 74 C.L.R. 31, 50.
[59] *Ibid.*
[60] *Ibid.* 52.
[61] Emphasis added.

In my opinion the invalidity of a federal law which seeks to control a State governmental function is brought about by the fact that it is in substance a law with respect to a subject as to which the Commonwealth Parliament has no power to make laws. Though there will sometimes be difficulties in applying such a criterion, this is a more satisfactory ground of decision than an opinion that a particular federal 'interference' with a State function reaches a degree which is 'undue'.[62]

Thus, the view of Latham C.J. was that Section 48 was legislation with respect to banking, other than State banking, but was *not* legislation with respect to 'Banking, other than State banking; . . .'[63] *because* Section 48 was legislation with respect to banking, other than State banking, which sought 'to control a State governmental function'[64]. That State governmental function was, of course, the right of the State to select its bankers in the performance of its general executive functions. But the Commonwealth control of the State governmental function, which Latham C.J. held was forbidden by the Constitution, was not expressly excepted from the words of Section 51 (xiii). Any detraction from the language of Section 51 (xiii) must therefore have come from a source outside Section 51 (xiii) itself. Where, then, was the source of authority for the prohibition used by Latham C.J. to qualify the enabling words of Section 51(xiii)? No express prohibition of the kind adumbrated by Latham C.J. can be found in the Constitution. Therefore, it is submitted that the prohibition, which overrode the express words of Section 51 (xiii), was supported by the doctrine which required the preservation of the federal system of government established by the Constitution *Act*, namely, the doctrine of implied prohibition. In other words, the Commonwealth Parliament's attempt to undermine the federal system through seeking to control a State governmental function was prohibited by the federal system of government required by the Constitution Act, even though, apart from this implied prohibition, Section 48 would have been within the words of Section 51 (xiii).

It is thus seen that the federal system established by the Constitution Act created both an implied *power* (implied by virtue of the existence of the federated *entity*) and an implied *prohibition* (implied by virtue of the existence of the *federated* entity). The implied power and the implied prohibition combine to express the federal *tension*. Just as the *entity* aspect of the federated entity created a federated entity *power*, so the *federated* aspect of the federated entity created a federated entity *prohibition*.

Rich J.[65] expressed himself consistently with the view of Latham C.J.

Starke J. stated the following basic proposition:

So we may start from the proposition that neither federal nor State governments may destroy the other nor curtail in any substantial manner the exercise of its powers or 'obviously interfere with one another's operations'.[66]

[62] (1947) 74 C.L.R. 31, 62.
[63] Section 51 (xiii) of the Constitution.
[64] *Supra* n. 62.
[65] (1947) 74 C.L.R. 31, 66.
[66] *Ibid.* 74.

Starke J. continued:

It is a practical question, whether legislation or executive action thereunder on the part of a Commonwealth or of a State destroys, curtails or interferes with the operations of the other, depending upon the character and operation of the legislation and executive action thereunder. No doubt the nature and extent of the activity affected must be considered and also whether the interference is or is not discriminatory but in the end the question must be whether the legislation or the executive action curtails or interferes in a substantial manner with the exercise of constitutional power by the other. The management and control by the States and by local governing authorities of their revenues and funds is a constitutional power of vital importance to them. Their operations depend upon the control of those revenues and funds. And to curtail or interfere with the management of them interferes with their constitutional power.[67]

Dixon J. condemned Section 48 as:

a law which discriminates against States, or a law which places a particular disability or burden upon an operation or activity of a State, *and more especially upon the execution of its constitutional powers*. In support of such a use of power the *Engineers Case*[68] has nothing to say. Legislation of that nature discloses an immediate object of *controlling the State* in the course which otherwise the Executive Government of the State might adopt, if that Government were left free to exercise its authority. The control may be attempted in connection with *a matter falling within the enumerated subjects of federal legislative power*. But it does *not* follow that *the connection with the matter* brings a law aimed at *controlling in some particular* the State's exercise of its executive power within the *true ambit* of the Commonwealth legislative power.[69]

Thus, in very clear language, Dixon J. expounded that the Commonwealth Parliament could not legislate on a matter within an express head of power if the legislation purported to control any State in the exercise of the State's constitutional powers. Because the purported legislation would be literally within the ambit of the relevant head of power, the only reason why such purported legislation would be beyond 'the true ambit'[70] of such a head of power must be an implied prohibition against an impairment of the federal system. As Dixon J. concisely reiterated:

The federal system itself is the foundation of the *restraint* upon the use of the power to control the States.[71]

So, Dixon J. was of the view that the restraint upon using an express head of power of the Commonwealth to control any State could only be found in the *federal system itself*. In short, the federal system established by the Constitution Act has created a fundamental protection for itself which thereby prohibits by necessary implication any use of the Constitution to undermine the federal system thus established. It is submitted that, but for the overriding prefatory words of Section 9 of the Constitution *Act* (read conjunctively with Sections 3 and 6 of that Act), there would be absolutely no scope for any implications of any kind to be made in qualification of the express provisions of the Constitution.

That the majority of the Justices in *Melbourne Corporation* were unanimous in holding that there was an implied prohibition imposed by the federal system itself upon the Commonwealth and the States against the use by any of them of any constitutional power to undermine the constitutional capacity of either the

[67] *Ibid.* 75.
[68] (1920) 28 C.L.R. 129.
[69] (1947) 74 C.L.R. 31, 79. Emphasis added.
[70] *Ibid.*
[71] *Ibid.* 81. Emphasis added.

Commonwealth or of the States, emerges from a consideration of the view of Williams J. when understood in combination with the views of Latham C.J., Rich, Starke and Dixon JJ. Williams J. observed:

> there arises from the very nature of the federal compact, which contemplates two independent political organisms, each supreme within its own sphere, existing side by side and exerting divided authority over the same persons and in the same territory, a necessary implication that neither the Commonwealth nor the States may exercise their respective constitutional powers for the purpose of affecting the capacity of the other to perform its essential governmental functions.[72]

The doctrine of implied prohibition was examined again by the High Court in *The State of Victoria v. The Commonwealth of Australia*[73] (hereinafter *Pay-roll Tax*). The Acts impugned in this case were the Pay-roll Tax Act 1941-1966 (Cth) and the Pay-roll Tax Assessment Act 1941-1969 (Cth). The purported effect of these two Acts was described by Gibbs J. thus:

> By this legislation, if it is valid, the Commonwealth has obliged the States, in common with other employers, to pay a tax on all wages paid or payable to their employees.[74]

The State of Victoria challenged the validity of the Acts insofar as they purported to apply to the wages of public servants engaged by that State.[75] This challenge was unanimously dismissed by the High Court. In dimissing this challenge, their Honours, with the exception of McTiernan J., discussed the doctrine of implied prohibition.

Barwick C.J. (with whom Owen J. completely concurred)[76] said:[77]

> It is to my mind clear that the Constitution in providing for the States did not give the Commonwealth legislative power over them, or their powers and functions of government, as subject matters of legislation. That the Government cannot "aim" its legislation against a State, its powers or functions of government is both true and fundamental to our constitutional arrangements. ***But, in my opinion, this does not derive from any implied limitation upon any legislative power granted to the Commonwealth.*** It is true simply because the topics of legislation allotted to the Commonwealth by the Constitution do not include the States themselves nor their governmental powers or functions as a subject matter of legislative power . . . a law of the Commonwealth which in substance takes a State or its powers or functions of government as its subject matter is invalid because it cannot be supported upon any granted legislative power. If the subject matter of the law is in substance the States or their powers or functions of government, there is no room, in my opinion, for holding it to be at the same time and in the same respects a law upon one of the enumerated topics in s 51[78].

It is submitted that Barwick C.J. was positing a false dichotomy. The dichotomy perceived by his Honour comprised, on the one hand, a lack of Commonwealth power resulting from an 'implied limitation upon any legislative power granted to the Commonwealth'[79], and, on the other hand, a lack of Commonwealth power because the Commonwealth's heads of power 'do not include the States themselves nor their governmental powers or functions as a subject matter of legislative power'[80]. However, Barwick C.J. appeared to have overlooked the point that it is of the essence of a prohibition (express or implied) that it prohibits something that

72 *Ibid.* 99.
73 (1971) 122 C.L.R. 353.
74 *Ibid.* 414.
75 *Ibid.*
76 *Ibid.* 405.
77 *Ibid.* 372. Emphasis added.
78 Section 51 of the Constitution.
79 *Supra* n. 77.
80 *Ibid.*

would *otherwise* be allowed to exist. So, the implied prohibiton espoused in *Melbourne Corporation* can only operate by excluding a power to undermine the States from a larger power which, but for the prohibition, would have included the excluded power, namely, a larger power which, but for the prohibition, would have allowed the Commonwealth to legislate against the constitutional capacity of the States. Thus, to say that the implied prohibition prevents the Commonwealth from legislating against the constitutional capacity of the States because the implied prohibition has so reduced the legislative scope of the Commonwealth Parliament, is another way of saying that the legislative scope of the Commonwealth Parliament does not include the power to legislate against the constitutional capacity of the States. Thus these two alternative modes of stating the same proposition should *not* be mistaken for two alternative propositions. The purported choice made by Barwick C.J. between two supposedly alternative propositions is consequently ineffectual because the supposed alternatives do not exist. In short, the lack of an appropriate subject matter for the Commonwealth Parliament in *Melbourne Corporation* was caused by the implied prohibition: the lack of an appropriate subject matter was *not* an alternative to the implied prohibition — it was the consequence of the implied prohibition.

In upholding the validity of the impugned legislation, Barwick C.J. said:

> No doubt to the the extent that the State pays the amount of the tax, it may have less money at its disposal for the pursuit of its own policies. But that, in my opinion, does not mean either that the law is a law with respect to a State or its functions, or that its independence as a State is threatened.[81]

In *Pay-roll Tax*, Menzies J. said:

> Does the fact that the Constitution is "Federal" carry with it *implications* limiting the law-making powers of the Parliament of the Commonwealth with regard to the States?
>
> To this question I have no doubt, both on principle and on authority, that an affirmative answer must be given. A constitution providing for an indissoluble Federal Commonwealth must protect both Commonwealth and States. The States are not outside the Constitution. They are States of the Commonwealth: s 106. Accordingly, although the Constitution does, clearly enough, subject the States to laws made by the Parliament, it does so with *some limitation*.
>
> Authority supports what principle dictates: *Melbourne Corporation v. The Commonwealth*[82] This decision, both accepting and taking into full account the authority of the *Engineers' Case*[83] — which both destroyed the doctrine of the immunity of instrumentalities and established the ruling principles of constitutional interpretation — leaves it in no doubt that *implications limiting Commonwealth legislative power over States* do arise *from the federal nature of the Constitution*.[84]

In upholding the validity of the impugned legislation, Menzies J. observed:

> Of course the payment of the tax by an employer upon wages paid is a burden, whether or not the employer is a State. Every tax is a burden. This tax could not, however, be described as an interference with the function of employers who are not States. Such employers remain free to carry on their businesses as they choose. All that is required is that they pay the tax. Similarly, the payment of the tax by a State does not interfere with the performance of its functions. Crown servants may still be employed at the will of the State.[85]

[81] (1971) 122 C.L.R. 353, 374.

[82] Menzies J.'s emphasis on the name of the case. The citation to the case given by Menzies J. has been omitted.

[83] Menzies J.'s emphasis. His Honour's citation to the case has been omitted.

[84] (1971) 122 C.L.R. 353, 386. Emphasis added.

[85] *Ibid.* 392. Emphasis added.

In *Pay-roll Tax*, Windeyer J. upheld the doctrine of implied prohibition, but, along with his brethren, upheld the impugned legislation. His Honour upheld the impugned legislation because it applied to employers generally.[86]

Walsh J. also accepted the doctrine of implied prohibition, but held that the doctrine did not invalidate the impugned legislation because the latter did not prevent or even impede the States from performing their functions.[87]

Gibbs J., too, endorsed the doctrine of implied prohibition,[88] but upheld the impugned legislation on the ground that the latter was not 'aimed at the restriction or control of the States'[89].

The result of *Pay-roll Tax* is that the Commonwealth legislation requiring a State, in common with other employers, to pay a tax to the Commonwealth for the privilege of engaging employees, does not constitute a sufficiently severe interference with, or burden upon, the State to amount to an impairment of the State's constitutional capacity, and therefore does not amount to an impairment of the federal system in Australia. Whether an interference by the Commonwealth with the performance by the State of its constitutional powers will be prohibited by the requirements of the federal system will have to depend on the *extent* of such an interference. The freedom of a State to choose its bankers is a right which cannot be removed by Commonwealth legislation (*Melbourne Corporation*), but a State does not enjoy freedom from Commonwealth legislation requiring it to pay tax to the Commonwealth for the privilege of engaging the State's public servants (*Pay-roll Tax*). Because there is no universally accepted enumeration of the characteristics of a federal system, the doctrine of implied prohibition does not yield an exhaustive code of prohibitions. Since legal doctrines generally do not express themselves in lists of exhaustive particulars, it is no criticism of the doctrine of implied prohibition that it does not have a catena of specific prohibitions — such a catena is the hallmark of express prohibitions, not of a general concept of implied prohibition.

In *Koowarta v. Bjelke-Peterson and Others*[90] (hereinafter *Koowarta*), sections 9 and 12[91] of the Racial Discrimination Act 1975 (Cth) were impugned for being beyond Commonwealth legislative competence. The High Court, by a majority[92], upheld the validity of the legislation on the ground that it was supported by Section 51 (xxix) of the Constitution which gave the Commonwealth power to legislate with respect to 'External affairs'.

Four[93] of the seven Justices examined the doctrine of implied prohibition.

Gibbs C.J. (with whom Aickin J. concurred[94]) said:

[86] *Ibid.* 403-4.
[87] *Ibid.* 410-2.
[88] *Ibid.* 417-8.
[89] *Ibid.* 426.
[90] (1982) 39 A.L.R. 417.
[91] These sections prohibited the practice of racial discrimination throughout Australia.
[92] The majority Justices were Stephen, Mason, Murphy and Brennan JJ. The dissentients were Gibbs C.J., Aickin and Wilson JJ.
[93] Gibbs C.J., Aickin, Stephen and Mason JJ.
[94] (1982) 39 A.L.R. 417, 475.

It should I think be held that a law made under s 51 (xxix) would *not* be valid if it discriminated against States *or if it prevented a State from continuing to exist and function as such.* It is unnecessary to discuss this matter further in the present case. The Act[95] does not infringe any of the express prohibitions contained in the Constitution. *Its provisions do not prevent a State from continuing to exist and function.*[96]

Thus, Gibbs C.J. and Aickin J. were undoubtedly of opinion that even a law which, but for the implied prohibition, would be within the power to legislate with respect to external affairs, would be void if such a law prevented a State from continuing to function as such. In other words, the implied prohibition would operate to restrict the scope which the words in Section 51 (xxix) would *otherwise* possess. If the words of Section 51 (xxix) were construed to possess paramount authority, then such paramountcy would be absolutely inconsistent with *any* doctrine of implied prohibition because the power to prohibit would lack a subordinate subject matter. Therefore, those who assert the existence of a doctrine of implied prohibition are doing nothing less than asserting the paramountcy of the prohibition over the subject matter prohibited. If, independently of the prohibition, the legislation would be void for falling outside the words of a head of power, then there would be no scope for invoking the prohibition. Such an invocation would be redundant. So, the prohibition can only apply where, prior to its application, a decision has been made that the legislation *does* fall within the words of the relevant head of power. Such was the tenor of *Melbourne Corporation.*

In support of a doctrine of implied prohibition, Stephen J. said:

There no doubt also exist limitations to be *implied* from the *federal nature* of the Constitution and which will serve *to protect the structural integrity* of the State components of the federal framework, State legislatures and State executives.[97]

Having noted the existence of the doctrine of implied prohibition, Stephen J. proceeded:

It will *not* be enough that the challenged law gives effect to treaty obligations. A treaty with another country, whether or not the result of a collusive arrangement, which is on a topic neither of especial concern to the relationship between Australia and that other country nor of general international concern will not be likely to survive that scrutiny.[98]

Stephen J. concluded:

There exists a quite precise treaty obligation, on a subject of major importance in international relationships, which calls for domestic implementation within Australia. This in itself, without more, suffices to bring the Racial Discrimination Act within the terms of s 51(29).[99]

The 'scrutiny' mentioned by Stephen J. was used by his Honour to ascertain whether or not a treaty was connected with a matter of international concern. However, Stephen J. did *not* test the validity of the legislation against the doctrine of implied prohibition, even though his Honour had approved the doctrine. It may be assumed that Stephen J., in common with Gibbs C.J.[1] and Aickin J.,[2] did not

[95] The Racial Discrimination Act 1975 (Cth).
[96] (1982) 39 A.L.R.417, 433. Emphasis added.
[97] (1982) 39 A.L.R. 417, 452. Emphasis added.
[98] *Ibid.* 453. Emphasis added.
[99] *Ibid.* 456.
[1] *Supra* n. 95.
[2] *Supra* n. 94.

consider that the legislation was concerned with that which the doctrine prohibited.

In *Koowarta*, Mason J. accepted the doctrine of implied prohibition thus:

> The exercise of the power[3] is of course subject to the express and to the implied prohibitions to be found in the Constitution . . . the exercise of the power is subject to the implied general limitation affecting all the legislative powers conferred by s 51 that the Commonwealth cannot legislate so as to discriminate against the States or inhibit or impair their continued existence or their capacity to function.[4]

However, having thus accepted the doctrine of implied prohibition, Mason J. proceeded to say:

> The consequence of the expansion in external affairs is that in some instances the Commonwealth now legislates on matters not formerly within the scope of its specific powers, to the detriment of the exercise of State powers. But in the light of current experience there is little, if anything, to indicate that there is a likelihood of a substantial disturbance of the balance of powers as distributed by the Constitution. To the extent that there is such a disturbance, then it is a necessary distrubance, one essential to Australia's participation in world affairs.[5]

With respect, the passage appearing immediately above is difficult to reconcile with the earlier statement[6] made by Mason J. in unequivocal support of the existence of a doctrine of implied prohibition. In the later passage, however, Mason J. asserted that whatever was 'essential to Australia's participation in world affairs'[7] was thereby within the Commonwealth's external affairs power, even if such an exercise of the external affairs power would cause a substantial disturbance of the constitutional balance of powers.[8] Mason J. was therefore asserting that once a matter was shown to be related to external affairs because the matter was essential to Australia's participation in world affairs, then such a matter would be within the Commonwealth's external affairs power, notwithstanding that such an exercise of power would substantially disturb the federal system, namely, the balance of powers as distributed by the Constitution.[9] It is submitted that Mason J.'s support for the doctrine of implied prohibition is inconsistent with his Honour's later statement in the same case that the Commonwealth may exercise its legislative powers in such a way as to cause a substantial disturbance to the federal system.

Suppose that, in common with a number of other countries, the Australian federal executive entered into a treaty requiring all its signatories to do whatever was within their respective powers to abolish federation within their respective countries in the belief, genuinely shared by all the signatories, that federations ought to be abolished because they were economically wasteful and politically inefficient, and were thus a serious detriment to the people who had to live under them. If the view of Mason J. in *Koowarta* were to be applied to such a treaty, then, subject only to the express prohibitions in the Constitution, the Commonwealth Parliament would be able to legislate as if it were the Sovereign Parliament in Australia. It is submitted that of the two inconsistent views expressed by Mason J.

[3] Section 51 (xxix) of the Constitution
[4] (1982) 39 A.L.R. 417, 460
[5] *Ibid.* 463.
[6] *Supra* n. 4, p.674.
[7] *Supra* n. 5, p.675.
[8] *Ibid.*
[9] *Ibid.*

in *Koowarta*, his Honour's view in support of the doctrine of implied prohibition is to be preferred. It is submitted that paramountcy cannot be given to the words in Section 51 (xxix) because to do so is to repudiate *Melbourne Corporation*. It will be recalled that in *Melbourne Corporation* a law with respect to banking, other than State banking was held by the High Court to be *not* a law with respect to 'Banking, other than State banking; . . .', because the law undermined the federal system; and was thus removed from the literal scope of Section 51 (xiii).

In *Commonwealth of Australia and Another v. State of Tasmania and Others*[10] (hereinafter *Tasmanian Dam*), a majority of the Justices[11] of the High Court upheld Commonwealth legislation[12] prohibiting the State of Tasmania from constructing a dam within the territory of that State. The Commonwealth legislation was upheld on the ground that it was supported by Section 51 (xxix) of the Constitution which gave the Commonwealth power to legislate with respect to external affairs.

All of the seven Justices in *Tasmanian Dam* adverted to the doctrine of implied prohibition.

Gibbs C.J. explicitly affirmed the doctrine of implied prohibition, thus:

> The division of powers between the Commonwealth and the States which the Constitution effects could be rendered quite meaningless if the Federal Government could, by entering into treaties with foreign governments on matters of domestic concern, enlarge the legislative powers of the Parliament so that they embraced literally all fields of activity. This result could follow even though all the treaties were entered into in good faith, that is, not solely as a device for the purpose of attracting legislative power. Section 51 (xxix) should be given a construction that will, so far as possible, avoid the consequence that the federal balance of the Constitution can be destroyed at the will of the Executive.[13] To say this is, of course, not to suggest that by the Constitution any powers are reserved to the States.[14]

Gibbs C.J. was thus saying that to assert that the States enjoyed an exclusive *residue* of legislative powers was entirely different from asserting that certain legislative powers were *assigned* (reserved) to the States which overrode the express words of the Commonwealth's heads of power: the former enunciated the doctrine of implied prohibition, whereas the latter embodied the doctrine of reserved State powers which was rejected in *Engineers*. The doctrine of implied prohibition is completely consistent with the States being given the residue of legislative authority, whereas the rejected doctrine of reserved State powers would, in contravention of Section 51 of the Constitution, have given the *Commonwealth* the residue of legislative authority.

In *Tasmanian Dam*, Mason J. said:

> The next question is whether the effect of the regulations is to infringe the implied prohibition forbidding the Commonwealth from imposing some special burden or disability upon a State or from inhibiting or impairing the continued existence of a State or its capacity to function, a prohibition which has been discussed earlier in this judgment. Mr Ellicott Q.C.[15] submits, in my

[10] (1983) 46 A.L.R. 625.

[11] The majority comprised Mason, Murphy, Brennan and Deane JJ. The dissentients were Gibbs C.J., Wilson and Dawson JJ.

[12] The relevant legislation comprised the World Heritage (Western Tasmanian Wilderness) Regulations made under Section 69 of the National Parks and Wildlife Conservation Act 1975 (Cth) and Sections 9, 10 and 11 of the World Heritage Properties Conservation Act 1983 (Cth): (1983) 46 A.L.R. 625, 836, *per* Dawson J.

[13] The context clearly indicates that Gibbs C.J. was referring to the *federal* executive.

[14] (1983) 46 A.L.R. 625, 669.

[15] Leading counsel for the State of Tasmania.

view correctly, that in order to come within the prohibition it is not necessary to show that the law discriminates against a State, though discrimination in itself will attract the principle. It is enough that the Commonwealth law inhibits or impairs the continued existence of a State or its capacity to function. It is then suggested that the prohibition strikes down a Commonwealth law which inhibits or curtails any governmental function of a State in a material way. But this is to rewrite the principle. What it does is to prohibit impairment of the capacity of the State to function as a government, rather than to prohibit interference with or impairment of any function which a State government undertakes.[16]

Mason J. continued:

To fall foul of the prohibition, in so far as it relates to the capacity of a State to govern, it is not enough that Commonwealth law adversely affects the State in the exercise of some governmental function as, for instance, by affecting the State in the exercise of a prerogative. Instead, it must emerge that there is a substantial interference with the State's capacity to govern, an interference which will threaten or endanger the continued functioning of the State as an essential constituent element in the federal system.[17]

Mason J. in *Tasmanian Dam* thus expounded the doctrine of implied prohibition as a doctrine forbidding 'a substantial interference with the State's capacity to govern'[18]. However, Mason J. in *Koowarta* had indicated that the doctrine of implied prohibition permitted 'a substantial disturbance of the balance of powers as distributed by the Constitution'[19] if such a disturbance was a matter concerning Australia's external affairs. Mason J's dictum in *Koowarta* means that if a matter fell within the words of a Commonwealth head of power then it would be permissible for the Commonwealth to reduce substantially a State's constitutional powers, and yet in *Tasmanian Dam* Mason J. asserted that it would be impermissible for the Commonwealth to exercise a head of power to reduce substantially a State's capacity to govern. On the assumption that a State's constitutional powers comprise its capacity to govern, it will be perceived that, in regard to the doctrine of implied prohibition, Mason J's dictum in *Koowarta* is contradicted by his Honour's dictum in *Tasmanian Dam*. It is submitted that it is Mason J's dictum in *Tasmanian Dam*, with its accent on the preservation of the States' capacity to function, rather than his Honour's dictum in *Koowarta*, that represents the doctrine of implied prohibition. However, in *Tasmanian Dam*, Mason J. proceeded to conceive, with marked narrowness, a State's capacity to govern. His Honour held that the prevention of a State from constructing a major dam within its own territory was not impliedly inconsistent with the federal system of government, saying:

It is perhaps possible that in some exceptional situations *if the area of land affected* by Commonwealth prohibitions similar to those imposed by reg 5 forms *a very large proportion* of the State, the imposition of the prohibitions would attract the *Melbourne Corporation*[20] principle. But this is certainly not the case here, where the regulations *affect 14,125 hectares only*.[21]

It is submitted that it is quite possible to accept Mason J.'s exposition of the doctrine of implied prohibition without accepting his Honour's application of it to the situation in *Tasmanian Dam*. It is further submitted that if the exposition of the

16 (1983) 46 A.L.R. 625, 703.
17 *Ibid.*
18 *Ibid.*
19 *Supra* n. 5, p.674.
20 Mason J.'s emphasis.
21 (1983) 46 A.L.R. 625, 705. Emphasis added.

doctrine by Mason J. in *Tasmanian Dam* (as distinct from his Honour's view thereof in *Koowarta*) is pursued, then it cannot be inferred from *Tasmanian Dam* that, in future, the Commonwealth would be completely free to enter into *bona fide* treaties with other countries which would give the Commonwealth power to deal with a matter otherwise within the exclusive residue of the States' legislative competence. The *nature* of the matter dealt with in the treaty will have to be examined in each case to determine whether the matter is one which, if legislated upon by the Commonwealth, will impair, impermissibly, a State's capacity to govern. If the view of Mason J. in *Tasmanian Dam* prevails, then the import of *Tasmanian Dam*, as a precedent for a legal principle rather than as a particular application of that principle, is not to allow every treaty made *bona fide* by the Australian Federal Executive which does not infringe any express prohibitions in the Constitution to attract the Commonwealth's external affairs power, but only to allow the attraction of the power if the treaty is not only *bona fide* but, additionally, does not, if implemented by the Commonwealth, impair a State's capacity to function. It is submitted that in *Tasmanian Dam*, regarding the application of the doctrine of implied prohibition, Mason J. should not have taken into consideration the fact that the area affected was not 'a very large proportion of the State'[22], because the range of a State's constitutional powers is not dependent on the size of the State concerned. Either the Commonwealth would have power to regulate a particular area of State territory, or it would not. The existence of the power cannot depend on the size of the territory to be regulated, for otherwise the Constitution would be construed to discriminate between States in its allocation of powers according to their respective sizes — the larger States having to submit to proportionately larger areas of Commonwealth regulations.

In *Tasmanian Dam* Murphy J. rejected the doctrine of implied prohibition. Murphy J. said:

> Counsel for Tasmania, relied on[23] . . . to argue that the Acts would prevent the continued existence of the State or its capacity to function. The Acts manifestly do not have such an operation; the argument is frivolous. The mere fact that the Acts impair, undermine, make ineffective or supersede various State functions or State laws is an ordinary consequence of the operation of federal Acts and does not affect their validity.
>
> Any 'extravagant' use of the granted powers in the actual working of the Constitution is a matter to be guarded against by the constituency *and not by the courts*.[24]

Wilson J. in *Tasmanian Dam* accepted the doctrine of implied prohibition.[25]

Brennan J. accepted the doctrine of implied prohibition,[26] but confined it in such terms as to make the doctrine ineffectual. Brennan J. said:

> The Commonwealth measures impose restrictions on the use of part of the Parks and expose the whole of the Parks to the possibility of restriction if the conditions specified in the Act were satisfied and the required declarations were made by proclamation under ss 6, 7 or 8. To affect that land in that way is not to impair the functioning of the Executive Government of the State, though the measures limit the areas within which the Executive Government may make its will effective. *The Commonwealth measures diminish the powers of the Executive Government, but they do not impede the processes by which its powers are exercised.* There is no foundation for attributing to the control

[22] *Supra* n. 21, p.677.
[23] The omitted cases are *Melbourne Corporation*, *Pay-roll Tax* and *Koowarta*.
[24] (1983) 46 A.L.R. 625, 728. Emphasis added.
[25] *Ibid*. 752-3.
[26] *Ibid*. 766-7.

of the mass of waste lands of a State a special immunity from valid Commonwealth law. Waste lands of a State are to be administered by the Executive Government of the State according to the law which is binding upon it, *including the laws of the Commonwealth that bind the State*. A restriction upon the doing of specified acts in the exercise of an executive power to use of waste lands is no invalid intrusion upon the exercise of that power.[27]

Brennan J.'s view was that the doctrine of implied prohibition would *not* prevent the Commonwealth from *reducing* the State's powers, so long as the *processes* by which the *remaining* State powers were exercised were not impeded by the Commonwealth. But such a line of reasoning would have upheld the legislation which the High Court had condemned in *Melbourne Corporation*. The power of the States to select their bankers in the performance of the performance of their general executive functions would have been validly removed under Section 48 of the Banking Act 1945 (Cth), pursuant to Section 51 (xiii) of the Constitution. Indeed, it must be emphasized that the distinction, supposed by Brennan J., between a power and the process whereby the power is exercised, is a very elusive one, because a power exists through its actual or prospective exercise, and thus the difference between a power and the method of its exercise is impalpable. To say that the Commonwealth may, pursuant to its heads of power, *reduce* State powers *but not impede their exercise*, is to say that the State powers are only to be preserved to the extent that the Commonwealth *chooses* not to reduce them by exercising the Commonwealth's heads of power. Such a view of the doctrine of implied prohibition affords the doctrine no restraining force against the Commonwealth's heads of powers, and deprives the doctrine of any function in the federal system.

In *Tasmanian Dam*, Deane J. endorsed the doctrine of implied prohibition, but appeared to assume that the doctrine did not apply to the facts of the case. Deane J. perceived the effect of the doctrine thus:

The grant of legislative power contained in s. 51 (xxix) is, like those contained in the other paragraphs of s. 51, subject to the express general limitations of the Constitution. It is also subject to any general overriding constitutional principle that Commonwealth legislative powers cannot be exercised in a way which would involve an indirect amendment to the Constitution or which would be inconsistent with the continued existence of the States and their capacity to function or involve a discriminatory attack upon a State 'in the exercise of its executive authority'[28] . . .

Otherwise, it is a plenary grant of power to make laws for the peace, order and good government of the Commonwealth with respect to all that is comprehended in the phrase 'external affairs'. It is not to be limited by reference to the notions of legislative powers being reserved to the States. Nor is it to be limited by the notion that to give the words conferring the power their full effect would imperil the balance between Commonwealth and States which was achieved by the distribution of legislative powers contained in the Constitution. To the contrary, it was pursuant to that distribution that the Commonwealth was given a full and complete grant of legislative power with respect to external affairs.[29]

It is of the very greatest importance to notice that Deane J. did not say that the Commonwealth's heads of power were plenary: Deane J. said that these heads of power were otherwise plenary.[30] The heads of power were only otherwise plenary because they were subject to express as well as implied prohibitions in the

[27] *Ibid*. 767-8. Emphasis added.
[28] The omitted citation is to *Melbourne Corporation v. Commonwealth* (1947) 74 C.L.R. 31, 83.
[29] (1983) 46 A.L.R. 625, 801-2.
[30] *Supra* n. 29, p.679.
[31] *Ibid*.

Constitution, such prohibitions having the effect of overriding[31] the 'grant of legislative power'[32] contained in these heads of power.

Dawson J. in *Tasmanian Dam* endorsed the doctrine of implied prohibition without much elaboration.[33]

What, then, is the impact of *Tasmanian Dam* on the doctrine of implied prohibition? Murphy J. denied the existence of the doctrine, and Brennan J., whilst accepting the doctrine, gave it no scope. However, the remaining five Justices (Gibbs C.J., Mason, Wilson, Deane and Dawson JJ.) affirmed the doctrine in the fundamental form it was propounded in *Melbourne Corporation*, namely, as serving to preserve the Australian federal system by prohibiting the exercise by either the Commonwealth or the States of their respective constitutional powers in such a way as to impair the capacity of the other to function.

3. *The Implied Incidental Power*

The implied incidental power is not a separate head of power. It is no more than a rule of construction whereby every grant of power is interpreted to include such ancillary powers as are reasonably necessary to effectuate the main power. It is to be emphasized that not *all* ancillary powers are part of the main power, but only those reasonably necessary for the main power's efficacy. It is impermissible to include in the interpretation of the main power all the powers ancillary to it because such an inclusion would be to add an indefinite number of other powers to the main power, since it would be difficult to exclude any power as being in no circumstance capable of assisting, as distinct from being reasonably necessary for the effectuation of, the main power.

In *Grannall v. Marrickville Margarine Proprietary Limited*[34] (hereinafter *Grannall*), Dixon C.J., McTiernan, Webb and Kitto JJ., in a joint judgment, observed:

> Every legislative power carries with it authority to legislate in relation to acts, matters and things the control of which is found *necessary to effectuate its main purpose*, and thus carries with it power to make laws governing or affecting many matters that are incidental or ancillary to the subject matter.[35]

Again, in *Gazzo v. Comptroller of Stamps (Vic.); Ex parte Attorney-General for Victoria*[36] (hereinafter *Gazzo*), Aickin J. said:

> It was argued for the wife that s. 90[37] is authorized by s. 51 (xx) and/or s. 51 (xxii) and by what has come to be called, somewhat inaptly, the 'implied incidental power'. I say inaptly because that expression suggests that there is some additional power over and above that given by the paragraphs of s. 51. It is of the nature of all the heads of power in s. 51 that there is granted by the words describing the power itself everthing which is incidental to its main purpose . . .
>
> It is necessary to draw attention to this because of the tendency to regard, or at least to speak of, that which is incidental to a head of power as though it were something separate from and additional to the power itself. Such a tendency is calculated to mislead in that it is sometimes the basis for a

[32] *Ibid.*
[33] (1983) 46 A.L.R. 625, 842.
[34] (1955) 93 C.L.R. 55.
[35] *Ibid.* 77. Emphasis added.
[36] (1981) 38 A.L.R. 25.
[37] Section 90 of the Family Law Act 1975 (Cth).

search for something beyond the head of power itself. This is not to say that the heads of power in s. 51 are to be read narrowly; the whole course of authority, at least since 1920[38], is to the contrary. Moreover the concept of that which is incidental being already embraced within a head of power points to a wide rather than a narrow construction.[39]

Thus, according to Aickin J. in *Gazzo*, only those ancillary matters that are incidental to, that is, reasonably necessary to the effectuation of, the main power form part of the main power.

The implied incidental power (using the accepted nomenclature but recognizing it to be a misnomer) is well illustrated in a trilogy of High Court decisions comprising *Philip Morris Incorporated and Another v. Adam P. Brown Male Fashions Pty Ltd*[40] (hereinafter *Philip Morris*); *Fencott v. Muller*[41] (hereinafter *Fencott*); and *Stack v. Coast Securities (No. 9) Pty Ltd*[42] (hereinafter *Coast Securities*).

In *Philip Morris*, a majority[43] of the Justices held that 'matter' and 'matters' in Section 76 (ii) and Section 77 (i), respectively, of the Constitution empowered the Commonwealth Parliament to invest jurisdiction in the Federal Court of Australia to determine *other* matters provided these other matters were not severable from a matter which was *originally*, and not merely derivately, within Section 76 (ii). It is submitted that this expansive interpretation of 'matter' in Section 76 (ii) of the Constitution is based on the application of the implied incidental power because the inclusion of other (non-severable) matters is reasonably necessary for the efficacy of the jurisdiction over the matter originally within the constitutional provision. *Grannall* and *Gazzo* would support such an interpretation.

In *Philip Morris*, Barwick C.J. said:

It is also important to observe that a matter may relevantly exist which may not in itself attract federal jurisdiction. That jurisdiction may be attracted, *e.g.*, by some assertion made within the facts or as a consequence of them or, indeed, by some assertion or claim made by the opposing party or sometimes by the identity of one of the parties. Thus, there may be circumstances in which the matter does not in substance itself attract federal jurisdiction, though that which attracts federal jurisdiction must in some way relate to the matter. The jurisdiction . . . accrues to the court because there is a matter, in relation to which federal jurisdiction has been attracted, to be resolved. The jurisdiction thus accrued is itself federal jurisdiction. But, of course, it is limited to the resolution of the matter in relation to which, but not necessarily by which, the federal jurisdiction was attracted in the first instance. But the jurisdiction will not extend to any other matter, though that other matter might in some sense be allied or associated matter. To be outside the accrued jurisdiction, however, the other matter must be separate and disparate from the matter in relation to or in connection with which federal jurisdiction has been attracted. The federal jurisdiction will not extend to enable the court to resolve the further matter, being as I have said in substance a disparate and independent matter.[44]

In *Philip Morris*, Mason J. said:

The lesson to be learned from the authorities is that the court having jurisdiction to determine a matter falling within ss. 75 and 76 giving rise to the exercise of federal jurisdiction has jurisdiction to decide an attached non-severable claim.

[38] The year in which *Engineers* was decided.
[39] (1981) 38 A.L.R. 25, 56.
[40] (1981) 33 A.L.R. 465.
[41] (1983) 46 A.L.R. 41.
[42] (1983) 49 A.L.R. 193.
[43] Barwick C.J., Gibbs, Stephen, Mason and Murphy JJ. comprised the majority. The dissentients were Aickin and Wilson JJ.
[44] (1981) 33 A.L.R. 465, 473-4.

The classification of a claim as 'non-severable' does not necessarily mean that it is, or must be, united to the federal claim by a single claim for relief, though this is a common illustration of a non-severable claim. The non-severable character of the attached claim may emerge from other aspects of the relationship between the federal and the attached claim. For example, it may appear that the resolution of the attached claim is essential to a determination of the federal question. Likewise, it may appear that the attached claim and the federal claim so depend on common transactions and facts that they arise out of a common substratum of facts. In instances of this kind a court which exercises federal jurisdiction will have jurisdiction to determine the attached claim as an element in the exercise of its federal jurisdiction.[45]

The view of Mason J. extracted above from *Philip Morris* was specifically approved by a majority[46] of the Justices in *Fencott*. Both *Fencott* and *Coast Securities* accepted the correctness of the decision in *Philip Morris*.

Thus it is clear that the implied incidental[47] power, even though it is in truth but a rule of construction, may be used to extend substantially what would otherwise have been a narrower main power.

4. *The Express Incidental Power*

The express incidental power gives the Commonwealth Parliament authority to legislate with respect to:

Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.[48]

The express incidental power, as its place in the enumeration in Section 51 of the Constitution predicates, is a distinct head of power. Unlike the misnamed implied incidental power, the express incidental power is definitely not a mere rule of construction.

However, this critical distinction between an express head of power (Section 51 (xxxix) of the Constitution) and a mere rule of construction (the implied incidental power) was confounded by the Privy Council in *Attorney-General for the Commonwealth of Australia and Others v. The Colonial Sugar Refining Company Limited and Others*[49] (hereinafter *Colonial Sugar*), where their Lordships, in examining the words of Section 51 (xxxix) of the Constitution, ruled:

These words do not seem to them[50] to do more than cover matters which are incidents in the exercise of some actually existing power, conferred by statute or by the common law.[51]

In short, the Privy Council held that an entire head of Commonwealth legislative power was completely redundant, in that this head of power had nothing to add to the rule of construction known as the implied incidental power. This line of reasoning has led to a number of High Court decisions in which the express

[45] *Ibid.* 504.

[46] The approval was given in a joint judgment by Mason, Murphy, Brennan and Deane JJ.: (1983) 46 A.L.R. 41, 65.

[47] That the concept of the *accrued jurisdiction* is based on the *implied incidental power* was explicitly stated by Mason, Brennan and Deane JJ., in a joint judgment, in *Coast Securities*: (1983) 49 A.L.R. 193, 216.

[48] Section 51 (xxxix) of the Constitution.

[49] [1914] A.C. 237.

[50] A reference to their Lordships who were deciding the case.

[51] [1914] A.C. 237, 256.

incidental power was regarded as synonymous with the implied incidental power. Three examples will suffice. In *Burton v. Honan*[52], the distinction between the express and the implied incidental powers was regarded, for the purposes of the case, as 'immaterial'[53] because the application of either power would have led to 'the same result'[54]. In *Milicevic v. Campbell and Another*[55], the examination of the distinction was considered to be 'unnecessary'[56] and no such examination was made. Again, in *R. v. The Judges of the Australian Industrial Court and Another; Ex parte C.L.M. Holdings Pty Ltd and Another*[57], it was held that it did *not* matter whether the relevant legislation was to be upheld under the relevant head of power 'or the incidental power'[58].

In 1915, in *Kidman*[59], Isaacs J. rejected the narrow view taken by the Privy Council in *Colonial Sugar* of the express incidental power, saying:

> The power[60] is an independent power of legislation as high as any of the preceding thirty eight in sec. 51. I, therefore, do not agree that it adds nothing to the Parliamentary power which would not be implied if it were omitted.[61]

However, in *Kidman*, the narrow view of the express incidental power was accepted by Griffith C.J.[62] and, in a joint judgment, by Gavan Duffy and Rich JJ.[63] Powers J. was ambivalent about the matter[64]. Only Higgins J. appeared to agree with Isaacs J., saying:

> It is clear that pl. xxxix of sec. 51 was not meant to limit, *it was meant to increase*, the powers of Parliament to make laws.[65]

In *Federal Council of the British Medical Association in Australia and Others v. The Commonwealth and Others*,[66] Dixon J.[67] thought that the express incidental power was a separate head of power capable of giving the Commonwealth Parliament authority to legislate with respect to subject matters that fell within it.

But the most curious decision of all, regarding the meaning of the express incidental power was that of the majority of the Justices of the High Court in *Le Mesurier v. Connor*[68] (hereinafter *Le Mesurier*). In *Le Mesurier*, in a joint judgment, Knox C.J., Rich and Dixon JJ., at first said:

[52] (1952) 86 C.L.R. 169.
[53] *Ibid.* 178.
[54] *Ibid.*
[55] (1975) 132 C.L.R. 307.
[56] *Ibid.* 313.
[57] (1977) 136 C.L.R. 235.
[58] *Ibid.* 246.
[59] (1915) 20 C.L.R. 425.
[60] Section 51 (xxxix) of the Constitution.
[61] (1915) 20 C.L.R. 425, 441.
[62] *Ibid.* 433.
[63] *Ibid.* 455-6.
[64] *Ibid.* 462.
[65] *Ibid.* 453. Emphasis added.
[66] (1949) 79 C.L.R. 201.
[67] *Ibid.* 274.
[68] (1929) 42 C.L.R. 481.

The distinction between a matter incidental to the execution of a power, something which attends or arises in its exercise, and a matter incidental to a subject to which the power is addressed, is material. The principle that everything which is incidental to the main purpose of a power is contained within the grant itself, is so firmly established and so well understood in English law that *it would have been superfluous to incorporate it in an express provision* of the Constitution . . .[69]

The above extract from the joint judgment, with its explicit emphasis on the superfluity of expressly providing for that which would be already necessarily implied, would immediately suggest that their Honours were about to reject, as the purport of Section 51 (xxxix), the express incorporation of a power already impliedly incorporated. However, their Honours proceeded to adopt the reasoning in *Colonial Sugar*, and said:

Much of sec. 51 (xxxix) as relates to matters incidental to the execution of powers vested by the Constitution in the Parliament *did not more than express* what *would in any case be understood*, namely, that whatever was incidental to a subject matter of legislation was included in the grant of legislative power.[70]

Thus did the majority Justices in *Le Mesurier* ultimately prefer the narrow interpretation of the express incidental power.

In 1975, sixty years after Isaacs J. in *Kidman* rejected the narrow interpretation given to Section 51 (xxxix) by *Colonial Sugar*, another Justice of the High Court, Jacobs J., propounded a broad view of the power. In *A.A.P.*[71] Jacobs J. said:

Matters incidental to the execution of an executive[72] power are not limited to matters either adjectival or ancillary to the execution of that power. That is to say the 'incidental' subject matter of s. 51 (xxxix) may be a matter of substance and not merely a matter in aid of or procedural to the relevant substantive power itself. The latter power is contained within the grant of the substantive power itself because it is incidental to, an incident of, the subject matter of power. *But a distinction must be drawn between* what is incidental or incident to the subject matter of a power and what is a matter incidental to the execution of a power. Compare *Le Mesurier v. Connor*[73]. The distinction reflects a recognized difference in the meanings of the word 'incidental'. The word may be used to describe a side occurrence which, though not essential to the main action, may be expected to arise in connexion with the main action. It may *also* be used to describe a side occurrence *with stress on its independence* of the main action . . . Thus the *Oxford Dictionary*[74] defines the adjective 'incident' first as 'liable' or apt to befall or occur to; likely to happen; hence, naturally appertaining or attaching'. On the other hand, it defines 'incidental' first as 'occurring or liable to occur in fortuitous or subordinate conjunction with something else of which it forms no essential part'. *This, it seems to me, is the distinction between the implied incidental power and the express power in s. 51 (xxxix).* Whatever is incident (in the above sense) to the subject matter of power comes within the ambit of the main power. It is incident to that power in that it naturally appertains and attaches to that power. Hower, what is incidental to the execution of a main power includes every matter which occurs or is liable to occur in subordinate conjunction with the execution of that power, *even though it forms no essential part of the main power itself.* It is subordinate *but just as importantly*, it is in conjunction. Thus a subject matter incidental to the execution of a power *may have a wider ambit* than the power implied in respect of the incidents of a subject matter of power. *It is itself a subject of legislative power* . . . and that is so even though it only exists in subordinate conjunction with the execution of a main power.[75]

It is hoped that the above exposition by Jacobs J. of the express incidental power represents the law on this subject.

[69] *Ibid.* 497. Emphasis added.
[70] *Ibid.* Emphasis added.
[71] (1975) 134 C.L.R. 338.
[72] The same reasoning would apply to legislative and judicial powers.
[73] The italicized reference to the case is made by Jacobs J. The citation to the case made by Jacobs J. has been omitted.
[74] Jacobs J.'s emphasis.
[75] (1975) 134 C.L.R. 338, 413-4. Emphasis added.

5. *The Federal Balance*

The Federal Balance comprises, on the one hand, the three elements which weigh in favour of the Commonwealth, namely, the implied national power, the implied incidental power and the express incidental power; and, on the other hand, the element which weighs against the Commonwealth, namely, the doctrine of implied prohibition. The balance will favour the Commonwealth if a broad interpretation is given to one or more of those elements in the balance which weigh in its favour. In particular, a broad interpretation of those elements in the balance which favour the Commonwealth, *if it is combined with* a *restricted* application of the doctrine of implied prohibition, will result in an expansion of Commonwealth power which will all but nullify the federal system, bearing in mind that the States, not possessing specific heads of power under the Constitution, would, apart from the doctrine of implied[76] prohibition, have no impediment to offer against any increase in Commonwealth power through an expansion of the three elements in the balance which weigh in its favour.

Thus, the Federal Balance in the Australian polity will depend on the degree of expansion or contraction which occur, from time to time, in the elements comprising that Balance.[77]

[76] The *express* prohibitions in the Constitution are, of course, insufficient by themselves to maintain the federal system.

[77] Section 96 of the Constitution is not relevant to the balance between the constitutional authority of the Commonwealth and that of the States because the section is not a source of power for the Commonwealth Parliament to *coerce* the States out of their constitutional capacity: *South Australia v. The Commonwealth* (1942) 65 C.L.R. 373; *Victoria and New South Wales v. The Commonwealth* (1957) 99 C.L.R. 575.