Chapter Six

Economic Integration and Federalism: Two Views from the High Court of Australia

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The title of my paper refers to a topic that must be obvious to most. My reason in raising it for discussion this afternoon lies in the ruling of the High Court of Australia, delivered on 5 August, 1997, in the *Ha v. New South Wales* case.[1] Although the case related to the constitutional validity of a business franchise fee, at the heart of the Court's ruling lie some disturbing views regarding the federal character of the Commonwealth Constitution. The purpose of this paper is to discuss these views and to examine how well they are founded in history and in modern theories of taxation and economic integration.

The *Ha Case* arose when the constitutional validity of the New South Wales business franchise licence fee on tobacco was challenged. The other States and Territories intervened in support of New South Wales, requesting a re-examination of the Court's definition of the term "duties of excise" within s. 90 of the Constitution.[2] The Court delivered a split decision by a majority of 4-3 and declared that the New South Wales licence fee was an excise duty, and hence unconstitutional.

An immediate consequence of this judgment was that it effectively invalidated business franchise fees on tobacco, petroleum products, and liquor in all States, as the constitutional objections accepted by the Court in the *Ha Case* applied equally to all these fees, which had been framed under similar legislative provisions. This wiped off the source of nearly $5 billion, or one-sixth, of total taxation revenue of the States.[3]

Another immediate effect of the ruling was that the Commonwealth government agreed to collect, under its own legislation, additional revenue from the same three commodities, and reimburse the States for the loss of revenue. The movement to this rescue package has not been altogether smooth. There has been confusion about the refunds of unconstitutionally collected revenue and pre-payments of fees covering the period after the Court's decision. Three manufacturers of tobacco had temporarily to suspend trading in their products and shares in the midst of such confusion. There was also uncertainty about the effect of the new arrangements on prices of the taxed products, especially in Queensland, where the State government had imposed no franchise fee on petroleum products but where the new Commonwealth taxation would apply just the same.

From Functional to Dysfunctional Federalism

The so-called rescue package will no doubt help stabilise the States' finances in the short run, although it cannot be, and is not presently intended to be, a long-term solution to the financial loss of the States.

A well-documented fact,[4] which is also shown in Table 1, is that the revenue raising power in Australia is extremely centralised. The share of tax revenue raised by the Commonwealth government is far higher than the corresponding situation in other major federations.

An appropriate degree of revenue decentralisation, to match the division of responsibilities for expenditure, is the critical precondition for a fully functional federalism. Given the current level of the States' financial dependence on the Commonwealth, it is clear that Australia today has a dysfunctional federalism. The latest rescue package of the Commonwealth will make the bad

situation worse, especially if it became a permanent feature of intergovernmental revenue sharing arrangements.

Table 1: Taxation Revenue by Level of Government in Major Federations

(Percentage share of total tax revenue, 1993)

Level of Government	Australia	Canada	Germany	USA
Federal	75.6	46.9	51.5	54.3
State	20.4	40.2	35.5	27.2
Local	4.0	12.9	13.0	18.5

Source: OECD (1996), *Revenue Statistics of OECD Member Countries, 1965/94,* Paris.

Financial domination by one level of government in a federation inevitably turns into concentration of political power in the hands of that government. This principle was the basis of the warning sounded by Alfred Deakin in 1902, when he said that financial provisions of Australia's Constitution had effectively tied the States to the chariot wheels of the central government.[5] It was also the message conveyed to the Parliamentary Labor Caucus in 1991 by the former federal Treasurer Keating when he said:

> "The national perspective dominates Australian political life because the national government dominates revenue raising, and only because the national government dominates revenue raising.'[6]

Contrary to Deakin's assertion, however, the Constitution of Australia did not establish a dysfunctional federalism. The constitutional assignment of tax powers could not have, by itself, created the extreme fiscal dependency of the States on the Commonwealth. Except for the customs duties and excise duties, both of which were assigned exclusively to the Commonwealth, the States had access to all other taxes.

Table 2: State Taxation 1901-02 and 1909-10

($ Million)

Six State Revenue	1901-02	1909-10	% change
Income Tax	1.3	2.5	92
Probate & Stamp Duties	2.4	4.2	75
Land Tax	1.0	0.7	- 30
Other taxes	0.5	0.6	20
Total Tax Revenue	5.3	8.0	51
Memorandum Item: Customs & Excise Duties	17.8	23.2	30.3

Source: Mathews, R. L. and Jay, W. R. C., *Federal Finance,* Tables 7 and 8.

It is true that customs duties and excise duties were the dominant sources of revenue at the turn of the last century. Exclusive assignment of these to the Commonwealth accordingly created the need for financial transfers from the Commonwealth to the States. Nevertheless, the States continued to raise substantial revenues from public lands and their business monopolies (e.g., railways and tramways). As is clear from figures in Table 2, even revenue from their own taxes grew strongly in the early years after Federation.

Australia's federalism became dysfunctional after the Second World War for two reasons. The exclusion of the States from income taxation since 1942, which Deakin could not have anticipated in 1902, and the High Court's interpretations of excise duties in subsequent years,

which again he would not have known about, together created the extreme degree of revenue centralisation.

In the initial years of Federation, the High Court's decisions on excise duties were not unreasonably confining when, in the *Peterswald Case* (1904), for example, excise duties were interpreted as taxes paid on goods produced or manufactured in a State.

The Court's judgment in the *Parton Case* (1949)[7] extended the definition of excise duties so widely as to literally cover the whole field of commodity taxation other than customs duties. Since then, the line of authority built upon *Parton* has cast a long shadow over the subsequent cases involving State levies on commodities. This line of authority was re-opened for argument and became the central issue in the *Ha Case.*

Commonwealth Power over Policy: The Fundamental Dividing Issue

Unlike many previous split decisions, the battle lines between the majority and the minority judges were clearly drawn in this case, and the issues dividing the two camps became crystal clear. This is because all the majority judges held one view in reaching their judgments, just as all the minority judges also held only one view for their dissenting judgment.

The majority judges reaffirmed the authority of *Parton* on two issues that were critical to this case. The first issue related to the scope of Commonwealth power as intended in the Constitution. The second involved the definition of duties of excise. The dissenting judges rejected the authority of *Parton* on both issues.

There was no disagreement between the judges on the point that the meaning of excise duties must be determined according to the purpose of s. 90 in the Constitution. There were, however, fundamental differences between them about the precise purpose of that section. These differences flowed from their conflicting interpretations about the intended scope of the Commonwealth power over economic policy.

According to the dissenting judges, an objective of the Constitution was to establish a customs union along with inter-colonial free trade, and the fiscal provisions of the Constitution were designed to achieve this outcome. To this end, the purpose of s. 90 was to build upon the assignment of tax powers that had already been specified by s. 51(ii).

Specifically, the role of s. 90 was to *add exclusivity* to the Commonwealth power over customs duties and excise duties. In the absence of such exclusivity, the Commonwealth's power to establish the common external tariff could have been jeopardised if a State imposed excise duties on, or granted bounties to, locally produced goods. The need for exclusive power over excise duties arose, according to this view, in conjunction with and after the imposition of customs duties, not independently of them.

Once this purpose of s. 90 is accepted, there is no need to extend the Commonwealth's exclusive power beyond the taxes imposed on goods when produced or manufactured. As the minority judgment explains, this is because "a tax imposed upon some latter step which fell indiscriminately upon locally produced and imported goods -- a step in the distribution of goods, for example -- would not operate to impair any policy of protection to be found in an external tariff in respect of those goods".[8] On this basis, the dissenting judges found that the New South Wales business franchise fee was not a duty of excise.

The majority judgment is based on a different interpretation of the scope of the Commonwealth power, according to which it was intended that the Commonwealth Parliament have exclusive power over not only customs and excise duties, but also any other commodity taxes. The genesis of this interpretation is found in the *Parton* judgment, in which Justice Dixon said:

> "In making the power of the Parliament of the Commonwealth to impose duties of customs and of excise exclusive it *may be assumed* that it was intended to give the Parliament a real control of the taxation of commodities and to ensure that the execution of whatever policy it adopted should not be hampered or defeated by State action. A tax upon a commodity at any point in the course of distribution before it reaches the consumer produces the same effect as a tax upon its manufacture or production.'[9]

Thus, on the basis of an assumption, Justice Dixon's formulation cast a wide net for Commonwealth power over taxation and policy. This is followed by the assertion that all types of taxes on a commodity have the same effect. The majority judgment embraced both the assumption and the assertion.

Baseless Foundation of the Division

The dissenting judges point out that there is no basis for this assumption in s. 90, or elsewhere in the Constitution or in history.[10] They argue that if this indeed had been the intention, it would have been logical and simple to insert such a provision in s. 51, which deals with the assignment of expenditure functions and tax powers in the Constitution.

Regardless, however, the *Parton* formulation has been transformed by some judges in recent cases into a claim that the combined effect of ss. 90 and 92, taken together with ss. 51 (ii), 51 (iii) and 88, is to create "a Commonwealth economic union, not an association of States each with its own separate economy".[11] This claim is the key to the majority reasoning in the *Ha Case*, and to the categorical rejection of that reasoning by the dissenting judges.

The precise meaning of the so-called economic union is not explained in the majority judgment, although the concept has played a key role in it. An important implication drawn from this concept is that no State action or tax should impair or undermine Commonwealth policy. The second part of the statement quoted in the previous paragraph also suggests that the implied reference is to Commonwealth policy over State economies.

The structure of the majority argument should now be clearly stated. The assumption of an economic union serves as a rationale for the claim that a wide and dominant role for Commonwealth policy was intended at Federation. This in turn serves as the basis for asserting that exclusive and unlimited Commonwealth powers over taxation of commodities were required to fulfil that role. Since exclusive Commonwealth power over customs duties had been already assigned, a way had to be found for bundling together all the remaining commodity taxes into the prohibition of s. 90. This was found by another assertion saying that the effect of a tax on any step in the distribution of a commodity is the same as that of a tax on its production or manufacture. This assertion would allow the labelling of a tax on any step in the distribution of a good as a duty of excise.

Thus, it is clear that the key to this argument is the assumed nature of Commonwealth power. It will be shown below that the assumption was itself based not on historical facts, but on certain hypotheses advanced in the 19th Century regarding the long-term future of federalism, which have since been proven to be baseless.

But first let us look at Australia's constitutional history. It should not be forgotten that Australia is one of the few federations that were formed as a result of voluntary and democratically approved decisions made by the constituent Colonies. There is no evidence to suggest that the Colonies intended the formation of an economic union in which the States would surrender to the Commonwealth the power over development of their local economies and communities. There is plenty of evidence to the contrary.

Thus, for example, when the Draft Constitution was put to popular vote in the referendums of the 1890s, those who were opposed to it raised many issues in each colony. The fear that the Draft would lead to the establishment of a union was not one of these concerns, simply because there was no such intention in the Draft.[12]

In 1927, the Royal Commission on the Constitution of the Commonwealth considered whether a federal type of Constitution should be retained or whether a unitary type should be adopted. It recommended the retention of the federal constitution.[13] In 1944, the Commonwealth unsuccessfully sought to increase its power over the economy through a referendum on Post-war Reconstruction and Democratic Rights.[14] If Australia's Constitution had already established an economic union, none of these initiatives would have been necessary.

It is highly likely that, in making the assumption in *Parton*, Justice Dixon was reflecting the anti-federalism sentiment that had gained currency during the inter-war and the post-war years. Even two decades before *Parton*, he had expressed views that were consistent with those of the political theorists of the 19th Century who were convinced that, as a form of government, federalism was destined to fail. For example, when giving evidence before the Royal Commission on the Commonwealth Constitution (then as Mr Dixon), he said, in part:

> "A federal form of government represents a compromise, and the theory upon which it rests as a political device includes the supposition that it will serve during a period of transition, while people separately governed may find it possible to unite more closely under a less rigid constitution."[15]

The Report of the Royal Commission was reviewed in *The Economic Record*, November, 1929, by Sir Kenneth Bailey, then a Professor of Jurisprudence at the University of Melbourne, who added the following commentary on Mr Dixon's evidence:

> " Federation is only an interim solution at best', he seems to say to the majority. It isn't worth bothering about minor amendments. Leave the Constitution alone until Australia is ready for a unitary system'."[16]

There were many others at the time who held similar views. In the latter part of the last century, an influential group of political theorists, including such well-known names as Alexis de Tocqueville and James (Lord) Bryce had proclaimed the ultimate demise of federalism. Putting across similar conclusions, Harold Laski's influential paper *The Obsolescence of Federation* was published in 1939, more than ten years after Mr Dixon's evidence before the Royal Commission but well before his judgment in *Parton*. In Australia, a distinguished political scientist, Gordon Greenwood published a major book in 1946 in which he also put forward the view that Australia should move to a unitary system of government.[17]

Although all these writers were proclaiming the end of federalism, the reasons for their conclusions were varied and in some cases mutually inconsistent.[18]

Thus, for example, while Tocqueville's view was based on his belief in "the inevitable spread of equality among human beings", Bryce was convinced of the unifying effects of the easier and cheaper communications, commerce and finance. Laski, on the other hand, approached the issue from an ideological perspective. For him, federalism was fundamentally flawed, as it was incapable of dealing with the issues raised by giant capitalism. He regarded the State governments (in the United States) as mere creatures of capitalist enterprises. He is reported to have said that Delaware was merely a pseudonym of the du Ponts, and Montana little more than a symbol of the Anaconda Copper Corporation.[19]

By the time of *Parton*, in 1949, the Great Depression and the Second World War had exposed the weakness of the State governments in dealing quickly and effectively with major crises, further cementing the superiority of a unitary government. The influence of Keynesian economics was also spreading fast through Australia, Great Britain, Canada and the United States. In Australia, this was reflected in the release of a *White Paper on Full Employment* in 1945. As Mathews and Jay explain, the federal structure of government must have appeared to many as a drawback at the time:

> "In a unitary government such as Great Britain, there were no constitutional difficulties in the way of exercising these new functions [for maintaining high levels of employment]. In Australia, however, the residual functions of government rest with the States. The Referendum of 1944 was an attempt to overcome this problem ...'[20]

Thus, a feeling of frustration, despair and antagonism towards State governments was common in those years.[21] Many people, who were in positions of power and influence, must have felt the urge to nudge federalism along towards what they believed to be its inevitable demise. As it has turned out, the assumption made by Justice Dixon in *Parton* became much more than such a nudge.

Federalism, however, did not disappear; not only has it survived, but in recent years it has also been hailed as the preferred form of government in comparison with a unitary system. The professed virtues of federalism are many. In addition to the enhanced accountability and participation by people in the political process, these include greater ability to combine diversity with unity, greater scope for escaping the tyrannies of the monopoly of central government, and greater opportunities for competition among governments where people can "vote with their feet".[22]

Unlike the early literature on economic stabilisation that developed in the wake of the Keynesian *General Theory*, and which suggested certain advantages of a unitary government, modern theory of fiscal federalism is built upon a disaggregation of three main functions of government, namely stabilisation of the economy, redistribution of income and wealth, and allocation of resources. Primary responsibility, though not an exclusive role, for the first two of these functions is assigned in this theory to the national governments. The allocative function is assigned mainly to subnational governments, by virtue of the potential benefits for accountability and efficiency noted above.[23] In this manner, federalism is able to combine the virtues of diversity and uniformity.

In the post-war period, the recognition of these virtues, combined with the spread of democratic institutions around the world, has contributed to a significant trend towards political and fiscal decentralisation in many countries.[24] In contrast, as we have noted above, federalism in Australia regressed into greater centralisation during the same period, assisted by, among other factors, the High Court's interpretations of s. 90.[25]

The upshot of this section is that Justice Dixon's assumption in *Parton* was based not upon historical facts but upon certain hypotheses about the long-term future of federalism, which had gained currency at the turn of the 19th Century and again in the years immediately following the Second World War. These hypotheses have since been proven to be unfounded. Indeed, the benefits of federalism are now increasingly being recognised around the world. Therefore, whatever the merits of that assumption in the 1940s, there can be little justification for it in the 1990s.

Economic Integration and Coordination of Taxation

The spread of political and fiscal decentralisation in the post-War period, and the recent growth in the number of international agreements for establishing free trade areas, customs unions, common markets and other forms of economic co-operation, have been accompanied by the development of a substantial literature that deals with the coordination of taxes within an integrating fiscal space.[26] The principles derived from this literature can also be usefully adopted for tax coordination within federations.

The formation of a customs union always requires, as it did at the time of Federation in Australia, the replacement of internal customs duties with uniform centralised customs duties. Taxation of commodities by subnational governments also needs to be coordinated to ensure that the integrity of the uniform customs duties is maintained, and that resource allocation is not adversely affected by geographic differences in tax rates. Various alternative approaches are available for such coordination, depending on whether the taxes in question are imposed on the production or sale of commodities.[27] But total exclusion of subnational governments from the field of commodity taxation has no special justification in the theory of tax coordination.

It is not only in the theory of economic integration that there is a definite place for non-discriminatory commodity taxes at the middle level of government. Indeed, such taxes are an important feature of the tax structures of other major federations, where subnational governments derive a significant share of their tax revenue from general taxes on commodities.

In denying commodity taxes to the State governments in Australia, the High Court has contributed to the perpetuation of a lop-sided tax structure in this country. As can be seen in Table 3, three-quarters of State revenue is raised from narrow-based taxes - almost exactly opposite to the situation prevailing in other major federations.[28]

Table 3: Composition of Tax Revenue of Middle Level Governments

(Percentage of total taxation receipts, 1993)

Broad-based Taxes	**Australia**	**Canada**	**Germany**	**USA**
Taxes on personal income	-	44.8	50.7	31.8
General taxes on good & services	-	22.9	30.2	32.5
Taxes on pay-roll or workforce	24.0	-	-	-
Total broad-based taxes	**24.0**	**67.7**	**80.9**	**64.3**
Narrow-based Taxes				
Taxes on specific goods & services	16.1	14.8	1.9	16.9
Taxes on use of goods & services	28.5	6.0	5.3	8.0
Taxes on immovable property	7.7	2.7	-	2.0
Taxes on financial & capital transactions	23.8	-	2.2	0.6
Other Taxes	-	8.8	9.7	8.1
Total Narrow-based Taxes	**76.0**	**32.3**	**19.1**	**35.7**

Source: OECD (1996), *Revenue Statistics of OECD Member Countries, 1965/93*, Paris.

It should be noted that the minority judgment in *Ha* is remarkably consistent with the above theoretical principles, and the practice in other federations. The majority view, however, favours absolute centralisation of commodity taxes, which would not only eliminate the need for tax coordination but also pave the way for centralisation of economic policy.

Definition of Duties of Excise

It has been noted already that the argument of the majority judgment would not be complete without a description of excise duties that is wide enough to embrace all taxes on commodities that are not customs duties. It has also been noted that such a description existed in Justice Dixon's judgment in *Parton*, and has been now reaffirmed in *Ha*.

The minority judges noted that the description of excise duties in *Parton* had been widely criticised, including recently in McLeod,[29] and in Mathews and Grewal.[30] They further argued that the description is wrong. They agreed that a tax imposed by a State on the production or manufacture of a commodity would reduce tariff protection for that commodity. But they argued that the effect would not be the same if a State tax is imposed at a later step in the distribution of the same commodity and the tax falls indiscriminately on domestic production and the imported supply of that commodity.[31] This is because such a tax would raise the price of both imports and domestic supply uniformly and leave the tariff protection unchanged.

In rejecting the wider description of excise duties, the minority judges were quite categorical:

> "It is plainly incorrect to assert that a tax upon a commodity at any point in the course of distribution before it reaches the consumer has the same effect as a tax upon its manufacture or production."[32]

I have discussed several criticisms of the *Parton* definition of excise duties in some detail elsewhere.[33] In addition to the above, I have shown that the assertion on which that definition is based breaks down when it is applied to State taxation within a federation. Given that the sole purpose of that definition is to settle the assignment of commodity taxes in a federation, this is a major failure of that definition.

The argument of my criticism runs as follows:

> "In a federation, the interjurisdictional effect of a tax on production or manufacture of a commodity will be quite different from the effect of a tax on another step in its distribution, say its sale. Consider a commodity which is produced in one State (A) but is sold and consumed in another State (B). A tax on its production, imposed by the government of State A, will be shifted through increased price over to the consumers of that commodity who are in State B. In contrast, a tax on retail sales of the same commodity will be both levied and collected by the government of State B. Assuming that each State government spends its tax revenue only for the benefit of its own residents, the production tax would effectively allow public expenditure of State A to be financed by a tax on the residents of State B, whereas the sales tax involves no such interjurisdictional shifting of tax burden."[34]

A major objective of any scheme of assignment of taxes in a federation must be to minimise the opportunities for tax exportation and the flight of the tax base from one State into another.[35] Minimisation of tax exportation can be achieved by designing subnational taxes on the destination principle (i.e., taxes are imposed on sales of commodities instead of production).

Tax base flight can be minimised by concentrating subnational taxation on goods or activities that are relatively immobile between jurisdictions (e.g., taxes on land instead of capital). If distances between the borders of particular States make it worthwhile, taxes on sales may be susceptible for avoidance through shopping trips into low taxing areas. However, the scope of such avoidance can be, and generally has been, minimised through harmonisation of tax rates across jurisdictions. Experience in Australia and elsewhere shows that despite initial temptations for tax competition, long-term interest of the stability of subnational revenues eventually prevails to make such harmonisation possible.

It is worth noting in the present context that, on both these criteria, the business franchise fees levied by the States on tobacco, liquor and petroleum products were superior taxes. The fees were levied on the destination principle, and were no longer causing serious interjurisdictional movement of sales, particularly after the rates had been fairly well harmonised through consultations between the States in recent years.

In summary, there can be no doubt that the assertion about the same effect of different taxes on a commodity is wrong on several accounts, the most important of which is that it does not hold as far as the effects on the shifting and exporting of the tax burden from one State to another in a federation are concerned.

Summary and Conclusions

The *Ha Case* provided, as we have seen, a long overdue opportunity for a review of the line of authority based on *Parton*. A majority of the full bench of the High Court has, however, reaffirmed that authority. As a result, the States have lost a major source of tax revenue. The direct effect of the Court's decision on the State finances, and on the fiscal balance between the Commonwealth and the States, is clearly disappointing.

The reasoning on which the *Parton* formulation is based has been shown to be lacking in support from history and contemporary economic theory. It turns out that the formulation is essentially a backward-looking interpretation as it is based on unsubstantiated and outdated hypotheses about federalism, which have no relevance in contemporary thought on the subject. Thus, it is also disappointing that a valuable opportunity has been lost for putting the judicial interpretation of the constitutional assignment of tax powers on a modern footing.

There is, however, some new light in the *Ha Case*.[36] The unanimous views of the three dissenting judges have exposed many weaknesses of the *Parton* formulation. They have helped bring out the important fact that the critical issues in this case are about the economics of taxation and economic principles of integration of separate political entities into closer groupings. Their reasoning in the minority judgment also shows that, once the economic issues are properly analysed and understood, there should be no constitutional impediment to the States imposing non-discriminatory taxes on the distribution or sale of commodities.

Such an interpretation, if successful, would go a long way in restoring the fiscal health of Australia's currently dysfunctional federalism. It would also open the way for a sensible process for introducing tax reforms, including the State taxes, which until now have been virtually ignored from the agenda for tax reforms.

In short, the facts are:

- the Constitution established a customs union within a federal structure, not a single economic union assimilating the States;
- the prohibition on excise duties imposed by s. 90 is limited to discriminatory taxes on commodities that undermine the Commonwealth power over tariff protection, but is no wider than that; and
- there is no constitutional objection to non-discriminatory State taxes on commodities.

The High Court must sooner or later recognise these facts. The longer this recognition is delayed, the longer it will take for Australia's fiscal federalism to realise its full potential and for its tax structure as a whole to be reformed.

Endnotes:

1. *Ngo Ngo Ha & Anor v. State of New South Wales & Ors* and *Walter Hammond & Associates Pty Limited v. New South Wales & Ors* (1997) 146 ALR 355.

2. Section 90 reads: "On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive."

3. In 1995-96, the States and Territories raised $4,889.4 million from these three business franchise fees, nearly 54 per cent of which was raised from tobacco and 31 per cent from petroleum products.

4. See, for example, Australian Constitutional Convention (1984), *Fiscal Powers Sub-Committee Report to Standing Committee*, Melbourne and Mathews, R L and Grewal, Bhajan, *The Public Sector in Jeopardy: Australia's Fiscal Federalism from Whitlam to Keating*, Centre for Strategic Economic Studies, Victoria University, Melbourne (1997).

5. Alfred Deakin, *The Chariot Wheels of the Central Government* (1902), as reproduced in W. Prest and R. L. Mathews (eds) (1980), *The Development of Australian Fiscal Federalism: Selected* Readings, ANU Press, Canberra, pp. 13-18.

6. P. J. Keating, Address to National Press Club, Canberra (1991).

7. (1949) 80 CLR 229.

8. (1997) 146 ALR 355 at 383.

9. *Ibid*., at 369, emphasis added.

10. *Ibid*., at 388.

11. *Ibid.*

12. See John Quick and Robert R Garran, *The Annotated Constitution of the Australian Commonwealth*, pp. 206-228 (the 1901 edition reprinted by Legal Books, Sydney, 1995).

13. See K. H. Bailey, *The Report of the Royal Commission on the Constitution of the Commonwealth* (1929), as reproduced in W. Prest and R. L. Mathews, *loc. cit*., p.85.

14. See R. L. Mathews and W. R. C. Jay, *Federal Finance: Australian Fiscal Federalism from Federation to McMahon* (1972 edition reprinted by the Centre for Strategic Economic Studies, Victoria University, Melbourne, 1997) for background of this referendum, pp.182-183.

15. Quoted in K. H. Bailey, *op. cit*., p.91.

16. *Ibid.*

17. Gordon Greenwood, *The Future of Australian Federalism: A Commentary on the Working of the Constitution*, Melbourne University Press, Melbourne (1946).

18. The following paragraph is based on the excellent summary provided in Albert Breton, *Centralization, Decentralization and Intergovernmental Completion*, The 1989 Kenneth R. MacGregor Lecture, Institute of Intergovernmental Relations, Queen's University, Kingston, Ontario (1990).

19. *Ibid.*, p.3.

20. R. L. Mathews and W. R. C. Jay, *loc. cit.*, p.182.

21. Alice Rivlin notes that in the United States of America, many "began to regard the States as anachronisms that might eventually fade away from the American governmental scene". *Reviving the American Dream: The Economy, the States and the Federal Government*, The Brookings Institution, Washington, DC (1992), p.92.

22. See Charles Tiebout, *A Pure Theory of Local Expenditures* (1956), Journal of Political Economy, 64, pp. 416-24; R. A. Musgrave (ed.), *Essays in Fiscal Federalism*, The Brookings Institution, Washington, DC (1965); W. E. Oates, *Fiscal Federalism*, Harcourt, Brace, Jovanovich, New York (1972); B. S. Grewal, Geoffrey Brennan and Russell Mathews (eds), *The Economics of Federalism*, ANU Press, Canberra (1980); and G. Brennan and J. Buchanan, *The Power to Tax: Analytical Foundations of a Fiscal Constitution*, Cambridge University Press, New York (1980) for economic perspectives on federalism as a system of government.

23. See W. E. Oates, *op. cit.*, for the classic statement of these principles.

24. See A. Breton, *loc. cit.*, and World Bank, *World Development Report 1997: The State in a Changing World*, Oxford University Press, New York (1997), for citations of several studies showing this trend.

25. See Russell Mathews and Bhajan Grewal, *loc. cit.*, for a detailed discussion of this process of centralisation.

26. According to the World Trade Organisation, *Regionalism and the World Trading System*, Geneva (1995), 98 regional integration agreements had been notified to GATT between 1947 and 1994. It is neither possible nor necessary to cite even all the major references here. For a representative sample, see C. S. Shoup (ed.), *Fiscal Harmonization in Common Markets*, Columbia University Press, New York (1967), volumes 1 and 2; F. Machlup, *A History of Thought on Economic Integration*, Columbia University Press, New York (1977); D. Swann, *The Economics of the Common Market*, Penguin Books Australia, Second edition (1972); and literature cited therein.

27. For the purpose of coordination, commodity taxes are separated into origin based and destination based taxes and different coordination procedures are required for each category. See Richard A. Musgrave, *Fiscal Systems*, Yale University Press, New Haven (1969), pp. 270-291, for example, for detailed discussion.

28. See Bhajan Grewal, *Vertical Fiscal Imbalance in Australia: A Problem for Tax Structure, not for Revenue Sharing*, Centre for Strategic Economic Studies Working Paper No. 2 (1995), where vertical fiscal imbalance in Australia is discussed as a major problem for the country's tax structure.

29. McLeod, *State Taxation: Unrequited Revenue and the Shadow of Section 90* (1994), *Federal Law Review*, 22, pp. 484-492.

30. *Loc. cit.*, pp. 508-512, 782.

31. *Ibid.* p.385.

32. (1997) 146 ALR 355 at 385.

33. Bhajan Grewal, *State Taxation and the High Court: Whither Australian Fiscal Federalism?,* forthcoming.

34. *Ibid.* p.7.

35. See R. A. Musgrave, *Who should Tax, Where, and What?* in Charles E. McLure Jr. (ed.), *Tax Assignment in Federal Countries* (1983), distributed by ANU Press, Canberra.

36. See Bhajan Grewal, *The Australian Financial Review,* 12 August, 1997: *New Light in High Court Ruling,* where the positive aspects of this judgment were first suggested.