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Federalism and the Principle of Subsidiarity

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Concepts such as subsidiarity and federalism may at first sound theoretical and academic. Increased centralisation of legislative and, in particular, financial powers, has had a very real impact on the States. Western Australia is currently in a dire financial situation, partly stemming from inadequate funding through a redistribution of the Goods and Services Tax (GST). This issue has received much media attention, particularly during Prime Minister Malcolm Turnbull's visit to Western Australia in July 2017. I will return to Western Australia's dire financial situation later.

First, I will explain the meaning of subsidiarity, and how it is a key characteristic of federalism. I will then discuss the federal nature of the Australian Constitution,[1] and how Australian federalism has been compromised in favour of centralisation.[2] I will conclude with some more specific comments about Western Australia's predicament and by suggesting some reforms (both idealistic and realistic) to restore the balance of power between

the State and Commonwealth governments.

The principle of subsidiarity

Subsidiarity means different things in different contexts, which was the motivation behind *Global Perspectives on Subsidiarity* (Michelle Evans and Augusto Zimmermann (eds)). The principle of subsidiarity came to prominence following the publication of Pope Pius XI's encyclical letter, *Quadragesimo Anno,* in 1931. He cast subsidiarity as a central principle of catholic social theory:

> Just as it is gravely wrong to withdraw from the individual and commit to the community at large what private enterprise and industry can accomplish, so, too, it is an injustice, a grave evil, and a disturbance of right order for a larger and greater organisation to arrogate to itself functions which can be performed efficiently by smaller and lower bodies. This is a fundamental principle of social philosophy, unshaken and unchangeable. Of its very nature the true aim of all social activity should be to help individual members of the social body, but never to destroy or absorb them.[3]

The Pope was concerned with empowering the individual so that individual citizens would have the autonomy to look after themselves, and to resolve their own issues without unnecessary interference from higher associations such as the government. If an individual citizen cannot help him or herself, there is a designated hierarchy of associations that can provide assistance, starting with those closest to the individual, namely their family. If the individual cannot be assisted by their family, then their local community may be able to offer assistance and, as a last resort, the Church or the state can intervene. The individual is empowered and respected because his or her issues are resolved

"closest to the problem at hand."[4]

Similarly, in a political or governmental context, subsidiarity also aims to empower the individual against unnecessary governmental interference. In a governmental context, "subsidiarity" means that:

> decisions, whether legislative or administrative acts, should be taken at the lowest practicable political level, that is as close as possible to those who are to be affected by them. Subsidiarity therefore presupposes an allocation of decision making powers within the state or other polity according to certain criteria designed to ensure that each decision is taken at the appropriate political level. The allocation of a particular decision making power to a higher or to the highest political level rather than to a lower or to the lowest political level might be made, for example, on such grounds as subject matter or effectiveness or efficiency or necessity or a combination of such grounds.[5]

Hence, the principle of subsidiarity in a political context aims to empower individual citizens and enhance democracy[6] through encouraging decision-making closest to where the problem has occurred, and to provide for more regionally appropriate and efficient action to be taken than if it were taken at a central level. These advantages, together with the checks and balances on centralised power, have been described by Shelton as follows:

> In applying the principle of subsidiarity, concentrations of power are avoided both vertically (between different levels of government) and horizontally (between different branches of government at the same level). Further, all

> government action is limited if the matter in question can be resolved by individual action. This is not necessarily federalism, but it is the establishment of a pyramidal structure with a broad base of local action. Such a structure enhances individual liberty, democratic participation, and societal diversity. Moreover, for the resolution of many questions, it is likely to prove more efficient as well.[7]

Although subsidiarity generally discourages centralisation, the principle does provide "justification of central involvement in affairs that cannot adequately be handled at the local level."[8]

The principle of subsidiarity was also embodied in article 5(3) of the *Treaty on European Union*. Many of the countries that agreed to form the European Union (initially the European Economic Community), known as "member states", were concerned about possible centralisation and the loss of their national autonomy upon joining.[9] The principle of subsidiarity, as it was originally intended in European Union law, provides that if a matter does not fall within the exclusive competence of the Community and can be better resolved by the individual member states, the central authority (Community) should *not* intervene, so that these matters can be resolved at a member state level.[10] The principle, however, has been unsuccessful in guarding against increased centralisation in the European Union. It has had some success as a procedural principle in reviewing legislation (called "Directives") before enactment, but no success as a judicial review principle in member state challenges post-enactment. This is because the Court has treated the principle as a political judgment, as opposed to a substantive principle of judicial review.[11]

Subsidiarity and Federalism

It is correct to say that the concepts of federalism and subsidiarity have much in common at a theoretical level. Halberstam has noted that:

> Federal systems across the world are generally designed according to the principle of subsidiarity, which in one form or another holds that the central government should play only a supporting role in governance, acting if and only if the constituent units of government are incapable of acting on their own.[12]

In the *Final Report to the Council for the Australian Federation*, subsidiarity is cited as one of "the fundamental rationales of federalism" and "a well documented driver of effective federations".[13] The authors comment on the effectiveness of subsidiarity in enhancing federalism, regional governance and representative democracy:

> The principle of subsidiarity is intrinsic to the efficient and effective allocation of responsibilities in a federal system. It is a means of ensuring that decision-making remains close to citizens and enables the system to be judged for whether it remains responsive to the needs of citizens . . . . State and Territory governments, being closer to their communities, are best placed to represent those communities when engaging with the national level government and in consultations over national policy frameworks. The closer the proximity of government to the community, the more authentic the notion of representative democracy becomes.[14]

In summary, both concepts have a similar underlying philosophy. Both include similar values such as decentralisation,

regionalism, and empowerment of individual citizens through ensuring greater democratic participation. Both concepts embrace checks and balances on power by distributing it so that it is not held by one level of government alone. Both concepts mandate a balance, and a distribution of powers between two or more levels of government, with powers allocated to the level of government that is best able to exercise them.

Subsidiarity and Federalism in the Constitution of Australia

This was certainly the philosophy adopted by the majority of the framers of the Constitution of Australia. In Australia, the framers of the Constitution, by adopting a federal system of government, intended to protect State power and autonomy against centralisation. Although the framers would not have been familiar with the term, "subsidiarity", it was a characteristic they sought to preserve in the federal nature of the Constitution. Upon federation, they intended to create a structure of government in which the States did not lose any more powers than was absolutely necessary. They intended the States to be in a position of equality, and certainly not to be subordinate to the Commonwealth. There are many instances of this intent in the Debates of the Constitutional Convention. For example, Alfred Deakin, later Australia's first Attorney-General, at the Sydney Session of the 1891 Constitutional Convention, stated:

> It is not a question of establishing a federal legislature, which is to have unlimited authority. The federal government is to have a strictly limited power; it is not to range at will over the whole field of legislation; it is not to legislate for all conceivable circumstances of national life. On the contrary, its legislation is to be strictly limited to certain definite subjects. The states are to retain almost all

> their present powers, and should be quite able to protect their own rights.[15]

Thus, the Constitution, as the framers intended, was indisputably federal. Professor Greg Craven has stated that: "If one had to pick the 'great theme' of the *Constitution*, it could only be federalism, upon the broad stage of which all other concepts play their crucial but undeniably supporting roles."[16]

This can be seen in the provisions of the Constitution itself. In section 7, the framers provided for the Senate, an upper house composed of an equal number of senators (originally six) "directly chosen by the people of " each State. The framers' view was that the Senate would specifically represent the people of each State, would protect State interests when passing legislation in the Senate and, importantly, guard against Commonwealth encroachment on State powers.[17] Care was also taken by the framers to include a separate chapter on "The States", Chapter V, which contains provisions about the endurance of State constitutions and powers after federation. Section 106 provides that State constitutions will continue in force after federation; section 107 provides that powers of State parliaments shall remain, except for those reallocated to the Commonwealth; and section 108 provides that State laws existing at the time of federation will continue to have force after federation. Section 109 has the purpose of resolving inconsistency between conflicting State and Commonwealth laws. Although this section provides that the Commonwealth law shall prevail, I would argue that this is certainly not a sign of the supremacy of the Commonwealth Parliament, but rather the simplest and most effective means of resolving any conflict.

Subsidiarity can also be seen in the allocation of legislative powers to the Commonwealth Parliament in section 51 of the Constitution. These include subjects that are more effectively

administered at a federal level, including defence,[18] currency[19] and international trade and commerce.[20] Notably, unlike State constitutions, which give State parliaments broad legislative powers to make laws for the "peace, order and good government" of the State, as decribed by Alfred Deakin in the preceding quote, the framers limited the Commonwealth Parliament's legislative powers by listing them. Hence, subsidiarity is evident in our Constitution because the framers provided for a structure of government where most legislative powers were decentralised, unless they were more appropriately exercised at a central level.

Where did Federalism (and subsidiarity) go?

The early High Court of Australia, led by Sir Samuel Griffith as Chief Justice, sought to preserve the federal balance of power between the Commonwealth and the States. Sir Samuel Griffith was certainly well-placed, and well-informed, in this task. He knew exactly what the framers of the Constitution intended, having been one of them himself. Griffith had been the Premier of Queensland and had represented Queensland at the Australasian Federal Conference in 1890. He was also a delegate at the National Australasian Convention at Sydney in 1891 where he was Vice-President and part of the drafting Committee, which produced the first draft of the Constitution.[21] Hence, under his leadership, the High Court employed the reserved powers doctrine and the doctrine of implied intergovernmental immunities to preserve the powers and autonomy of the States.

The "immunity of instrumentalities doctrine", also known as the "implied intergovernmental immunities doctrine", was an implication developed and applied by the early High Court, based on the federal nature of the Constitution in order to preserve and protect the federal division of powers between the Commonwealth and the States. Although the initial application

of the doctrine was to prevent State laws from interfering with the Commonwealth,[22] it was subsequently extended to both State and federal levels of government.[23] The doctrine recognised that the Commonwealth and State governments were independent entities, and were consequently immune from the operation of each other's legislation if that legislation impinged on the exercise of their legislative or executive powers.

At the same time as they implied the doctrine of implied intergovernmental immunities, the High Court also implied the "reserved State powers doctrine", once again on the basis of the federal nature of the Constitution. As Professor Nicholas Aroney has noted, the doctrine has been primarily associated with Griffith's judgments.[24] It provided that the legislative powers of the Commonwealth prescribed by the Constitution should be read narrowly so as not to detract from the power of the States "reserved" by section 107 of the Commonwealth Constitution. Thus, if a legislative power was not unmistakably granted to the Commonwealth by the Constitution, then it was treated as belonging to the States.[25]

These federalist doctrines were decisively rejected by the High Court in the *Engineers'* decision in 1920.[26] In *Engineers'*, a 5-1 majority of the High Court rejected the immunity of instrumentalities doctrine, and also the reserved State powers doctrine. The composition and experience of the High Court had changed from the federalist High Court under Chief Justice Griffith, with members of the High Court under Chief Justice Knox adopting a nationalist approach whereby they applied a literal, and consequently centralist, method of constitutional interpretation.[27]

Engineers' was, and remains, a controversial decision, sparking considerable debate, primarily because it completely reversed the approach taken by the early High Court by endorsing an expansive interpretation of Commonwealth powers

without limitation by any concept of federalism. *Engineers* proved, however, to be a lasting constitutional precedent.[28] The constitutional scholar, Professor Greg Craven, has strongly criticised the decision, stating that the decision in *Engineers'* irreparably altered the balance of power between the Commonwealth and the States. Craven has argued that, "Since the decision in the *Engineers'* case in the 1920s, the High Court has been strongly, institutionally, anti-federal."[29] Indeed, the result of *Engineers'* was a series of subsequent High Court decisions in which Commonwealth powers continued to be interpreted expansively. In fact, Craven described the success of the Commonwealth in these decisions as one that "must rival any win-loss ratio in the history of either professional sport or dubious umpiring."[30]

These decisions include the *First* and *Second Uniform Tax* cases.[31] Until the Second World War, Australians paid income tax to their State governments, who distributed the proceeds between both the State and the Commonwealth. In 1942, the Commonwealth passed several pieces of legislation under the guise of being for defence purposes, which centralised the collection and distribution of income tax.[32] This centralised regime withstood two High Court challenges from States in the *First* and *Second Uniform Tax* cases, thus reinforcing the centralisation of income tax and ensuring the States' reliance on grants from the Commonwealth.

Other notable decisions that had a significant detrimental impact on State financial and legislative autonomy included *Ha*[33] and *Work Choices*.[34] *Ha* affirmed a broad interpretation of excise duties in section 90 of the Constitution, which resulted in a revenue loss to the States of $5 billion per annum.[35] To make financial matters even worse for the States, in *British American Tobacco* the High Court held that a State would have to repay any monies raised under legislation that was subsequently found to

impose an invalid excise duty to the taxpayer.[36] In *Work Choices* a majority of the High Court upheld a broad definition of "trading corporation" in section 51(xx), effectively taking the power to regulate employment away from the States, with 85 percent of employees being brought under the federal jurisdiction.[37]

In a dissenting judgment, Justice Kirby recognised the potential for the Commonwealth to use the corporations power to encroach on areas of State legislative responsibility. He stressed the importance of the federal nature of the Constitution and its necessary effect as a limiting principle on federal powers:

> . . . it would be completely contrary to the text, structure and design of the Constitution for the States to be reduced, in effect, to service agencies of the Commonwealth, by a sleight of hand deployed in the interpretation by this Court of specified legislative powers of the Federal Parliament. Specifically, this could be done by the deployment of a near universal power to regulate the 'corporations' mentioned in s 51(xx). Such an outcome would be so alien to the place envisaged for the States by the *Constitution* that the rational mind will reject it as lying outside the true construction of the constitutional provisions, read as a whole, as they were intended to operate in harmony with one another and consistently with a basic law that creates a federal system of government for Australia.[38]

Justice Callinan also dissented and, like Justice Kirby, articulated serious concerns about the consequences of a broad interpretation of the corporations power on the federal balance and the impact on the States. His Honour stated that:

> The *Constitution* mandates a federal balance. That this is so

> should be closely and carefully kept in mind when construing the *Constitution*. That the federal balance exists, and that it must continue to exist, and that the States must continue to exist and exercise political power and function independently both in form and substance, until people otherwise decide in a referendum under s128 of the *Constitution*, are matters that necessarily inform and influence the proper construction of the *Constitution*. The Act here seeks to distort that federal balance by intruding into industrial and commercial affairs of the States.[39]

In summary, the principle of subsidiarity has been gradually eroded and removed from the Australian federal system of government. Instead of matters being resolved at a decentralised level, increased centralisation is apparent. Instead of each level of government being autonomous, we see central power increasing and regional (State) power decreasing. The States are no longer autonomous and independent, particularly in a financial sense. Western Australia is a relevant case study, which helps to illustrate some of the practical disadvantages of centralisation, and to illustrate suggestions for reform.

The (financial) "State" of Western Australia

The State of Western Australia is in financial crisis. CommSec's *July 2017 State & Territory Economic Performance Report* ("the Report"), also known as the "State of the States" Report, states that Western Australia is the worst performing State in the Australian federation and that it "continues to lag other economies and annual growth rates remain below national averages on all indicators."[40] The eight economic indicators across which Western Australia is underperforming are stated in the Report to include: "economic growth, retail spending, business investment, unemployment, construction work done,

population growth, housing finance and dwelling commencements."[41] The Report also notes, in its Executive Summary, that the "economic performance of Western Australia reflects the end of the mining construction boom".[42]

Additionally, it is also relevant to note that Western Australia is facing spiraling public debt. It has been reported that this debt will amount to $40.2 billion by 30 June 2020.[43] Despite the dire economic predicament that Western Australia finds itself in, its share of revenue from the Goods and Services Tax (GST), as allocated by the Commonwealth Grants Commission, has only been recommended to increase from 30 cents in the dollar for the 2015-2016 financial year, to 34 cents in the dollar for the 2017-2018 financial year.[44] These cent values represent the number of cents being returned to the State for every dollar of GST revenue raised in Western Australia by the Commonwealth Government. When contrasted with other States this distribution seems manifestly unfair. For example, the Grants Commission recommended that New South Wales receive 87 cents, Victoria 92 cents and Queensland $1.18, for the 2017-2018 financial year.[45]

Recent figures provided by the Western Australian Government for the 2016-2017 financial year indicate that Western Australia earns revenue of approximately $25.7 billion (which includes income from State taxes, Commonwealth grants, and mining royalties), with expenses of $29.6 billion. This amounts to a shortfall of $3.9 billion.[46] This raises serious concerns about what will happen to Western Australia if it continues to sustain these losses and highlights the need for reform. Its independence, autonomy, and even its continued existence, appear to be in jeopardy.

Idealistic and realistic reforms

My view is that reforms to the Constitution to restore

subsidiarity to Australian federalism are required, and would be best made by way of amendment to the Constitution. I do realise, however, that this is a somewhat academic and idealistic (rather than realistic) possibility. This is due to the difficulty in amending the Constitution as set out in section 128, and the fact that any amendments have to be initiated at a federal level. The following possible reforms may prompt some discussion of the issues.

The framers undoubtedly thought that the federal nature of the Constitution was so obvious that they neglected to include any provision confirming how it should be interpreted. As a result, various interpretive techniques have been employed over the decades including the originalist approach (in which the intentions of the framers are relevant), *Engineers* literalism, and the "living constitution" (also known as the "living tree" or "revisionist") approach (where the meaning of the Constitution is deemed to adapt to meet the changing needs of society). Given this confusion, a provision could be included in chapter III of the Constitution to include federalism as an interpretive principle to limit Commonwealth power.

It is suggested that a further provision could be inserted after the provisions in chapter III that define the jurisdiction of the High Court, specifically after section 78. The suggested provision could read as follows:

> 78A. The High Court of Australia must interpret this *Constitution* in a manner that is consistent with its role as the guardian of Australian federalism, and must consider and apply the following relevant considerations:
> (i) The intentions of the framers of the *Constitution*;
> (ii) The powers reserved to the States pursuant to section 107;
> (iii) The maintenance of fiscal and legislative equality

between the Commonwealth and the States;

(iv) The autonomy and sovereignty of the States;

(v) If a constitutional provision has two or more interpretations, the interpretation that is the most consistent with maintaining the equality of the federal balance of power between the Commonwealth and the States must be applied.

Such a provision would assist in confirming federalism as a principle of constitutional interpretation, and guard against future centralisation by preventing an expansive (centralist) interpretation of Commonwealth legislative and financial powers in the future.

Further, it is time for a reconsideration of the distribution of Commonwealth-State powers in accordance with the principle of subsidiarity. Such a redistribution was recommended by Twomey and Withers in their *Report for the Council for the Australian Federation.* They stated:

> The allocation of legislative power in the Constitution, which was undertaken in the 1890s, needs to be reconsidered today. It needs to take into account changes in the world, such as new developments in information technology and communication, as well as globalisation and the operation of modern economies. The most commonly used principle for making such an assessment in federations today is subsidiarity. Under this principle, functions should be undertaken by the States and Territories or their local governments, unless this is not practicable. Factors that will influence the allocation of a matter to the Commonwealth or the States include whether it is a matter of national interest, such as defence, or whether national standards are required as a measure of

> equity, such as social security support. Other important factors include whether significant spillovers into other jurisdictions are involved, whether significant economies of scale could be achieved and whether the harmonisation of policy is needed to increase efficiency. These factors are the core rationale for central government functions and should guide the distribution of powers. They should be respected, but not exceeded.[47]

Ideally, this redistribution would take place by way of constitutional amendment, and would have a particular focus on powers that have been increasingly centralised, including the corporations power, and taxation and excise duties. A redistribution of financial powers is particularly important. The dire situation that Western Australia is now in stems, in part, from its inability to raise, independently, sufficient finances. Indeed, approximately one-third of Western Australia's revenue is in the form of Commonwealth grants and the redistribution of GST revenue, making the State highly dependent on the good-will of the Commonwealth.[48] The consequent financial dependence of the States on the Commonwealth supports the argument that more permanent measures, such as a referral of income taxation powers to the States, and a more restrictive definition of excise duties, could assist to restore the fiscal federal balance.

It was somewhat disheartening that, in March 2016, the proposal by the Prime Minister of Australia, Malcolm Turnbull, that the levying of income tax should be shared with the States, whilst strongly supported by Western Australia, was resoundingly rejected by the other State premiers. This was presumably because they perceived that the revenue of their own States may decline under such an arrangement. So it would appear that whilst constitutional amendment is unlikely, so, too, is any

uniform cooperative approach, for example, a return of income taxation powers back to the States.

Another idealistic reform is to make the Senate more representative of State interests – more specifically, a "States house". In the German version of the Senate, the "Bundesrat", members are chosen from executive governments of the lander. If such a model were to be adopted in Australia, it would give State governments more direct representation at a federal level and the opportunity to participate directly in the federal legislative process.[49] Senators need to be reminded that their first obligation should be to their States and not to the agenda of their political parties. Perhaps some sort of formal reporting back to their State parliaments, where senators must account for how they have helped to protect their State's interests at the federal level, may help to encourage a Senate role as a States house through increased accountability to State parliaments.

Other more practical and achievable solutions (which do not require constitutional amendment) could include the scrutiny of legislation to be introduced in the Commonwealth Parliament from a federalist perspective. For example, the Explanatory Memorandum, required when any bill is presented to the Commonwealth Parliament, could be required to include a statement about how the proposed legislation affects the federal balance, and to justify how it falls within federal rather than residual State powers.

Federalism could also be made a requirement that must be addressed in the Second Reading Speech. The *Standing Orders* provide for a debate, and for the minister to be questioned about the Second Reading Speech, at a future sitting after the Second Reading Speech. This presents an opportunity for the minister to be questioned about, and being made to justify, the constitutional basis for the Bill and, in particular, debate any federal implications.[50]

An additional advantage of including federalism in both the Explanatory Memorandum and the Second Reading Speech is that section 15AB(2)(e) and (f) of the *Acts Interpretation Act* 1901 (Cth) provides that when a court is interpreting legislation, it can take the Explanatory Memorandum and Second Reading Speech into consideration. This would serve as a further reminder to the judiciary and a safeguard of federalism.

A further reform that does not require constitutional change is for the Commonwealth Grants Commission to amend its formula for the redistribution of GST revenue. For example, the formula should be based on the States' current financial situation, rather than looking at the States' performance three years prior which, in the case of Western Australia, results in historic royalties being included in the current distribution formula (despite those royalties now being in steep decline with the end of the "mining boom").[51] Amendment to the formula to reflect the States' current populations would also result in a significant revenue increase to States such as Western Australia.[52] Indeed, this was a recommendation of the *GST Distribution Review* presented in October 2012 (colloquially referred to as the "Greiner Review" after its chair, Nick Greiner, AC, Premier of New South Wales, 1988-92), but the recommendation was never implemented.[53] Whilst amending the formula has been strongly supported by States such as Western Australia, other States have argued strongly against Western Australia's challenge to this redistribution, presumably because it may result in their share of the finances being reduced. On 30 April 2017, Federal Treasurer Scott Morrison announced yet another inquiry by the Productivity Commission into the horizontal fiscal imbalance and the distribution of GST revenue, which is due to be delivered to the Government on 31 January 2018.[54]

A further option, which could be combined with the amendment of the formula, is to increase the dollar amount of

Commonwealth grants to the States substantially. I note, however, that, in 2016-2017, the Western Australian Government received a $1 billion "top up" in its grant monies.[55] This was nevertheless insufficient to redress Western Australia's dire financial predicament.

Unfortunately, both of these options, namely amending the Commonwealth Grants Commission's GST redistribution formula and increasing the amount of federal grants, are not consistent with the principle of subsidiarity because they do not empower the States to help themselves. They do not give the States autonomy over their own finances, and the States will continue to be reliant on the discretion and favour of the Commonwealth Government.

Conclusion

The Australian federation has become increasingly centralised. Reform is urgently required to restore the Australian system of government as an authentic federation. Subsidiarity and federalism have many commonalities, but the most significant is that subsidiarity helps to remind us that a federal system of government is (or certainly should be) a decentralised one. Federalism and subsidiarity both promote increased accountability of government through the division of power and responsibility between different levels, and the resolving of issues at a regional level whenever possible. This enhances democracy and ensures that problems are resolved efficiently and effectively. The principle of subsidiarity provides some guidance and inspiration as to how diminished State financial and legislative powers can be restored and protected against future attempts at centralisation.

Endnotes

1. *Commonwealth of Australia Constitution Act* 1900 (UK) ("Constitution").

2. This paper draws upon my doctoral dissertation and other scholarly research, primarily the following: Michelle Evans, "The Use of the Principle of Subsidiarity in the Reformation of Australia's Federal System of Government", PhD Thesis, Curtin University, 2012; and 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, Netherlands, 2014.

3. Pius XI, *Quadragesimo Anno: Reconstructing the Social Order and Perfecting it Conformably to the Precepts of the Gospel in Commemoration of the Fortieth Anniversary of the Encyclical "Rerum Novarum"*, Australian Catholic Truth Society, 1931, 25.

4. Robert A. Sirico, "Subsidiarity, Society, and Entitlements: Understanding and Application" (1997) 11 *Notre Dame Journal of Law Ethics and Public Policy* 549, 551–552.

5. John W. Bridge, "Subsidiarity as a Principle of Constitutional Law", in K. D. Kerameus (ed.), *XIV International Congress of Comparative Law, Athens 1994, General Reports* (1996) 613 cited in John W. Bridge, "Constitutions, Powers and the Doctrine of Subsidiarity" (1999) 31 *Bracton Law Journal* 49, 50–51.

6. Michael Longo, "Subsidiarity and Local Environmental Governance: A Comparative and Reform Perspective" (1999) 18 *University of Tasmania Law Review* 225, 225.

7. Dinah Shelton, "Subsidiarity, Democracy and Human Rights", in Donna Gomien (ed.), *Broadening the Frontiers of Human Rights: Essays in Honour of Asbjørn Eide*, Scandinavian University Press, 1993, 43, 54.

8. Daniel Halberstam, "Federal Powers and the Principle of Subsidiarity" in Vikram David Amar and Mark V. Tushnet (eds), *Global Perspectives on Constitutional Law*, Oxford University Press, 2009, 34, 35.

9. W. Gary Vause, "The Subsidiarity Principle in European Union Law – American Federalism Compared" (1995) 27 *Case Western Reserve Journal of International Law* 61, 64–65.

10. For an explanation of subsidiarity in the European Union, see Gabriël A. Moens and John Trone, "Subsidiarity as Judicial and Legislative Review Principles in the European Union", in Michelle Evans and Augusto Zimmermann (eds), *Global Perspectives on Subsidiarity*, Springer, Netherlands, 2014, 157-183.

11. See Michelle Evans, PhD thesis, above n 2, chapter 7, and Moens and Trone, ibid.

12. Halberstam, above n 8, 34.

13. John Wanna et al., *Common Cause: Strengthening Australia's Cooperative Federalism: Final Report to the Council for the Australian Federation*, May 2009, 9.

14. John Wanna et al., ibid.

15. *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 5 March 1891, 79-80 (Alfred Deakin).

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

17. See Mr Edmund Barton, Adelaide Convention Debates, page 21–23, cited in John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth*, LexisNexis Butterworths, first published 1901, 2002 ed, 417.

18. Constitution, section 51(vi).

19. Constitution, section 51(xii).

20. Constitution, section 51(i).

21. John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth*, LexisNexis Butterworths, first published 1901, 2002 ed., 123, 129. See, generally, J. A. La Nauze, *The Making of the Australian Constitution*, Melbourne University Press, 1972, for an account of the various Constitutional Conventions and their participants.

22. *D'Emden v Pedder* (1904) 1 CLR 91; *Deakin and Lyne v Webb* (1904) 1 CLR 585; *Commonwealth v New South Wales* (1906) 3 CLR 807.

23. *Federated Amalgamated Government Railway & Tramway Service Association v New South Wales Railway Traffic Employees Association* (1906) 4 CLR 488 ("*Railway Servants'* case").

24. Nicholas Aroney, "Constitutional Choices in the *Work Choices Case*, or what *Exactly* is Wrong with the Reserved Powers Doctrine?" (2008) 32 *Melbourne University Law Review* 1, 4.

25. Case examples include *Peterswald v Bartley* (1904) 1 CLR 497; *R v Barger* (1908) 6 CLR 41; and *Huddart, Parker & Co v Moorehead* (1909) 8 CLR 330.

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

27. Haig Patapan, "Politics of Interpretation" (2000) 22 *Sydney Law Review* 247, 250. See, also, Jeffrey Goldsworthy, "Justice Windeyer on the *Engineers'* Case" (2009) 37 *Federal Law Review* 363, 364.

28. I discuss the *Engineers* decision in some detail in *"Engineers:* The Case that Changed Australian Constitutional History" 24 (2012) *Giornale di Storia Costituzionale* (Journal of Constitutional History), 65-79.

29. Greg Craven, "The High Court of Australia: A Study in the Abuse of Power" (1999) 22 *University of New South Wales Law Journal* 216, 222.

30. Greg Craven, *Conversations with the Constitution: Not Just a Piece of Paper*, University of New South Wales Press, 2004,

78.

31. *South Australia v Commonwealth* (1942) 65 CLR 373 ("*First Uniform Tax case*") and *Victoria v Commonwealth* (1957) 99 CLR 575 ("*Second Uniform Tax case*").

32. *Income Tax Act* 1942 (Cth); *States Grants (Income Tax Reimbursement) Act* 1942 (Cth); *Income Tax (War-time Arrangements) Act* 1942 (Cth) and the *Income Tax Assessment Act* 1942 (Cth). For a discussion of the centralisation of income tax in the Australian Federation, see Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials*, Federation Press, 4th ed., 2006, 1122–1123.

33. *Ha v New South Wales* (1997) 189 CLR 465 ("*Ha*").

34. *Work Choices* (2006) 229 CLR 1.

35. Anne Twomey and Glenn Withers, *Australia's Federal Future: A Report for the Council for the Australian Federation*, Federalist Paper 1, 2007, 34.

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