Chapter Two
The Ghost in the Machine: Exorcising *Engineers*

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The *Engineers Case*[1] is widely regarded as the most significant High Court decision in Australian constitutional history.[2] Time and again, the Court has turned to *Engineers* for the requisite inspiration and guidance on that most fundamental of matters: the appropriate approach to be taken in interpreting the federal Constitution.[3] If Australian constitutional law has had a reputedly machine-like operation over the years, the *Engineers Case*, more than any other, has been its animating spirit.

However, recent cases and commentary have suggested that the *Engineers Case* no longer bears the authority that it once had. While the Court has never explicitly overruled the decision, a number of cases have cast doubt on many of its fundamental propositions.[4] Is it at last time for the Court to exorcise the *Engineers Case* from the machinery of Australian constitutional law entirely?

Since doubt has been cast on many of the propositions in *Engineers*, really to grapple with this question requires me to address what I call the resilient core of the decision, the proposition that the legislative powers of the Commonwealth enumerated in s.51 of the Constitution are to be interpreted prior to, and without substantial regard to, the impact on the remaining legislative capacities of the States.[5] Why do I regard this as the resilient core of the decision? Other fundamental propositions from the case have certainly proved persistent and influential. But despite their persistency and influence, most of these have now been undermined, in various ways. Let me give just two examples of this, before elaborating what I mean by the resilient core of the decision.

The first example has to do with the origin and fundamental nature of the Constitution. Prior to *Engineers*, the High Court had interpreted the Constitution as in the nature of a federal compact between the separate Australian Colonies.[6] But in *Engineers* the Court insisted that the Constitution was rather to be understood as a statute of the Imperial Parliament, and was to be interpreted as such, according to ordinary principles of statutory interpretation.[7] This approach prevailed for many years after *Engineers*,[8] and still has its supporters.[9] However, it has recently been challenged, in the most fundamental terms, by the suggestion that the Constitution really derives its force from the Australian people, rather than the Imperial Parliament.[10] Many of the Court's most adventurous constitutional decisions of the past decade have drawn on the idea that the Constitution is thus founded on popular, rather than Imperial, sovereignty.[11] In this way, *Engineers* has been undermined.

The second example of an *Engineers* proposition that has subsequently been undermined concerns the question of what doctrines or philosophies of government are central to the design and meaning of the Constitution. For almost two decades,[12] the High Court had said that federalism is an essential aspect of the system – and the immunity of instrumentalities and State reserved powers doctrines were the result.[13] But *Engineers* changed all that. In substitution for federalism, the *Engineers* Court asserted that the doctrine of responsible government was fundamental to the Constitution, indeed more fundamental than federalism.[14]

What exactly this amounted to, and how responsible government was precisely relevant to the question at hand, was not really made clear in the joint judgment, delivered by Isaacs J.[15] On the facts in *Engineers*, at least, it meant that the implied immunity doctrine was not available to protect State government agencies from the operation of federal industrial arbitration laws.

Some, it seems, understood this to mean that in the interpretation of the Constitution, implications had no role to play whatsoever.[16] Yet, as we all know, in less than thirty years the High Court under the influence of Sir Owen Dixon was again insisting that federalism was an integral part of the constitutional design. Sir Owen seems never to have been particularly fond of *Engineers*,[17] and he capitalized on some of the qualifications expressed in the judgment to formulate a modified, two-tier federal and State immunity doctrine.[18] Thus while the *Engineers* Court certainly abandoned the doctrine of the immunity of instrumentalities, it was not that long before a qualified, two-track intergovernmental immunity re-emerged in *Melbourne Corporation v. Commonwealth*[19] and *Commonwealth v. Cigamatic*.[20]

In these and other ways,[21] fundamental to the decision, *Engineers* has been undermined. Professor Williams has gone so far as to say that "*Engineers* is dead".[22] But despite all of these reversals, a resilient core of the *Engineers* decision has remained.

That resilient core is the proposition that federal legislative powers are to be interpreted in priority to, and without substantial consideration of, the "remaining" legislative capacities of the States.[23] Such a proposition was a direct challenge to the doctrine of State reserved powers, the idea that the Constitution impliedly reserves to the States a certain sphere of exclusive legislative power.[24] Ironically, while the *Engineers* case was not directly concerned with this doctrine, this aspect of the judgment has rarely, if ever, been criticised.[25] Indeed, the priority to be given to the interpretation of federal legislative powers became so well entrenched that it remained fundamental even in those cases, such as *Melbourne Corporation*, which challenged other aspects of "received" *Engineers* doctrine.[26] Thus truly to grapple with the question whether it is time to abandon *Engineers* entirely, one must address this, the resilient core of the decision.

I: To explain what this task amounts to necessitates some further remarks about the origin and nature of the Constitution, and about approaches to its interpretation.

In the first place, it is important to bear in mind the different theories of the origin of the Constitution at play in any critical discussion of the meaning and significance of the *Engineers Case*.[27] I have said that before *Engineers*, the High Court had emphasised the idea that the Constitution embodied the terms of a kind of federal compact between the constituent States. As the Preamble and covering clauses of the *Commonwealth of Australia Constitution Act* 1900 make clear, the federation was predicated on the agreement of the people of each of the Australian Colonies, the Original States were therefore constituent elements of the Commonwealth of Australia, and the Commonwealth was itself designated a Federal Commonwealth.[28]

On this view, there was an important sense in which the governmental powers of the Commonwealth were *derived from the Original States*, and this was reflected in the manner in which the legislative powers of the States and the Commonwealth were treated in the Constitution.[29] Only limited legislative powers on specific topics were conferred on the Commonwealth,[30] whereas the original legislative and other governmental powers of the States were said to "continue" under the Constitution.[31] The Constitution did not attempt to define – let alone to confer – the governmental powers of the States precisely because the States were the presupposition and basis of the entire federal system. In other words, the continuing powers of the States were undefined, not because they were a mere "residue" to be identified only after the prior and more important powers of the Commonwealth had been ascertained, but because it made no sense to define the powers of the States in the federal Constitution when the very emergence of the Constitution had been dependent upon the exercise of the political capacities of the States in the first place.[32]

Of course, the compact theory of Australian federalism is not without its difficulties, foremost of which is the patent fact that at federation the Australian States were still Colonies, and were dependent upon the Imperial Parliament to exercise its sovereign legislative powers in order to enact the Australian Constitution and bring the Commonwealth into being.[33] Justice

Isaacs was therefore on strong ground when he insisted – when writing the joint judgment in *Engineers* – that the Constitution is in essence a statute of the Parliament at Westminster and is to be interpreted as such.

Justice Isaacs's theory of the origin of the Constitution entailed a number of important implications. Some of these implications were not explicitly referred to in the *Engineers* judgment, but they become evident when we consult the contemporary writings upon which Isaacs J relied for his theory of federalism. Foremost among his authorities is a neglected figure, John W Burgess, whose *Political Science and Comparative Constitutional Law*[34] influenced not only Isaacs, but also Higgins, Quick and Garran.[35]

According to Burgess, a "federal state" is best understood, not as the result of a federal compact between original states, but as an essentially unitary state in which the ordinary powers of sovereignty are elaborately "divided" between federal and State governments. It was a position that nicely dovetailed with AV Dicey's theory of federalism, in which the division of powers between the federation and the States is of the essence of modern federalism.[36] On Burgess's view,[37] a federal system of government derives its being from some kind of superior or sovereign political entity that confers power on both the federal and State governments. The republican version of this theory thus maintained that the requisite sovereignty resided in the underlying "nation" as a whole, "the people". Within the context of the British Empire, it was a simple matter to say that this originating sovereignty lay in the hands of the Imperial Parliament – a position taken by Quick and Garran in their *Annotated* Constitution,[38] and the stance adopted by Isaacs J in *Engineers*.[39]

But here is the irony. Such a theory of the "division" of legislative power between the federal and State governments would, one might expect, lead to a relatively even-handed approach to the interpretation of federal and State powers. Indeed, such has largely been the result in Canada, in part because the Canadian Constitution explicitly defines and confers the specific legislative powers of both the Provinces and the Dominion of Canada.[40] However, as in Australia, where only federal legislative powers are explicitly defined, the "imperial" theory of the origin of the federal Constitution and the literal approach to constitutional interpretation that it seemed to entail, resulted in a remarkable priority being given to the articulation of Commonwealth legislative powers in priority to what are taken to be the "residual" powers of the States. As such, a scheme that was intended to reflect the original, constituent status of the States, as well as the derivative nature of the Commonwealth, has ironically facilitated an approach to interpretation in which the powers of the Commonwealth are accorded priority.

But the result, of course, was not just ironic, nor fortuitous. Justices Isaacs and Higgins – the only members of the *Engineers* Court who had been directly involved in the debate over the drafting of the Constitution – had from the very beginning adopted Burgess's nationalistic theory of the "federal state". It had been their misfortune during the Convention debates of the 1890s to be confronted with a majority of delegates who adhered to a relatively more "compactual" theory of federalism. Isaacs and Higgins persistently failed to convince their fellow delegates to construct a federal Constitution that would reflect their own nationalistic theory of the federal state. However, it was their fortune in 1920, not only to survive the first three Justices of the High Court (Griffith CJ, Barton and O'Connor JJ),[41] but to be joined by three others (Knox CJ, Rich and Starke JJ)[42] who were prepared to overturn 17 years of "compactualist" interpretation by the Griffith Court.

Not a few commentators have accordingly observed that, despite the ostensible emphasis in the *Engineers* judgment on the text of the Constitution and the adherence to established canons of statutory interpretation, the judgment rested much more on political considerations and conceptions of what the emergent Australian nation had become.[43]

II: What then are we to make of what I have called the resilient core of the *Engineers* decision? Before getting to this question, I want to emphasise at this point that I have sought to define the "compact" theory of federalism carefully, and I do not want what I have said to be taken as an unqualified affirmation of all that has in the past been associated with compact theories of federalism generally, particularly in their American guises.[44] Nor do I wish my remarks to be taken as unqualified support for all that was said or decided in decisions prior to *Engineers*. Elsewhere I have expressed a number of criticisms of particular compact theories of federalism.[45] On the contrary, I prefer to describe my own views as amounting to a "covenantal" theory of federalism which mediates between the extremes of the compactualist and nationalist points of view.[46] Let me briefly elaborate.

The classic compactual theory of federalism – most famously developed in the mid-19th Century by John C Calhoun,[47] but succinctly described more than fifty years earlier by James Madison[48] – holds that a "pure" federation is in essence a compact between *sovereign* states, and that *the states retain this fundamentally sovereign status within the federation*.[49] As Madison put it in one of his most famous essays, a properly "federal" government emerges from the unanimous agreement of several "distinct and independent States". Such a government derives its powers from those States "as political and co-equal societies", and these will necessarily be equally represented in that government. A properly federal government will, moreover, "operate" only on the States in their "political capacities" – its laws will *not* be executed directly against individual citizens, but only through the States. Likewise, a federal government will have only a limited jurisdiction over "certain enumerated objects", the several States retaining a "residuary and inviolable sovereignty over all other objects". Finally, a federal Constitution will only be amended with the "concurrence of each State", that is, unanimously.[50]

On the other hand, as Madison explained, a purely "national" government – if "republican" in character – is "founded on the assent and ratification of the people" of "one aggregate nation", rather than on an agreement between sovereign States. Such a government will therefore be composed of representatives of the people of the entire nation, its laws will operate directly on individual citizens, not the States, and the scope of such laws will be unlimited. A national government will therefore possess "supreme" authority over all local governments, and such localities will be "subordinate" to, rather than "independent" of, the national government. In a republic, the highest authority will therefore be the "majority of the people of the Union" as a whole, and they will "be competent at all times" to amend the national Constitution in any particular.[51]

However, the American Constitution diverged in important respects from both the compactualist and nationalist theories. As Madison himself concluded, the American Constitution was neither completely compactual nor completely national, but a "combination of both" – and the same can be said of the Australian Constitution in so far as it followed the American design.[52]

Certainly, the origin and foundation of both systems was largely compactual in nature.[53] Thus in Australia, notwithstanding the appeal to "the people" in referenda, it was the separate "peoples" of each Australian Colony that consented to federation, as the Preamble to the Constitution clearly affirms. However, the so-called "compromise" over representation in the federal legislature – under which the people of the States are equally represented in the Senate, and the people of the Commonwealth are represented in the House – reflects the "partly federal, partly national" character of both the American and Australian Constitutions.

Similarly, the method of constitutional amendment, which in Australia depends on a majority of Australian voters as well as a majority of voters in a majority of States, exhibits the "mediating" character of the Constitution. And most importantly so far as our present question is concerned, we can note that the treatment of federal and State legislative power under both the American and Australian Constitutions also manifests this "combination of both" characteristic. Thus on one hand, only limited powers are conferred upon the federal legislature (s.51), and the

States continue to exercise their original governmental powers (ss.106-7). However, a certain number of exclusive powers are conferred on the federal Parliament (s.52), particular prohibitions are directed at the States (e.g., s.90), and there is the overriding provision that valid federal legislation will prevail over inconsistent State legislation to the extent of the inconsistency (s.109).

So far, so good, you may say: but what light does this shed on *Engineers*? My point is that, if the Australian federal system is partly compactual and partly national in character, our first objective must be to identify the specific ways in which these two approaches are embodied in the treatment of federal and State legislative power under the Constitution. Ascertaining the answer to this preliminary question will shed light on our second and more substantive question as to what interpretative approach is appropriate in the circumstances.

As to this first and preliminary question, the decision by the framers of the Constitution to confer only limited heads of legislative power on the Commonwealth Parliament derived specifically from their decision to create a system that was, as to its foundation, what Madison would have called "federal" in character. *A fortiori*, the decision not to define the legislative powers of the States derived specifically from the idea that the Australian federation was "compactual" in origin.[54] It was inappropriate and illogical in such a system to attempt to define – let alone to confer – the powers of the States in the instrument under and through which (the people of) those States would agree to be united into a federal Commonwealth. The federal Constitution thus did not attempt to establish the States as bodies politic, nor to confer their powers, but rather confirmed that they would "continue" as such, subject only to the terms of union to which they had agreed under the Constitution. The order of priority, therefore, was (1) the original governmental powers of the States, (2) the limited conferral of powers to the Commonwealth, and (3) the supremacy of federal power, but only within these limited areas.[55]

The *Engineers* Court, however, totally ignored the *original* and *continuing* status of the Australian States in its interpretation of federal and State legislative power under the Constitution. Rather, the Court skipped to the second step in the formula – the definition of federal legislative power – and gave this priority. According to *Engineers* doctrine, only after prior and full attention is given to the scope of federal legislative power can any thought be given to the (merely) residual legislative capacities of the States. On this view, as Isaacs J put it in his dissenting judgment in *R v. Barger*,[56] there was no more logic in assuming an area of reserved State power than there would be in trying to find out the residue of a deceased estate before first finding out what specific gifts had been made.[57]

This, the "residue" theory of State power, is the first aspect of the resilient core of the *Engineers* case. The rest really follows from this. No longer is there any room, before considering the scope of federal legislative power, for a consideration of the original, so-called "reserved powers", of the States. As Barwick CJ later observed:

> "[T]he nature and extent of State power or of the interests or purposes it may legitimately seek to advance or to protect by its laws do not qualify in any respect the nature or extent of Commonwealth power. On the contrary, the extent of that power is to be found by construing the language in which power has been granted to the Commonwealth by the Constitution without attempting to restrain that construction because of the effect it would have upon State power".[58]

On this approach, the first question – and really the only question – concerns the scope of each grant of federal legislative power set out in ss.51 and 52 of the Constitution. The original and continuing status of the Australian States is irrelevant to the question.

III: But this is not all that needs to be said about what I have called the resilient core of *Engineers*. As formulated by the Griffith Court, the reserved powers doctrine did not rest solely on the supposed "reservation" of State powers in s.107 of the Constitution, but on the limited terms in

which specific heads of federal legislative power are conferred in s.51. More to the point, the Griffith Court treated what is *not* said and what is *not* granted in s.51 as being of as much significance as what *is* said and *is* granted. The classic exemplar of this was s.51 (i) of the Constitution, which gives the federal Parliament power to legislate with respect to "trade and commerce with other countries, and among the States". This latter aspect, the power to legislate with respect to "trade and commerce … among the States" (or "interstate trade and commerce") very soon became the focus of attention.[59]

Clearly, the *placitum* does not confer power to legislate with respect to *intrastate* trade and commerce. Much of the debate has therefore concerned how far the Parliament can legislate with respect to trade and commerce specifically under *placitum* (i). What does *interstate* – as distinct from *intrastate* – trade and commerce mean? Unlike the Supreme Court of the United States,[60] the Australian High Court has insisted that the words "among the States" require a substantial "interstate" element in federal legislation before it will be upheld under *placitum* (i).[61]

However, the scope of *placitum* (i) *per se* is not our particular concern here, for the question of its meaning in isolation was not central to the point of the reserved powers doctrine. The point of the doctrine, rather, was that the limited terms of *placitum* (i), together with s.107, imply that the federal Parliament does *not* have power *under other heads of power* to legislate with respect to *intrastate* trade and commerce. In other words, the limited terms of *placitum* (i) imply a "prohibition" on the scope of federal power under other heads of power in s.51.

The reasoning in the *Engineers* case completely reversed this approach to the interpretation of federal legislative power. As well as saying that interpretative priority is to be given to the construction of federal legislative power, the *Engineers* Court has been taken to insist on the general principle that each head of federal power is to be interpreted separately, each without implying a limitation on the scope of any other.[62] Thus, in principle, the federal Parliament *is* able to regulate *intrastate* trade and commerce, so long as it does so pursuant to some other head of power, such as the power to legislate with respect to "trading corporations" in s.51 (xx).[63]

This is the second aspect of the resilient core of the *Engineers* case. It raises a difficult issue precisely because it seems illogical to suggest that the scope of each head of federal legislative power is limited by the scope of all the others. For, if this were so, the federal Parliament would only be competent to legislate in areas on which all heads of federal power happen to coincide – which is, of course, absurd. This is not to suggest that the reserved powers doctrine was ever formulated in such bizarre terms. But the proposition that *placitum* (i) implies a prohibition, *if generalised*, would indeed have this result.

All of this is probably what led Sir Owen Dixon to observe that the reserved powers doctrine "lacked a foundation in logic".[64] It may also account for why this aspect of the *Engineers Case* has been so resilient. Just as it seems impossible to identify the reserved powers of the States if they are not defined in the Constitution, so it seems absurd to limit the scope of a positive grant of federal power by reference to what is not granted by another. It appears much more sensible to begin the inquiry with the powers that are specifically defined – the powers of the Commonwealth – and to designate as State reserved powers whatever happens to be left over, the residue.

IV: Where does this leave us, then? Given what has just been said, it would seem that the resilient core of *Engineers* has survived for good reason. Unless the reserved powers doctrine is somehow restrained in its operation, it appears to produce an absurd result. The alternative principle propounded in *Engineers* seems sensible and logical by all comparison.

But it does not end there. For just as there had to be a limit to the application of the reserved powers doctrine – as the Griffith Court recognised[65] – so the High Court has, unavoidably, limited the application of the countervailing *Engineers* doctrine. Two examples suffice to make the point.[66]

In s.51 (xxxi) of the Constitution the Commonwealth Parliament is given power to legislate with respect to "the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws". Now if the *Engineers* principle were to be applied in this instance, the *just terms* requirement in *placitum* (xxxi) could be easily circumvented simply by legislating for the acquisition of property under some other head of power. The High Court has recognised this theoretical possibility because it has said that, if it were not for the existence of *placitum* (xxxi), there would be a separate capacity to legislate for the acquisition of property in connection with *other* heads of power.[67] However, given the existence of *placitum* (xxxi), the Court has held that when the Commonwealth legislates with respect to the acquisition of property, it will in most cases be taken to be legislating under *placitum* (xxxi), and is therefore subject to the just terms requirement. (There are some exceptions to this, for example when the Commonwealth legislates to impose a tax or a penalty, but these need not concern us for present purposes.)[68]

Why has the High Court insisted that most other heads of legislative power are necessarily circumscribed by the just terms requirement in *placitum* (xxxi)? The easy answer is to say – as the Court has said – that *placitum* (xxxi) confers an "immunity", and is not just a conferral of "power", and that the immunity must limit the powers conferred by the other *placita* of s.51.[69] However, it is not clear simply from the text of *placitum* (xxxi) that the just terms element was meant to operate as a general prohibition against the acquisition of property by the Commonwealth other than on just terms. The corresponding American provision, which simply states that "private property [shall not] be taken for public use, without just compensation", is much clearer in this regard.[70]

In saying this, I do not want to be taken to be suggesting that the High Court has taken a wrong turn in its interpretation of the acquisition power. What I am saying is that – for good reason – the High Court has *not* consistently adopted the principle that Commonwealth heads of power are to be interpreted in isolation from each other so that limits expressed in one *placitum* do not limit the scope of another. Rather, at least in the case of the acquisition power, the Court has been prepared to apply limitations expressed in one head of power in its interpretation of others.[71]

Another example of this is the banking power in s.51 (xiii) of the Constitution, which empowers the Parliament to legislate with respect to "banking, other than State banking".[72] Under this *placitum*, the Commonwealth clearly has power to legislate with respect to banking generally, except that its power to do so does not extend specifically to State banking.[73] However, what the Court has *also* said is that the words "other than State banking" impose a general limitation on the scope of *other* powers. The Commonwealth *cannot* legislate with respect to "State banking" under other heads of power, even if the terms in which such other powers are conferred seem, on their face, to authorise such legislation.[74]

But let us compare the banking power with the trade and commerce power in s.51 (i). *Placitum* (i) confers power to legislate with respect to "trade and commerce … among the States". *Placitum* (xiii) confers power with respect to "banking, other than State banking". When each provision is read in isolation, it is clear that *both* qualifying phrases ("among the States" and "other than State banking") delimit a class of things in respect of which the Commonwealth can legislate. "Among the States" delimits the class of things designated as "trade and commerce", and "other than State banking" delimits that class of things designated as "banking". When each provision is read in isolation, the meaning is structurally and logically the same. Both qualifications function to delimit the class of particular things in respect of which the Commonwealth is authorised to legislate.

So what is the difference between these two provisions? Why have they been interpreted differently?[75] It might be said that the difference is that *placitum* (i) builds the qualification into the definition of the class of things to which it refers (in effect, "interstate trade and commerce"),

whereas *placitum* (xiii) first defines the class ("banking"), and then carves out an exception to it ("other than State banking") – an exception expressed in negative terms. As Professor Zines has put it, the wording of *placitum* (xiii) "expressly *extracts from* or *restricts* what otherwise might be included within" the power.[76] And this seems to be the difference that has made all the difference. The words "other than State banking" *extract from* the scope of federal power, whereas "among the States" builds the qualification into the definition of the class of things to which reference is made.

However, there is an outstanding question which is not resolved by this explanation. I said that the words "other than State banking" extract from the scope of federal power. But *which* repository of federal power do they extract from? Is it the specific head of power in which the words appear (*placitum* (xiii)), or is it the entirety of federal legislative power conferred by s.51? While the qualification "other than State banking" clearly extracts from the meaning of "banking", the real question is whether it also extracts from the meaning of *other* heads of power.[77] The Court has answered this second question in the affirmative – correctly, in my view – but it has not given a compelling reason why this must be the case. The literal terms of *placitum* (xiii) provide no clear answer, and in this respect, there is no relevant, textual difference between *placitum* (i) and *placitum* (xiii).

So why the difference, in substance? This is an unanswered question.[78] I do not suggest that there is an easy answer. But what can be said is that these two examples – the Court's interpretation of the acquisition and banking powers – represent important chinks in what I have otherwise so far designated as the resilient core of *Engineers*.

V: I have said that the resilient core of the *Engineers Case* is the proposition that primary and virtually exclusive attention is to be given to the interpretation of federal legislative power, without regard to the impact on State legislative capacity. The third dimension to this, the resilient core of the decision, is the idea that heads of federal legislative power are therefore to be interpreted as fully and completely as the terms allow,[79] without consideration of the impact of such an interpretation on what remains of the capacity of the States to legislate on topics without the possibility of legislative overriding by the Commonwealth.

Space does not permit a detailed examination of this issue.[80] Suffice to say that this approach to interpretation has enabled the Commonwealth to make very full use of its legislative powers. I could say that it has enabled the Commonwealth to legislate on topics that the framers of the Constitution would never have anticipated. But to pose this as an objection would be to adopt the view that the particular expectations of the framers as to the practical operation of the Constitution is a controlling principle in constitutional interpretation, and I do not adopt that view.

What I will say, however, is that what I have described as the "federal" structure of the Constitution – particularly the logical priority of what I have called the *original* powers of the States, over against the *limited* powers conferred upon the Commonwealth – does not support the view that federal powers are to be interpreted as fully and completely as their literal words can be interpreted to mean. Such a view, rather, derives from the idea that the Constitution is foremostly to be interpreted as a statute of the Imperial Parliament. Consequently, as was said in *Engineers*, the powers conferred upon the Commonwealth are to be interpreted by reference to 19th Century Privy Council decisions on the scope of legislative power conferred upon British Colonies, which decisions affirmed that the enacting words "peace, order and good government" conferred an authority "as plenary and as ample … as the Imperial Parliament in the plenitude of its power possessed and could bestow".[81] Isaacs J used this principle in the *Engineers* case to conclude that Commonwealth laws *could* bind the Crown in right of a State,[82] with the wider implication that the conferral of plenary power meant that the Court should "always lean to the broader interpretation".[83]

I have argued that such an approach, while sustainable in view of the patent fact that the Constitution is, in form, a statute of the Imperial Parliament, completely overlooks the federal basis and structure of the Constitution as a whole. This, the "compactual" logic of the Constitution, accounts for the decision to define the powers of the Commonwealth specifically, while deliberately providing that the existing powers of the States should "continue". It suggests that there is a real sense in which the continuation of State power in s.107 is *logically prior* to the conferral of federal power in s.51. Such a scheme also suggests that there is good reason to bear in mind what is *not* conferred on the Commonwealth by s.51 when determining the scope of what *is* conferred. There is, therefore, good reason to be hesitant before interpreting federal heads of power as fully and completely as their literal words can allow.

The treatment of State and federal power in the federal Constitution was predicated on the original status of the States and their powers, and by no means implies that federal legislative power is to be accorded interpretative priority. Quite the contrary.

Endnotes:

1. *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd*, (1920) 28 CLR 129. The matter arose out of an industrial dispute between the Amalgamated Society of Engineers, a trade union, and some 844 employers throughout Australia, including three Western Australian State government instrumentalities. The question was whether the Commonwealth has legislative power under its industrial arbitration power (s.51(xxxv) of the Constitution) to make laws which are binding on State instrumentalities. The Court decided that it could, overturning the immunity of State instrumentalities from federal laws and, by implication, radically undermining the approach to the interpretation of the Constitution that the High Court had followed for 17 years previously.

2. Sir Robert Menzies, *Central Power in the Australian Commonwealth: An Examination of the Growth of Commonwealth Power in the Australian Federation*, Cassell & Company Ltd, London, 1967, 30 ("a landmark in Australian constitutional interpretation"); Leslie Zines, *The High Court and the Constitution*, 4th Edition, Butterworths, Sydney, 1997, 8 ("it probably remains the most important case in Australian constitutional law, at any rate, from the point of view of principles of general interpretation").

3. E.g., *Melbourne Corporation v. Commonwealth*, (1947) 74 CLR 31, 78 (Dixon J); *Victoria v. Commonwealth*, (1971) 122 CLR 353, 396 (Windeyer J); *Strickland v. Rocla Concrete Pipes Ltd*, (1971) 124 CLR 468, 488-9 (Barwick CJ); *Commonwealth v. Tasmania*, (1983) 158 CLR 1, 128 (Mason J); *Nationwide News Pty Ltd v. Wills*, (1992) 177 CLR 1, 44-5 (Brennan J).

4. See, e.g., G Williams, *Engineers is Dead, Long Live the Engineers!*, (1995) 17 *Sydney Law Review* 62.

5. As Isaacs J, who delivered the joint judgment in *Engineers*, maintained:

> "Where the affirmative terms of a State power would justify an enactment, it rests upon those who rely on some limitation or restriction upon the power, to indicate it in the Constitution. … [I]t is a fundamental and fatal error to read s. 107 as reserving any power from the Commonwealth that falls fairly within the explicit terms of an

express grant in s. 51, as that grant is reasonably construed, unless that reservation is as explicitly stated". *Engineers* (1920) 28 CLR 129, 154.

6. *Federated Amalgamated Governmental Railway and Tramway Service Association v. NSW Railway Traffic Employees Association*, (1906) 4 CLR 488, 534 (Griffith CJ, Barton and O'Connor JJ); *Baxter v. Commissioners of Taxation (NSW)*, (1907) 4 CLR 1087, 1104, 1121, 1126 (Griffith CJ, Barton and O'Connor JJ).

7. *Engineers*, (1920) 28 CLR 129, 148-154 (Knox CJ, Isaacs, Rich and Starke JJ); 161-2, 165 (Higgins J). See also *Deakin v. Webb*, (1904) 1 CLR 585, 596-7 (Isaacs KC in argument); *Webb v. Outtrim*, [1907] AC 81; (1906) 4 CLR 356.

8. See, e.g., Sir John Latham, *Interpretation of the Constitution*, in Else-Mitchell (ed.), *Essays on the Australian Constitution*, 2nd edn, Law Book Company, Sydney, 1952, 5; Sir Owen Dixon, *The Law and the Constitution*, in *Jesting Pilate and Other Papers and Addresses*, Law Book Company, Melbourne, 1965, 44; *Australian Capital Television Pty Ltd v. Commonwealth*, (1992) 177 CLR 106, 181-3 (Dawson J); J Quick and RR Garran, *The Annotated Constitution of the Australian Commonwealth*, Angus & Robinson, Sydney, 1901, 285-6, 294-5, 324-8.

9. *McGinty v. Western Australia*, (1996) 186 CLR 140, 231 (McHugh J).

10. GJ Lindell, *Why is Australia's Constitution Binding? – The Reasons in 1900 and Now, and the Effect of Independence*, (1986) 16 *Federal Law Review* 29; M Kirby, *Deakin: Popular Sovereignty and the True Foundation of the Australian Constitution*, (1996) 3 *Deakin Law Review* 129, 138.

11. E.g., *Australian Capital Television Pty Ltd v. Commonwealth*, (1992) 177 CLR 106, 138, 210-1, 228; *Nationwide News Pty Ltd v. Wills*, (1992) 177 CLR 1, 69-74; *Leeth v. Commonwealth*, (1992) 174 CLR 455, 475, 483-4, 486; *Theophanous v. Herald & Weekly Times Ltd*, (1994) 182 CLR 104, 171.

12. The High Court was established in 1903. See *Hannah v. Dalgarno*, (1903) 1 CLR 1.

13. Under the first of these doctrines, the Commonwealth (and its instrumentalities) was declared to be immune from any law passed by a State, and the States (and their instrumentalities) were immune from laws passed by the Commonwealth, wherever such laws would in some way "fetter, control, or interfere with the free exercise of the legislative or executive power" of the Commonwealth or the States, respectively. Under the second of these doctrines, also known as "implied prohibition", heads of Commonwealth legislative power were read "narrowly", on the basis that specific areas of legislative competence were impliedly "reserved" to the States and necessarily outside the legislative competence of the Commonwealth.

14. *Engineers*, (1920) 28 CLR 129, 146-8.

15. For a discussion, see S Gageler, *Foundations of Australian Federalism and the Role of Judicial Review*, (1987) 17 *Federal Law Review* 162.

16. *West v. Commissioner of Taxation*, (1937) 56 CLR 657, 681-2 (Dixon J), 687-8 (Evatt J).

17. G Sawer, *Australian Federalism in the Courts*, Melbourne University Press, 1967, 133.

18. See, e.g., *West v. Commissioner of Taxation (NSW)*, (1937) 56 CLR 657, 681-3; *In re Foreman & Sons Pty Ltd; Uther v. Federal Commissioner of Taxation*, (1947) 74 CLR 508, 528-32.

19. *Melbourne Corporation v. Commonwealth*, (1947) 74 CLR 31, 78-82.

20. *Commonwealth v. Cigamatic Pty Ltd (In Liquidation)*, (1962) 108 CLR 372, 376-8.

21. *Engineers* also rejected the use of American precedents in the interpretation of the Australian Constitution, but this embargo has clearly come to an end. *Engineers* counselled a certain judicial deference to Parliament, but this deference has been qualified in various ways, such as the implied freedom of political communication in *Australian Capital Television Pty Ltd v. Commonwealth*, (1992) 177 CLR 106.

22. G Williams, *Engineers is Dead, Long Live the Engineers!*, (1995) 17 *Sydney Law Review* 62; G Williams, *Engineers and Implied Rights*, in M Coper and G Williams (eds), *How Many Cheers for Engineers?*, Federation Press, Sydney, 1997.

23. Compare RD Lumb, *Problems of Characterization of Federal Powers in the High Court*, (1982) *Australian Current Law Digest* 45, suggesting that a doctrine of "federal balance" was still discernible in the cases, but written before the decision in *Commonwealth v. Tasmania*, (1983) 158 CLR 1.

24. See *Peterswald v. Bartley*, (1904) 1 CLR 497, 507; *R v. Barger*, (1908) 6 CLR 41, 72; *Attorney-General (NSW) v. Brewery Employees Union of New South Wales* (*Union Label Case)*, (1908) 6 CLR 469, 502-3; *Huddart, Parker & Co Pty Ltd v. Moorehead*, (1909) 8 CLR 330, 350-52, 360.

25. Zines, *High Court and the Constitution*, 12, observes:

> "On the question of reserved powers doctrine, there had been general agreement that it is wrong to interpret Commonwealth powers on the basis that s.107 has left domestic matters to the States".

26. *Melbourne Corporation v. Commonwealth*, (1947) 74 CLR 31, 79 (Dixon J).

27. For a fuller discussion, see NT Aroney, *Imagining a Federal Commonwealth: Australian Conceptions of Federalism, 1890-1901*, (2002) 30(2) *Federal Law Review* (forthcoming).

28. *Commonwealth of Australia Constitution Act* 1900 (UK), Preamble, ss 3, 6.

29. This was recognised by the Judicial Committee of the Privy Council in *Attorney-General (Cth) v. Colonial Sugar Refining Company Limited*, (1913) 17 CLR 644, 651-4.

30. Commonwealth Constitution, ss 51 and 52.

31. Commonwealth Constitution, ss 106 and 107.

32. Thus the entire process of federation, from the election of delegates to the federal Conventions right up to the submission of the *Constitution Bill* to the Imperial Parliament,

was undertaken under the specific authority of the colonial legislatures expressed in a series of *Enabling Acts* passed in the 1890s.

33. While federation depended, in fact, on the exercise by the Colonies of their *ordinary political powers* to convene Conventions and hold referenda, the Colonies *qua* Colonies lacked the *constitutive power* to create the Commonwealth.

34. JW Burgess, *Political Science and Comparative Constitutional Law*, 2 vols, Ginn & Company, Boston, 1890. For background on Burgess, see BE Brown, *American Conservatives: The Political Thought of Francis Lieber and John W Burgess*, Columbia University Press, New York, 1951. See also JW Burgess, *The Ideal American Commonwealth*, (1895) 10 *Political Science Quarterly* 404.

35. See Convention Debates, Adelaide, 1897, 181, 698, 1022 (Isaacs); *Official Record of the National Australasian Convention Debates, Sydney, 1897*, 306-9, 426 (Isaacs), 433 (O'Connor's reply), 862 (Isaacs), 913 (Glynn's reply); Higgins (1900), 73; Quick and Garran, *Annotated Constitution of the Australian Commonwealth*, 325, 333-4.

36. AV Dicey, *Introduction to the Study of the Law of the Constitution*, 5th edn, Macmillan, London, 1897, 130-55, 410-13. For Dicey's influence, see *Convention Debates, Sydney, 1897*, 312-3 (Isaacs); *Official Report of the National Australasian Convention Debates, Adelaide, 1897*, 910-12, 952 (Barton), 307 (Clarke); J Quick, *A Digest of Federal Constitutions*, JB Young, Bendigo, 1896, 12-4; RR Garran, *The Coming Commonwealth: An Australian Handbook of Federal Government*, Angus & Robertson, Sydney, 15-6, 76; Quick and Garran, *Annotated Constitution*, 325-8.

37. Dicey, on the contrary, accepted a kind of compact theory of the origin of federal systems. See Dicey, *Law of the Constitution*, 137-9.

38. See, e.g., Quick and Garran, *Annotated Constitution*, 380, 928.

39. Isaacs J combined both the republican and Imperial dimensions when he stated that the Constitution is "the political compact of the whole of the people of Australia, enacted into binding law by the Imperial Parliament": *Engineers* (1920) 28 CLR 129, 142; compare at 148 and 152.

40. See, generally, *Attorney-General (Cth) v. Colonial Sugar Refining Company Limited*, (1913) 17 CLR 644, 651-4; PW Hogg, *Constitutional Law of Canada*, 4th edn, Carswell, Toronto, 1997, ch. 5; CD Gilbert, *Australian and Canadian Federalism 1867-1984*, Melbourne University Press, Melbourne, 1986.

41. O'Connor J died in 1912 and was replaced in 1913 by Gavan Duffy J. In 1913, Powers and Rich JJ were appointed. Griffith CJ retired in 1919 (replaced by Knox CJ) and Barton J died in 1920 (replaced by Starke J).

42. The majority in *Engineers* consisted of Knox CJ, Isaacs, Rich and Starke JJ, Higgins J concurring and Gavan Duffy J dissenting.

43. RTE Latham, *The Law and the Commonwealth*, in WK Hancock, *Survey of British Commonwealth Affairs*, Vol 1, *Problems of Nationality 1918-1936*, Oxford University

Press, 1937, 563-4; *Victoria v. Commonwealth*, (1971) 122 CLR 353, 395-6 (Windeyer J); Zines, *High Court and the Constitution*, 15-6.

44. Compare the criticisms of a compact theory of Australian federalism in *Victoria v. Commonwealth*, (1971) 122 CLR 353, 370-2 (Barwick CJ), 395-6 (Windeyer J).

45. See Aroney, *Imagining a Federal Commonwealth*, *loc. cit.*.

46. For federalism as covenantalism, see DJ Elazar, *Exploring Federalism*, University of Alabama Press, Tuscaloosa, Alabama, 1991 and *The Covenant Tradition in Politics*, 4 vols, Transaction Publishers, New Brunswick, 1995-8.

47. See JC Calhoun's formidable *A Discourse on the Constitution and Government of the United States* (1853), in Ross Lence (ed.), *Union and Liberty: The Political Philosophy of John C Calhoun*, Liberty Fund, Indianapolis, 1992.

48. J Madison, *Federalist No 39*, in C Rossiter, (ed.), *The Federalist Papers*, New American Library of World Literature, New York, 1961.

49. Today, we would probably call this a "confederal", rather than a "federal", arrangement. What Madison described as "federal" more closely approximates the American Articles of Confederation of 1781 than the American Constitution of 1789.

50. Madison, *Federalist No 39*, *passim*.

51. *Ibid*..

52. *Ibid*..

53. Notwithstanding the famous opening words of the US Constitution: "We, the People …". Article VII of the US Constitution provides for the establishment of the Constitution upon ratification by conventions in at least nine of the American States.

54. See, e.g., the preliminary "resolutions" passed in 1891 and 1897: *Official Report of the National Australasian Convention Debates, Sydney, 1891*, 23, 499-50; *Convention Debates, Adelaide, 1987*, 17, 395.

55. I use "supremacy" in a wide sense here, covering both the "supremacy" of federal laws under s.109 in areas of concurrent jurisdiction (s.51), as well as the exclusive powers of the Commonwealth (s.52).

56. *R v. Barger*, (1908) 6 CLR 41 at 84-5 (Isaacs J); 113 (Higgins J). See Sawer, *op. cit.*, p.128. Isaacs J similarly observed in *Huddart Parker v. Moorehead*, at 391:

> "The reservation of a power to a State does not imply prohibition to the Commonwealth. The reserved powers are those which are not either *exclusively* vested in the Commonwealth, or *withdrawn* from the States. But a power may be *concurrent* in both; and such a power is reserved to the State though existing also in the Commonwealth. Consequently reservation to the States cannot be taken as the test of whether a given federal power includes the right to affect internal trade, and cannot amount to a prohibition express or implied. It is always a question of *grant*, not of prohibition, unless that is express".

57. For a brief critique of the analogy, see Sawer, *Australian Federalism in the Courts*, 199; Zines, *High Court and the Constitution*, 12. The supposed analogy breaks down in a number of ways. There is a significant difference between a *single* testator making a will and *several* states agreeing to create a federation. There is also a substantial difference between the status of beneficiaries under a will and the position of State and federal governments within a federation.

58. *Airlines of New South Wales Pty Ltd v. New South Wales (No 2)*, (1965) 113 CLR 64, 79.

59. The focus on "interstate trade and commerce" was in part due to s.92. See *W & A McArthur Limited v. Queensland*, (1920) 28 CLR 530, 549, affirming that the meaning of "trade and commerce among the States" in s.51 (i) and s.92 "must be the same".

60. US Constitution, Art I, §8, cl 3, discussed in Zines, *High Court and the Constitution*, 55-60. But see, more recently, *United States v. Lopez*, 514 US 547 (1995).

61. *Airlines of New South Wales Pty Ltd v. New South Wales (No 2)*, (1965) 113 CLR 54, 113-7 (Kitto J).

62. Contrast the situation in Canada, where specific topics are given to both the Dominion and the Provinces (ss 91 and 92), with the result that "the two sections must be read together, and the language of one interpreted, and where necessary, modified, by that of the other": *Citizens Insurance Company of Canada v. Parsons*, (1881) 7 App Cas 96, 109. See also *Bank of Toronto v. Lambe*, (1887) 12 App Cas 575, 581, 585.

63. See *Strickland v. Rocla Concrete Pipes Ltd*, (1971) 124 CLR 468. Compare *Pidoto v. Victoria*, (1943) 68 CLR 87, holding that the power under *placitum* (vi) was not cut down by the terms of *placitum* (xxxv).

64. *Melbourne Corporation v. Commonwealth*, (1947) 74 CLR 31, 83 ("the attempt to read s. 107 as the equivalent of a specific grant or reservation of power lacked a foundation in logic".)

65. See, e.g., *Farey v. Burvett*, (1916) 21 CLR 433, 441 (Griffith CJ: "the power to make laws with respect to defence is, of course, a paramount power, and if it comes into conflict with any reserved State rights the latter must give way".) See also *Attorney-General (NSW) v. Brewery Employees Union of New South Wales* (*Union Label Case)*, (1908) 6 CLR 469, 503 (Griffith CJ: "no exception from [the reservation of powers to the States] can be admitted which is not expressed in clear and unequivocal words".).

66. A further illustration of the problem is provided by the majority and minority judgments in *Russell v. Russell*, (1976) 134 CLR 495, concerning *placita* (xxi) and (xxii). See Zines, *High Court and the Constitution*, 24-6.

67. *Attorney-General (Cth) v. Schmidt*, (1961) 105 CLR 361, 371-2 (Dixon CJ).

68. See, e.g., the discussion in *Mutual Pools & Staff Pty Ltd v. Commonwealth*, (1994) 179 CLR 155.

69. *Bank of NSW v. Commonwealth*, (1948) 76 CLR 1, 349-50 (Dixon J); *Clunies-Ross v. Commonwealth*, (1984) 155 CLR 193 at 201-2, using the expression "a constitutional guarantee of just terms".

70. US Constitution, Fifth Amendment. The particular way in which the Court has said that s.51(xxxi) limits the scope of other powers is discussed in *Mutual Pools & Staff Pty Ltd v. Commonwealth*, (1994) 179 CLR 155.

71. See the discussion of the problem in *Strickland v. Rocla Concrete Pipes Ltd*, (1971) 124 CLR 468, 507-8 (Menzies J).

72. Compare s.51 (xiv): "insurance, other than State insurance".

73. State banking is banking undertaken by or on behalf of a State government: *Melbourne Corporation v. Commonwealth*, (1947) 74 CLR 31, 52 (Latham CJ), 78 (Dixon J).

74. *Bourke v. State Bank of New South Wales*, (1990) 170 CLR 276, 285. The Court, at 286-9, went on to say this did not mean that there was an exclusive State power over State banking, a limited revival of reserved State powers. Rather, it was said that a law that can be characterised as being with respect to "banking" (whether or not it can also be characterised as a law with respect to another head of power) must not "touch or concern State banking", except to the extent that such interference is so incidental that the law can no longer be regarded as a law with respect to State banking. In effect, this meant that even if a law *could* be characterised as a law with respect to another head of power (e.g., "financial corporations" under *placitum* (xx)), it would nevertheless be invalid if it could at the same time be characterised as a law with respect to State banking (prohibited under *placitum* (xiii)).

75. See the discussion in T Blackshield, *Engineers and Implied Immunities*, in Coper and Williams, *How Many Cheers for Engineers?*, 92-100.

76. Zines, *High Court and the Constitution*, 24 (emphasis added).

77. *Bourke v. State Bank of New South Wales*, (1990) 170 CLR 276, 285. The Court recognised that it was possible to interpret "other than State banking" as only qualifying the scope of the banking power (*placitum* (xiii)), but chose to read it as limiting the scope of other powers, in particular the corporations power (*placitum* (xx)). See also *Bank of NSW v. Commonwealth*, (1948) 76 CLR 1, 203-4 (Latham CJ).

78. See Blackshield, *Engineers and Implied Immunities*, *loc. cit.*. The problem is exacerbated by the fact that *placitum* (xiii) adds the words: "also State banking extending beyond the limits of the State concerned". The latter words, read in isolation, are structurally identical to *placitum* (i): they build the qualification ("extending beyond …") into the definition of the class of things to which reference is made. Under the *Engineers* principle, such words would not (in isolation) imply a prohibition.

79. See *Jumbunna Coal Mine, No Liability v. Victorian Coal Miners' Association*, (1908) 6 CLR 309, 367 (O'Connor J); *Attorney-General for New South Wales v. Brewery Employees Union of New South Wales*, (1908) 6 CLR 469, 611 (Higgins J).

80. Another vital issue that I do not address concerns the characterisation of federal laws. When determining whether a law is indeed a law "with respect to" one of the heads of power indicated in s.51, should the Court seek to identify the "dominant" character of the law, or merely a "substantial" or "sufficient" connection between the law and the subject matter of the head of power? Compare *R v. Barger*, (1908) 6 CLR 41 and *Fairfax v. Federal Commissioner of Taxation*, (1965) 114 CLR 1.

81. *Hodge v. The Queen*, (1883) 9 App Cas 117, 132.

82. *Engineers*, (1920) 28 CLR 129, 153.

83. See *Bank of NSW v. Commonwealth*, (1948) 76 CLR 1, 332-3 (Dixon J), who cites *Jumbunna Coal Mine, No Liability v. Victorian Coal Miners' Association*, (1908) 6 CLR 309, 367 (O'Connor J) and then immediately notes that the legislative power of the Commonwealth is "plenary in its quality".