

# AUSTRALIAN CONSTITUTIONALISM BETWEEN SUBSIDIARITY AND FEDERALISM

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*A full 125 years has passed since Sir Henry Parkes delivered a speech at Tenterfield advocating for a political process that led to the Federation. Throughout this period, our constitutionalism was understood through the prism of the federal model where sovereignty is divided between different tiers of government. This article argues that a refined understanding of our constitutional journey suggests a different model, one based on the principle of subsidiarity where sovereignty is not divided but shared. The article proposes a fundamental shift in the way we see federalism — from a value in itself to a subset of subsidiarity. On 27 October 2014, the Australian Prime Minister delivered another speech at Tenterfield that called for a bipartisan reform plan to fix the Federation. On the same day, The Committee for the Economic Development of Australia ('CEDA'), a bipartisan, non-profit, national think tank, published a report on the Federation that details some reform options. Understanding that subsidiarity forms the hypostasis of our constitutionalism is imperative to any successful reform.*

## I INTRODUCTION

If you consult a leading textbook on Australian constitutional law, such as *Winterton's Australian Federal Constitutional Law* or *Hanks Australian Constitutional Law*,<sup>1</sup> you will find a clear commitment to positioning Australian constitutionalism within a federal model. This paper is intended to provide a more nuanced understanding of Australian constitutionalism by expounding the difference between federalism and subsidiarity, and arguing that the latter is the true 'hypostasis' of Australian constitutionalism. Some commentators have

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1 Peter A Gerangelos et al (eds), *Winterton's Australian Federal Constitutional Law: Commentary and Materials* (Thompson Reuters, 3<sup>rd</sup> ed, 2013); Jennifer Clarke et al (eds), *Hanks Australian Constitutional Law: Materials and Commentary* (LexisNexis Butterworths, 9<sup>th</sup> ed, 2013).

already invoked the principle of subsidiarity in the Australian context.<sup>2</sup> I, however, hope to make a contribution as to our understanding of the (political) principle of subsidiarity, and its role (historical, present and future) in the Federation. Subsidiarity forms part of the fabric (assumptions) of our constitutional history which the Australian Parliament has a constitutional obligation to uphold. By drawing implications from the constitutional text, I argue that the *Australian Constitution* envisages subsidiarity rather than federalism, even though it is the latter that is referred to in the text.

The starting point is to elucidate the meaning of the principle of subsidiarity and its relation to federalism. Later on, I show how the principle of subsidiarity forms the essence of the *Australian Constitution*, and how this *should* guide reforming the Federation (see below section IV).

## II THE PRINCIPLE OF SUBSIDIARITY

I now proceed to elaborate on subsidiarity and the interconnection between this principle and the concepts of federalism and of referenda.<sup>3</sup> The principle of subsidiarity is an organisational principle that originated in Mosaic Law,<sup>4</sup> transferred to Greek political and social thought, and was later elaborated on by St. Thomas Aquinas and medieval scholastics, before being updated by the Catholic Church as a social doctrine.<sup>5</sup> Subsidiarity is a principle that is ‘anchored in the concept of sovereignty of the individual’, where ‘all other levels of social organisation are given a subsidiary role, taking up only those tasks and responsibilities that are beyond the capacity of the individual’.<sup>6</sup> Subsidiarity envisages ‘onion-like’ layers of socio-political structures where the bulk of decision-making is taken at the lowest scales. Subsidiarity ‘holds that the burden of argument lies with attempts to centralise authority’.<sup>7</sup> In other words, subsidiarity

- 2 Michelle Evans, ‘Subsidiarity and Federalism: A Case Study of the Australian Constitution and Its Interpretation’ in Michelle Evans and Augusto Zimmermann (eds), *Global Perspectives on Subsidiarity* (Springer, 2014) 185. Evans suggests that subsidiarity is ‘a central characteristic of an authentic federal system of government’: at 185, 186–8. I on the other hand classify federalism as one possible modality of subsidiarity, characterised mainly by a rigid (static) *division* of power between *two* vertical levels of government. Subsidiarity is however wider: it is a dynamic *sharing* of (legislative) powers between multiple levels of governance (not necessarily governments).
- 3 For a good introduction to this principle in English, see Michelle Evans and Augusto Zimmermann (eds), *Global Perspectives on Subsidiarity* (Springer, 2014); Alessandro Colombo (ed), *Subsidiarity Governance: Theoretical and Empirical Models* (Palgrave Macmillan, 2012).
- 4 See *Exodus* 18:13–27. Moses paid attention to his father-in-law’s counsel and chose from among the people competent men to be in charge of ‘thousands, hundreds, fifties and tens’.
- 5 Chantal Millon-Delsol, *L’État Subsidaire: Ingérence et Non-Ingérence de l’État: Le Principe de Subsidiarité aux Fondements de l’Histoire Européenne* (Presses Universitaires de France, 1992) 15–27. For a detailed account of the theological origins of subsidiarity, and for its counterpart in Calvinism, see Kent A Van Til, ‘Subsidiarity and Sphere-Sovereignty: A Match Made in ...?’ (2008) 69 *Theological Studies* 610.
- 6 Bhajan Grewal, ‘Economic Perspectives on Federalism’ in ‘A Federation for the 21<sup>st</sup> Century’ (Research Report, Committee for Economic Development of Australia, 2014) 44.
- 7 Andreas Follesdal, ‘Subsidiarity and the Global Order’ in Michelle Evans and Augusto Zimmermann (eds), *Global Perspectives on Subsidiarity* (Springer, 2014) 207, 208.

is built on the ideas of *methodological individualism* and *methodological collectivism*.<sup>8</sup> This formulates the basis for the link between subsidiarity and referenda on the one hand (through methodological individualism), and subsidiarity and federalism on the other (through methodological collectivism). The principle hence places a constitutional responsibility on higher levels of government not only to enable the autonomy of lower levels, but to provide these lower levels with necessary support.<sup>9</sup> Later in this paper I argue that in Australia we see both types of subsidiarity: methodological individualism through referenda and methodological collectivism through federalism. Due to the concurrent powers under s 51,<sup>10</sup> our federalism is more dynamic than the classic version seen in other countries, for example in the United States.

One of the weaker versions of the subsidiarity principle can be found in the *United States Constitution* amend X (*Tenth Amendment*) where it states that ‘powers not delegated to the [federal government] by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people’.

In the European Union, the principle of subsidiarity was first introduced in the context of environmental policy under the Single European Act (1987), although it was not referred to explicitly.<sup>11</sup> It was later formally enshrined by the *Treaty on European Union*.<sup>12</sup> A more recent formulation of the principle was established in the Charter of Fundamental Rights of the European Union in December 2000.<sup>13</sup> The principle is also central to the *European Charter of Local Self-Government*.<sup>14</sup> The legal basis for the principle of subsidiarity in the European Union comes from *Treaty on European Union* art 5(3),<sup>15</sup> and the *Treaty of Amsterdam*.<sup>16</sup> Under

- 8 Methodological individualism asserts that explaining sociological phenomena must be anchored in facts about the individual. Methodological collectivism, however, holds that sociological phenomena are explained by social institutions as real entities with their own complex existence that cannot be reduced to individuals.
- 9 Stefan Gosepath ‘The Principle of Subsidiarity’ in Andreas Follesdal and Thomas Pogge (eds), *Real World Justice: Grounds, Principles, Human Rights, and Social Institutions* (Springer, 2005) 157, 157.
- 10 *Australian Constitution* s 51.
- 11 *Single European Act* [1987] OJ L 169/2; see also Nicolas de Sadeleer, ‘Principle of Subsidiarity and the EU Environmental Policy’ (2012) 9 *Journal for European Environmental and Planning Law* 63, 63.
- 12 *Treaty on European Union*, opened for signature 7 February 1992, [1992] OJ C 191/1 (entered into force 1 November 1993) (*Treaty on European Union*).
- 13 *Charter of Fundamental Rights of the European Union* [2000] OJ C 364/1; Paolo G Carozza, ‘Subsidiarity as a Structural Principle of International Human Rights Law’ (2003) 97 *The American Journal of International Law* 38, 39, 53.
- 14 *European Charter of Local Self-Government*, opened for signature 15 October 1985, ETS No 122 (entered into force 1 September 1988) arts 4(2), 4(3); for a critique of the principle of subsidiarity in the context of the European Union see Christian Kirchner, ‘The Principle of Subsidiarity in the Treaty on European Union: A Critique from a Perspective of Constitutional Economics’ (1998) 6 *Tulane Journal of International and Comparative Law* 291.
- 15 *Treaty on European Union*, opened for signature 7 February 1992, [2016] OJ C 202/1.
- 16 *Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Protocol on the Application of the Principles of Subsidiarity and Proportionality*, opened for signature 2 October 1997, [1997] OJ C 340/1 (entered into force 1 May 1999).

the 2007 *Treaty of Lisbon*,<sup>17</sup> the principle of subsidiarity is enshrined by art 3b — replacing art 5 of the *Treaty on European Union*. This introduced an explicit reference to regional and local levels of governance, and by doing so, ushered in a more inclusive approach to subsidiarity relative to former treaties:

3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.<sup>18</sup>

The most progressive statement of the principle can be found in the *Federal Constitution of the Swiss Confederation* art 5a (*‘Swiss Federal Constitution’*): ‘The principle of subsidiarity must be observed in the allocation and performance of state tasks’. The methodological individualist version is given in art 6: ‘All individuals shall take responsibility for themselves and shall, according to their abilities, contribute to achieving the tasks of the state and society’; while the methodological collectivist version can be seen in art 3: ‘The Cantons are sovereign except to the extent that their sovereignty is limited by the Federal Constitution. They exercise all rights that are not vested in the Confederation’.

Subsidiarity has two foundations: one economic, the other ethical. The difference therefore between decentralisation and subsidiarity is that the latter includes an ethical rationale that goes beyond the economic ‘efficiency’ objective inherent in decentralisation theories.<sup>19</sup> Conventional public economics is predicated on a decentralisation theorem that models incomplete contracts under uniformity and homogeneity assumptions where the central government can replicate the public goods supplied by local governments. Subsidiarity on the other hand introduces a *processual* mechanism that is also predicated on ethical considerations that signal the appropriate scale at which political organisation should be induced. Identifying that scale is a collective responsibility of different levels of government, not only the highest (national) level. Subsidiarity is hence a decentralisation modality that takes into account the political forces of existing social structures. The principle

17 *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, opened for signature 13 December 2007, [2007] OJ C 306/1 (entered into force 1 December 2009).

18 *Ibid* art 3b.

19 See Albert Breton, Alberto Cassone and Angela Fraschini, ‘Decentralization and Subsidiarity: Toward a Theoretical Reconciliation’ (1998) 19 *University of Pennsylvania Journal of International Economic Law* 21.

has its foundation in the right to human dignity,<sup>20</sup> and the principle of social trust.<sup>21</sup> The use of trust as the basis for describing the relationship between the state and its subjects is hardly an innovation.<sup>22</sup> Recourse to general principles of justice in order to assist the ‘just’ application of law is a feature common to major legal systems.<sup>23</sup> In relation to the political state, trust manifests itself either as a fiduciary or subsidiarity standard. Trust emerges as a way of coping with the task of governing under complexity. State-subject relations emerge as a delicate dialectic of trust and distrust, discretion and accountability, hard legal rules and soft social norms. The fiduciary and subsidiarity principles maintain the integrity of relationships perceived to be of importance in a society.<sup>24</sup> As the perceptions of social interests and values change, so also can the ambience of these principles. In this, the true nature of the fiduciary and subsidiarity principles is revealed. They originate in public policy.<sup>25</sup> However, there is an overarching principle that can be seen in the subsidiarity and fiduciary principles.<sup>26</sup> The need for, and existence of, this overarching ‘auxilium’ obligation (on the state towards its subjects) is independent of any legislative enabler, and is superior to parliamentary sovereignty. This superiority derives directly from the nature of

- 20 ‘Le fondement du principe de subsidiarité réside dans la dignité inhérente à la personne humaine car attachée à sa qualité de créature de Dieu façonnée à son image’: Joël-Benoît d’Onorio, ‘La Subsidiarité: Analyse d’un Concept’ in Joël-Benoît d’Onorio (ed) *La Subsidiarité: De la Théorie à la Pratique* (TÉQUI, 1995) 10, 13. The right to dignity forms the basis for all human rights law. For an elaboration on this right see Rex D Glensy, ‘The Right to Dignity’ (2011) 43 *Columbia Human Rights Law Review* 65. Glensy expounds four different meanings to the right to dignity: a positive rights approach, a negative rights approach, a proxy approach and an expressive approach: at 71. Glensy argues that ‘[t]he centrality of dignity in a democratic society cannot be underestimated’: at 68. Glensy quotes Paolo G Carozza who makes the link between the right to dignity and the principle of subsidiarity. See Carozza, above n 13, 39: ‘When used in its original and most comprehensive sense, subsidiarity has deep affinities at its roots with many of the implicit premises of international human rights norms, including presuppositions about the dignity and freedom of human persons, the importance of their association with others, and the role of the state with respect to smaller social groups as well as individuals’.
- 21 See Benjamin Franklen Gussen, ‘The State is the Fiduciary of the People’ [2015] *Public Law* 440. This paper introduces an analytical model, ‘the auxilium model’ to explain the connection between social trust, the fiduciary principle and subsidiarity.
- 22 See, eg, Kathleen Clark, ‘Do We Have Enough Ethics in Government Yet?: An Answer from Fiduciary Theory’ (1996) *University of Illinois Law Review* 57; Anthony Mason, ‘The Place of Equity and Equitable Remedies in the Contemporary Common Law World’ (1994) 110 *Law Quarterly Review* 238.
- 23 Vaughan Lowe, ‘The Role of Equity in International Law’ (1988–89) 12 *Australian Year Book of International Law* 54; L S Sealy, ‘Fiduciary Relationships’ (1962) 20 *Cambridge Law Journal* 69; Marcus Tullius Cicero, *On Moral Obligation: A New Translation of Cicero’s ‘De Officiis’ with Introduction and Notes by John Higinbotham* (John Higinbotham trans, Faber and Faber, 1967) book 1, ch 25, § 85, 69; John Locke, *Two Treatises of Government* (Legal Classics Library, 1994) 77–9, 107–9, 119–22, 136, 229–30; James Madison, ‘Federalist No 46: The Influence of the State and Federal Governments Compared’ in Clinton Rossiter (ed) *The Federalist Papers* (Signet, 2003) 294; Alexander Hamilton, ‘Federalist No 65: The Powers of the Senate Continued’ in Clinton Rossiter (ed) *The Federalist Papers* (Signet, 2003) 397; Martin Loughlin, *Legality and Locality* (Oxford University Press, 1996) 204, 259.
- 24 Evan J Criddle, ‘Fiduciary Foundations of Administrative Law’ (2007) 54 *UCLA Law Review* 117, 134.
- 25 P D Finn ‘The Fiduciary Principle’ in T G Youdan (ed) *Equity, Fiduciaries and Trusts* (Carswell, 1989) 1, 27.
- 26 See Gussen, above n 21, 440.

social relations, although there are also important arguments to be made from (common law) historical analyses.<sup>27</sup>

One of the earliest economic formulations of subsidiarity can be found in Christian Wolff's *Principles of Natural Law*, first published in 1754.<sup>28</sup> In section 1022, the principle is formulated as integral to the creation of the welfare state, where the subsidiarity principle keeps 'the burden of the welfare taxes to be borne by citizens at a minimum'.<sup>29</sup> This is so given that state intervention is only where individuals have 'no relatives or friends who could take care' of them.<sup>30</sup> In this sense, the state is only subsidiary to community relationships. A clear statement of the ethical formulation of subsidiarity can be found in the first papal encyclical on the 'social question', Leo XIII's *Rerum Novarum* of 1891, where we see a principle of intervention (positive dimension) but not interference (negative dimension) based on the ethical objective of 'remedy of the evil or the removal of the mischief'.<sup>31</sup> A stronger and more precise version of the ethical formulation is contained in section 79 of Pius XI's 1931 papal encyclical paper, *Quadragesimo Anno*.<sup>32</sup> This formulation emphasises the ethical constraint on larger (political) entities, preventing them from usurping duties that can be reasonably discharged by smaller entities. The justification for such a constraint is derived directly from 'the principle of justice'.<sup>33</sup>

Subsidiarity is a concept wider than federalism and subsumes the latter as one of its modalities.<sup>34</sup> Subsidiarity is about limiting sovereignty. Federalism limits that sovereignty by dividing it between federal and state levels. Powers are distributed among different levels of government. Subsidiarity on the other hand also foresees 'sharing' these powers. In this sense, subsidiarity is not only a wider concept than federalism, but a more dynamic one. Subsidiarity envisages a pendulum-like shift in the seat of decision-making, from the individual to the national state

27 See Christine Brown, 'The Fiduciary Duty of Government: An Alternative Accountability Mechanism or Wishful Thinking?' (1993) 2 *Griffith Law Review* 161, 172.

28 See Jürgen G Backhaus, 'Subsidiarity' in Jürgen G Backhaus (ed) *The Elgar Companion to Law and Economics* (Edward Elgar, 2005) 280, 281.

29 Ibid 281–2.

30 Ibid.

31 Leo XIII, 'Rerum Novarum: Encyclical of Pope Leo XIII on Capital and Labor' (1891). The principle of sphere sovereignty is the Reformed version of the Catholic principle of subsidiarity: see Jonathan Chaplin 'Subsidiarity and Sphere Sovereignty: Catholic and Reformed Conceptions of the Role of the State' in Francis P McHugh and Samuel M Natale (eds), *Things Old and New: Catholic Social Teaching Revisited* (University Press of America, 1993) 175.

32 Pius XI, 'Quadragesimo Anno: Encyclical of Pius XI on Reconstruction of the Social Order' (1931).

33 For a detailed account of the theological origins of subsidiarity, and for its counterpart in Calvinism, see Van Til, above n 5.

34 On the relationship between subsidiarity and federalism see also John Wanna et al, 'Common Cause: Strengthening Australia's Cooperative Federalism' (Final Report, Council for the Australian Federation, May 2009) 9–10. Due to the nature of subsidiarity's relationship to sovereignty, its role as a cornerstone in constitutional architecture straddles both unitary and federal states. For example, the *Constitution of the Republic of Poland* [trans] states that the Constitution is based 'on the principle of subsidiarity in the strengthening [of] the powers of citizens and their communities', and at the same time art 3 states '[t]he Republic of Poland shall be a unitary State'. On the other hand, the *Federal Constitution of the Swiss Confederation* art 5a [trans] states that '[t]he principle of subsidiarity must be observed in the allocation and performance of state task', while art 1 declares Switzerland a Confederation.

(and all the socio-political entities that lie in between) depending on the context and the time at which the decision is to be made. Hence, under subsidiarity there would be a considerable overlap between different levels of governance, and that overlap would allow for removing decision-making between these levels over time. One way of limiting sovereignty is through dividing sovereignty between different levels of government and then attempting to centralise some of the functions at the federal level.<sup>35</sup> However, sovereignty could also be limited by local autonomy in a ‘quasi federal’ arrangement where the central (federal) government continues to ‘succour’ lower levels of government. It could also be limited to ‘single-issue’ politics where citizens propose changes to legislation (including non-constitutional matters) and government ‘succours’ such initiatives by carrying them through provided there are no constitutional bars on the same. In summary, subsidiarity looks at limiting sovereignty. Federalism is only one mode of achieving the same, through dividing sovereignty between (usually) two tiers of government.<sup>36</sup> Under subsidiarity there is a political exchange that sees a wide margin of local autonomy weaved into multi-level governance structures.

The literature provides a number of taxonomies.<sup>37</sup> I briefly discuss two of the most relevant ones. The first taxonomy can be grouped under three headings: liberty (non-intervention), efficiency (transfer of competencies), and fairness (assistance in the form of limited intervention).<sup>38</sup> Under the liberty taxonomy of subsidiarity there are two main schools of thought. The first is that of Johannes Althusius who adopted a territorial interpretation of subsidiarity (inspired by Calvinism).<sup>39</sup> In this school we also find a consociational (community-based) version,<sup>40</sup> where emphasis is on functionality rather than on territoriality. While Althusius builds his subsidiarity on existing geo-social entities such as cities, consociationalism builds its subsidiarity on a functional organisation of political units. The second school under liberty is confederal subsidiarity, which adopts

35 In Australia this is done through the concurrent powers under the *Australian Constitution* s 51.

36 This explains why the *United States Constitution* and the *Australian Constitution* do not mention local government.

37 See, eg, Aaron Martin ‘The Principle of Subsidiarity and Institutional Predispositions: Do the European Parliament, the German Bundestag, and the Bavarian Landtag Define Subsidiarity Differently?’ (Working Paper, Center for Applied Policy Research, July 2010) 5, 8.

38 See Andreas Føllesdal, ‘Competing Conceptions of Subsidiarity’ in James E Fleming and Jacob T Levy (eds) *Federalism and Subsidiarity* (New York University Press, 2014) 214–30; Andreas Føllesdal ‘Survey Article: Subsidiarity’ (1998) 6 *The Journal of Political Philosophy* 190; Andreas Føllesdal ‘The Principle of Subsidiarity as a Constitutional Principle in International Law’ (2013) 2 *Global Constitutionalism* 37.

39 Althusius was part of the Calvinist political thought on liberty, inspired by the ‘city fathers of Geneva’. Calvinist resistance theory seized the language of liberty and framed it in the biblical Exodus narrative. The theory was presented as fighting for freedom from civil and ecclesiastical bondage. Althusius followed this tradition in arguing for popular self-government, emphasizing republican liberty and equality; ‘Althusius saw the absolute liberty of conscience as the natural corollary to the absolute sovereignty of God, a doctrinal staple of Calvinism’: John Witte Jr ‘Natural Rights, Popular Sovereignty, and Covenant Politics: Johannes Althusius and the Dutch Revolt and Republic’ (2010) 87 *University of Detroit Mercy Law Review* 565, 592. On this point refer to John Coffey, ‘The Language of Liberty in Calvinist Political Thought’ in Quentin Skinner and Martin van Gelderen (eds) *Freedom and the Construction of Europe* (Cambridge University Press, 2013) vol 1, 296–316.

40 For an introduction on consociationalism see Brian Barry ‘The Consociational Model and Its Dangers’ (1975) 3 *European Journal of Political Research* 393.

methodological individualism rather than collectivism (as under Althusius).<sup>41</sup> This school also requires local government to be able to veto any intervention from the central government in its affairs, including the right to exit from any confederal arrangements, even by force if necessary. Because both schools, Althusian/consocial and confederal, see subsidiarity as a mechanism to ensure the liberty of citizens from interventions by a central government, there is no emphasis on the need for central government intervention. Under justice, there are also two schools. The first is embedded in Catholic teachings where the state has to maintain respect for the individual and the family. The second comes from liberal contractarianism where civil deliberations between individuals (methodological individualism) lead to a just (and legitimate) organisation of society. Both schools emphasise prescriptive subsidiarity. The third strand, efficiency, has one main school of thought, fiscal federalism, which provides strong prescriptive signals for central government intervention.

Under the second taxonomy, subsidiarity is either instrumental or intrinsic.<sup>42</sup> If instrumental, it could be based on methodological individualism, resulting in economy-oriented subsidiarity, or it could be based on methodological collectivism, which gives politically-oriented subsidiarity. The latter is an integration of objectives from the economy and the community. Alternatively, if subsidiarity is intrinsic, it could be civil-society oriented or communal, similar to Catholic individualism, or transparency oriented (based on collectivism). The transparency oriented strand is comprehensive in that it integrates the three spheres present in the other strands: the economic, the political and the communal.

The above typologies can be integrated into three core principles of subsidiarity that cut across methodological individualism and methodological collectivism.<sup>43</sup> The first is a positive version, where a ‘rule of assistance’ requires higher levels of organisation to support lower levels (down to the individual) where they cannot perform the functions of governance. This rule would be violated where for example the central government refuses to assist upon the appeal of a local government, or when the local government requests aid for something it already can perform for itself.<sup>44</sup> This sub-principle resonates with an ancient concept in Western political theory where the state has a duty to protect its subjects and a reciprocal duty of obedience on the subjects towards the state.<sup>45</sup> The second sub-principle is the ‘ban on interference’, a negative version of the subsidiarity principle, where the higher level of organisation is prohibited from interfering in the affairs of the lower level. This rule would be violated for example when the central government interferes

41 The phrase *methodische Individualismus* was coined by Max Weber’s student, Joseph Schumpeter, in 1908: Joseph Schumpeter, *Das Wesen und der Hauptinhalt der Theoretischen Nationalökonomie* (Verlag von Duncker & Humboldt). Under methodological individualism, only individuals choose and act. Jean-Jacques Rousseau’s conception of sovereignty would be within methodological individualism as his sovereignty is based on the collective of the people (as individuals).

42 Neil MacCormick ‘Democracy, Subsidiarity, and Citizenship in the “European Commonwealth”’ (1997) 16 *Law and Philosophy* 331.

43 See, eg, Gosepath, above n 9, 162; Peter J Floriani, *Subsidiarity* (Penn Street Productions, 2012) 82–3.

44 Note that subsidiarity is not limited to any particular number of levels of government.

45 This is what came to be known as the doctrine of allegiance.



with the work of a local government. This non-intervention rule parallels the concept emanating from the humanitarian movement of the 1820s and 1830s which recognises the sovereignty and independence of indigenous peoples. The third sub-principle derives from the first two and limits the legitimate support of higher levels to helping lower levels help themselves. This rule is violated where the positive rule is broken, for example where the federal government fails to correct a state government which fails to respond to an appeal for assistance from a local government. This third sub-principle is also violated when the negative rule is broken, for example, when the federal government fails to stop a state government from interfering with the work of a local government.

The sovereignty of the individual under subsidiarity leads to referenda. Referenda were used by Germanic tribes before being adopted by Switzerland in the 16<sup>th</sup> century.<sup>46</sup> The German word for referenda is *Volksbefragung* which literally means ‘asking the people’.<sup>47</sup> Referenda correspond in their widest sense to the maxim *vox populi, vox dei*, where they ‘devolve’ decision-making to individuals. Referenda are analogous to opinion polls, although the former are more authoritative and comprehensive than the latter.<sup>48</sup> England itself is in fact the birthplace of modern referenda under the Levellers movement of the mid-17<sup>th</sup> century. At the same time, we see referenda as part of the law-making process in New England.<sup>49</sup> Since then the use of referenda has ‘proliferated remarkably’, especially since the 1970s.<sup>50</sup> Referenda are ‘used almost twice as frequently today ... compared with fifty years ago and almost four times more than at the turn of the twentieth century’.<sup>51</sup> The reason for this proliferation, according to the input-output model of political systems, where input is first articulated by civic society, which is then aggregated by political parties into legislation, is that the alignment between the inflexible and highly institutionalised ‘articulators’ and the dynamic ‘aggregators’ had broken down.

It was Switzerland who first made referenda a cornerstone of political systems. Their use was first introduced at the cantonal level, as early as 1830, when it was possible to amend the cantonal constitution or repeal a legislation using a referendum. Referenda were later used at the federal level, first to amend the constitution (since 1848), and later to repeal ordinary law (since 1874). The

46 Matt Qvortrup, ‘Introduction: Theory, Practice and History’ in Matt Qvortrup (ed), *Referendums Around the World: The Continued Growth of Direct Democracy* (Palgrave Macmillan, 2014) 1, 3–4.

47 The Latin word ‘referendum’ comes from the verb ‘refero’ which in turn means ‘to give up’ (to the people).

48 Graeme Orr, ‘The Conduct of Referenda and Plebiscites in Australia: A Legal Perspective’ (2000) 11 *Public Law Review* 117, 117. The referendum is an interpretation of subsidiarity in the following terms, ‘[t]he taking of Referendum on any question is, so far as it goes, a reversion to the ideals of Greek democracy. The orator is replaced by the writer, the Ecclesia by a few hundred polling-booths; but the voice of the people cries ‘Aye’ or ‘No’ as clearly as if they were gathered together in a marketplace or a Senate House’: Robert Randolph Garran, *The Coming Commonwealth: An Australian Handbook of Federal Government* (Angus and Robertson, 1897) 135.

49 Thomas E Cronin, *Direct Democracy: The Politics of Initiative, Referendum, and Recall* (Harvard University Press, 1989) 12.

50 Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press, 2012) 1.

51 David Altman, *Direct Democracy Worldwide* (Cambridge University Press, 2011) 65.

last evolutionary step was the introduction of citizen-initiated referenda which occurred for the first time in 1891.<sup>52</sup>

Similarly, in the United States referenda were first used for approval of state constitutions and constitutional amendments, and later, ‘[g]radually, states also began to confer upon the people the right to legislate directly upon subjects other than constitutional questions’.<sup>53</sup>

Referenda are based on methodological individualism as seen in consociational, confederal and liberal (contractarian) subsidiarity.<sup>54</sup> Under methodological individualism only individuals choose and act.<sup>55</sup> The decisions are made by individuals, not collectives.<sup>56</sup> Carl Menger, who founded the Austrian School of Economics, and is considered the founder of methodological individualism,<sup>57</sup> was open to the idea that economic analysis can be based on units larger than the individual (such as the city or the state), although the ultimate explanation of all phenomena must be the individual.<sup>58</sup> The doctrine means that ‘all social phenomena (their structure and their change) are in principle explicable only in

52 The *Swiss Federal Constitution* (of 1848) was discussed in the *Official Report of the National Australasian Convention Debates*, Sydney, 17 March 1891, 427 (Thomas Playford) in these terms:

[The Swiss Constitution] has been altered more in regard to the referendum. In the first instance, a referendum was only allowed with regard to the alteration of the constitution, and not with regard to general subjects; but they have enlarged the power of referendum, and they have given some powers of initiation which were not in existence before.

The same trend can be seen today in other countries where referenda became more than constitutional guards: see Maija Setälä and Theo Schiller (eds), *Citizens’ Initiatives in Europe: Procedures and Consequences of Agenda-Setting by Citizens* (Palgrave Macmillan, 2012).

53 Cronin, above n 49, 42.

54 There are different strands of methodological individualism: see Lars Udehn, *Methodological Individualism: Background, History and Meaning* (Routledge, 2001) 347. For our purposes this detail is not essential.

55 For more on methodological individualism see above n 41. Note, however, that Schumpeter was more of a methodological pluralist, closer to the Austrian tradition and to Emile Durkheim’s interpretation of social facts as *sui generis* and therefore irreducible to facts about individuals. See *ibid* 106, 124. This Weberian concept suggests that while we talk about states (and other social organisations) as capable of action just like an individual, these collectives must still be treated as the resultants of individual acts, since only individuals can be treated as having a subjectively understandable action. For Weber, ‘action’ refers to the subset of human behaviour that is motivated by an intentional state. For example, coughing is behaviour, apologising afterwards is action. *Methodological individualism* stands in opposition to historicism and structural functionalism as determinants of individual behaviour. Its use in economic analysis was promoted first by the Austrian School of Economics. For a more detailed account see Joseph Heath, *Methodological Individualism* (21 January 2015) Stanford Encyclopedia of Philosophy <<http://plato.stanford.edu/entries/methodological-individualism>>.

56 It follows that parliaments don’t make decisions but members of parliament do, and this is only a second-best approach as it only uses a sample of the larger body of decisions-makers, namely the electorate. When it is cost effective to consult a larger sample (especially due to a low frequency of such consultations), and the issues are of high importance that merits the same, then subsidiarity enshrines a right to referenda.

57 Udehn, above n 54, 94.

58 Carl Menger, *Problems of Economics and Sociology* (University of Illinois Press, 1963) 193–6.

terms of individuals — their properties, goals, and beliefs'.<sup>59</sup> Methodological individualism allows for 'revolutionary' changes to the political state that do not take into account historical 'meso' scales of social organisation. It only allows for the micro of the individual from which is born the macro of the nation state. This is in contrast to methodological collectivism which adopts an evolutionary understanding of the state where jurisdictional breakup is a 'natural' biological consequence of both growth and eventual death (of the state). Emphasis on methodological individualism allows for the state to grow in 'revolutionary' ways both through the speed of growth as well as its nature.

In the remainder of this paper I present subsidiarity in the context of the *Australian Constitution*, both in its methodological collectivism and collective individualism dimensions.

### III SUBSIDIARITY IN THE AUSTRALIAN CONSTITUTION<sup>60</sup>

One monograph on Australian constitutional law declares that '[o]ne of the fundamental features of Australian constitutionalism is *federalism*. In Australia, legislative power is *shared* by the Commonwealth and the states'.<sup>61</sup> Other leading constitutional law textbooks suggest the same.<sup>62</sup> In these tomes, one could hardly find any reference to subsidiarity. Even their indices fail to produce any reference to subsidiarity. This section hopes to rectify this conflation between federalism and subsidiarity through an analysis of the *Australian Constitution*. To this end, I discuss the two dimensions of subsidiarity in the *Australian Constitution*, namely methodological collectivism and methodological individualism.

While the word 'subsidiarity' does not feature in the *Australian Constitution*,<sup>63</sup> its *logos* can be discerned from the Constitutional Conventions leading up to

- 59 Jon Elster, 'Marxism, Functionalism, and Game Theory: The Case for Methodological Individualism' (1982) 11 *Theory and Society* 453, 453. But see the critique of some versions of methodological individualism in Neil MacCormick, 'Liberalism, Nationalism and the Post-Sovereign State' (1996) 44 *Political Studies* 553, 564 n 20; see also Friedrich A Hayek, *Individualism and Economic Order* (University of Chicago Press, 1948); Ludwig von Mises, *Human Action: A Treatise on Economics* (Ludwig von Mises Institute, 1998) 30–46. Mises suggests that human cooperation, as in a democratic process leading to a legislature, is only a special case of methodological individualism where social action is attained.
- 60 Note that this argument seems to be an innovation and hence will need some time to be understood. Leading textbooks such as Gerangelos et al, above n 1; Clarke et al, above n 1 make no mention of the principle of subsidiarity.
- 61 Patrick Keyzer, *Principles of Australian Constitutional Law* (LexisNexis Butterworths, 4<sup>th</sup> ed, 2013) 6 (emphasis added).
- 62 Jennifer Clarke, Patrick Kayzer and James Stellios, *Hanks Australian Constitutional Law: Materials and Commentary* (LexisNexis, 9<sup>th</sup> ed, 2013); Peter Gerangelos et al *Winterton's Australian Federal Constitutional Law: Commentary & Materials* (Thomson Reuters, 3<sup>rd</sup> ed, 2013).
- 63 It would be reasonable to expect the word itself to be missing given that its modern formulation came about only in 1891 in Leo XIII, 'Rerum Novarum: Encyclical of Pope Leo XIII on Capital and Labor' (1891). Notwithstanding, the logic of subsidiarity can still be discerned throughout the Constitution and the Constitutional Conventions leading up to it.

federation,<sup>64</sup> as well as the structure and provisions of the *Constitution* itself.<sup>65</sup> Whether one follows a textual, structural, or historical (intentional or original) approach to interpreting the *Constitution*, there are clear indicia of subsidiarity's methodological collectivism and methodological individualism.

Following a textual approach, I focus on two areas to make the argument. The first is based on methodological individualism which manifests itself in the emphasis on referenda, the other is based on methodological collectivism and its manifestation in our federal structure. Both can be discerned from the Preamble (to the *Australian Constitution*):<sup>66</sup>

WHEREAS *the people* of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble *Federal Commonwealth* under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established ...<sup>67</sup>

Compare this to the preamble of the Canadian *Constitution Act 1867* (Imp) ('*Constitution Act 1867*):

WHEREAS the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be *federally* united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom ...<sup>68</sup>

And to the preamble of the *United States Constitution*:

WE *THE PEOPLE* of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.<sup>69</sup>

Note how the Canadian preamble focuses exclusively on methodological collectivism, while the US preamble focuses exclusively on methodological individualism.<sup>70</sup> Only the Australian Preamble contemplates explicitly a

64 For background information on the Constitutional Conventions see John Quick and Robert Randolph Garran (eds), *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, revised 2<sup>nd</sup> ed, 2015); J A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972).

65 According to Michelle Evans, '[t]he federal nature of the *Constitution*, and the resultant characteristic of subsidiarity, is apparent from an examination of the structure and provisions of the *Constitution* itself': see Evans, above n 2, 189, 190–4.

66 I follow the general rule of statutory interpretation where the preamble can be used as an aid to interpreting the *Constitution*. On the substantive effect of the preamble see *Leeth v Commonwealth* (1992) 174 CLR 455, 486 (Deane and Toohey JJ); cf Brennan J: at 475; *Kruger v Commonwealth* (1997) 190 CLR 1, 96–7. See also Republic Advisory Committee, Parliament of Australia, *An Australian Republic: The Options* (1993) vol 1 135–6.

67 *Australian Constitution* Preamble para 1 (emphasis added).

68 *Constitution Act 1867* (Imp), 30 & 31 Vict, Preamble para 2 (emphasis added).

69 *United States Constitution* Preamble para 1 (emphasis added).

70 While the preamble of the *United States Constitution* mentions the word 'union' it does not explicitly refer to a federal union. In fact, the body of the *United States Constitution* itself does not make reference to the idea that the people are to be united.

subsidiarity based equally on methodological collectivism and on methodological individualism. The fact that the Preamble refers to both is an indication of understanding the continuum, under subsidiarity, of governance structures from the individual (the lowest) level, to the federation (the highest level). The reference to ‘the people’ in the Preamble is related to the plebiscites held in five of the six original colonies which approved the *Constitution*.<sup>71</sup>

As already argued by Michelle Evans, subsidiarity is a ‘central characteristic’ of the *Constitution*.<sup>72</sup> What was envisaged during the Constitutional Conventions was a centralisation only when ‘absolutely necessary’.<sup>73</sup> The clearest signal in the *Australian Constitution* on the intention to limit centralisation are ss 51–2 which limit the power of the Commonwealth Parliament to legislate only in a number of enumerated areas, either concurrently with the states (s 51) or exclusively (s 52). These sections, especially s 51, are also a clear indication of a sharing of sovereignty (qua powers) which is the essence of subsidiarity. Compare this to the *United States Constitution*. Here we find reference only to residual powers in the Tenth Amendment, and unlike the *Australian Constitution*, there is no contemplation of any ‘concurrent’ powers.

Moreover, there are also unmistakable signs in our constitutional history that the *Australian Constitution* was intended to give effect to the principle of subsidiarity. This can be seen when recalling the conscious choice we made

71 See also Quick and Garran, above n 64, 293–5. In particular, Quick and Garran (at 355) suggest that the words:

‘The People ... shall be United’ [in the covering clauses] are more forcible, striking, and significant than those of the corresponding parts of the Constitutions of the United States and of Canada; they indicate the fundamental principle of the whole plan of government, which is neither a loose confederacy nor a complete unification, but a union of the people considered as citizens of various communities whose individuality remains unimpaired, except to the extent to which they make transfers to the Commonwealth (emphasis added).

72 Evans, above n 2, 194. However, Evans portrays subsidiarity as a characteristic of federalism, rather than identifying the latter as one modality of the former. This is an essential distinction as it envisages possibilities unavailable under federalism. In particular, subsidiarity suggests a dynamic ‘equilibrium’ between different levels of government that ‘evolves’ to new states (equilibria) as a form of (local) adaptation to exogenous stimuli (for example through supranational organisations, world trade, and shocks to the world system).

73 *Official Report of the National Australasian Convention Debates*, Sydney, 4 March 1891, 23–5 (Sir Henry Parkes):

I think it is in the highest degree desirable that we should satisfy the mind of each of the colonies that we have no intention to cripple their powers, to invade their rights, to diminish their authority, except so far as is absolutely necessary in view of the great end to be accomplished ... By my next condition I seek to define what seems to me an absolutely necessary condition of anything like perfect federation, that is, that Australia, as Australia, shall be free — free on the borders, free everywhere — in its trade and intercourse between its own people ... It is, indeed, quite apparent that time, and thought, and philosophy, and the knowledge of what other nations have done, have settled this question in that great country to which we must constantly look, the United States of America ... And with the example to which I have alluded, of the free intercourse of America and the example of the evils created by customs difficulties in the states of Europe, I do not see how any of us can hesitate in seeking to find here absolute freedom of intercourse among us.

See also *Official Report of the National Australasian Convention Debates*, Sydney, 18 March 1891, 328 (Thomas Playford); *Official Report of the National Australasian Convention Debates*, Sydney, 5 March 1891, 79–80 (Alfred Deakin); *Official Report of the National Australasian Convention Debates*, Sydney, 16 March 1891, 383 (Alfred Deakin).

between two different approaches to constitutional design, namely that of convention versus (the Swiss-inspired) referendum. The orthodox views of Albert Venn Dicey suggest that Parliament cannot in law bind itself for the future by requiring approval by referenda before amending the Constitution. Instead, under Diceyan orthodox legal doctrine, such amendment would be possible only through constitutional conventions.<sup>74</sup> Instead, as Alfred Deakin points out, our *Constitution* was inspired by the Swiss Federal Constitution:

There are many like myself, who would be perfectly prepared, if we were bound to change our present, constitutions altogether, to adopt the Swiss system, with its co-ordinate houses, its elective ministry, and its referendum, by which the electors themselves were made masters of the situation ...<sup>75</sup>

The three sub-principles of subsidiarity can be seen in the operation of the *Australian Constitution*. The rule of ‘non-interference’ is seen in s 106 which guarantees the existence of the states and their constitutional powers.<sup>76</sup> The ‘rule of assistance’ can be seen in ss 51(xxxvii)–(xxxviii) where states have the right to refer to the Commonwealth Parliament jurisdiction on matters that they deem necessitate such assistance. These have included areas such as terrorism offences — under the *Criminal Code Act 1995* (Cth) — or corporate regulation — under the *Corporations Act 2001* (Cth)). There was also the transfer of ownership and control of country railways in South Australia and Tasmania in 1977, and the Victorian government handing over of its industrial relationship powers in 1998. The ‘assistance’ rule can also be seen in s 96, which enables the Commonwealth Parliament to grant financial assistance to any state on terms and conditions agreed to by the concerned state. Similarly, under s 120, states make provision for custody of offenders against Commonwealth laws, while under ss 51(vi) and 119 the Commonwealth protects the states against invasion and domestic violence.

The third rule of helping the states help themselves can be seen in s 77 where the Commonwealth Parliament has specific power to vest federal jurisdiction in state courts. Another indicator of the third rule is the establishment in 1992 of the Council of Australian Governments (‘COAG’) which continues to push for reform to help improve the performance of all three levels of government (federal, state and local).

Subsidiarity can be seen in the *Australian Constitution* ch 1 pt V, and the operation of concurrent and exclusive powers, under ss 51–2 respectively. These sections affirm the doctrine of ‘implied prohibition’ where sovereignty is shared between the Commonwealth and the states such that state law can operate in an

74 See F M Brookfield, ‘Referendums: Legal and Constitutional Aspects’ in Alan Simpson (ed), *Referendums: Constitutional and Political Perspectives* (Victoria University of Wellington Press, 1992) 7, 8.

75 *Official Report of the National Australasian Convention Debates*, Sydney, 3 April 1891, 709–710 (Alfred Deakin); see also *Official Report of the National Australasian Convention Debates*, Sydney, 8 April 1891, 895–6 (Alfred Deakin).

76 *Australian Constitution* s 106. The section ensures the continued existence of the scheme of government: *Stuart-Robertson v Lloyd* (1932) 47 CLR 482, 491 (Evatt J); it protects state power over appropriation: *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319, 389–90; it protects the states’ legal systems: *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 575.

area left vacant by federal law,<sup>77</sup> and the doctrine of ‘reserved powers’ where the Commonwealth could not interfere with residual or ‘reserved’ powers falling outside the list of enumerated powers.<sup>78</sup> These two doctrines were however rejected by the majority of the High Court in *Amalgamated Society of Engineers v Adelaide Steamship Company Limited* on the basis that these doctrines were ‘formed on a vague, individual conception of the spirit of the compact’ and did not accord with the constitutional text.<sup>79</sup> The High Court opted instead to follow the ‘golden rule’ of statutory interpretation where the *Australian Constitution* is to be read, just like any other Act, in its natural and ordinary sense.<sup>80</sup> Nevertheless, even the *Engineers’ Case* confirmed that the Commonwealth concurrent powers do not operate automatically to reserve any areas of legislation to the Commonwealth. Moreover, state law would be inoperative only to the extent it is inconsistent with a federal law under s 109. In fact, the High Court endorsed a doctrine analogous to the ‘implied prohibition’ doctrine in *Melbourne Corporation v Commonwealth*, where it indicated that the Commonwealth may not vitiate the states’ ability to function as governments.<sup>81</sup>

The structure of the *Australian Constitution* is also instructive. After the Preamble, we find the first chapter which is dedicated to the Commonwealth Parliament. This is no different from the *United States Constitution* or the *Canadian Constitution Act 1867*. In the *United States Constitution* art 1 § 1 states that ‘[a]ll legislative Powers herein granted shall be vested in a Congress of the United States’. Only in the Tenth Amendment, ratified three years after the ratification of art 1, do we find a reference to other powers: ‘[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people’.<sup>82</sup> Similarly, the *Canadian Constitution Act 1867* pt VI distributes legislative powers between the federal and provincial governments. Exclusive powers of the federal government are enumerated in s 91, and the exclusive powers of the provinces in s 92. There are some concurrent

77 See *D’Emden v Pedder* (1904) 1 CLR 91, 109–11; *Deakin v Webb* (1904) 1 CLR 585, 606; *Federated Amalgamated Government Railway and Tramway Service Association v New South Wales Railway Traffic Employees Association* (1906) 4 CLR 488 (‘*Railway Servants Case*’).

78 See *R v Barger* (1908) 6 CLR 41, 69; *A-G (NSW) v Brewery Employees’ Union of New South Wales* (1908) 6 CLR 469, 503 (‘*Union Label Case*’); *Huddart, Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 352.

79 *Amalgamated Society of Engineers v Adelaide Steamship Company Limited* (1920) 28 CLR 129, 145 (‘*Engineers’ Case*’).

80 *Ibid* 149–150. However, in *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248, 274, Brennan, Deane and Toohy JJ said:

The Constitution was enacted to give effect to the agreement reached by the [Australian] people ... to unite ‘in one indissoluble Federal Commonwealth’. The *Constitution* is no ordinary statute; it is the instrument to fulfil the objectives of the federal compact ...

81 (1947) 74 CLR 31 (‘*Melbourne Corporation*’). Under the *Melbourne Corporation* doctrine, states have an implied immunity from certain Commonwealth laws. In addition, under s 114 of the *Constitution*, states have immunity from Commonwealth taxes on property belonging to a state. This principle has been applied in *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192; *Re Australian Education Union; Ex Parte Victoria* (1995) 184 CLR 188; *Victoria v Commonwealth* (1996) 187 CLR 416, 498; *Austin v Commonwealth* (2003) 215 CLR 185; *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272.

82 *United States Constitution* amend X.

powers however: for example, under s 92A which deals with natural resources. In particular, s 92A(3) suggests a structure similar to the operation of the *Australian Constitution* s 109. Other concurrent powers can be found in s 95 in respect of agriculture. Any residual powers under the *Canadian Constitution Act 1867* come under the federal Parliament, which is granted the power to legislate ‘for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislature of the Provinces’.<sup>83</sup>

What is clearly different in the *Australian Constitution* is the structure of pt V on the powers of the Commonwealth Parliament. Section 51 enumerates the concurrent powers of the Commonwealth Parliament, while ss 52, 90, 114 and 115 enumerate its exclusive powers. In comparison to the *Canadian Constitution Act 1867*, only an equivalent to s 52 can be seen, namely s 91. Under the *Australian Constitution*, states can not only operate in the residual space, but also enter into powers under s 51, with the proviso that in the event of a clash between state and federal laws, the latter overrides the former by virtue of s 109. Even if we accept the argument that some of the concurrent powers under s 51 are for all practical purposes exclusive because they require active involvement from the Commonwealth,<sup>84</sup> it is still clear that the section underlines a different constitutional approach to the Commonwealth relative to that in the United States and Canada.

Last but not least, we see a dynamic interpretation of methodological collectivism in the *Australian Constitution*. In particular, the *Australian Constitution* ch VI envisages changes in the borders of states that could lead to the creation of new states (s 121), or shifting the jurisdiction over certain territories from the states to the Commonwealth (ss 122, 123). Just like we saw in the Preamble, this methodological collectivism is inextricably coupled with methodological individualism in the form of referenda (s 123), where the majority of the voters in a given state have to approve any territorial changes to that state.

I now proceed to discuss the methodological individualism aspects of the *Australian Constitution*.

As pointed out by William Harrison Moore, the ‘predominant feature of the *Australian Constitution* is the prevalence of the democratic principle, in its most

83 *Constitution Act 1967* s 91.

84 See for example Keyzer, above n 61, 67 [3.26–3.27].



modern guise.<sup>85</sup> The democratic principle enshrined in the *Constitution* ensures that the Australian people play a direct part in governance.<sup>86</sup> I argue that the principle of subsidiarity, more so than the concept of direct democracy, is that modern guise, namely allowing rule by the people at various levels of governance, from the national level, all the way down to the individual. In Australia, the important role of referenda can be seen from the very early beginnings of the

85 See Geoffrey de Q Walker, *Initiative and Referendum: The People's Law* (Centre for Independent Studies, 1987) 20, quoting W Harrison Moore, *The Constitution of the Commonwealth of Australia* (John Murray, 1902) 327. De Q Walker provides a poignant view of the Australian constitutional crisis at 31–2:

It must be obvious that the reality of Anglo-Australian representative government today is far from [the ideal of the independence model: the principle that legislators are free to vote according to their own perception of the long-term interests of the community], let alone from the mandate view [where the representative must do what the voters would do if they were acting themselves]. This is due mainly to the undue strength and rigidity of the party system. The candidates who are to contest the election are chosen not by the electors, as under the American system of primaries, but by the parties. They are selected not primarily for their individual wisdom but for their ability to take orders and to sell the party platform to the electorate. And above all, they have no freedom whatever to vote according to their own perception of long-term community interests ... The Labor Party requires all its parliamentary representatives to take a pledge acknowledging that they are the delegates of the party and promising to be bound by the platform and rules of the party and decisions of the party conference, and to vote according to the majority decision of the caucus of the parliamentary party. They face expulsion from the party if they break any aspect of the pledge. [Similarly, while] Liberal or National Party members are not required to take a formal pledge [they] face strong pressure to conform and failure to do so will jeopardize their future within the party.

86 The following excerpt from Moore, above n 85, 327–8, which compares the Australian and United States Constitutions, explains the fundamental role played by the people in the *Australian Constitution* (emphasis added):

It is true, that, in a federal government, the simple democratic plan of pure majority rule must make compromises with the principle of State right. But that is the only compromise which it makes in Australia. The federalism of Australia is the federalism of the United States; her democracy is her own. The American Constitution was born in distrust. To possess power, was to abuse it; therefore, in devising the organs of Government, the first object was, less to secure their co-operation, than to ensure that each might be a check upon the natural tendencies of the other. Large states, where the central power is far off, were more dangerous to liberty than small states, where popular control was more readily exerted; therefore, central power was to be no greater than was absolutely necessary for security against external attack and internal dissension. And the maxim, 'Trust in the People,' carried the Fathers of the Constitution but a little way on the democratic road. Direct participation by the people in the ordinary functions of central government seemed equally impracticable and mischievous. The people could, at most, be choosers, and, even here, they were to act at second-hand; there was to be a College of Electors, who should exercise a free judgment in the choice of a President; the Senators were to be chosen by the Legislatures of the States. Thus, the most important offices in the Union were to be filled without the pressure of popular clamour. The Constitution was accepted not by direct vote, but by State Conventions, and amendments were to be approved either by the States Legislatures or by States Conventions. *The Constitution of the Commonwealth of Australia bears every mark of confidence in the capacity of the people to undertake every function of government.* In the Constitution of the Parliament, in the relations of the Houses, and in the amendment of the Constitution, the people play a direct part. There are no intermediaries in the formation of the Senate; the electors are the arbiters between the Houses; there are no conventions of select men to approve alterations of the Constitution. The artificial majorities of the American Constitution are not required. The system, governing the qualifications of members and electors, is dictated by a desire to rest those qualifications upon the widest possible basis.

federation.<sup>87</sup> There is here a clear indication of the direct role people play in Australian politics. The Australian people chose the delegates for the 1897–98 Constitutional Conventions and endorsed the draft constitution resulting from these conventions before it was passed by the British Parliament.<sup>88</sup> The Australian Federation was approved and adopted through a series of plebiscites held in the 1890s at the state level. This suggests a paramount place for subsidiarity (methodological individualism) and the principle of popular sovereignty.<sup>89</sup>

This role is protected in the *Constitution* by s 128,<sup>90</sup> which had been adopted from the *Federal Constitution of the Swiss Confederation*.<sup>91</sup> Referenda are necessary for changing the *Constitution*. The section limits amendments to the *Constitution* except through referenda: ‘[t]his constitution shall not be altered except’ through

87 I adopt a wide definition of ‘referendum’, as a ‘popular vote for purposes other than electing representatives’. See Robert Randolph Garran, *The Coming Commonwealth: An Australian Handbook of Federal Government* (Angus & Robertson, 1897) 134. This is also in line with the definition of referenda under *Referendum Act 1964* (NI) s 3 (repealed). The vote will be referred to as a referendum regardless whether it is binding or not. When the need arises, the distinction is made by designating a referendum as either binding or non-binding. The latter is sometimes referred to as a plebiscite. Similarly, the vote will be referred to as a referendum regardless whether it is initiated by the government or by citizens. The latter is sometimes referred to as an initiative or citizen-initiated referendum. The term ‘referendum’ will also refer to recalls where citizens can initiate motions to remove an official (whether elected or not) from their office.

88 See generally LexisNexis, *Halsbury’s Laws of Australia*, (at 27 February 2012) 345 Public Administration, ‘4 Elections’ [345-2125]–[345-2135]; LexisNexis, *Halsbury’s Laws of Australia*, (at 27 November 2014) 265 Local Government, ‘4 Council Elections and Polls’ [265-2320]–[265-2335].

89 In *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 180 citing James Madison, ‘Madison’s Report on the Virginia Resolutions’ in Jonathan Elliot (ed), *The Debates in the Several State Conventions of the Adoption of the Federal Constitution* (2<sup>nd</sup> ed, 1836) vol 4, 569, Deane J stated that the doctrine of popular sovereignty is of central importance both to the *Constitution* as a whole and to its construction:

As has been said, the basis of the constitutional implication of freedom of political communication and discussion is the doctrine of representative government which forms part of the fabric of the Constitution. That doctrine reflects both the central thesis and the theoretical foundation of our Constitution and the nation which it established, namely, that all powers of government ultimately belong to, and are derived from, the governed or in Madison’s words, that ‘[t]he people, not the government, possess the absolute sovereignty’.

Deane J was also of the view that the absence of a Bill of Rights or any guarantee of universal suffrage or political equality in the *Constitution* suggests that the *Constitution* does not give effect to any general doctrine of representative democracy. In particular (at 167):

There are circumstances in which an express conferral of rights by an instrument will, by reason of the rule of *expressio unius*, preclude the implication of other rights. Indeed, it would be at least arguable that, if our Constitution had included an express detailed ‘Bill of Rights’ such as that contained in Amendments to the United States Constitution, the implication of other ‘rights’ either from other express provisions or from the doctrines which the Constitution incorporates would be precluded or impeded.

See also *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138 (Mason J), where he recognises that ‘ultimate sovereignty resided in the Australian people’; George Winterton, ‘Popular Sovereignty and Constitutional Continuity’ (1998) 26 *Federal Law Review* 1.

90 The *Referendum (Machinery Provisions) Act 1984* (Cth) and the *Electoral and Referendum Regulation 2016* (Cth) contain the rules and regulations governing the conduct of referenda in Australia. For an overview of the referenda scheme in Australia see George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (University of New South Wales Press, 2010).

91 John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, 1995) 986, cited in George Williams and Geraldine Chin, ‘Australian Experiments with Community Initiated Referendum: CIR for the ACT?’ (1998) 7 *Griffith Law Review* 274, 276.

double majority referenda.<sup>92</sup> If a proposed law for alteration is passed by an absolute majority in both houses of the Commonwealth Parliament, it must be submitted to a national referendum no less than two months and not more than six months after it has been passed by parliament (s 128 para 2). In addition, a proposed amendment may be submitted to a referendum if passed on two separate occasions by one House of Parliament (s 128 para 3).

Such methodological individualism is absent from the *United States Constitution* and the Canadian *Constitution Act 1867*. In the United States, under art V, the *Constitution* can be amended through approval of the Congress and the House of Representatives, and either a state legislature approval, or through ratifying conventions. There was however only one occasion on which conventions were invoked, namely the ratification of the 21<sup>st</sup> Amendment in 1933 (repealing the 18<sup>th</sup> Amendment Prohibition on alcohol).<sup>93</sup> There is no requirement for referenda.<sup>94</sup> Similarly, in Canada, amending the *Constitution* requires adoption by the federal and provincial legislations, but not through referenda.<sup>95</sup>

So far, s 128 has been invoked eight times. The first was in 1906 when the *Australian Constitution* s 13 was amended to facilitate concurrent elections for the Senate and the House of Representatives. In 1910, s 105 was amended to allow for state debts to be assumed by the Commonwealth government. In 1946, sub-s 51(xxiiiA) was added to allow for Commonwealth legislation on welfare services such as unemployment. In 1967, sub-s 51(xxvi) was amended to remove ‘*other than the aboriginal race in any State*’; and s 127, which barred counting the aboriginal people in reckoning population, was repealed. In 1977, s 15 was amended to ensure casual vacancies in the Senate are filled by a person from the same political party, and s 72 was amended to provide a mandatory retirement age for federal judges. Furthermore, in 1977 a referendum on referenda amended s 128 to allow for counting the electors in the Northern Territory and the Australian Capital Territory in determining the majority required to approve a change. The question was: ‘It is proposed to alter the *Constitution* so as to allow electors in the Territories, as well as electors in the States, to vote at referendums on proposed laws to alter the *Constitution*. Do you approve the proposed law?’ The measure was carried with a 77.72 per cent approval rate.<sup>96</sup> Electors in other territories however still cannot vote on referenda.

At the sub-national level, some state constitutions also provide for constitutional amendments through referenda.<sup>97</sup> Referenda are held at the state level when the

92 *Australian Constitution* s 128. Double majority requires a majority of the national vote and in at least four of the six states.

93 *United States Constitution* amend XXI, repealing *United States Constitution* amend XVIII.

94 While there are differences in state laws on ratifying conventions, the composition of these conventions is generally through delegates. It does not afford the methodological individualism under subsidiarity.

95 *Canada Act 1982* (UK) ch 11, sch B, pt V, ss 38–49 (*‘Constitution Act 1982’*).

96 Parliament of Australia, *The 44<sup>th</sup> Parliament Parliamentary Handbook of the Commonwealth of Australia 2014* (Parliamentary Library, Department of Parliamentary Services, 2014) Part 5 Referendums and Plebiscites, 393.

97 See, eg, *Constitution Act 1902* (NSW) s 7A; *Constitution Act 1934* (SA) s 10A.

government would like to change the state constitution or would like the electors to give their opinion on a proposed change in policy. For example, in Queensland, amendments to the *Constitution Act 1867* (Qld), as well as altering the office of the Governor, or extending the duration of the Legislative Assembly, require approval by referenda.<sup>98</sup> Similarly, in New South Wales, referenda are required for changing the state Constitution and altering Assembly electorates.<sup>99</sup> The same requirement for referenda can be found in South Australia,<sup>100</sup> Victoria,<sup>101</sup> and Western.<sup>102</sup> There are however no provisions for referenda in Tasmania.

At the local government level, in New South Wales, South Australia, Tasmania and the Northern Territory, councils may conduct referenda on any matters.<sup>103</sup> Under the *Local Government Act 1993* (Cth) certain issues need referenda (for example, increasing the number of councillors), and others can be dealt with by way of a poll. For example, in New South Wales, a council must obtain approval at a binding constitutional referendum before certain measures such as changing the number of councillors.<sup>104</sup> Also, referenda (citizen initiated referenda ('CIR') in particular) already have a role in relation to liquor licencing legislation where citizens have the right to initiate a referendum as to whether the sale of liquor should be banned in a given neighbourhood.<sup>105</sup> Voting on referenda is compulsory and the result is binding. Voting on a poll is not compulsory and the result is not binding on the council. In most instances special legislation is enacted to provide the particulars for the referendum or the poll. Note, however, that local government has no constitutional status in Australia.

Entrenched legislation may also require referenda. For example, the *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 26 requires submitting entrenched law to a referendum of the electors of the Territory. Other legislation also provides for referenda. For example, the *Flags Act 1953* (Cth) s 3(2) requires a majority vote at a national referendum to change the flag.

Referenda in Australia were first governed by the *Referendum (Constitution Alteration) Act 1906* (Cth) and later by the *Referendum (Machinery Provisions) Act 1984* (Cth) ('R(MP) Act') and the *Electoral and Referendum Regulation 2016*

98 *Constitution Act 1867* (Qld) s 53.

99 *Constitution Act 1902* (NSW) ss 7A(2), 7B.

100 *Constitution Act 1934* (SA) ss 10A, 88.

101 *Constitution Act 1975* (Vic) s 18(1B).

102 *Constitution Act 1889* (WA) s 73.

103 *Local Government Act 1993* (NSW) s 14; *Local Government (Elections) Act 1999* (SA) s 9; *Local Government Act 1993* (Tas) s 60B; and *Local Government Act 2008* (NT) s 89.

104 *Local Government Act 1993* (NSW) ss 15–17.

105 See De Q Walker, above n 85, 11: 'some liquor licensing legislation permits a certain number of local residents to require the holding of a local option poll on whether liquor sales should be prohibited in the area'. By 1911, states passed acts that allowed residents to veto liquor licenses in their districts: see, eg, *The Local Option Act 1905* (SA).

(Cth).<sup>106</sup> Compulsory enrolment and voting is a feature of Australian referenda.<sup>107</sup> Commonwealth expenditure on advertising referenda is limited to the level necessary to promote the fact and procedure of the ballot,<sup>108</sup> although there is no limit on private expenditure on referenda.

As to non-binding government sponsored advisory referenda (plebiscites), the current approach is lackadaisical. Plebiscites were federally evinced only on three occasions: in 1916, 1917 and 1977.<sup>109</sup> This compares to 44 binding referenda after federation (from 1906 to 1999). The issue in 1916 and 1917 was the introduction of conscription during the First World War. Both plebiscites were defeated. In 1977 the issue was the choice of a national anthem which was decided in favour of ‘Advance Australia Fair’ (defeating three other choices).<sup>110</sup> Note that there are no specific rules on running plebiscites in Australia.

In this part I hope to have given a sketch of the unique influences flowing from subsidiarity on the *Australian Constitution*. In the next section, I use this as a stepping stone to argue for certain policy interventions.

#### IV CONSEQUENCES AND POLICY CONSIDERATIONS

In this paper I hope to contribute to the debate on reforming the federation. One hundred and twenty-five years have passed since Sir Henry Parkes delivered a speech at Tenterfield advocating for a political process which led to the Federation. On the 27<sup>th</sup> of October 2014, the Australian Prime Minister delivered another speech at Tenterfield that called for a bipartisan reform plan to fix the Federation.<sup>111</sup> Big items on the agenda included tax reform, improving health, education, and state services. On the same day, CEDA, a bipartisan, non-profit, national ‘think-tank’, published a report on the Federation that details some reform

106 There is also State and Territory legislation for referenda: *Constitution Further Amendment (Referendum) Act 1930* (NSW); *Referendums Act 1997* (Qld); *Referendums Act 1983* (WA) and *Referendums Regulations 1984* (WA); *Referendum Procedures Act 2004* (Tas); *Referendum (Machinery Provisions) Act 1994* (ACT) and *Referendum (Machinery Provisions) Regulations* (ACT); *Referendums Act 1998* (NT) and *Referendums Regulations 1998* (NT). Where there is no standing legislation, ad hoc legislation is enacted for particular referenda: see, eg, *Referendum (Electoral Redistribution) Act 1990* (SA).

107 *R(MP) Act* s 45.

108 *Ibid* s 11(4). Exceptions to this requirement include the 1999 Republic and Preamble referenda which, due to their importance, were afforded federal funding to provide for a public education program under the *Referendum Legislation Amendment Act 1999* (Cth) s 4.

109 There were two subnational plebiscites (in Queensland in 1992 and in Western Australia in 2009) over daylight saving. Both were rejected: ‘Qld — Daylight Saving One Day, Not The Next’, *The Canberra Times* (ACT), 23 February 1992, 1; ABC News, *WA Voters Reject Daylight Saving* (17 May 2009) <<http://www.abc.net.au/news/2009-05-16/wa-voters-reject-daylight-saving/1685358>>.

110 Parliament of Australia, *The 44<sup>th</sup> Parliament Parliamentary Handbook of the Commonwealth of Australia 2014* (Parliamentary Library, Department of Parliamentary Services, 2014) Part 5 Referendums and Plebiscites, 373.

111 David Crowe, ‘Federation “Starving” States, Says Reform Plan’, *The Australian* (online), 27 October 2014 <<http://www.theaustralian.com.au/national-affairs/federation-starving-states-says-reform-plan/news-story/39a112798419538c1d907b3f5d7d9336>>.

options.<sup>112</sup> Earlier in the year, on the 28<sup>th</sup> of June 2014, the office of the Prime Minister released the Terms of Reference for the *White Paper on the Reform of the Federation*. These Terms, which have been developed in collaboration with states and territories, identify the objectives and issues to be considered. The key objective is to clarify the roles and responsibilities of the states and territories to ‘ensure that, as far as possible, [they] are sovereign in their own sphere’.<sup>113</sup> Today, Australia is a very different nation facing new challenges. Salient changes include the restructuring of industries, and the growing proportion of older people and people from other parts of the world that make Australia home. These changes require a new thinking on centralisation as the main strategy for dealing with greater complexity. The Terms envisage improving economic productivity by creating a more efficient and effective federation, which includes ensuring that the federal system ‘enhances governments’ autonomy, flexibility and political accountability’.<sup>114</sup> The white paper was expected to consider four issues. First, is the feasibility of a governance architecture that could limit ‘Commonwealth policies and funding to core national interest matters’; second, is minimising the overlap between different tiers of government; third, designing the revenue structures around agreed, mutually exclusive, roles and responsibilities; the last issue pertains to designing equity and sustainability into responsibility areas where overlap is unavoidable.<sup>115</sup> These issues are expected to be addressed using principles and criteria such as subsidiarity, equity, efficiency, effectiveness, accountability, durability, and fiscal sustainability.<sup>116</sup>

In this section I want to outline three consequences from an understanding of Australian federalism rooted in subsidiarity rather than federalism. The first is heuristic, where it is hoped that law schools across the nation will adopt the principle of subsidiarity as an analytical lens for interpreting the *Constitution* which eventually feeds into judicial dicta. Constitutional law courses and textbooks need to explicitly engage subsidiarity in analysing the *Constitution*, and explain clearly the difference between such interpretation and that of the federal model (as in the United States).

The second relates to understanding the relationship between different vertical levels of government in Australia as dynamic, one that evolves through shifts in legislative powers to enable local responses to global stimuli. An example of this approach is illustrated below.

The guardian of subsidiarity in Australia is the High Court which, under *Australian Constitution* s 71, is entrusted with maintaining the balance between the state and the federal governments.<sup>117</sup> The High Court’s commitment to subsidiarity can also be seen in numerous statements acknowledging the people of Australia as the

112 CEDA, *A Federation for the 21st Century*, Research Report (2014).

113 Ibid, quoting Prime Minister Tony Abbott.

114 Prime Minister Tony Abbott, *White Paper on the Reform of the Federation*, Terms of Reference.

115 Ibid 80.

116 Ibid.

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

sovereign.<sup>118</sup> The subsidiarity aspect of referendums can also be seen in judicial limits put on the ability of the executive branch to influence the vote. Hence, in *Reith v Morling*, the educational pamphlets provided by the government on proposed changes to the *Constitution* were found as being promotional in nature.<sup>119</sup>

Some commentators, however, suggest High Court ‘skulduggery’ since the 1920s, which occulted the principle of subsidiarity by adopting a literal interpretation of the *Constitution*, and shifted the balance of power in favour of centralisation.<sup>120</sup> This approach ensured mimicking the Diceyan interpretation of the doctrines of parliamentary supremacy and ministerial responsibility,<sup>121</sup> without regard to the role that the principle of subsidiarity plays in the Australian context. My view, however, is that the High Court brought to life the dynamic nature of subsidiarity, which unlike federalism, experiences a shifting in the allocation of decision making powers that accommodates the exigencies of any given zeitgeist. For example, the *Engineers’ Case* was one decided in 1920, soon after the end of the First World War. Australia at the time was still going through a development phase that, from an efficiency perspective, necessitated centralising much of the powers that hitherto were the domain of the states.<sup>122</sup> The remainder of the 20<sup>th</sup>

118 For example, in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138, Mason CJ stated that the *Australia Act 1986* (Cth) ‘marked the end of the legal sovereignty of the Imperial Parliament and recognized that ultimate sovereignty resided in the Australian people’. Similarly, in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 171, Deane J stated that the legitimacy of the Constitution derives ‘exclusively [from] the original adoption (by referenda) and subsequent maintenance (by acquiescence) of its provisions by the people’. However, as pointed out by Gummow J in *McGinty v Western Australia* (1996) 186 CLR 140, 274–5, this sovereignty is not absolute; the people exercise their sovereignty as speculated for under s 128 of the *Australian Constitution*. Parliament is simply a representative of the sovereign. Hence King CJ in *West Lakes Ltd v South Australia* (1980) 25 SASR 389, 397, points out that constitutional referenda do not amount to abdication by Parliament of its legislative authority, as it is the voters who the legislature represents. See also Bede Harris, *A New Constitution for Australia* (Cavendish Publishing, 2002) 197–8. Harris makes a distinction between political and legal sovereignty, where the former is held by the people and the latter by the Crown. Instead, the analogous double sovereignty formulation seen in Bodin’s theories is used in this paper, leading to the concept of constituent power. See Martin Loughlin, ‘The Concept of Constituent Power’ (2014) 13 *European Journal of Political Theory* 218, 219. However, see also Sir Owen Dixon, ‘The Law and the Constitution’ (1935) 51 *Law Quarterly Review* 590, 597. Dixon argues that the *Constitution* is not a supreme law from the people but a statute exercising legal sovereignty over a British dominion.

119 (1988) 83 ALR 667.

120 The argument is that the decision in the *Engineers’ Case* (1920) 28 CLR 129, which interpreted the *Constitution* as an Imperial statute, would not import the historical ‘originalism’ that was inclined towards subsidiarity, as seen in earlier decisions such as *D’Emden v Pedder* (1904) 1 CLR 91 and the *Railway Servants Case* (1906) 4 CLR 488. See Geoffrey de Q Walker, ‘The Seven Pillars of Centralism: Engineers’ Case and Federalism’ (2002) 76 *Australian Law Journal* 678; see also GS Reid, ‘The Parliament in Theory and Practice’ in Michael James (ed), *The Constitutional Challenge: Essays on the Australian Constitution, Constitutionalism and Parliamentary Practice* (Centre for Independent Studies, 1982); Augusto Zimmermann, ‘Judicial Betrayal’ (2012) 28(2) *Policy* 18; Evans, above n 2.

121 *New South Wales v Commonwealth* (2006) 229 CLR 1 (*‘Work Choices’*), 103–16.

122 The dynamic nature of the interpreting the Constitution was also noted by Windeyer J who never saw the *Engineers Case* as overturning any precedents, but as a reflection of 1920s Australia, stating that ‘in 1920 the Constitution was read in a new light, a light reflected from events that had, over twenty years, led to a growing realization that Australians were now one people and Australia one country and that national laws might meet national needs’: *Victoria v Commonwealth* (1971) 122 CLR 353, 396.

century depicts a similar picture.<sup>123</sup> The fact that the High Court moved in this direction does not negate the principle of subsidiarity's place as a constitutional principle in Australia. Instead, it emphasises the fact that our federalism is more dynamic than its United States counterpart. This approach allows for the pendulum of power to swing between the vertical levels of governance as dictated by the constraints of every period. It hence would not be unrealistic to suggest that the High Court would decide differently in the 21<sup>st</sup> century. Just like the High Court shifted away from the jurisprudence of Griffith CJ, Barton and O'Connor JJ (namely the doctrines of 'implied immunity' and 'reserved powers'), and by doing so asserted that that sovereignties in Australia are shared rather than divided, it would not be unthinkable that the sharing of legislative powers could once more shift towards lower levels of government.

Today, sovereignty is seen more and more as largely relative in the aftermath of increasing global economic integration. Today, '[e]merging forms of "complex sovereignty" [lead to the] emergence of polycentric centers of power within the state'.<sup>124</sup> The effect of globalisation on sovereignty is part of a cyclical process.<sup>125</sup> In the 21<sup>st</sup> century it seems that power is shifting again from national governments to subnational ones, especially local governments. One of the key indicators of this trend is the *Cities and Local Government Devolution Act 2016* (UK) in the United Kingdom. The bill provides a blank canvas for the devolution of any public authority function,<sup>126</sup> by breaking away from the top-down approach followed earlier by central government and instead institutes a framework for negotiating devolution on case-by-case basis. The evolving global importance of local governments 'manifests itself in international legal documents and institutions, transnational arrangements, and legal regimes within many countries'.<sup>127</sup> Localities are now given domestic jurisdiction based on international law instruments.<sup>128</sup> Subsidiarity is promoted by international organisations such as the World Bank, and by supranational entities such as the European Union. We are now evolving towards a new world order where local governments are becoming the key actors on the 'international' stage.<sup>129</sup> This trend is increasing the need for coordination between localities and suggests a growing need for local governments to have a say in the creation and adjudication of 'international norms'.<sup>130</sup>

123 As observed by Sir Anthony Mason, '[l]iberal interpretation and legalism ... were characteristic of the Court's constitutional interpretation for the greater part of the 20<sup>th</sup> century': Sir Anthony Mason, 'The High Court of Australia: A Personal Impression of its First 100 Years' (2003) 27 *Melbourne University Law Review* 864, 873.

124 Kanishka Jayasuriya 'Globalization, Sovereignty, and the Rule of Law: From Political to Economic Constitutionalism?' in Neil Walker (ed), *Relocating Sovereignty* (Ashgate Dartmouth, 2006) 361, 367.

125 Giovanni Arrighi, 'Globalization, State Sovereignty, and the "Endless" Accumulation of Capital' in David A Smith, Dorothy J Solinger and Steven C Topik (eds) *States and Sovereignty in the Global Economy* (Routledge, 1999) 53.

126 United Kingdom, *Parliamentary Debates*, House of Lords, 8 June 2015, vol 762, col 654 (Lord McKenzie).

127 Yishai Blank, 'Localism in the New Global Legal Order' (2006) 47 *Harvard International Law Journal* 263, 263-4.

128 See *Canada Ltée v Town of Hudson* [2001] 2 SCR 241, where the Supreme Court of Canada inferred jurisdiction of the municipality to act on environmental protection based on international environmental law.

129 Blank, above n 127, 269.

130 Ibid 272-3.



The third consequence relates to invigorating methodological individualism in Australia. Subsidiarity requires reimagining the relevance of referenda to our political system beyond sections such as ss 123 and 128 of the *Australian Constitution*. The way forward cannot be bogged down by simplistic versions of legal positivism, and the doctrines of parliamentary supremacy and ministerial accountability, but must instead acknowledge the need for a framework that contextualises the applicability of these doctrines to Australia's national and subnational constitutions — a context born from subsidiarity (through its modalities of federalism and referenda). Many scholars analyse the issues surrounding the use of referenda as a tension between two polar positions: direct democracy, where citizens have the right to participate individually in policy making, and representative democracy (or indirect democracy), where citizens can participate only through elected representatives.<sup>131</sup> Others see referenda as a 'complement' or 'supplement' to representative democracy.<sup>132</sup> Some emphasise the negative effects some types of referenda (especially citizen initiated referenda or CIRs) has led to in some jurisdictions.<sup>133</sup> I, however, return to the most

- 131 See, eg, Jack Vowles et al, *Proportional Representation on Trial: The 1999 New Zealand General Election and the Fate of MMP* (Auckland University Press, 2002). Vowles et al highlight the effect of negative public perception of parliamentary representatives in precipitating the arrival of the CIR in New Zealand. The collapse of coalitions such as the National-New Zealand First coalition in 1998, the defection of Members of Parliament to other parties, and the vicissitude of independent Members of Parliament seem to have vivid counterparts in Australia's political landscape, especially of recent years. See also Helen Gregorcuk, 'Citizen Initiated Referendums: Republican Innovation or Scourge of Representative Democracy?' (1998) 7 *Griffith Law Review* 249. Gregorcuk uses 'direct democracy' and CIR interchangeably.
- 132 Robert Podolnjak, 'Constitutional Reforms of the Citizen-Initiated Referendum: Causes of Different Outcomes in Slovenia and Croatia' (2015) 26 *Journal for Constitutional Theory and Philosophy of Law* 129. Podolnjak emphasises the complementary nature of referenda in relation to constitutional and political decisions. He nevertheless also acknowledges the potential for abuse of referenda, especially, citizen-initiated ones, in particular in relation to human rights.
- 133 See, eg, Anne Twomey, 'Dangerous Democracy: Citizens' Initiated Referenda in California' (2010) 21 *Public Law Review* 61, 70–76. But in California and other US states where there is a CIR process, even if we accept the dangers of CIR, there were hardly calls to abolish them. Instead, as cited by Twomey herself, there were calls for *processual* reform. However, Twomey went on to attack the very idea of direct democracy, and by doing so closing the door on all forms of CIRs (even those that are non-binding). She ends by cautioning that CIRs are 'a genie that cannot be put back in its bottle, no matter how dire the economic crisis or the government dysfunction ... The simplistic promise of democratic rule directly by the people needs to be reassessed in the harsh light of reality before it is ever let loose on the Australian people'. Instead of this implicit 'blanket' rejection, this author suggests that CIRs, and referenda generally, are a *sui generis* application of subsidiarity that could be given short shrift only under the spectre of democracy itself (whether representative or otherwise) being dismissed for analogous risks. Referenda merit a case-by-case or referendum-by-referendum consideration. See also the reply to Twomey's argument in Steven Spadizer, 'Dangerous Democracy or a Dangerous Judiciary? A Reply to Anne Twomey' (2013) 24 *Public Law Review* 233, 245–251. Spadizer suggests that issues with CIRs originate in judicial review rather than the process of CIRs as seen in California. Probably, Spadizer's most enlightened observation comes when he ends by opining that '[t]he reason why the system of direct democracy has not held up to its initial promise in California is precisely because California is a quasi-democracy operating under the constraints of the oligarchic US Constitution'. Spadizer nevertheless coaches his arguments mainly in the language of 'direct democracy' without probing the nature of the 'constraints' that emanate from the federal constitution and how the federal system itself shapes the success or otherwise of CIRs (and referenda generally). As argued in this paper, federalism is a rigid modality of subsidiarity where sovereignty is divided rather than shared. Referenda are another modality that instead emphasises not only the shared aspects of sovereignty under subsidiarity, but also subsidiarity's dynamic, asymmetric attributes. See section III for more on this point.

fundamental issue, namely the intention of the designers of the *Constitution* in relation to the role played by the Australian people. The proper functioning of democracy (direct and indirect) suggests subsidiarity.<sup>134</sup> Under subsidiarity, rigid polar positions such as direct or indirect democracy give way to a pragmatic approach that entertains referenda on case-by-case basis.

Australia does not have citizen initiated referenda or CIRs, although the idea of CIR has been debated in Australia even before federation.<sup>135</sup> CIR proposals have in fact been introduced at the Commonwealth level and into every state and territory parliament except Victoria and the Northern Territory.<sup>136</sup> In Australia, we still have no Commonwealth or state legislation to allow citizens to initiate referenda. The first CIR Bill was introduced in South Australia in 1895.<sup>137</sup> In the early 20<sup>th</sup> century (after federation) similar Bills were introduced at the federal level and in Western Australia and Queensland.<sup>138</sup> Efforts to introduce CIR continued unsuccessfully throughout that century.<sup>139</sup> The participants in the Conventions leading up to the adoption of the *Australian Constitution* seem to have been aware of the use of citizen initiated referenda in Switzerland, but were not willing to discuss them in any detail.<sup>140</sup> In 1988, a Constitutional Commission recommended against the introduction of CIRs, suggesting that they cannot be reconciled with the doctrines of responsible government and representative government. The commission also cited possible abuse of CIRs due to the risk of the tyranny of the majority and due to the influence of big business.<sup>141</sup>

In Australia, at the state and territory level, CIRs were available only in the Territory of Norfolk Island, under the *Referendum Act 1964* (NI) s 6. The Act was repealed on 17 June 2015 by the *Norfolk Island Continued Laws Amendment*

134 Note that subsidiarity would have much wider ramifications than in relation to referenda. This paper however zeros in on that particular aspect. For a wider analysis see Benjamin F Gussen, 'The Evolutionary Economic Implications of Constitutional Designs: Lessons from the Constitutional Morphogenesis of New England and New Zealand' (2014) 6(2) *Perspectives on Federalism* E319.

135 Williams and Chin, 'Australian Experiments with Community Initiated Referendum: CIR for the ACT?', above n 91, 277. Williams and Chin indicate that the Australian Labor Party has advocated CIRs since the 1890s and adopted it as part of its federal platform until 1963. There was also support from the Australian Democrats and the Australian Liberal Party (although not at the federal level).

136 George Williams and Geraldine Chin, 'The Failure of Citizens' Initiated Referenda Proposals in Australia: New Directions for Popular Participation?' (2000) 35 *Australian Journal of Political Science* 27, 28.

137 The Referendum Bill 1895 (SA) was introduced by a member of the Labor Party. It, however, lapsed due to lack of support by government: Williams and Chin, 'Australian Experiments with Community Initiated Referendum: CIR for the ACT?', above n 91, 278.

138 Refer to the motion in support of CIRs in the House of Representatives: Commonwealth, *Parliamentary Debates*, House of Representatives, 25 March 1920, 846 (William Maloney). See also Initiative and Referendum Bill 1913 (WA); Popular Initiative and Referendum Bill 1915 (Qld).

139 Other failed Bills include the Constitutional Alteration (Electors' Initiative) Bill 1982 (Cth); Legislative Initiative Bill 1989 (Cth); Citizens' Initiated Referendum (Constitution Amendment) Bill 1998 (Qld); Community Referendum Bill 1998 (ACT): Williams and Chin, 'Australian Experiments with Community Initiated Referendum: CIR for the ACT?', above n 91, 278.

140 See Helen Gregorcuk, 'Citizens Initiated Referenda' (Research Bulletin No 1/98, Parliamentary Library, Parliament of Queensland, 1998) 2; Gregorcuk, 'Citizen Initiated Referendums: Republican Innovation or Scourge of Representative Democracy?', above n 131.

141 Commonwealth Constitutional Commission, *Final Report* (1988), vol 2, 868–9.

*Ordinance 2015* (NI).<sup>142</sup> Norfolk Island is relevant to the analysis given its original status as a dependency of New South Wales in 1788, its status as part of the Commonwealth since its inception in 1901, and its limited self-government under the *Norfolk Island Act 1979* (Cth).<sup>143</sup> Norfolk Island subsidiarity can be seen in its limited form of self-government under the *Norfolk Island Act 1979* (Cth), before its amendment under *Norfolk Island Legislation Amendment Act 2015*, which took effect on 18 June 2015.<sup>144</sup> Under the repealed *Referendum Act 1964* (NI), CIRs were stipulated for under s 6, on matters ‘affecting the peace, order and good government of Norfolk Island’ but not ‘relating to the constitution of the [NI] Assembly’. The initiatives required 30 per cent of the electoral votes.<sup>145</sup> For the initiative to pass, the ‘yes’ votes must exceed the ‘no’ votes by not less than 10 per cent of the total number of votes.<sup>146</sup>

Between 1979 and 2015, the CIRs were invoked a total of seven times, compared to sixteen government-sponsored referenda, including the final referendum in 2015, just before losing self-government status.<sup>147</sup> Since 1979, referenda averaged one every two years.<sup>148</sup> See Appendix 1 for further details on the nature of these referenda.

The last attempt to introduce CIRs at the federal level was in 2013 when the Citizen Initiated Referendum Bill 2013 (Cth) was introduced on 12 March 2013 by Senator John Madigan, DLP Senator for Victoria, but lapsed at the end of

142 The Explanatory Statement for the Ordinance states ‘[t]his Act is repealed as the establishment of the Advisory Council provides for a means of ongoing community consultation and engagement during the interim transition time, after which a Regional Council will be established’: Explanatory Statement, *Norfolk Island Continued Laws Amendment Ordinance 2015* (NI) 51.

143 Note that the Australian Capital Territory (ACT) also has self-government under the *Australian Capital Territory (Self-Government) Act 1988* (Cth). However, the Community Referendum Bill 1998 (ACT) was not successful and the ACT to this day does not have CIRs. The Hon Greg Cornwell, commenting on the ACT CIR Bill, opined in favour of CIRs: Greg Cornwell, ‘Involving the People: Citizen-Initiated Referenda in the Australian Capital Territory’ (1997) 78 *The Parliamentarian* 150.

144 Yvon French, ‘Referendum Act 1964; Result of the Referendum Held on 8 May 2015; Declaration of Poll’ in Norfolk Island, Norfolk Island Government Gazette, No 24, 15 May 2015, 78, 78. From 1 July 2016, this self-government will be revoked by the federal government and replaced with a local council with New South Wales providing services for the island. The *Referendum Act 1964* (NI) has already been doffed, and CIRs have no more any place in Australia. In response, the Norfolk Island Legislative Assembly held a (symbolic) referendum on 8 May 2015 where voters were asked the following question: ‘Should the people of Norfolk Island have the right to freely determine their political status, their economic, social and cultural development, and be consulted at referendum or plebiscite on the future model of governance for Norfolk Island before such changes are acted upon by the Australian parliament?’ The voters return a ‘yes’ majority with 68 per cent. The result contradicts the federal government claims that the voters were overwhelmingly in support of revoking self-government.

145 *Referendum Act 1964* (NI) s 6. This is a high hurdle relative to the *Citizen Initiated Referenda Act 1993* (NZ) s 19(1) where the threshold is only 10 per cent. Although in the New Zealand case the referenda are only indicative (non-binding). Moreover, CIRs in Norfolk Island were aided by the small number of voters (around 1,100).

146 *Referendum Act 1964* (NI) s 24(2); see also Dorothy Jean Kitching, ‘9 Vacancies, 9 Votes, How Does It Work? The Norfolk Island System of Voting’ (1994) 75 *The Parliamentarian* 15.

147 For the count up to 2011 see Robin Eleanor Adams, ‘Governance and Democracy “Norfolk Island Style”: At Risk Again?’ (2010) 91 *The Parliamentarian* 130.

148 Helen Irving, ‘Autonomies of Scale: Precarious Self-Government on Norfolk Island’ in Yash Ghai and Sophia Woodman (eds), *Practicing Self-Government: A Comparative Study of Autonomous Regions* (Cambridge University Press, 2013) 200, 212.

Parliament on 12 November 2013. The Bill intended to enable citizens ‘to initiate a proposal for a referendum to amend the Constitution’.<sup>149</sup> The Bill was hence limited to constitutional amendments rather than ordinary legislation or recalls. This was acknowledged in the Bill as it only ‘takes a small, [but] long overdue, step along that path’.<sup>150</sup> The Bill envisaged that the approval of such initiatives would be through the Electoral Commissioner.<sup>151</sup> The signatures threshold was suggested at 1% of all Australian electors, a relatively low threshold compared to New Zealand.<sup>152</sup>

On 14 March 2013 the Bill was referred by the Senate to the Finance and Public Administration Legislation Committee for inquiry and report. The Committee issued its report on 29 June 2013. The Committee was not supportive of the Bill. Below is an extract of its views:

- 1.35 [The committee] does not believe CIR are the most effective way to encourage active participation by citizens in the political process. At best ... the bill would promote only a very narrow form of political participation. The committee is of the view that proponents of CIR overstate the potential benefits to society of direct democracy and underplay the stability and robustness of the system of representative democracy.
- 1.36 Nor does the committee accept the view that laws derived from CIR are more clearly the popular expression of the will of the people than those derived from elected representative government.
- 1.37 The committee ... accepts the argument that complex social and economic issues within the political process should not be reduced to simple yes or no answers ...
- 1.38 [T]he CIR process contained in the bill may provide an unwelcome platform for extreme and divisive political agendas, engage parliamentarians in protracted debates over issues which have little chance of success, and result in policy debate in Australia being hijacked by well-resourced professional lobby groups. These potential shortcomings, which have long been associated with CIR processes in the United States, particularly in California, are of concern to the committee. When combined with the bill’s numerous technical shortcomings, the committee concludes that it is unable to support this bill.<sup>153</sup>

Unfortunately, the Committee continued to analyse CIRs as creating a tension between representative and direct democracy,<sup>154</sup> while ignoring the safe guards in

149 Citizen Initiated Referendum Bill 2013 (Cth) cl 4. The Bill was intended to operate under the provisions of the *Referendum (Machinery Provisions) Act 1984* (Cth) cl 13.

150 Explanatory Memorandum, Citizen Initiated Referendum Bill 2013 (Cth).

151 Citizen Initiated Referendum Bill 2013 (Cth) cl 8.

152 Ibid cl 10. Clause 12 also had that requirement that: ‘Within 4 months after a proposal for a referendum is verified under section 11, the Minister must cause a proposed law that will alter the Constitution in accordance with the proposal to be introduced into the Parliament.’

153 Senate Finance and Public Administration Legislation Committee, Parliament of Australia, *Citizen Initiated Referendum Bill 2013* (2013) 10.

154 Ibid.

the Bill against the possibility of referring ‘complex social and economic issues’<sup>155</sup> to the people (for example, the approval required by the Electoral Commissioners). In his dissenting report, Senator John Madigan identified correctly the main issue with the Committee’s approach: ‘While the committee’s report raises a number of reasonable concerns *it fails to address the basic principle of the right of citizens to have a direct voice in decision making*.’<sup>156</sup> More accurately, the Committee ignored the role of referenda, including those initiated by citizens, in our *Constitution*, especially under the principle of subsidiarity.

## V CONCLUDING REMARKS

I argue for a nuanced understanding of Australian constitutionalism that breaks the shackles of a lethargic federal model based on a static (competitive) relationship between two (and only two) vertical levels of government. Instead I advocate for an ‘agile’ subsidiarity model of changing (evolving) relationships between vertical levels of government (beyond the two-tiers under federalism). Both dimensions of subsidiarity, namely ‘methodological individualism’ and ‘methodological collectivism’, can be seen in the *Australian Constitution*. Subsidiarity operates on shared sovereignties, while federalism adopts a polar position where legislative powers must be divided. A textual and structural analysis of the *Australian Constitution* suggest that subsidiarity, rather than federalism, is the essence of Australian constitutionalism, even though the word ‘subsidiarity’ itself was never used in the *Constitution* — which is expected given that the modern usage of the term did not materialise until 1891, at which time even the Swiss Federal Constitution (which in many ways is the pinnacle of subsidiarity) did not have any explicit reference to subsidiarity.<sup>157</sup>

A subsidiarity gloss on the *Australian Constitution* could furnish normative signals as to reforming the federation. Australian governments should be open to the possibilities created by subsidiarity, and read these within exogenous (supranational) factors rather than by clinching onto existing arrangements, arrangements that are largely influenced by a calculus defining the zeitgeist of the 20<sup>th</sup> century, and pertaining to technologies enabling the development of an Australian economy very different from that ushered by the 21<sup>st</sup> century.

Another point that the paper accentuates is that we have had 120 years of failure to initiate CIRs in Australia (part of subsidiarity’s ‘methodological individualism’), even though the history of referenda in this country suggests that ‘Australians appreciate the opportunity for direct, national consultation’.<sup>158</sup> The main reason

155 Ibid.

156 Senate Finance and Public Administration Legislation Committee, Parliament of Australia, *Citizen Initiated Referendum Bill 2013: Dissenting Report by Senator John Madigan* (2013) [1.1] (emphasis added).

157 The explicit reference to subsidiarity in the *Federal Constitution of the Swiss Confederation* (1999) had to wait until 2004 with the adoption of art 5a, which came into force in 2008.

158 Graeme Orr, above n 48, 118.

for this is that CIRs challenge political parties' grip on setting the political agenda more than usurp the sovereignty of parliament.<sup>159</sup> The Citizen Initiated Referendum Bill 2013 (Cth) is a recent example of this failure. This is usually explained as being due to the risks that come with CIRs, especially their binding or quasi-binding effect on representative government. However, New Zealand provides a clear example of a 'floor' (minimum standard) design for CIRs that would be (more) compatible with representative government, although some suggest that 'true' CIRs must be binding on parliament.<sup>160</sup> The argument is that non-binding CIRs would undermine the basic principles of direct democracy. But the issue is not the tension between direct and representative democracy. The issue is the right of citizens to vote other than on choosing representatives. In particular, CIRs ensure sovereignty (qua power) is shared between the political state and the constituent power.<sup>161</sup> The 'mere presence of [CIRs] indirectly [makes] policies more representative of state opinion'.<sup>162</sup> As a starting point, the New Zealand approach would go a long way into achieving the same, without the risks that could result from a binding approach. For the *Australian Constitution* to be 'a democratically legitimate constitutional regime' it must allow for 'fundamental change' to occur through the most participatory procedures through which the Australian 'constituent power,' namely, the citizenry, can manifest itself.<sup>163</sup> Enabling direct participation of all citizens in the process of law-making is a basic democratic ideal without which there can be no constitutional legitimacy.

159 Political parties are generally weakened by referenda regardless of whether they are initiated by parliament or by citizens:

In the interaction between the key actors in a referendum, political parties are potentially weakened by the absence of clear-cut issue ownership, the likelihood of internal dissidents and the changed dynamics of coalition formation, all of which result in signals to the media and the electorate that deviate from those of 'normal' domestic politics.

Claes H de Vreese, 'Political Parties in Dire Straits? Consequences of National Referendums for Political Parties' (2006) 12 *Party Politics* 581, 584. Sometimes due to the complexity of the issues themselves, parties fail to offer a recommendation for their supporters on how to vote, but even if they did, parties, especially larger ones, struggle to get their voters to follow party recommendations.

160 Williams and Chin, 'Australian Experiments with Community Initiated Referendum: CIR for the ACT?', above n 91, 275.

161 See Michael Macklin, 'The Case for a Citizen's Initiative' in Kenneth Wiltshire (ed) *Direct Democracy: Citizen Initiated Referendums* (Constitutional Centenary Foundation, 1996) 21; cited in Gregorzuk, 'Citizen Initiated Referendums: Republican Innovation or Scourge of Representative Democracy?', above n 131, 257. Macklin sees CIRs as part of the checks and balances on government by diffusing the latter's power.

162 Todd Donovan, 'Direct Democracy as "Super-Precedent"?: Political Constraints of Citizen-Initiated Laws' (2007) 43 *Willamette Law Review* 191, 198. See also Elisabeth R Gerber, 'Legislatures, Initiatives, and Representation: The Effects of State Legislative Institutions on Policy' (1996) 49 *Political Research Quarterly* 263; John G Matsusaka, *For the Many or the Few: The Initiative, Public Policy, and American Democracy* (University of Chicago Press, 2004); John G Matsusaka, 'Problems with a Methodology Used to Evaluate the Voter Initiative' (2001) 63 *Journal of Politics* 1250, 1250–6; Shaun Bowler and Todd Donovan, 'Measuring the Effect of Direct Democracy on State Policy: Not All Initiatives are Created Equal' (2004) 4 *State Politics and Policy Quarterly* 345. Cf Edward L Lascher Jr, Michael G Hagen and Steven A Rochlin, 'Gun Behind the Door? Ballot Initiatives, State Policies and Public Opinion' (1996) 58 *Journal of Politics* 760, 760–75, finding no evidence that initiatives lead to more responsive policy.

163 Joel Colón-Ríos, 'New Zealand's Constitutional Crisis' (2011) 24 *New Zealand Universities Law Review* 448. Constituent as opposed to constituted power, such as the power exercised by ordinary institutions of government. Constituent power is the source of positive law.

Some argue that elections are in fact nothing more than referenda on issues of importance to Australians. The front runners at this juncture seem to be same-sex marriages and refugee policy. Even if we set aside the important delay factor, it is hard to miss the agenda-setting dimension. It seems that our voting right has to inevitably go through political parties that are more usual than not bent on ideologies that do not necessarily chime with our own. These parties then ‘package’ issues, preventing voters from ‘picking and choosing’ different positions on individual issues. More importantly, the very possibility that citizens are able to exercise their right to referenda on their own initiative is likely to result in closer alignment between party and voter agendas. In addition, the cost of running referenda is falling, thanks largely to ICT advances that are making e-referenda more attractive.<sup>164</sup> Even e-referenda carry a legitimacy and accuracy above and beyond pollsters’ renditions.

164 E-Voting has been experimented with in Australia since 2001 (ACT Assembly elections), and included in a pilot by Victoria for the 2006 state election. See also the discussion paper Brenton Holmes, ‘E-Voting: The Promise and the Practice’ (Parliamentary Library, Parliament of Australia, 2012). Holmes advocates for slow reform given privacy and security issues. See also Jordi Barrat, *E-Voting: The Last Electoral Revolution* (Institut de Ciències Politiques i Socials, 2008); Council of Europe, *Legal, Operational and Technical Standards for E-Voting* (Council of Europe Publishing, 2005); Alexander Prosser and Robert Krimmer (eds), ‘Electronic Voting in Europe: Technology, Law, Politics and Society’ (Workshop of the ESF TED Programme together with GI and OCG, Schloss Hofen/Bregenz, Austria, 7–9 July 2004).

## APPENDIX 1

Government initiated referenda were held under the Referendum Act 1964 (NI) ss 5 and 6. The list below provides the dates and questions for these referenda.

### Citizen Initiated Referenda (under s 6 of the *Referendum Act 1964* (NI))

#### 1. 21 May 1986

Would television as proposed by the Norfolk Island Government be good for Norfolk Island?

#### 2. 6 July 1988

Is it appropriate that the Government risk industrial dispute by altering the conditions of service of public servants?

#### 3. 17 August 1996

Should the proposed new terminal for the Norfolk Island Airport be constructed in accordance with existing plans which have been displayed during September and October 1996 by the Norfolk Island Government?

#### 4. 27 August 1998

The Australian Government has recently indicated its intention to bring about changes to Norfolk Island's electoral process. Given this situation do you feel that it is appropriate that the Australian Government in Canberra dictates the electoral process on Norfolk Island?

#### 5. 10 January 2000

- 1) 1 Do you believe that senior officers and senior employees of the Public Service (i.e. Program Managers, Branch Heads, Section Heads and Managers of Government Business Enterprises) should be eligible, at the same time, to maintain their Public Service employment and to sit as Members of the Legislative Assembly?
- 2) 2 If the present system is changed, should such change be made effective from the earliest possible date (i.e. within a short time after obtaining assent to the necessary amending legislation)?

#### 6. 21 August 2002

Do you support the installation of a Digital Mobile Phone System in Norfolk Island?

#### 7. 21 December 2011

Do you agree with the Norfolk Island Legislative Assembly's changes to the Road Traffic Act 1982 (now consolidated as Traffic Act 2010), namely –

1. Compulsory wearing of seatbelts
2. "L" and "P" plates



3. The provisions applicable to “L” and “P” plates
4. Compulsory wearing of cycle helmets

Government Sponsored Referenda (under s 5 of the *Referendum Act 1964* (NI))

**1. 10 July 1979**

Should the method of election of members of the Legislative Assembly of Norfolk Island be by the system of Proportional Representation used in the Legislative Assembly election of August 1979 instead of the system used in the election of members of the ninth Norfolk Island Council?

**2. 1 December 1982**

Are you in favour of a change from proportional representation type of system of voting to a new cumulative system of voting?

**3. 17 February 1983**

Do you want an election for a new Legislative Assembly to be called immediately?

**4. 14 February 1990**

Do you support the Healthcare Scheme?

**5. 2 January 1991**

With respect to matters discussed by the Legal Regimes Inquiry, including the question of Federal Representation, should the constitutional position of Norfolk Island be changed?

**6. 21 October 1991**

The Commonwealth proposed to pass a law to make Norfolk Island part of Canberra for Federal electoral purposes. Are you in favour of this proposal?

**7. 15 March 1995**

Are you in favour of a quarantine facility for alpacas being established in Norfolk Island, subject to conditions reflected in the resolution of the Legislative Assembly on 15 March 1995?

**8. 18 March 1998**

Do you wish the Kingston and Arthur’s Vale Historic Area of Norfolk Island to be nominated for World Heritage Listing?

**9. 14 May 1998**

On the question of World Heritage listing of the Kingston and Arthur’s Vale Historic Area.

**10. 27 August 1998**

The Australian Government has recently indicated its intention to bring about changes to Norfolk Island’s electoral process. Given this situation do you feel that

it is appropriate that the Australian Government in Canberra dictates the electoral process in Norfolk Island?

**11. 22 March 1999**

Do you agree with the Australian Federal Government's proposal to alter the Norfolk Island Act so that -

- 1) people who have been ordinarily resident in the Island for 6 (six) months will in future be entitled to enrol on the electoral roll for Legislative Assembly elections; and
- 2) Australian citizenship will in future be required as a qualification to be elected to the Assembly, and as a qualification for people who in future apply for enrolment on the electoral roll for Assembly elections

**12. 12 May 1999**

Do you want to change the present voting system back to that known on Norfolk Island as "first-past-the-post" where an elector shall give no more than one vote to any candidate?

**13. 24 October 2001**

Should a new election be held for the full membership of the Legislative Assembly at the earliest convenient date?

**14. 19 March 2010**

Do you think that the profitable publicly owned Norfolk Island Liquor Bond Supply Service should be sold to private enterprise?

**15. 20 August 2014**

- 1) Do you agree that the Norfolk Island community should be given the opportunity to have a vote in a referendum or plebiscite on the future model of government for Norfolk Island?
- 2) Do you agree that the referendum or plebiscite should be conducted by an independent authority unrelated to Norfolk Island or to Australia?

**16. 8 May 2015**

Should the people of Norfolk Island have the right to freely determine their political status, their economic, social and cultural development and be consulted at referendum or plebiscite on the future model of governance for Norfolk Island before such changes are acted on by the Australian Parliament?

## APPENDIX 2

The following table lists the non-constitutional referenda held in Australia since federation. In comparison, in New Zealand, government-sponsored, non-constitutional referenda were held only seven times. The issues were: liquor licensing (in 1949 and 1967), off-course betting (1949), compulsory military training (1949); compulsory retirement savings scheme (1997); and changing the flag (in 2015 and 2016).

<b>Jurisdiction</b>	<b>Issue</b>	<b>Year</b>	
Commonwealth	Conscription	1916 and 1917	
	National anthem	1977	
<b>States</b>			
New South Wales	Hotel closing hours	1916, 1947, 1954, and 1969	
	Size of parliament	1903	
	Prohibition without compensation	1928	
	Daylight saving	1976	
	New state	1967	
Queensland	Religious instruction in schools	1910	
	Prohibition	1920, 1923	
	Daylight saving	1992	
South Australia	Payment of members	1910	
	Hotel closing hours	1915	
	State lotteries	1965	
	Shop trading hours	1970	
	Daylight saving	1982	
Tasmania	Hotel licencing	1916	
	Casino	1968	
	Where to dam the Franklin River	1981	
Victoria	Hotel closing hours	1956	

<b>Jurisdiction</b>	<b>Issue</b>	<b>Year</b>
Western Australia	Local option on hotel trading	1911
	Prohibition	1925, 1950
	Secession	1933
	Daylight saving	1975, 1984, 1992 and 2009
	Shop trading hours	Two questions in 2005
<b>Territories</b>		
ACT	Self-government	1978
	Electoral system entrenchment	1995
Northern Territory	Statehood	1998
Norfolk Island	Self-government	2015