HOW TO REFORM AUSTRALIAN FEDERALISM

by

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To make our system of government work in the way we would like it to we need to change our Constitution radically. We desire two things from our federation. First, we want a truly national government, able to make laws for the good of Australia. Second, we want autonomous States, able to pursue their own policies without interference from Canberra. Our Constitution gives us neither of these things. It gives us a Commonwealth government which instead of having power to make laws for the good of Australia has power to make laws only on particular subjects.[1] The subjects on which the Commonwealth can make laws were chosen with an eye to the political issues of the last century. For example, the Commonwealth can make laws on the subject of lighthouses, but not on education. It can legislate to control interstate trade, but not the economy. On its face, the defence power is limited to the power to raise armed forces. By subterfuge and with the help of the High Court, which has the duty of interpreting the Constitution, many of the more onerous restrictions on Commonwealth power have been evaded. However, the limits on Commonwealth power are still so great that the Commonwealth is unable to pursue coherent policies for the whole of Australia.

Howard has recently given a good example of the odd results our Constitution produces.[2] In the early seventies, the Commonwealth government moved to save two natural wonders, Lake Pedder and Fraser Island. It failed in its efforts to save Lake Pedder because it has no power to make laws to protect the environment. All it could do was to try to persuade the Tasmanian Government not to flood the lake. However, it was able to prevent sandmining on Fraser Island. Fraser Island was saved not because of any new found powers over the environment, but because the Commonwealth has power to control overseas trade. As the only market for the sand from Fraser Island was overseas, the Commonwealth stopped the mining by banning the export of any of the sand. The Commonwealth is often forced to pursue its policies by such indirect methods.

Although the Constitution has stopped the Commonwealth from developing into a government able to pursue national objectives effectively,

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1 These subjects are found mainly in ss. 51 and 52 of the Constitution.

2 See *Australia's Constitution* (1978), at pp. 19-21.

it has not protected the autonomy of the States. The Constitution leaves the States wide legal powers. However, the Commonwealth is able to exercise considerable control over their policies because it controls their finances. Much of the money which the States receive is given with strings attached; (*i.e.* it has to be spent in a particular way). For example, nearly all Commonwealth spending on education is done through the States. The States are given the money and are told how it is to be spent. The Commonwealth has been able to gain control of the States partly as a result of the High Court's attempts to give it the powers which it needs to be an effective national government. The High Court has not been able to give the Commonwealth power to pursue national objectives, but it has enabled it to subordinate the States to its will. As a result, our federalism gives us the worst of both worlds: an impotent national government and States which lack autonomy.

Two basic changes in our Constitution are needed to make our system of government work. First, the Commonwealth needs be given the power to make laws on any subject which it chooses, not merely laws on the subjects listed in the Constitution. Second, the States need to be given a constitutionally guaranteed source of finance, so that they will not be dependent on the Commonwealth for their revenues. These changes would give us a national government able to pursue national objectives. The result would, I believe, reflect the way in which we try to make our existing institutions work. At present, we elect the Commonwealth government to pursue national objectives. Neither the parties, when they put forward their policies, nor the electorate, when they vote, have any regard for the Constitutional limits on Commonwealth power. Instead, we expect the government to implement its policies despite the limits on its powers.

It is surprising how often government is able to oblige. The ingenuity of the draftsmen of our laws knows no limits. For example, the Whitlam government set up the *Prices Justification Tribunal* in order to force companies to justify price rises before they were made. The government faced two problems: first, it had no power to pass laws either on the subject matter of prices or on the subject matter of trade.[3] Second, the Constitution, according to the High Court, allows people who buy and sell across State boundaries, to charge whatever prices they like. All major companies, which were the target of the legislation, buy and sell across State boundaries. No matter how the law was drafted, it did not seem possible that it could apply to them. In spite of these obstacles, the government was able to establish the *Prices Justification Tribunal.*[4]

To establish the *Prices Justification Tribunal,* the Commonwealth relied on its power to make laws with respect to trading corporations. As the Act was aimed at companies with a turnover large enough to

3 Its power is limited to regulation of interstate trade. For the limits on its power to control interstate trade, see *infra* 7.

4 *Prices Justification Act* 1973.

have an effect on the market[5] its effectiveness was not curtailed by the fact that the Commonwealth has only limited power to control individual traders. However, it is not clear whether the Act can be applied to State government corporations such as Tasmania's Hydro Electric Commission, because even if they do nothing else but trade, they may not be trading corporations for the purposes of the Constitution.[6] Corporations of this type may be able to raise their prices without going to the Tribunal. The result is neither fair nor practical.

However, the major obstacle which the Commonwealth had to face is that it may have no power to set prices in interstate trade.[7] To avoid this possible limit on its powers, it adopted an ingenious solution.

The *Prices Justification Tribunal* has no power to set prices. Nor can it stop a trader raising prices or force him to lower his existing prices. A trader can raise his prices as much as he likes but before he does so, he must wait until the Tribunal has considered whether the price rise is justified. If he raises his prices without waiting until the Tribunal has considered whether the rise is justifiable, he is liable to a stiff fine. The system works remarkably well. Companies do not put prices up without the approval of the Tribunal, because to do so would attract too much criticism from politicians and the media.

Rather than go through the time consuming and expensive process of a Tribunal hearing, companies often accept lower prices suggested by the Tribunal as a compromise. A mixture of moral persuasion and public criticism and, the cynics would suggest, reluctance on the part of

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5 Only companies with an annual turnover of $20,000,000 or more are subject to s. 5 of the Act.

6 In the *St. George County Council Case* (1974) 48 A.L.J.R. 26, two judges of the High Court, Menzies and Gibbs, JJ., held that a State government corporation, the St. George County Council, set up under the *Local Government Act* (N.S.W.), was not a trading corporation even though it had never done anything other than trade in electricity and electrical goods.

7 The High Court has held that s. 92 protects a trader's freedom to trade between one State and another from any major interference by government. Price control is such an interference; *McArthur's Case* (1920) 28 C.L.R. 531. However, it was held in *Wragg's Case* (1953) 88 C.L.R. 353 that a State may fix prices for sales which occur within its borders, even where the effect is to fix prices for interstate trade as well. However, whether the Commonwealth can fix prices at which goods may be sold within each State with the intention of fixing prices for the whole of Australia is doubtful. However, in the recent *Wheat Board Case* (*Clark King* v. *Australian Wheatboard* 1978 unrep.) the High Court upheld legislation designed to regulate an industry on an Australia-wide basis, even though it placed considerable restraints on interstate trade. Mason and Jacobs, JJ., distinguished regulation on an Australia wide basis from regulation which only applied within the boundaries of one State.
The former may be valid even if it requires the compulsory acquisition of goods which are the subject of interstate trade, because no matter where the goods are in Australia, they will be subject to the same system of regulation. The latter will be invalid if it purports to expropriate goods which are the subject of interstate trade, because it merely prohibits that trade rather than subjecting it to a system of regulation; at pp. 58-59. On the basis of this reasoning, nation-wide price controls may not infringe s. 92, because they will amount to a system of regulation uniform throughout the country.

the Tribunal to refuse to approve proposed price rises, has made the system work.[8]

Although the *Prices Justification Tribunal* has worked quite successfully, it is an improvised stop-gap measure. All too often, the Commonwealth is forced to pursue policies by means of such devices. It should be given the power to pursue policies by whatever methods it thinks fit. Our attitude is peculiar because we elect national governments to pursue particular policies, but consistently refuse to give them the powers to implement those policies. Ineffectual governments have been the result. Effective national government requires that the Commonwealth be given a general power to make laws for Australia.

Although it is important that we gain a national government able to make laws on whatever topic it thinks fit, I do not believe that we would want to achieve that result by abolishing the States and setting up a unitary system of government. Most Australians would like to see the States recover their full autonomy. They can only regain their independence if they do not have to rely on the Commonwealth for money. To end the States' reliance on Commonwealth handouts, we need to alter our Constitution so that it gives the States a source of finance with which the Commonwealth cannot interfere. Giving the States a guaranteed source of revenue does not entail giving them the power to raise income tax. A better solution would be to give them a prescribed percentage of all revenue raised by the Commonwealth.

There are two major obstacles in the way of such a reform. First, it will be difficult to reach agreement on the percentage of overall income which the States should receive, especially as the Constitution would have to be changed to guarantee the States their income. Second, it will not be easy to divide up the moneys fairly between the States. The simplest way of dividing up the money would be to determine each State's share on a *per capita basis*. However, that process would be inflexible and it would also be unfair to the smaller States. Unless smaller States, such as Tasmania and West Australia, receive more funds per head of population than do the larger States they will be unable to maintain services at a level provided by the larger States. The result would be disastrous because it would encourage people to leave the smaller States to live in New South Wales and Victoria, thus increasing the problems of the smaller States, which ought to be subsidised by the larger and richer States. However, there would need to be a way of changing any such subsidy from time to time, because, even in the next twenty years, the proportion of national wealth and population in a State such as Western Australia is likely to rise considerably.

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8 However, a few days after the original version of this paper was delivered, it was alleged that two wool brokerage firms had decided to raise com-mission fees above the level approved by the *Prices Justification Tribunal*. The *Prices Justification Tribunal* and the government conceded that they were powerless, under present legislation, to stop companies ignoring *Prices Justification Tribunal* findings.

It will not be easy to decide the degree to which the smaller States should be subsidised. The need for subsidies will be questioned by the larger States, especially if the smaller States provide services which the larger do not provide. It will be difficult to be fair to the larger States without creating pressure on the smaller States to do no more than use money to provide similar services to those available in the larger States. Such a result must be avoided because it would reduce the autonomy of the smaller States.

Despite the problems, there are many advantages in giving the States a fixed proportion of all revenues raised rather than access to a growth tax, such as income tax. Allowing the States to raise substantial amounts of tax would reduce the Commonwealth's power to control the economy. Control over the level of taxes is a major economic tool. Raising the level of taxes can be used to reduce demand and, hopefully, inflation by reducing the amount people have available to spend, while lowering taxes can be used to stimulate spending and provide more employment. It would be unwise to reduce Commonwealth power in this area by ending the system under which all income tax is raised by the Commonwealth. Besides there are many advantages for the tax payer in uniform income taxation. He knows that no matter where he lives within Australia, the rate of tax will be the same.[9] Local variations in income tax, which could be the result of giving the States wide taxing powers, will be far more unpopular now than they were in the thirties when interstate travel was not so common. In fact, if rates of tax vary greatly from State to State, people, especially the wealthy, may move to the State with the lowest rate of tax. As a result, other States could be forced to lower their taxes to compete. The fact that Queensland has recently forced the other States to abolish, or to drastically reduce, death duties shows that the threat of the States competing for money by offering lower rates of tax is very real. Such competition ought to be avoided because it favours the rich. Only the rich can efford to move from State to State, to find the lowest rates of tax. Competition for their money would lead to a gradual shifting of the tax burden onto the poorer sections of the community. Our Constitution should not lock us into such a tax policy.

Not only the Commonwealth and the great majority of taxpayers would lose from the States being given the power to impose their own income tax, but the smaller States would also suffer. It costs more per person to provide a service in a smaller State than it does in a State with a large population. States such as Tasmania would not have the tax base to provide the government services that could be expected in New South Wales. The problem would be aggravated by the fact that many people and especially many companies who earn income in the smaller States are resident in the larger States. In order to be financially viable, the small States would have to tax all income which was earned within their boundaries. However, the larger States might not be prepared to

9 Of course, present tax rates provide for some particular incentives for people to live in outback areas.

forego their right of taxing residents who earn their income in other States, especially where the residents may be large and wealthy companies. Unless the States could agree about where such tax should be paid (whether in the State of residence or in the State where the income was earned) such taxpayers could pay twice.[10]

Even if the small States taxed all income earned within their borders, it is still possible that they might not be able to raise enough money to provide services equivalent to those provided by the larger States. To provide a measure of equality, they could be forced to rely on special grants from the federal government and, hence the Grants Commission would still have a role to play. In return for federal moneys, the small States would lose something of their autonomy, since the Commonwealth would be free to impose conditions on the special grants.

Hence, giving the States access to a growth tax such as income tax, would not be as effective a guarantee of autonomy as would a constitutionally protected right to a percentage of all revenues raised by the Commonwealth. In particular, the small States would be disadvantaged if they were forced to rely on their own taxes, because they might not have a large enough tax base to be able to finance their own activities. As a result, they might become dependent on Commonwealth grants to supplement their incomes. The number of claimant States could increase if the States start competing among themselves for wealth by cutting tax rates.

Besides, giving the States power to raise income taxes has disadvantages both for the Commonwealth and for the individual taxpayer. It lessens the Commonwealth's ability to control the economy and it could well lead to the tax burden of the States being shifted onto the shoulders of the poorer sections of the community.

As against these disadvantages, it has no great disadvantages. Power to raise its own taxes does give each State the legal right to decide exactly how much revenue it will raise, a right which the States would not have if they were guaranteed a fixed percentage of all Commonwealth revenue. However, that right may be quite illusory, because a State could risk losing both population and wealth if its tax rates were substantially higher than its neighbours. Besides, to allow each State some scope to raise extra revenues, the States could be left with residual power to raise taxes such as stamp duty, pay roll tax and the like. Given a fixed percentage of Commonwealth revenues and a residual taxing power, the States could have almost as much actual ability to decide how much revenue to raise as they would if they raised their own taxes.

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10 The problem would remain, even if, as has been suggested, the Commonwealth collects the tax for the States. The Commonwealth probably would not have power to tell the States who they can tax; *Secnd Uniform Tax Case* 99 C.L.R. 575. However, as tax collector for the States, it may be able to refuse to collect tax from certain parties, forcing the States to collect it themselves, or what is more likely, to waive the tax.

The Constitution must be changed if the Commonwealth were to be given power to make laws for the government of Australia in return for giving the States guaranteed finance. It is true that the Commonwealth could surrender to the States either a fixed percentage of its revenues or a substantial control over income tax without any change in the Constitution. However, unless the Constitution were changed, there would be nothing to stop the Commonwealth government from either taking back complete control over income tax or repudiating an agreement to give the States a fixed proportion of its revenues. If the Commonwealth were given unlimited legislative powers, it would, thus, be absolutely necessary to protect the States by giving them constitutionally guaranteed finances.

The scheme of our present Constitution is very different from the one which I have suggested. I have suggested that the States should be protected from the Commonwealth by being given financial autonomy. Under this system, the Commonwealth would be free to pursue whatever policies it chooses without being subject to unnecessary legal restraints. The areas which would be left to the States could be decided by normal political processes. The whole Constitution would be designed to free federal politics from as many legal restraints as possible while at the same time protecting the States.

Our present Constitution attempts to defend the States by subjecting federal politics to severe legal constraints. The Commonwealth was given the power to make laws on a number of specific topics[11] and giving the Commonwealth power in some areas and not in others, a sphere of activity was reserved for the States. It was assumed that the States would, at least, always retain the power to deal with those topics on which the Commonwealth could not make laws. To ensure that the Commonwealth did not exceed its legal powers, the States were given the right to challenge the validity of Commonwealth legislation in the High Court of Australia.

The idea of maintaining a federal system by placing legal limits on the powers of federal government was borrowed from the United States. The American political system assumes that individuals and groups have interests which ought to be protected against the government. The *Bill of Rights* protects the rights of individuals, while the Constitution gives both the federal government and the state governments protection against each other. These rights and protected interests are seen as paramount in the sense that laws which purport to abrogate them are invalid. Since these interests are paramount, the Supreme Court has been given power to enforce them by striking down any government action which infringes them. The fact that so many interests are protected gives American politics a special flavour. Policies are the results of compromise between all the

11 Most Commonwealth powers are listed in ss. 51 and 52 of the Constitution. Others are found scattered throughout the document, *e.g.* s. 78 gives the Commonwealth power to make laws allowing legal proceedings against it or against a State.

competing individuals and the interest groups which the system harbours. It is extremely difficult for the federal government to achieve any substantial reforms. Change tends to be incremental and is often achieved by the evolution of institutions themselves rather than by sweeping legislation. In fact, to ensure that the federal government is not able to act decisively in ways which may affect these paramount interests, it is even effectively divided against itself. The executive is separated completely from the legislature, and the judiciary is independent of both. Not only are the executive and legislature different institutions, but each is given power to frustrate the initiatives of the other (*e.g.* the President has power to veto Congressional legislation).

In this system of government, where certain interests are paramount and it is the task of government to work out compromise policies which are consistent with these interests, the role of the Supreme Court is crucial. It protects paramount interests by ensuring that the government does not exceed its legal powers. We did not borrow the whole American system designed to protect paramount interests against the government. However, we did borrow the idea of protecting the States by giving them legal defences against the Commonwealth.[12] Taken out of the American political system, where rights are paramount, and put into our system, where no other individuals or groups have interests which are legally protected from government interference, this idea has caused problems.

Partly to avoid these problems, and partly because they are not familiar with the idea that individuals and groups should have interests legally protected against the government, Australian lawyers and judges have tended to ignore the fact that the legal limits placed on Commonwealth power were designed to give the States substantive legal protection. If the limits on Commonwealth power give the States legal protection, the content of that protection ought to be considered when deciding on the scope of Commonwealth powers. Before 1920, the High Court recognised that the Constitution gave the States rights against the Commonwealth. States rights were the basis of two related doctrines, the implied immunities doctrine, which gave the States the right to carry out their activities free from all Commonwealth control[13] and the reserved powers doctrine which gave the States exclusive power to make laws on some topics.

The implied immunities doctrine was based on the idea that, despite federalism, the Commonwealth and the States were all sovereign and independent political bodies. As independent equals they had the right to run their own affairs free of interference by each other except to the

12 Of course, the Commonwealth was also protected against the States by being given certain legal defences against them. I will not consider them in any detail because the problem of Australian federalism is how to protect the States from the Commonwealth, not *vice versa*.

13 The implied immunities doctrine also protected the Commonwealth from State government interference, because the Constitution was also seen as giving the Commonwealth rights against the States; see *D'Emden* v. *Pedder* (1904) 1 C.L.R. 91.

extent that the Constitution explicitly authorised such interference.[14] As the grants of power to the Commonwealth did not expressly state that the Commonwealth could regulate State activities, the States were not bound by Commonwealth legislation.[15] Similarly, the reserved powers doctrine that the States had the exclusive right to all legislative powers not specifically vested in the Commonwealth was based on the theory that the States and their inhabitants had retained all rights and powers which they had not specifically surrendered in the Constitution. To ensure that the Commonwealth did not gain powers which had not been specifically vested in it, Commonwealth powers were to be read narrowly.[16] Not only were Commonwealth powers to be read narrowly, but also Commonwealth legislation which amounted to an attempt to pass laws on a topic over which it had not been specifically granted power were to be struck down. In *Barger's Case*[17] the High Court invalidated a Commonwealth law which attempted to use the power to levy taxes to control working conditions in industry. An excise tax was levied on the production of agricultural machinery. The tax was waived if wages and working conditions met certain requirements. The Court held that though the law was in form a tax law, in substance it was an effort to regulate working conditions. The law was invalid because since the Commonwealth had not been granted a specific power to regulate working conditions that power was reserved exclusively for the States.

The implied immunities and reserve powers doctrines were swept away in 1920 by the *Engineers' Case*.[18] The *Engineers' Case* laid down that grants of legislative power to the Commonwealth were to be interpreted widely without regard to the effect that such an interpretation would have on the powers of the States.[19] In other words, the case decided that the limits on Commonwealth powers were to be interpreted without considering the rights that those limits were designed to give the States.

Although the court in the *Engineers' Case* made much of the difficulty of deciding the scope of both the States' immunity from intereference by the Commonwealth and of their reserve powers,[20] the difficulty of applying the doctrines was not the reason why they were overruled. Both embody a reasonable attempt to solve the problem of maintaining a balance of power in a federal system. Besides, although the immunities'

14 *D'Emden* v. *Pedder* (1904) 1 C.L.R. 91 at p. 109.

15 *Railway Servants Case* (1906) 4 C.L.R. 488 at pp. 536-8. That case held that Commonwealth conciliation and arbitration legislation could not apply to State cntrolled industries, such as the railroads, because if the legislation had applied, it would have reduced State control over their railways in a way to which they had not consented at federation.

16 *The Railway Servants' Case* (1906) 4 C.L.R. 488 at p. 534.

17 *R.* v. *Barger* (1908) 6 C.L.R. 41.

18 *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (1920) 28 C.L.R. 129.

19 Ibid, at pp. 153-154.

20 Ibid, at pp. 150-151, 159-160.

doctrine is certainly not expressed in our Constitution,[21] it is arguable that the reserve powers doctrine is. If the limits which the Constitution places on Commonwealth power were not designed to reserve certain powers to the States, it is not clear why they are there at all. The *Engineers' Case* does not deny that those powers are there to protect the States, but the case does not state how they are to protect the States. The reasoning seems to be based on an implicit assumption that, no matter how widely Commonwealth powers are interpreted, the States will always be left with some power.[22] The position adopted by the *Engineers' Case* is strange, if not actually inconsistent. It does not deny

21 Though it is not expressly adopted by our Constitution, the immunities doctrine does provide a reasonable solution to some of the problems of federalism which are difficult to solve in any other way. For the most part, Dixon, J.'s idea suggested in the *State Banking Case* (1947) 74 C.L.R. 31, and adopted in the *Bank Nationalisation Case* (1948) 76 C.L.R. 1, that the States, like any other person, are subject to general Commonwealth legislation by virtue of s. 109 of the Constitution, but that the Commonwealth cannot legislate in a way which discriminates against the States is an adequate basis for Commonwealth State relations. Its effect is that if a State decides to engage in an activity such as running railroads, which ordinary citizens may engage in, it is subject to ordinary Commonwealth laws. However, the Commonwealth cannot pass laws which apply to States alone, or which regulate activities which can only be engaged in by governments. However in some cases the view that the States are subject to the ordinary law of the land fails to give them adequate protection. For example, the *St. George County Council Case* (1974) 48 A.L.J.R. 26 Barwick C.J. and Stephen J. dissenting, decided that the Council, a N.S.W. State government controlled corporation set up under the Local Government Act to supply electricity, was subject to Commonwealth restrictive trade practices legislation. The dissent of Barwick C.J. and Stephen J. seemed, in all the circumstances, sensible, because although the corporation was a State government instrumentality, it was largely autonomous. The State government could not be expected to police it in order to prevent it from pursuing undesirable trading policies and there was no other good reason for exempting it from the ordinary law preventing other traders from indulging in such practices. However, such a decision would create problems if the Commonwealth power over corporations extends to controlling their internal affairs, because it would have allowed the Commonwealth to regulate the internal affairs of State government instrumentalities, in effect allowing control to be taken out of the hands of the States. It may have been this consideration which led Menzies and Gibbs, JJ., to decide that the corporation concerned was not a trading corporation in respect of which the Commonwealth could make laws. A better solution might have been to have revived a degree of the *immunities' doctrine,* allowing the Commonwealth to control the trading activities of such a corporation, but preventing it from controlling the corporation's internal affairs, whether or not it could control the internal affairs of privately owned trading corporations. Thus in situations where, under the normal law of the land, the Commonwealth could gain an unwarranted degree of control over State activities, a limited immunities doctrine would be helpful.

22 The Court based Commonwealth State relations firmly on ss. 51 and 109. S. 107 was not to be read as reserving any powers to the States exclusively. Its effect was to enable the States to legislate on any topic which had not been given exclusively to the Commonwealth, and which was not the subject of Commonwealth legislation. Once the Commonwealth legislated on a particular topic, s. 109 invalidated any inconsistent State legislation. To that extent, the Commonwealth was protected from interference by the States. However, the States do not receive similar protection because although a State power exists until the Commonwealth power is exercised and although it revives when Commonwealth legislation is repealed, a Commonwealth government could by fully using the wide powers given to it by the *Engineers' Case* regulate many areas to the exclusion of the States.

that the limits on Commonwealth powers were designed to protect the States. The Court has always conceded that, whenever it is determining the scope of a Commonwealth power, it is also deciding questions as to the balance of power between Commonwealth and States. The States' interest in decisions as to the scope of Commonwealth power is shown by the fact, that through their Attorney-Generals, they may bring an action against the Commonwealth where their only interest in the case is in having the law declared invalid and the Commonwealth power narrowly interpreted. These considerations suggest that, in interpreting Commonwealth powers, some weight must be given to the effect that a particular interpretation will have on State powers. However, the *Engineers' Case* established that Commonwealth powers were to be given that wide interpretation, regardless of any effect on State powers.[23]

The Court justified ignoring the implications which flowed from giving the Commonwealth a specific list of powers by arguing that Australia is not a true federation. If Australia were a true federation, *i.e.* if the

23 The *Engineer's Case* illustrates only one aspect of the High Court's reluctance to concede that the Constitution set out to protect both Commonwealth and States by giving them rights against each other. The orthodox view is that the Constitution places limits on the powers of both Commonwealth and States without giving them rights to enforce those limits against each other. On this view, for example, the Commonwealth has limits placed on its legislative powers by ss. 51 and 52, but the States do not have any specific legal right to enforce those limits.
The effect of the orthodox view is to import the doctrine of *ultra vires* into the Australian Constitution so that Commonwealth and State laws made without power are void *ab initio*. If an attempt is made to enforce the void law against an individual, he is entitled to ignore it and may be able to sue the officials attempting to enforce it for illegally interfering with his rights. However, the Constitution itself does not give rise to substantive rights; the injured person only has the right to have the law declared invalid and the right to have the court protect whatever other rights he may have from interference by officials relying on the invalid law; see *James* v. *South Australia* (1927) 40 C.L.R. 1. In that case, the doctrine was applied to s. 92 but it is of general application.
The doctrine leads to strange conclusions. It is clear that it enables individuals affected by invalid Commonwealth or State laws to challenge those laws. However, it does not provide a definite basis for either the Commonwealth or a State to sue to prevent the other from invading areas of power reserved to it by the Constitution. It is an odd result because individuals, who are guaranteed a right of action, only have a minor interest in ensuring that the Commonwealth and the States observe the terms of the federal compact, while the Commonwealth and the States, to whom the compact is of vital concern, are not guaranteed standing.
It would have been absurd to deny the Commonwealth and the States standing to sue to have the Constitution enforced. The problem was avoided by stretching the law of standing and making the remedy of a declaration easily available. Under the doctrine, the Attorney-General of a State is able to sue the Commonwealth for a declaration that Commonwealth legislation is invalid if the public of the State is affected by the legislation; see *Attorney-General (Victoria)* v. *The Commonwealth (Pharmaceutical Benefits Case)* (1945) 71 C.L.R. 237 at p. 272 per Dixon J. For a discussion of the doctrine, see A. Wynes, *Legislative, Executive and Judicial Powers in Australia* (5th ed. 1970) at pp. 448-50.
Allowing the Attorney-General of the State to sue in the public interest avoids many of the problems. However, a simpler solution would be to allow the Commonwealth and the States to enforce the Constitution against each other. The Court is now moving towards conceding such a right; see Barwick C.J., Gibbs and Mason JJ., in *Victoria* v. *The Commonwealth* (1975) 134 C.L.R. 338 at pp. 365-6, 381-3, 401-2 respectively.

Commonwealth of Australia had come into existence as a result of an agreement to federate by the States, the argument that the grants of specific power to the Commonwealth were designed to reserve certain powers to the States would have been too strong to ignore. The High Court avoided the argument by claiming that Australia was not a true federation because in 1900 the Australian colonies were not independent political bodies and did not have the power to federate. Instead of being adopted by the States the Constitution was imposed on Australia by the Imperial Parliament. Although it is federal in form, it should not be interpreted as a federal compact similar to the Constitution of the United States, but as a new system of government imposed on colonies by their imperial master.

The colonies retained their separate identities but from that fact alone it could not be assumed that they were not subordinated to the new system of government. The ordinary rules for construing acts of the United Kingdom Parliament led to the conclusion that the colonies were subordinated to the new system of government unless the Constitution specifically protected them.[23a]

The argument that Australia is not a true federation is weak. It is dishonest because it ignores the fact that the Constitution was not imposed on the Australian colonies. Any colony which did not agree to federation had the choice of opting out. The Constitution took the form of an Act of the United Kingdom Parliament because it was accepted by all parties that that course was the most appropriate way of changing the system of government in Australia. Although the United Kingdom government insisted on a few minor changes designed to protect appeals to the Privy Council, the fact that our Constitution is an Act of the United Kingdom Parliament should not affect the way in which it is interpreted. First and foremost, it is Australia's Constitution, drafted by Australians for Australia.[24]

In spite of what was said in the *Engineers' Case,* the High Court did not overrule the doctrines of reserve powers and implied immunities because they were inconsistent with Australia's status as a British colony. The arguments from Australia's colonial status were relied on in an attempt to bolster a weak position. The High Court decided to ignore the fact that the Commonwealth had been given certain specific powers in order to reserve powers for the States because that method of maintaining a federal balance was inconsistent with the general tenor of our

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23a *Engineers' Case* (1920) 28 C.L.R. at pp. 152-3. (The argument takes the traditional form that as the Crown is indivisible throughout the empire, all of its agents, whether they be the British or colonial governments, are equally bound by an Act of the British Parliament which is intended to bind the Crown.

24 A legacy of the *Engineers' Case* is the view still held by many judges, that just as the United Kingdom Parliament imposed the Constitution on the Australian colonies, it has the legal power to abolish it. It is absurd that an Australian court would even consider whether English legislation could change our Constitution. Luckily, our judges are beginning to realise that for Australian law at least Australia is no longer a British colony; see the judgment of Murphy J. in *Bistricic* v. *Rokov* (1976) 11 A.L.R. 129.

political system. Unlike the American system, our political system is not based on the idea that the only way to prevent abuses of power is to grant individuals and groups legal rights which the government cannot infringe. Instead, we rely on political means to prevent abuses of power. If Parliament or the electorate believes that the government is abusing its powers, it can vote the government out of office.

The belief that placing legal limits on Commonwealth power in order to protect the States is out of place in our political system permeates the *Engineers' Case*. The majority judgment is based on the view that in a political system such as ours, which is based on English traditions, Parliament expresses the will of the people. To enable the people to obtain the laws which they want, grants of power to Parliament should be read as widely as possible. No limits which are not expressed in the Constitution itself ought to be placed on its powers.[25] In particular, grants of power must not be read down in order to prevent them being used to limit the autonomy of the States. If Commonwealth powers are used to weaken the States, the electorate can decide whether that amounts to abuse of power by voting for or against the government. It is not for the High Court to pre-empt the electorate's decision by invalidating legislation which in its opinion amounts to a mis-use of power.[26]

The *Engineers' Case* reflects the inconsistency between the English and the American borrowings in our political system. The English system of responsible government, part of which we borrowed, places unlimited legal powers in the hands of Parliament and of an executive which is responsible to it. It is designed to allow the government to pass whatever laws it believes are in the best interests of the community. Popular control over this legally omnipotent government is exercised through general elections. General elections offer the people a chance both to reject a government, with whose policies they disagree, and to elect a government which they support. General elections produce a government with a mandate, that is with a vote of support for the policies on which it was elected. Once in power, it will be expected to implement its policies. If it fails to carry out its mandate, it will face calls to resign. Although governments do not resign or call an election because they have failed to carry out their mandate, the idea that a government is elected to carry out certain policies is embedded in our political system. However, the system of protecting the States by placing severe legal restraints on Commonwealth power, which we adopted from America, prevents the doctrine of mandate from working properly because it stops governments from implementing the policies which they were elected to carry out.

The *Engineers' Case* was an attempt to solve the dilemma posed by a political system which elects a government to carry out specific policies but often denies it the power to implement those policies. It attempted

25 28 C.L.R. at pp. 153-154.
26 Ibid at pp. 150-152.

to solve the problem by widening Commonwealth powers as much as possible. In doing so, it chose to ignore that Commonwealth powers were limited in order to protect State powers. Given the nature of the problem, a solution such as that adopted in the *Engineers' Case* was ultimately inevitable. The pressure to widen Commonwealth powers would have become too great to resist. Pressure would have arisen both from social change and from the political dynamics of our system of government. In the United States the Supreme Court has been forced to extend federal government powers in response to social change and the pressure for reform to which social change has given rise. However, the States have been protected to some extent by the nature of the American federal government itself. American government is not designed in a way which encourages the political parties to present specific policies to the electorate. Even presidential candidates are often vague about their policies, because they know that whatever policies are implemented will be the result of compromise with all types of pressure groups both in and out of Congress. In this system, where the executive is not chosen from the legislature, Congressmen can take their own line. As their actions cannot bring down the government, they are not committed to following the party line. There are many who will support the States against expansionist federal policies.

Our central government is not set up in a way which provides the same degree of protection to the States. The fact that our executive is chosen from the majority party in the legislature and exercises a considerable degree of practical control over the legislature gives our government a unity of purpose which is lacking in the U.S.A. The degree of actual control which the executive has over the legislature enables a government to be reasonably confident that its legislative programme will be enacted into law. Members of the government party cannot afford to oppose government legislation because a major defeat for the government might force it to resign. Besides, voting against the government greatly lessens a member's chances of becoming a government minister. Opposition members will oppose, but usually they are not likely to be able to defeat, legislation. As a result, the States cannot rely on any effective opposition in the Commonwealth Parliament to legislation which interferes with their powers. The Senate was set up to provide the States with a voice in the federal government, but it quickly became a party house, and, thus, unable to protect them. Because of the differences in the two political systems, the Commonwealth government is much more likely to pass legislation which ignores the interests of the States than is its American counterpart.

If the High Court were to have interpreted Commonwealth powers narrowly, a clash between it and the Commonwealth government might have been inevitable. To win elections, Commonwealth governments have been forced to devise, and to try to implement, wide ranging economic and social policies. Interpreted narrowly, the Constitution would have made it impossible to pursue these policies. However, political

pressures, especially the need to make attractive promises in order to win elections would have forced successive governments to try to implement such policies without regard to the limits on their powers. The High Court could not have continually invalidated attempts to pursue policies for which the government had a mandate. Eventually it would have had to bow to the people and widen Parliament's powers. The *Engineers' Case* reduced the likelihood of such a clash by widening Commonwealth powers.[27]

The *Engineers' Case* not only widened Commonwealth powers, but it also removed many of the legal restraints on the Commonwealth's ability to alter Commonwealth-State relations by normal political means. Giving the Commonwealth the power to alter its relations with the States was an integral part of the attempt to free the Commonwealth from legal constraints so that responsible government could work. In doing so, it left the States defenceless because they had very few political weapons with which to force the Commonwealth to negotiate. Since 1920, the exact nature of Commonwealth/State relations has been determined by the Commonwealth Government. It has been able to impose its view of federalism on the States. Nowhere is Commonwealth control more obvious than in its control over finances. It has been given control over finances in a series of decisions firmly based on the *Engineers'* principle that the Court should not construe Commonwealth powers narrowly in order to stop their abuse. Commonwealth control over finances rests on s. 96 of the Constitution which confers the power to grant financial assistance to any State on such terms and conditions as the Parliament thinks fit. Under that section, the Commonwealth is allowed to make grants to the States and to specify in detail how the

27 The method of interpretation adopted in the *Engineers' Case* makes such a clash unlikely. If Commonwealth powers are not read down in order to preserve State powers, no other limits readily suggest themselves. Given the problems that arise from placing limits on the powers of government, it always seems more sensible to extend them in order to uphold legislation rather than to read them down unless one can appeal to a strong theory which requires them to be read narrowly. Since there are no strong and acceptable grounds for limiting Commonwealth powers, the tendency has been to expand them on an incremental basis. An excellent example of this approach is *Strickland* v. *Rocla Pipes* (1971) 45 A.L.J.R. 485. In that case, the High Court expanded the scope of Commonwealth power to make laws with respect to trading corporations. The whole court held that the Commonwealth had power to control the trading activities of trading corporations No judge considered the exact scope of the power, because it was not necessary to do so in order to decide that case and because, given that the power was not to be read down to protect the States, no obvious limits suggested themselves. The case does not give any reasons for not widening the scope of the power in later cases. There is no plausible theory which the High Court can use to justify a ruling that any law which regulates any of the activities of a trading company is beyond power. Later cases are likely to see the power gradually widened. Similarly other Commonwealth powers are likely to be widened gradually without the High Court ever attempting to lay down their exact width. The tendency to expand Commonwealth powers on a case by case basis which is implicit in the *Engineers'* approach rules out the likelihood of a major clash between the Commonwealth and the High Court.

money is to be spent.[28] The Commonwealth can even make the grants conditional on the States agreeing to give up their right to levy taxes.[29]

The grants power has been interpreted in a way which gives the Commonwealth a great degree of control over State finances. As a result of the *Uniform Tax Cases*,[30] the Commonwealth has gained a monopoly over income tax. The States depend for the major part of their finances on Commonwealth grants, which are given in return for the States agreeing not to levy income tax. Reduced to dependence on Commonwealth grants, the States are always short of money. The grants power has been used to control the States in other ways. Some of the moneys the States receive is given for a specific purpose; *i.e.* it has to be spent in ways which are laid down by the Commonwealth. Commonwealth control over the expenditure of these grants can be detailed. Much Commonwealth spending in the fields of education, public works and health is by means of special purpose grants. The Commonwealth gives the States the money and requires them to spend it as it directs. Legally, the States are free to refuse to accept such grants, but politically no State government could survive if it turned down federal government spending.[31]

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28 The Commonwealth can even require the States to hand over the money to third parties; *Moran's Case* (1939) 61 C.L.R. 735 (High Court) and (1940) 63 C.L.R. 338 (Privy Council). In *Moran's Case*, money was given to the Tasmanian government on the understanding that it would hand it over to millers of flour to compensate them for a tax which they had to pay on all flour they milled. The grant was given because it had been decided that Tasmanian millers ought to be exempt from a nation-wide tax on flour and the Commonwealth did not have power to exempt Tasmanians from a tax levied elsewhere in Australia, s. 51 (11). Although the grant was designed to enable the Commonwealth to avoid a specific limitation on its powers and although the money had to be handed over immediately to third parties, the legislation was upheld.

29 *First Uniform Tax Case* (1942) 65 C.L.R. 373 and *Second Uniform Tax Case* (1976) 99 C.L.R. 575.

30 *Supra*, n. 29.

31 The fact that the States are not under any legal obligation to accept the grants or the conditions attached to them has led judges such as Dixon, C.J., who did not fully accept the idea that the Court should not intervene to prevent the Commonwealth abusing its powers, to acquiesce in the Commonwealth's gaining political control of the States through conditional grants. In the *Second Uniform Tax Case* (*supra*, n. 29) Dixon, C.J. said of the grants power: '.... [I]t is apparent that the power to grant financial assistance to any State upon such terms and conditions as the Parliament thinks fit is susceptible of a very wide construction in which few if any restrictions can be implied. For the restrictions could only be implied from some conception of the purpose for which the particular power was conferred upon the Parliament or from some general constitutional limitations upon the powers of the Parliament which otherwise an exercise of the power given by s. 96 might transcend. In the case of what may briefly be described as coercive powers, it may not be difficult to perceive that limitations of such a kind must be intended. But in s. 96 there is nothing coercive. It is but a power to make grants of money and to impose conditions on the grant, there being no power of course to compel acceptance of the grant and with it the accompanying term or condition.' (99 C.L.R. at 605.) The statement ignores reality because although there was no legal compulsion to accept the grants, politically the States could not refuse them. The statement reflects the fear expressed in the *Engineers' Case* that there are no legal critria which a court can use to determine when a grant of power is being abused. The reasoning ignores the fact that because of the gravity of the issues involved, the Court is forced to take a political stand whenever it decides a constitutional issue.

State governments have been forced by their political weakness to act as agents of the Commonwealth implementing its policies in areas where it has no legal power to act itself. Legally, there is no reason why all Commonwealth grants to the States could not be tied grants to be spent as the Commonwealth requires. Through the use of conditional grants, the Commonwealth can dictate policy to the States.

Allowing the Commonwealth government to dictate the policies of the State government is inconsistent with federalism. There is no point in having constitutionally established State governments if they do not have constitutionally guaranteed powers to determine their own policies. However, it would not now be wise to go back to the situation as it was before the *Engineers' Case* and to ask the High Court to protect the States by invalidating attempts by the Commonwealth to abuse its powers. The powers which the Constitution actually grants to the Commonwealth are far too narrow to enable it to be an effective national government. The wide interpretation of the grants power has benefited Australia in that it has enabled the Commonwealth to pursue many policies in areas which are outside its powers. What it has not been able to do itself, it has forced the States to do for it. Besides, the idea that the Constitution should allow federal state relations to evolve pelitically is an excellent one, both because it is consistent with our system of responsible government and because it allows our national government to change its priorities easily. It should not be abandoned for a system which protects the States by freezing Commonwealth/State relations into a particular pattern. Instead, it needs to be improved by freeing the Commonwealth from all unnecessary legal constraints[32] and by giving the States enough political power for them to regain their independence and have some influence over the future development of Australian federalism. To achieve these aims, we should adopt a new Constitution, which establishes the Commonwealth as a true national government by giving it the power to enact whatever laws it believes are in the best interests of Australia and which guarantees the political independence of the States by granting them a set share of all revenues raised.

32 It will be impossible to free the Commonwealth from all legal restraints. The Court will still have a major role to play in Commonwealth-State relations in two areas. First, there must be some means of deciding what obligations a person faced by conflicting Commonwealth and State laws actually has. The Court is the appropriate body to decide such questions, probably on the basis that as at present, Commonwealth laws should prevail over State laws. Second, the Commonwealth would have to be prohibited from trying to destroy or to take over the States, or from attempting to force them to use their powers in a particular way. Again, it would fall to the Court to decide whether a Commonwealth law infringed this prohibition.