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The High Court of Australie : A Federal Supreme Court in a Common Law Federation

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Résumé :

La Haute Cour joue plusieurs rôles fondamentaux au sein du système fédéral australien. En plus de constituer la juridiction d'entrée dans une série de matières – dont celles relatives à l'interprétation et l'application de la constitution, elle est la juridiction d'appel pour toutes les cours suprêmes des états fédérés et les tribunaux fédéraux inférieurs. Ceci signifie que la Cour est l'arbitre final s'agissant des différends portant sur la constitutionnalité des lois issues tant de la fédération que de ses états. La Haute Cour est constituée de sept juges nommés par le gouvernement fédéral qui exercent leur mandat jusqu'à l'âge de 70 ans. Ce faisant, les juges exercent un pouvoir important et institutionnellement indépendant des composantes politiques du système. Dans ce contexte, la plupart des modifications constitutionnelles en Australie ont été adoptées en réaction à la tendance qu'ont eu les gouvernements fédérés à outrepasser leurs pouvoirs constitutionnellement établis. Toutefois, bien que la Haute Court a fait beaucoup pour renforcer la fédération, les états fédérés sont toujours fondamentaux au bon fonctionnement du système gouvernemental. Les états continuent à jouer un rôle important dans la politique fédéral et demeurent des centres d'investissements politiques locaux et régionaux. Dans cette lignée, des développements récents suggèrent qu'il est possible que la Haute Court s'intéresse désormais davantage à la préservation du rôle des états fédérés dans le système constitutionnel australien.

Abstract :

The High Court of Australia performs several judicial functions that are fundamental to the federal system1. It determines appeals from all state supreme courts and inferior federal courts and it has original jurisdiction in several kinds of matters, including those involving the interpretation and application of the constitution. This means that the Court is the final arbiter of disputes concerning constitutionality of laws enacted by the federation, as well as those of the states. The High Court consists of seven judges, appointed by the federal government, who hold tenured office until the age of 70. As such, the judges exercise very substantial powers in a manner that is institutionally independent of the political branches of government. In this context, the most significant causes of constitutional change in Australia have been the tendency of federated governments to press the scope of their powers up to and arguably beyond their constitutional limits and High Court decisions which have mostly affirmed those exercises of power. However, while the Court has done much to strengthen the federation, the states are still fundamental to the system of government. The states continue to play an important role in federal politics and remain vigorous centres of regional and local political engagement. Moreover, recent developments suggest that the High Court may be taking a renewed interest in preserving the role of the states within the Australian constitutional system.

1. BRIEF DESCRIPTION OF THE FEDERAL SYSTEM

1.1. BACKGROUND

The Commonwealth of Australia is a federation of six states, formed by mutual agreement among six independent, self-governing British colonies in 19012. Federation occurred through the *Commonwealth of Australia Constitution Act* 1900 (U.K.), an imperial statute, which contained the Commonwealth Constitution.

The Constitution combines the principles of parliamentary responsible government with federalism3. Thus, in accordance with the conventions of responsible government, Commonwealth executive power, which is formally vested in the Queen and exercised by the governor-general as her appointed representative, is in the ordinary course of events exercised strictly on the advice of a prime minister and other ministers of state who have the confidence and support of the Parliament. Secondly, in accordance with the federal principles of self rule and shared rule, the Commonwealth and each of the States are constitutionally preserved as self-governing political communities (ss. 106 and 107) and the people of each State are equally represented in one of the houses of the Commonwealth Parliament (the Senate), while the people of the Commonwealth as a whole are represented in the lower house (the House of Representatives) (ss. 7 and 24).

No new states have been added to the original six, each of which continues to have the same constitutionally guaranteed status as a self-governing political community. There are also two self-governing Territories and several smaller Territories, all of which are in principle subject to the authority of the Commonwealth Parliament (s. 122). Although the existence of local government is acknowledged in all of the State constitutions4, the State parliaments have the power to subject local government to supervision, control and fundamental reorganisation5.

The Constitution distributes legislative, executive and judicial power between the Commonwealth and the States. The legislative powers of the States are general or plenary (ss. 106 and 107)6, subject only to the exclusive legislative powers conferred upon the Commonwealth (s. 52) and various general constitutional prohibitions (e.g., ss. 90, 92). By contrast, the legislative powers of the Commonwealth are limited to specific topics (ss. 51, 52)7. The exclusive Commonwealth legislative powers relate to the Australian Capital Territory, places acquired by the Commonwealth, and the Commonwealth public service (s. 52). The Commonwealth has broad legislative power with respect to its Territories generally (s. 122). Concurrent federal legislative powers (s. 51) include defence, external affairs, immigration, interstate trade and commerce, trading and financial corporations, banking, industrial arbitration, postal services and telecommunications, currency, marriage, and divorce.

If validly enacted Commonwealth and State laws are inconsistent, the federal law will prevail to the extent of the inconsistency (s. 109). The States continue to legislate, regulate, and provide services in important areas such as education, hospitals, policing, and civic infrastructure, but the Commonwealth now exercises substantial regulative control in several of these fields by placing conditions on financial grants to the States (s. 96) and by enacting overriding legislation within its concurrent areas of legislative competence.

As with legislative power, State executive power is not limited to particular topics8, whereas the Commonwealth’s executive power is constitutionally defined as extending to the “execution and

maintenance of [the] Constitution, and of the laws of the Commonwealth" (s. 61).

Adjustments to the federal distribution of power can be achieved in various ways, including formal amendment to the Constitution (s. 128)9 and State referral of legislative powers to the Commonwealth (s. 51(xxxvii)). Harmonisation of law also occurs through the enactment of uniform legislation on the basis of "host" laws enacted in one State and adopted by others, through promulgation of "model" legislative schemes that States and Territories "mirror" in their own legislation, and through Commonwealth "framework" laws that only operate in the absence of adequate State or Territory laws10. Despite these arrangements, Australia's Constitution does not formally envisage a role for federal framework legislation. Australia's federal system is quite different from many of its European counterparts, where the integration of the constituent polities (e.g., Länder and cantons) within the governing institutions of the federation is more far-reaching than in common-law federations such as Australia, Canada, and the United States11.

Each State has its own constitution which is an ordinary statute of the State parliament, enacted under authority ultimately traceable to Orders in Council or British statutes, the effect of which is continued under the federal Constitution (s. 106). The general principle is that the State constitutions can be altered by an ordinary statute of the State parliament, either explicitly or by implication12. The first qualification to this is that the State constitutions are "subject to" the federal Constitution (s. 106) and cannot, therefore, contain anything contrary to its relevant requirements, such as the maintenance of State courts meeting the description of "Supreme Courts" (as referred to in ss. 73)13. A second, now far-reaching qualification to this principle is that the legislative powers of each State parliament are subject to any procedural "manner and form" requirements imposed by a predecessor parliament14. A law made by a State parliament is of "no force or effect" if it is inconsistent with a binding manner and form requirement15. State parliaments have sought to entrench a range of constitutional provisions in this way, including provisions relating to the governor16, the composition, procedures and electoral basis of the parliament17, and the Supreme Court18. Manner and form requirements were originally binding on the Australian colonial Parliaments due to the Colonial Laws Validity Act 1865 (U.K), a British statute that operated within Australian with paramount force. They are now binding on the Australian state Parliaments due to the Australia Acts 1986, enacted simultaneously by the British Parliament and the Commonwealth Parliament with the consent and request of the State Parliaments. However, according to these statutes, manner and form provisions are only binding when the subject matter of the amending law concerns the "constitution, powers or procedure of the Parliament," and so the effectiveness of some manner and form requirements is questionable19. There has been some discussion of alternative grounds upon which State constitutional provisions might be entrenched, but the effectiveness of these grounds is subject to serious doubt20.

The ultimate relationship between the Commonwealth and State constitutions has not been entirely resolved. While provisions of the Commonwealth Constitution limit State powers (e.g., ss. 90 and 92) and allow appeals to the High Court from State Supreme Courts (s. 73), there is isolated judicial dicta that there are limits on the extent to which Commonwealth legislation, although otherwise validly enacted pursuant to the Commonwealth Constitution, can alter certain fundamentals of the State constitutions, such as the existence and functioning of State courts21.

1.2. LINKS BETWEEN FEDERALISM AND CONSTITUTIONAL JUSTICE

At federation, provision was made in the Commonwealth Constitution for the establishment of

the High Court of Australia (s. 71), which was given general appellate jurisdiction (s. 73) and original jurisdiction in several kinds of matters (ss. 75-76) including the resolution of constitutional disputes. Although the High Court's jurisdiction clearly extends to constitutional matters, this was not entrenched by the Constitution; it had to be affirmed by legislation at the establishment of the Court in 1903[22].The jurisdiction of the Judicial Committee of the Privy Council was preserved in the Constitution (s. 74), but the High Court soon asserted that it was the final interpreter of the constitutional powers of the Commonwealth and the States (so-called "inter se" matters)[23], and between 1968 and 1986 the Privy Council's jurisdiction to hear appeals from Australian courts was abolished[24].

Constitutional jurisdiction is not exclusive to the High Court; any Australian federal or State court may consider such questions, on the basis that all courts are responsible to determine what the law is, and such a determination may on occasion involve application of the Constitution[25]. The constitutional jurisdiction of the High Court is enlivened either when its original jurisdiction is directly engaged or when in the course of ordinary litigation, a party raises a constitutional issue and the matter is removed into the Court or comes before it upon appeal[26]. The High Court controls its workload by insisting that appeals from state supreme courts and the Federal Court be heard only by special leave[27], and by remitting matters commenced in its original jurisdiction to federal or state courts[28].

A strict doctrine of precedent applies in Australia; the determinations of all superior courts bind courts lower in the judicial hierarchy[29]. The High Court does not regard itself as being bound by its previous decisions[30], but only rarely overturns well-established cases, except that it is somewhat more willing to overrule previous decisions in constitutional matters due to the entrenched nature of the Constitution, the Court's role as its final interpreter, and the importance of the issues raised in such cases[31].

The Constitution empowers the Commonwealth to establish other federal courts (ss. 71, 77(i)). The Commonwealth has established the Federal Court of Australia, Family Court of Australia, and Federal Magistrates Court. The independence of the High Court and other federal courts from interference by legislative and executive branches of government is safeguarded by the requirement in the Constitution that judges appointed to these courts enjoy tenure to age 70[32]. The High Court has vigilantly protected its independence, drawing on the separation of powers implied by the distinct investment of legislative, executive, and judicial power in the legislature, executive, and judiciary (ss. 1, 61 and 71), following the U.S. Constitution in this respect[33].

The most significant causes of constitutional change in Australia have been the tendency of federal governments to press the scope of their powers up to (and arguably beyond) their constitutional limits and High Court decisions which have mostly affirmed those exercises of power[34].

Since its landmark decision in the *Engineers Case*[35] in 1920 the High Court has adopted an approach to constitutional interpretation that is essentially unitarist[36]. It interprets the legislative powers of the federal Parliament in a manner that excludes from consideration a need to reserve any particular powers to the States. The basis for this approach is the view that the Constitution originally derived its legal force from its enactment by the British Parliament and that it obtains its continuing legitimacy from the support of the Australian people considered as an undifferentiated whole[37]. On this view, the Court has held that federal powers are to be interpreted as broadly

as the constitutional language can reasonably sustain, without imposing any limit on their scope by reference to the merely "residual" capacities of the States, leaving them in an 'inherently vulnerable' position[38].

The High Court has also held that, because the Commonwealth has power to make grants to the States 'on the terms and conditions that it thinks fit' (s. 96), it is able to impose all sorts of conditions on the States, even in areas of recognized State jurisdiction, such as roads, education, and health[39]. Moreover, although the Commonwealth's power to legislate on taxation is *concurrent* with the continuing power of the states to levy taxes, the High Court upheld a scheme introduced by the Commonwealth during the Second World War whereby it effectively monopolized the imposition of income taxes[40]. As a consequence, Australia's fiscal system involves a severe vertical fiscal imbalance between the Commonwealth and the States, which undermines the political accountability of all orders of government and reduces incentives for competitive innovation[41].

However, while the High Court has done much to strengthen the Commonwealth, the States are still fundamental to the Constitution. The States continue to play an important role in federal politics and remain vigorous centres of regional and local political engagement. Why is this so? One reason is the sheer size of the country. Another is the continuing popular attachment to the States as locations of political participation and activity. Moreover, although the High Court has denied that the Constitution guarantees to the States any of the particular powers they have exercised historically, it has insisted that they must continue to exist 'as separate governments … exercising independent functions[42], and has occasionally struck down Commonwealth laws that unduly interfere with the States[43]. The status and position of the states within the federation is thus constitutionally entrenched and remains fundamental to Australia's political system, even though their particular functions and roles have been increasingly overridden by the federal government.

Moreover, some recent developments suggest the possibility of a renewed interest in preservation of the federal characteristics of the Australian constitutional order by the High Court. For example, in a recent case, the then Chief Justice of the High Court began his judgment by quoting from an observation of one of the framers of the Australian Constitution, Andrew Inglis Clark, which articulated a robust view of the existence and powers of the states. In that observation Clark stated that the Constitution gives effect to 'a truly federal government' in which the 'preservation of the separate existence and corporate life of each of the component states' is as much an 'essential' feature of the Constitution as the establishment of the Commonwealth as an effective government[44]. In that case the High Court held that the executive power of the Commonwealth did not extend to the entry into contracts and the expenditure of money on projects that are not authorised by either the Constitution itself or by legislation ordinarily enacted by both houses of the Parliament. And in a companion case the Court held that the Parliament did not have the legislative power to authorise the particular payments that had been the subject of those contracts[45]. This insistence by the Court that the Commonwealth must remain within the limits imposed by the Constitution is perhaps a promising sign for the integrity of the federation, but given the twists and turns that have occurred in the history of Australian federalism, it is difficult to predict where current trends are likely to lead[46].

2. ORGANISATION OF THE FEDERAL SUPREME COURT

2.1. COMPOSITION OF THE FEDERAL SUPREME COURT

Members of the High Court and Federal Court are appointed by the Governor-General in Council (s. 72(i)) based on a decision made within the Commonwealth Cabinet on a recommendation by the Commonwealth Attorney-General. The Attorney-General is required to consult with the State attorneys-general47, but the nature and extent of this consultation is not transparent, and there have been calls for reform.

The High Court presently consists of seven judges48. Despite Australia's federal structure and extensive territory, there is no convention that judicial appointments must reflect geographic diversity; indeed, notwithstanding the requirement for consultation with the State attorneys-general49, the Commonwealth has appointed more than three-quarters of High Court judges from the two largest States, New South Wales and Victoria, and has not yet appointed any High Court judge from the two smallest, South Australia and Tasmania. Some of those concerned by the strongly centralist leanings of the High Court have suggested that in order to redress the balance, appointments to the High Court should better reflect the federal diversity of the country; but there has been no simple correspondence between a judge's State of origin and his or her federal predilections50.

Most individuals appointed to the High Court have held prior judicial office in either the Federal Court or a State supreme court; occasionally individuals are appointed from the practising bar in one of the States, but this has become increasingly rare51. Relatively few appointees have had political careers52.

2.2. FINANCING OF THE FEDERAL SUPREME COURT

Funding for the federal courts comes exclusively from the Commonwealth. Typically, court budget proposals are prepared annually by the Commonwealth Attorney-General53, with some input from members of the judiciary, and then put before Cabinet for review54. Ultimately, Parliamentary approval must be given to all appropriations from the Consolidated Revenue Fund55. A similar process occurs in each of the States: court budget proposals are formulated by the executive branch56, funds are appropriated from State revenue funds and must be approved by the legislature57.

Federal courts have a large degree of control over funds allocated to them58 while State courts are subject to much greater administrative control by the executive59.

3. FEDERAL SUPREME COURT COMPETENCES

3.1. FEDERAL SUPREME COURT MATERIAL COMPETENCES

As noted earlier, the High Court has general appellate jurisdiction (s. 73) and also has original jurisdiction in several kinds of matters (ss. 75-76). Section 75 directly confers on the High Court original jurisdiction in "all matters:

- arising under any treaty;

- affecting consuls or other representatives of other countries;
- in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;
- between States, or between residents of different States, or between a State and a resident of another State;
- in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth."

Section 76 empowers federal Parliament to confer on the High Court original jurisdiction in "any matter:

- arising under this Constitution, or involving its interpretation;60
- arising under any laws made by the Parliament;61
- of Admiralty and maritime jurisdiction;
- relating to the same subject-matter claimed under the laws of different States."

The jurisdiction of the High Court includes judicial review of all statutes passed by the Commonwealth, State and Territory legislatures, and all regulations and executive actions by the Commonwealth, State and Territory governments, and their respective departments and agencies. It also extends to the review of all decisions of Federal, State and Territory courts and tribunals and all measures of local governments. Commonwealth and State statutes must comply with the Commonwealth Constitution because the legislative powers of their respective Parliaments are conferred or continued 'subject to' the Constitution (ss. 51, 106, 107). Territory laws must also comply with applicable provisions Constitution, but there is some doubt about the particular provisions of the Constitution that apply within the Territories. Regulations and executive actions undertaken by Commonwealth, State and Territory governments must comply with the Constitution and all applicable statutes62. If a Commonwealth, State or Territory statute is found to be constitutionally invalid the courts may declare it to be void and will refuse to enforce it.

Challenges to such laws, executive actions and judicial decisions are usually heard at first instance by lower courts in the Federal, State and Territory judicial hierarchies, but ultimately all of these kinds of legal questions can come before the High Court in its appellate or original jurisdiction. Accordingly, the High Court can be asked to determine cases involving the interpretation of the State constitutions and the constitutional effectiveness of their manner and form provisions.

3.2. FEDERAL SUPREME COURT REFERRALS

The High Court's jurisdiction is limited to "matters" (ss. 75-77). This means that it has no general advisory jurisdiction. As in the United States, and unlike Canada, the High Court's jurisdiction is only enlivened when litigants bring a case involving the determination of the particular rights, duties or liabilities of a person63.

While it is clear that an individual will have standing to challenge a law that regulates conduct in which that person has allegedly engaged, the extent to which a person will have standing beyond that is unclear. It is necessary for a plaintiff to show a sufficient "material" or "special" interest in the matter, and thus an interest greater than that of an ordinary member of the public64, but what exactly this amounts to has been confused, rather than clarified, by recent High Court cases, partly because the parties have often conceded the issue of standing65. However, the Commonwealth

and State attorneys-general have standing to challenge the constitutional validity of legislation or executive action of each other[66], and individuals who lack standing are able to seek the fiat of an attorney-general to bring the action in the attorney-general's name[67].

The High Court controls its workload by insisting that appeals from State supreme courts and the Federal Court be heard only by special leave[68], and by remitting matters commenced in its original jurisdiction to Federal or State courts when appropriate[69]. When a case involving constitutional issues comes before a court, the court must satisfy itself that notice of the case has been given to the Commonwealth, State, and Territory attorneys-general to enable them to consider intervention in the proceedings or seek removal of the cause into the High Court[70]. It is common for attorneys-general to intervene in constitutional cases, especially those involving questions about the distribution of power between the Commonwealth and the States. The Court has only infrequently granted leave to persons and representative groups to appear as *amici curiae*. At the least, they must demonstrate that their legal interests are liable to be substantially affected by a decision in a case and that the Court would not receive submissions relevant to the matters in issue without their intervention[71].

4. CONSTITUTIONAL EFFECTS OF DECISIONS BY THE FEDERAL SUPREME COURT

The legislative and executive powers of the Commonwealth and the States are subject to the Constitution. Laws and executive actions that contravene the Constitution are liable to be held unlawful by the courts[72]. States become aware of court decisions that affect them through the requirement that State attorneys-general be notified by courts when a constitutional issue comes before them[73]. Published court decisions are made publically accessible[74].

Parties alleging a breach of the Constitution may seek several remedies. Three such remedies explicitly recognised by the Constitution are the common law writs of mandamus, prohibition, and injunction (s. 75(v)). These "constitutional writs" extend to compelling public officials to perform public duties (mandamus) and restraining public officials, especially lower courts or tribunals, from usurping or exceeding jurisdiction (prohibition). The courts can also issue orders quashing decisions of lower courts or tribunals (certiorari), preventing the usurpation of an office (quo warranto), and requiring the liberation of an unlawfully imprisoned person (habeas corpus)[75]. In addition, where the aforementioned remedies are not available or inadequate, the courts can issue authoritative declarations as to the legal rights of parties and the true State of the law, including the invalidity of legislation, ie, that the law is ultra vires the Constitution[76]. Although a wide range of remedies is thus available, the High Court has discretion whether to grant a remedy in any particular case. Nonetheless, in most constitutional cases, declaratory or other orders are readily issued once a finding of invalidity has been made, and it is rare for deserving cases to be without a remedy[77].

It is generally accepted that the courts and, in particular, the High Court of Australia, have ultimate competence to determine the scope of power possessed by the various institutions of government in the federation[78]. When the High Court decides such matters, although there may be criticism and disagreement, the specific finding and its legal implications are widely adhered to by the other institutions and orders of government. Political leaders in the States have, however, not infrequently expressed grave concern about the centralisation of power resulting from High Court decisions. This has, at times, generated heated disagreement between the two orders of government[79]. Such disagreements often affect the tone and conduct of intergovernmental

negotiations concerning the regulation of matters ordinarily within State power. They also create incentives for State governments to pool their political resources against the Commonwealth, such as through the Council for the Australian Federation, a body formed to defend the States in the federal system80.

5. CONNECTIONS BETWEEN THE FEDERAL SUPREME COURT AND THE COURTS OF FEDERATED ENTITIES.

As noted earlier, the States have their own hierarchies of courts usually consisting of magistrates courts, district courts, and a supreme court (in some instances including a permanent court of appeal). Members of the State courts are appointed by the State governors on the advice of the State governments. The State supreme courts operate as courts of general jurisdiction in all matters that arise under common law, equity, or statute within the State, which can thus also include constitutional causes. They function as intermediate courts of appeal in State and Federal matters and also have general supervisory responsibility for State law, State institutions, and the State's legal profession81. The two self-governing mainland Territories, the Northern Territory and the Australian Capital Territory, also have their own supreme courts and systems of magistrates courts.

While the Constitution empowers the Commonwealth Parliament to confer federal jurisdiction upon State courts (ss. 71, 77(iii)) the High Court has held that State jurisdiction cannot be vested in federal courts82. When conferring federal jurisdiction on State courts, the Commonwealth may regulate the jurisdiction and procedure of such courts, but cannot interfere with their composition and structure, which are matters for each State to determine within the limits prescribed by the federal and State constitutions83. It has also been held by the High Court that the general principle of judicial independence required by the Commonwealth Constitution also protects State courts and applies to State judges because they exercise federal jurisdiction84.

Because the High Court is the general court of appeal from the supreme courts and those courts are invested with federal jurisdiction, the legal system as a whole has been described as an "integrated system of State and federal courts and organs for the exercise of federal judicial power as well as State judicial power."85.

6. CONCLUSION

The Australian judicial system is profoundly shaped by federalism. The High Court of Australia sits at the top of an integrated court system consisting of federal and State court hierarchies. But despite the thoroughly federal character of the Commonwealth Constitution, there is no requirement that the composition of the High Court must be representative of the States.

The High Court has both a general appellate jurisdiction and an original jurisdiction to hear, among other matters, constitutional disputes. All State and federal legislation and executive power are subject to the Constitution and Commonwealth and State attorneys-generals have standing to challenge executive and legislative action on constitutional grounds. The High Court's interpretation of the Constitution has tended to be strongly unitarist which has been a significant factor in increasing the legislative and financial powers of the Commonwealth.

While a broad interpretation of the Commonwealth's legislative and financial powers seems firmly

entrenched, the States are still fundamental to the Constitution and there are some signs of a renewed interest within the High Court in preserving the federal characteristics of Australia's constitutional order.

Notes

1 This chapter draws on ARONEY (N.), "The High Court of Australia: Textual Unitarism vs Structural Federalism", in ARONEY (N.) and KINCAID (J.), *Courts in Federal Countries: Federalists or Unitarists?* Toronto, University of Toronto Press, 2017 and ARONEY (N.), GERANGELOS (P.), STELLIOS (J.) and MURRAY (S.), *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation*, Cambridge, Cambridge University Press. 2015. The support of Australian Research Council grant FT100100469 is gratefully acknowledged. Thanks are also due to Terry East and Terence Le for their very capable research assistance.

2 LUMB (R.), *The Constitutions of the Australian States*, Brisbane, University of Queensland Press. 1991, 5th edition. The six colonies were separately established between 1788 and 1859.

3 For a fuller account of the federal design of the Australian Constitution, see ARONEY (N.). *The Constitution of the Federal Commonwealth: The Making and Meaning of the Australian Constitution*, Cambridge, Cambridge University Press. 2009. For a broader contextual account of the operation of the Constitution, see SAUNDERS (C.), *The Constitution of Australia: A Contextual Analysis*, Oxford, Hart Publishing. 2011.

4 SAUNDERS (C.), "Constitutional Recognition of Local Government in Australia", in STEYTLER (N.), *The Place and Role of Local Government in Federal Systems*, Johannesburg, Konrad-Adenauer-Stiftung, 2005, p. 47, 53-56.

5 AULICH (C.) and PIETSCH (R.), "Left on the Shelf: Local Government and the Australian Constitution", *Australian Journal of Public Administration*, vol 61 n° 4, 2002, p. 14.

6 CARNEY (G.), *The Constitutional Systems of the Australian States and Territories, Melbourne*, Cambridge University Press. 2006, p. 106-107.

7 *Attorney-General (Cth) v. Colonial Sugar Refining Company Limited* (1913) 17 C.L.R. 644, 651-4.

8 Carney, *Constitutional Systems*, chap. 8.

9 A proposed amendment of the Constitution must be (1) passed by an absolute majority of both houses of the Commonwealth Parliament (or by only one house of the Parliament, if after a period of delay the other house fails or refuses to pass the proposed law or passes it with amendments with which the first-mentioned house does not agree) and (2) simultaneously approved by a majority of voters in the nation as a whole and by a majority of voters in a majority of states (s. 128). This procedure is competent to amend the Constitution in any respect, except that changes to the territorial limits of a state or its representation in the federal Parliament can only be made with the approval of a majority of voters in the state concerned (s. 128, para. 5).

10 WANNA (J.) et al, *Common Cause: Strengthening Australia's Cooperative Federalism*, Council for the Australian Federation, 2009, 20.

11 HUEGLIN (T.) and FENNA (A.), *Comparative Federalism: A Systematic Inquiry*, Peterborough, Broadview Press, 2006, p. 145-178, 235-243; POIRIER (J.) and SAUNDERS (C.), “Conclusion: Comparative Experiences of Intergovernmental Relations in Federal Systems”, in POIRIER (J.), SAUNDERS (C.), & KINCAID (J.), *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics*, Oxford University Press, 2015, p. 440–498.

12 *McCawley v. The King* (1920) 28 C.L.R. 106 (Privy Council), discussed in ARONEY (N.), "Politics, Law and the Constitution in McCawley’s Case", *Melbourne University Law Review*, vol. 30, n° 3, 2006, p. 605.

13 *Kirk v. Industrial Court of New South Wales* (2010) 239 C.L.R. 531, 566, 580-581; *Forge v. Australian Securities and Investments Commission* (2006) 228 C.L.R. 45, 76.

14 Australia Acts, 1986 (Cth) and (UK), sec. 6. Manner and form requirements include approval by an absolute majority of both houses of parliament or approval by voters in a referendum. E.g. *Constitution Act 1889* (WA) sec. 73; *Constitution Act 1867* (Qld) sec. 53.

15 Australia Acts, 1986 (Cth) (UK) sec. 6; *Attorney-General (WA) v Marquet* 217 C.L.R. 545 [1]-[4], [63]-[71].

16 E.g. Constitution Act 1867 (Qld) sec. 53 purports to entrench ss 11A and 11B (concerning the Governor) by requiring any bill affecting those provisions be approved by a majority of electors qualified to vote in state elections.

17 E.g. Constitution Act 1889 (WA) sec. 73 requires that any Bill that “provides for the abolition of the Legislative Council or of the Legislative Assembly; or…provides that the Legislative Council or the Legislative Assembly shall be composed of members other than members chosen directly by the people; or… provides for a reduction in the numbers of the members of the Legislative Council or of the Legislative Assembly” be passed by an absolute majority of each House of Parliament.

18 E.g. Constitution Act 1975 (Vic) sec. 18 purports to entrench pt. III of the Act, which contains provisions relating to the Supreme Court of Victoria, by requiring any bill affecting these sections be passed by an absolute majority of both Houses of parliament.

19 The meaning of “constitution, powers of procedure of Parliament” is discussed in *Attorney-General (WA) v Marquet* (2003) 217 C.L.R. 545 [72]-[80].

20 *McGinty v. Western Australia* (1996) 186 C.L.R. 140, 296-7; *Attorney-General (W.A.) v. Marquet* (2003) 217 C.L.R. 545.

21 *Re Tracey; Ex parte Ryan* (1989) 166 C.L.R. 518, 547, 574-575; *Western Australia v. Wilsmore* [1981] W.A.R. 179, 181-183.

22 Judiciary Act, 1903 (Cth), sec. 30.

23 *Baxter v. Commissioners of Taxation (N.S.W.)* (1907) 4 C.L.R. 1087.

24 Privy Council (Limitation of Appeals) Act, 1968 (Cth); Privy Council (Appeals from the High Court) Act, 1975 (Cth); Australia Act, 1986 (U.K.) and (Cth), sec. 11.

25 Cf. Judiciary Act,1903 (Cth), sec. 39 (re jurisdiction of State courts).

26 Matters arising under the Constitution or involving its interpretation may be removed into the High Court under an order of the High Court on the motion of a party for sufficient cause or as a matter of course upon application of the Attorney-General of the Commonwealth, the Attorney-General of a state or the Attorney-General of one of the self-governing mainland territories: Judiciary Act, 1903 (Cth), sec. 40(1).

27 Judiciary Act, 1903 (Cth), sec. 35(2); Federal Court of Australia Act, 1976 (Cth), sec. 33. Such leave is only granted where it is in the interests of the administration of justice and either raises matters of “public importance” or there is a difference of opinion between different courts: Judiciary Act, 1903 (Cth), sec. 35A.

28 Judiciary Act, 1903 (Cth), sec. 44(1).

29 *Garcia v. National Australia Bank Ltd* (1998) 194 C.L.R. 395, 403, 418.

30 *Attorney-General for New South Wales v. Perpetual Trustees Company Ltd*. (1952) 85 C.L.R. 237, 244.

31 Zines (L.), *The High Court and the Constitution*, Sydney, Butterworths. 1997, 4th edition, p. 433-444.;Kirby (M.), "Precedent Law, Practice and Trends in Australia", *Australian Bar Review*, vol. 28, 2007, p. 243.

32 Australian Constitution, sec. 72. Such judges can only be removed from office on an address from both houses of Parliament on the ground of proved misbehaviour or incapacity.

33 *R. v. Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 C.L.R. 254.

34 Only eight of 44 constitutional amendment proposals have secured the necessary support of a majority of voters in the nation as a whole and a majority in a majority of states (s. 128).

35 Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd (1920) 28 C.L.R. 129, 153.

36 Winterton (G.), "The High Court and Federalism: A Centenary Evaluation", in Cain (P.) and Winterton (G.), *Centenary Essays for the High Court of Australia*, Sydney, LexisNexis Butterworths, 2004, p. 197; Craven (G.), “The Crisis of Constitutional Literalism in Australia", in Craven (G.), Lee (H.) and Winterton (G.), *Australian Constitutional Perspectives*, Sydney, Lawbook Co., 1992, p. 1. Although the general tendency of the High Court’s federalism jurisprudence has been centralising, several important qualifications should be noted. See, further, Aroney (N.), "The High Court of Australia: Textual Unitarism vs Structural Federalism", in Aroney (N.) and Kincaid (J.), *Courts in Federal Countries: Federalists or Unitarists?* Toronto, University of Toronto Press, 2017.

37 *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd* (1920) 28 C.L.R. 129, 153.

38 Crommelin (M.), "'Federalism'", in Finn (M.), *Essays on Law and Government, Vol I: Principles and Values*, Sydney, Lawbook Co, 1995, p. 168, 172.

39 *Victoria v. Commonwealth* (1926) 38 C.L.R. 399.

40 *South Australia v. Commonwealth* (1942) 65 C.L.R. 373; affirmed in *Victoria v. Commonwealth* (1957) 99 C.L.R. 575.

41 WARREN (N.), "Designing Intergovernmental Grants to Facilitate Policy Reform", in KILDEA (P.), WILLIAMS (G.) and LYNCH (A.), *Tomorrow's Federation*, Sydney, Federation Press, 2012, p. 131.

42 *Melbourne Corporation v. Commonwealth* (1947) 74 C.L.R. 31, 83.

43 Eg, *Queensland Electricity Commission v. Co.mmonwealth* (1985) 159 C.L.R. 192; *Austin v. Commonwealth* (2003) 215 C.L.R. 185; *Clarke v. Commissioner of Taxation* (2009) 240 C.L.R. 272.

44 *Williams v. Commonwealth* (2012) 248 C.L.R. 156, [1], [61], [83], citing CLARK (A.), *Studies in Australian Constitutional Law*, Melbourne, Charles F. Maxwell (G. Partridge & Co.), 1901, p. 12-13.

45 *Williams v. Commonwealth (No. 2)* (2014) 252 C.L.R. 416.

46 See SAUNDERS (C.), "Can Federalism Have Jurisprudential Weight?", in COURCHENE (J.), ALLAN (J.), LEUPRECHT (C.) and VERRELLI (N.), *The Federal Idea: Essays in Honour of Ronald L. Watts*, Montreal and Kingston: McGill-Queen's University Press, 2011, p. 111, 127.

47 High Court of Australia Act, 1979 (Cth), sec. 6.

48 High Court of Australia Act, 1979 (Cth), sec. 5.

49 High Court of Australia Act 1979 (Cth), sec. 6.

50 ALLAN (J.) and ARONEY (N.), "An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism", *Sydney Law Review*, vol. 30 n° 2, 2008, p. 290.

51 On calls for reform of the appointment process generally, see WILLIAMS (G.), "High Court Appointments: The Need for Reform", *Sydney Law Review*, vol. 30 n° 1, 2008, p. 161.

52 CRAWFORD (J.) and Openski (B.), *Australian Courts of Law*, Melbourne, Oxford University Press, 2004, p. 191.

53 In Australia, attorneys-general are generally members of cabinet.

54 FRENCH (R.), "Boundary conditions: The funding of courts within a constitutional framework", *Journal of Judicial Administration*, vol. 19, 2009, p. 75, 84.

55 See, e.g., Commonwealth Constitution, sec. 83. An Appropriation Act controls budgetary expenditures by appropriating amounts of money out of the Consolidated Revenue Fund for expenditure by government departments for particular purposes.

56 FRENCH (R.), *op.cit.*, "Boundary conditions", p. 84.

57 See, e.g., Constitution of Queensland 2001, Chapter 5; Constitution Act 1889 (WA) Pt VI.

58 On the control of the High Court over allocated funds see High Court of Australia Act 1979 (Cth) Pts. III-V.

59 See FRENCH (R.), *op.cit.*, "Boundary conditions", p.86.

60 As noted earlier, Parliament conferred this jurisdiction on the High Court through the Judiciary

Act 1903 (Cth), sec. 30.

61 See, e.g., Commonwealth Electoral Act 1918 (Cth), sec. 354.

62 However, a Commonwealth statute cannot constitutionally bind a State government or State government agency in a manner contrary to the principle in *Melbourne Corporation v. Commonwealth* (1947) 74 C.L.R. 31.

63 *Re Judiciary and Navigation Acts* (1921) 29 C.L.R. 257.

64 *Australian Conservation Foundation Inc. v. Commonwealth* (1980) 146 C.L.R. 493, 527.

65 Cf. *Croome v. Tasmania* (1997) 191 C.L.R. 119; *Pape v. Commissioner of Taxation* (2009) 238 C.L.R. 1; *Williams v. Commonwealth* (2012) 248 C.L.R. 156.

66 *Attorney-General (Vic); Ex rel. Dale v. Commonwealth* (1945) 71 C.L.R. 237; *Attorney-General (Victoria); Ex rel. Black v. Commonwealth* (1981) 146 C.L.R. 559.

67 Occasional examples include: *Attorney-General (Vic); Ex rel. Dale v. Commonwealth* (1945) 71 C.L.R. 237; *Attorney-General (Cth); Ex rel. McKinlay v. Commonwealth* (1975) 135 C.L.R. 1; *Attorney-General (Victoria); Ex rel. Black v. Commonwealth* (1981) 146 C.L.R. 559.

68 Judiciary Act, 1903 (Cth), sec. 35(2); Federal Court of Australia Act, 1976 (Cth), sec. 33. Such leave is only granted where it is in the interests of the administration of justice and either raises matters of “public importance” or there is a difference of opinion between different courts: Judiciary Act, 1903 (Cth), sec. 35A.

69 Judiciary Act, 1903 (Cth), sec. 44(1).

70 Judiciary Act, 1903 (Cth), sec. 78B.

71 *Levy v. Victoria* (1997) 189 C.L.R. 579.

72 Some scholars have, however, pointed out the difficulties of identifying a textual basis for judicial review in the Constitution and have questioned whether judicial review on federalism grounds can be justified.

73 Judiciary Act, 1903 (Cth), sec. 78B.

74 Lower court decisions not considered of broad significance may be left unpublished.

75 High Court Rules, 2004, Pt. 25. See, generally, Zines (L.), *Cowen and Zines’s Federal Jurisdiction in Australia*, Sydney, Federation Press, 2002, p. 15-16, 46-65.

76 Robert French, “Declarations – Homer Simpson’s Remedy – Is There Anything They Cannot Do?” (Paper presented at Faculty of Law, University of Western Australia, 30 November 2007).

77 Garry Downes, “Judicial Review” (Paper presented at the Seminar for the College of Law, Government & Administrative Law, Sydney, 24 March 2011), 4.

78 See *Australian Communist Party v. Commonwealth* (1951) 83 C.L.R. 1, 262-63, citing *Marbury v. Madison* (1803) 5 U.S. 137; *The Queen v. Kirby; Ex parte Boilermakers’ Society of Australia*

(1956) 94 C.L.R. 254, 267-68; *Plaintiff S157/2002 v. Commonwealth* (2003) 211 C.L.R. 476, 513-514.

79 E.g., Ted Baillieu, “Speech to the Australia-Israel Chamber of Commerce,” 7 August 2012.

80 MENZIES (J.), "The Council for the Australian Federation and the Ties That Bind", in KILDEA (P.), WILLIAMS (G.) and LYNCH (A.), *Tomorrow's Federation*, Sydney, Federation Press, 2012, p. 53.. On the general ineffectiveness of the Council, see CHORDIA (S.) and LYNCH (A.), "Constitutional Incongruence: Explaining the Failure of the Council of the Australian Federation", *Federal Law Review*, vol. 43, 2015, p. 339..

81 CRAWFORD (J.) and OPESKIN (B.), *Australian Courts of Law*, Oxford, University of Oxford Press, 2004, 4th edition, p. 27.

82 *Re Wakim; Ex parte McNally* (1999) 198 C.L.R. 511, [126]-[127].

83 CRAWFORD (J.) and OPESKIN (B.), *Australian Courts of Law*, Oxford, University of Oxford Press, 2004, 4th edition, p. 45-46. See *Kirk v. Industrial Court of New South Wales* (2010) 239 C.L.R. 531, 566.

84 *Kable v. Director of Public Prosecutions for N.S.W.* (1996) 189 C.L.R. 51; *South Australia v. Totani (*2010) 242 C.L.R. 1; *Wainohu v. New South Wales* (2011) 243 C.L.R. 181.

85 *Kable v. Director of Public Prosecutions for N.S.W.* (1996) 189 C.L.R. 51, 114-5.