

Engineers: The Case that Changed Australian Constitutional History

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1. Introduction

In Australia, the framers of the *Constitution*¹, by adopting a federal system of government, intended to protect state power and autonomy against centralisation. The Commonwealth *Constitution* that resulted from the Constitutional Convention Debates of the 1890s limits central powers; provides for the continued existence of the states, their Constitutions and powers; and consequently, mandates a federal balance between the central and state governments. Central to a federal system of government, such as Australia's, is the ideal of maintaining the powers and autonomy of the states so that decisions can be made, and problems solved locally wherever possible.

Despite the federal origins and intentions of the framers of the Commonwealth Constitution, the Australian federal landscape has become increasingly centralised. The turning point towards centralisation was the decision in

Engineers, in which the High Court irreparably altered the balance of power between the Commonwealth and the states by interpreting the Constitution literally, or in other words, as a statute of the British Parliament, devoid from any historical intentions or federal implications. In the words of Craven: 'Since the decision in the *Engineers* case in the 1920s, the High Court has been strongly, institutionally, anti-federal'².

In fact, federalism in Australia has been compromised to such an extent that Australia can no longer be seen as an authentic federation³. This trend towards centralisation has gradually worsened, culminating in decisions such as *New South Wales v Commonwealth of Australia* ('*Work Choices*' case). In *Work Choices*, a majority of the High Court affirmed that the federal balance is not relevant when interpreting the *Constitution* and endorsed a very broad interpretation of the Commonwealth Parliament's corporations power. This greatly expanded the Commonwealth Parliament's legislative powers in that area

and paved the way for further expansions. An example of the states' loss of financial autonomy occurred after the decision in *Ha v New South Wales* ('Ha'), in which the High Court affirmed a broad interpretation of excise duties resulting in a loss of \$5 billion per annum to the states because s 90 of the Constitution provides that only the Commonwealth can levy duties of excise.

When one looks at how the High Court interpreted the Constitution before *Engineers*, the extent of the *Engineers* High Court's departure from precedent and tradition can be seen as nothing less than radical, and to use more modern terminology, it could be said to amount to judicial activism. In decisions regarding the extent and delineation of Commonwealth and state powers after federation, the High Court developed two interpretive doctrines that were implied from the federal nature of the Constitution. These were the 'immunity of instrumentalities doctrine' and the 'reserved state powers doctrine'. This approach to constitutional interpretation became known as 'originalism' because it sought to give effect to the original intent of the framers of the *Constitution*.

The 'immunity of instrumentalities doctrine', also known as the 'implied intergovernmental immunities doctrine', was an implication developed and applied by the early High Court that was based on the federal nature of the *Constitution*. It recognised that the Commonwealth and state governments were independent entities, and consequently, could not legislate so as to interfere with the operation of each other's affairs. This meant that both the Commonwealth and states were immune from the operation of each other's legislation if that legislation impinged on the exercise of

their legislative or executive powers⁴. The doctrine was a necessary implication in order to preserve and protect the federal division of powers between the Commonwealth and the states.

At the same time as they implied the doctrine of implied intergovernmental immunities, the High Court, prior to *Engineers* also implied the 'reserved powers doctrine' or 'reserved state powers doctrine', once again on the basis of the federal nature of the *Constitution*. It provided that the legislative powers of the Commonwealth prescribed by the *Constitution* should be read narrowly so as not to detract from the power of the states 'reserved' by s 107 of the Commonwealth *Constitution*⁵. Section 107 provides that the states will retain their powers after federation, except to the extent that they had been given exclusively to the Commonwealth, or otherwise withdrawn from the states, by the new *Constitution*.

This paper will examine and critique the *Engineers* decision in detail, outlining how it radically departed from these earlier interpretive doctrines employed by the High Court to protect the federal balance of power between state and Commonwealth governments. In the latter part of this paper, the application of precedent by the High Court will be examined, in order to explain why the *Engineers*' High Court was so readily able to depart from it. Some observations will be made as to why the decision has proven to be so enduring, despite being so ill-conceived.

2. *The Engineers Case – Disregarding the Federal Balance*

The *Engineers* decision was handed down on 31 August 1920 in Melbourne. In *Engineers*, a 5-1 majority of the High Court rejected the immunity of instrumentalities doctrine, and in passing, also rejected the reserved powers doctrine. *Engineers* was, and remains, a controversial decision sparking considerable debate. This was primarily because, as noted above, it completely reversed the approach taken by the early High Court by endorsing an expansive interpretation of Commonwealth powers, and without limitation by any concept of a federal balance, unless expressly stated in the *Constitution*. The lack of logic and reasoning in the joint majority decision, attributed to the authorship of Isaacs J and delivered by him, was noted by Sawyer who stated, "The joint judgment is one of the worst written and organised in Australian judicial history. Isaacs was given to rhetoric and repetition, and here he gave these habits full rein"⁶. Despite this, *Engineers* has proved to be a lasting constitutional precedent that has even recently been used to justify centralisation⁷.

2.1. *The Facts*

The Amalgamated Society of Engineers ('the Union') was a Trade Union representing workers throughout Australia. The Union served a log of claims on 844 employers throughout Australia claiming improved wages and conditions for its members. When the Union's demands were not met, it commenced proceedings in the Common-

wealth Arbitration Court. The *Conciliation and Arbitration Act 1904* (Cth) gave the Court jurisdiction to prevent and settle industrial disputes that extended beyond the limits of any one state. The types of disputes that the Court was empowered to resolve included those where the Commonwealth, state or any Commonwealth or state public authority was an employer.

Included in the list of 844 employers who were parties to the dispute were several public authorities of the state of Western Australia. These were the Western Australian Minister for Trading Concerns, the Western Australian State Implement and Engineering Works and the Western Australian State Sawmills. Western Australia argued that they should be exempt from the operation of the *Conciliation and Arbitration Act 1904* (Cth) on the basis of the immunity of instrumentalities doctrine. In other words, they argued that the conciliation and arbitration power in s 51(xxxv) of the *Constitution* should not allow the Commonwealth to legislate for the regulation of the states as employers. To do so, they argued, would contravene the immunity of instrumentalities doctrine. As this argument raised constitutional issues, the President of the Commonwealth Arbitration Court referred the case to the High Court, pursuant to s 18 of the *Judiciary Act 1903* (Cth)⁸.

2.2. *Summary of the Decision*

A 5-1 majority of the High Court held that the conciliation and arbitration power in s 51(xxxv) was wide enough to allow the Federal Parliament to make laws with respect to state government employers and

employees. Additionally, the state was not immune from interference by the Commonwealth on the basis of any immunity implied from the federal nature of the *Constitution*. The majority, consisting of Knox CJ, Isaacs, Rich and Starke JJ wrote a joint judgment ('the joint majority'). Higgins J, also in the majority, delivered a separate judgment which was consistent with that of the joint majority on its central arguments. Powers J, for unknown reasons did not sit to hear the case⁹.

2.3. *Willingness to Depart from Existing Authorities*

Such a result was somewhat unexpected when contrasted with the original argument put forward by Robert Menzies, Counsel for the Union. His initial argument was to distinguish the application of the implied intergovernmental immunities doctrine on the basis that Western Australian employees were engaged in 'trading activities', rather than 'governmental activities'¹⁰. However, after Starke J asserted that this line of argument was 'a lot of nonsense', Menzies asserted that he could put forward a 'sensible argument' if allowed to challenge the previous line of authorities which had affirmed and applied the implied intergovernmental immunities doctrine¹¹. Menzies' 'sensible argument' was enthusiastically accepted and endorsed in the joint majority judgment, and in the majority judgment of Higgins J. In fact, the joint majority judgment in *Engineers* commences with criticism of previous decisions of the High Court which it claims are inconsistent and based on 'personal opinion'¹².

This is then justified by the joint majority in a somewhat self-satisfying manner when they state that it was their 'manifest duty' to give 'earnest attention' to the interpretation of the *Constitution* in order 'to give true effect to the relevant constitutional provisions'¹³, because this had not been done previously. The joint majority harshly criticised the previous line of federalist decisions, stating: 'The attempt to deduce any consistent rule from them has not only failed, but has disclosed an increasing entanglement and uncertainty, and a conflict both with the text of the *Constitution* and with distinct and clear declarations of law by the Privy Council'¹⁴.

Again, this highly critical approach was echoed by Higgins J in his separate majority judgment, stating at the beginning of his judgment, 'it is our duty to reconsider the subject, and to obey the *Constitution* and the Act rather than any decision of this Court, if the decision be shown to have been mistaken'¹⁵. The confidence in which these statements were made was arguably an attempt to mislead potential critics of the *Engineers* decision away from its activist nature by accusing previous justices of judicial activism when they upheld the federal nature of the *Constitution*. Further comment will be made in the following section about the arbitrariness of this literalist approach, despite its outward appearance of objectivity.

2.4. *A Literal, yet Expansive Approach*

The *Engineers* majority advocated a new method of constitutional interpretation from the previous line of decisions which is known as 'literalism'. The joint major-

ity stated that the words of the *Constitution* must be interpreted in their 'natural sense'¹⁶ and by utilising 'the ordinary lines of statutory construction'¹⁷. That is, the *Constitution* was to be interpreted as if it was a statute, with its words being given their literal and widest possible meaning. Quoting from the English authority of *Hodge v The Queen*¹⁸, the joint majority commented that grants of Commonwealth power should be construed as 'plenary' and 'ample... as the Imperial Parliament in the plenitude of its power possessed and could bestow'¹⁹. This method of interpretation was also adopted by Higgins J in his majority judgment:

The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result would be inconvenient or impolitic or improbable. Words limiting the power are not to be read into the statute if it can be construed without a limitation. [...] The Parliament is given a power here to make any law which, as it thinks, may conduce to the peace, order and good government of Australia on the subject of pl. xxxv., 'subject to this *Constitution*.' There is no limitation to the power in the words of the placitum; and unless the limitation can be found elsewhere in the *Constitution*, it does not exist at all²⁰.

Like Higgins J, the joint majority also noted that enumerated Commonwealth legislative powers were to be interpreted as extensively as possible unless they were limited by express provision in the *Constitution*. They stated:

It is undoubted that those who maintain the authority of the Commonwealth Parliament to pass a certain law should be able to point to some enumerated power containing the requisite authority. But we also hold that, where the affirmative terms of a stated power would justify an enactment, it rests upon those who rely on some lim-

itation or restriction upon the power, to indicate it in the *Constitution*²¹.

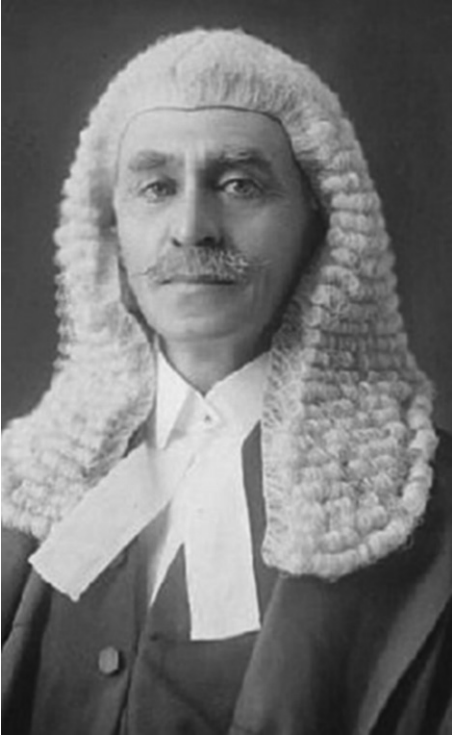
Higgins J also noted the lack of express limitation on the legislative powers of the Federal Parliament in the conciliation and arbitration placitum²², concluding that the Federal Parliament could bind the states unless the express wording of the *Constitution* excluded it:

My view is that, on the true construction of sec 51, the State activities which are not distinctly excluded from the Federal powers by the *Constitution* are subject to the Federal laws, to the full extent of their meaning; and that there is no exemption from Federal Acts unless and until they pass beyond the limits of the Federal powers on their true construction²³.

By characterising the conciliation and arbitration power generally and expansively, the majority sanctioned the enactment by the Federal Parliament of legislation that interfered with state government employers²⁴.

One of the many problems with this new, supposedly value-neutral, literal approach to interpretation adopted by the *Engineers* majority was that it failed to achieve objectivity. Gageler notes:

The difficulty is that a purely judge-based interpretation of the wording of constitutional powers and restraints is necessarily open to the same criticism as was employed in the *Engineers*' case to consign the old doctrines to oblivion. That is not to suggest that legalism is a mere cloak for blatantly political action. [...] It is simply to say that legalism is incapable of fulfilling its own agenda: that a neutrally based a priori approach to constitutional line drawing is in its own terms impossible and that the High Court's acknowledged readiness to depart from old doctrine where it considers it misconceived or inappropriate means that the choice between any number of reasonable alternative positions assumes an air of arbitrariness²⁵.



Sir Isaac Isaacs (1855-1948): Australian judge and politician, the third Chief Justice of the High Court, ninth Governor-General of Australia and the first born in Australia to occupy that post. He is the only person ever to have held both positions of Chief Justice of the High Court and Governor-General of Australia. (Photo from Wikipedia)

However, Craven has suggested that literalism is, to use Gagler's words, 'a mere cloak for blatantly political action'. He argues that the High Court is best viewed not as a legal institution, but as a political institution attempting to 'acquire and exercise power' in a 'calculated' manner²⁶. Thus, instead of fulfilling its intended role as a 'protector of federalism', the High Court has pursued its own 'progressivist', anti-federal, centralist agenda²⁷.

The mechanics of the expansive literal approach adopted by the *Engineers* majority

have been widely criticised by commentators such as Walker who noted that a 'literal meaning' means something very different from 'the widest literal meaning'²⁸ or 'the widest (that is, most centralist) meaning that the words can possibly bear'²⁹. In addition, as Walker explains, the Court disregarded the fact that a broad reading of one power may make another power 'redundant or meaningless'³⁰. Craven has also fiercely criticised the majority's literal approach in *Engineers* because it undermines the 'central character' of the *Constitution* as fundamentally federal, oversimplifying the *Constitution*, and ignoring the 'complex range of historic intentions' behind the document as fundamentally and incontrovertibly federal³¹. Instead, Craven (perhaps rather cynically) points out that: 'The essence of literalism is thus that the *Constitution* may be read in much the same way as a telephone directory or the instructions to a model aeroplane kit, with the assistance of a dictionary, but not much else'³².

2.5. Rejection of Implications Based on Federalism

In adopting a broad and general interpretation of Commonwealth powers, the joint majority also rejected any implications from the constitutional text, and accordingly rejected the previously recognised immunity of the states from the application of Commonwealth laws that were otherwise within power, and vice versa. The joint majority dismissed the relevance of looking at the federal intentions on which the *Constitution* was based, stating:

It is an interpretation of the *Constitution* depending on an implication which is formed on a vague, individual conception of the spirit of the compact, which is not the result of interpreting any specific language to be quoted, nor referable to any recognised principle of the common law of the *Constitution*, and which, when started, is rebuttable by an intention of exclusion equally not referable to any language of the instrument or acknowledged common law constitutional principle, but arrived at by the Court on the opinions of Judges as to hopes and expectations respecting vague external conditions³³.

They went on to state that: 'The doctrine of "implied prohibition" finds no place where the ordinary principles of construction are applied so as to discover in the actual terms of the instrument their expressed or necessarily implied meaning'³⁴. Thus, instead of viewing the *Constitution* as a federal document, with corresponding immunities of each level of government from interference with one another, the majority treated the *Constitution* as a British statute and regarded the relevant question to be whether the *Constitution* could bind the Crown. They concluded that the Crown, consisting of both the state and federal executive, was indivisible and was subject to the *Constitution*, meaning that the states were subject to Commonwealth laws:

The first step in the examination of the *Constitution* is to emphasise the primary legal axiom that the Crown is ubiquitous and indivisible in the King's dominions. Though the Crown is one and indivisible throughout the Empire, its legislative, executive and judicial power is exercisable by different agents in different localities [...] the Federal *Constitution* of Australia, being passed by the Imperial Parliament for the express purpose of regulating the royal exercise of legislative, executive and judicial power throughout Australia, is by its own inherent force binding on the Crown to the extent of its operation [...] The Commonwealth *Constitution* as it exists for the time being, dealing expressly with sovereign functions of the

Crown in its relation to Commonwealth and to States, necessarily so far binds the Crown, and laws validly made by authority of the *Constitution*, bind, so far as they purport to do so, the people of every State considered as individuals or as political organisms called States — in other words, bind both Crown and subjects³⁵.

According to the majority, limitations based on the federal nature of the *Constitution* were erroneously based on American authorities and the American federal system. Instead, they argued that English authorities, namely those of the Privy Council, should be followed. The joint majority stated:

American authorities, however illustrious the tribunals may be, are not a secure basis on which to build fundamentally with respect to our own *Constitution* [...] they cannot [...] be recognised as standards whereby to measure the respective rights of the Commonwealth and the States under the Australian *Constitution*. For the proper construction of the Australian *Constitution* it is essential to bear in mind two cardinal features of our political system which are interwoven in its texture and, notwithstanding considerable similarity of structural design, including the depositary of residual powers, radically distinguish it from the American *Constitution*. Pervading the instrument, they must be taken into account in determining the meaning of its language. One is the common sovereignty of all parts of the British Empire; the other is the principle of responsible government³⁶.

The English authorities advocated by the majority regarded parliamentary sovereignty as paramount to responsible government. This meant that it should be a political question for Parliament to determine the limits of its legislative power, rather than the Courts. Hence, parliamentary sovereignty gives a great deal of latitude to Parliament, without interference from the judiciary. Ratnapala notes that this notion of sovereignty supports centralism, defin-

ing 'constitutional sovereignty' as 'a limitlessly empowered supreme authority within a national legal system'³⁷. He further states that, 'The driving sentiment behind sovereignty in the constitutional sense is the belief that governments, particularly those responsible to the electorate, must not be restrained in the pursuit of the public good'³⁸. Ratnapala notes that the result of *Engineers* was a shift to this constitutional sovereignty model, even to the extent that the Commonwealth could 'extend itself to matters over which it has no express constitutional authority'³⁹.

It is interesting to note that although the majority rejected the reserved powers doctrine and implied intergovernmental immunities doctrines as unauthorised constitutional implications, they endorsed the British tradition of parliamentary sovereignty and the constitutional implication of responsible government. This selective approach has been criticised by Walker as contradictory⁴⁰. Further, Craven argues that if any implication must be elevated above all others, it must be one of federalism, to which all other concepts, such as responsible government, play a supporting role. In fact, in discussing the intended role of the High Court Craven argues that federalism is much more than a mere implication:

The positive and fundamental role of the High Court was to protect federalism. In this connection, it goes without saying that the *Constitution* itself breathes federalism, not merely implicitly, but expressly in its very terms. If one had to pick the 'great theme' of the *Constitution*, it could only be federalism, upon the broad stage of which all other concepts play their crucial but undeniably supporting roles. The critical function of the Court in relation to federalism was to maintain the Commonwealth and the States within their

respective spheres, and in particular to ensure that the Commonwealth kept within the ambit of its powers and did not invade the realms of the States⁴¹.

The approach of the *Engineers* joint majority is also problematic because, as noted above, the federal structure of Australia's system of government is obvious upon reading express provisions of the *Constitution*, and upon viewing the document as a whole. In fact, even Higgins J stated that a 'fundamental rule of interpretation' was 'that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole'⁴². Although Higgins J was referring to the language throughout the document, he acknowledged (albeit inadvertently) that the whole document was nevertheless relevant. The myopic view of the joint majority overlooked this, instead focusing on an expansive interpretation of individual words in the *Constitution*. They stated:

the legislative powers given to the Commonwealth Parliament are all prefaced with one general *express* limitation, namely, 'subject to this *Constitution*,' and consequently those words, which have to be applied *seriatim* to each placitum, require the Court to consider with respect to each separate placitum, over and beyond the general fundamental considerations applying to all the placita, whether there is anything in the *Constitution* which falls within the express limitation referred to in the governing words of sec. 51⁴³.

One of the flaws of this literalist approach is that it fails to take into account the method of interpretation to be applied in the event of ambiguity in wording, and does not take into account how to interpret provisions that require historical background

to be understood, such as the meaning of 'duties of customs and excise' in s 90⁴⁴.

2.6. *The Elevation of s 109*

As well as being selective about what could be implied from the *Constitution* and what could not, the joint majority was selective about how to read the specific federal provisions of the *Constitution*. They read down s 107 (which, as noted earlier in this paper, saved state powers after federation), and elevated s 109 (which seeks to resolve inconsistency between overlapping state and Commonwealth legislation by stating that the Commonwealth legislation will prevail to the extent of any inconsistency) as paramount in demonstrating the Commonwealth's supremacy over the states. The joint majority stated:

Sec. 107 continues the previously existing powers of every State Parliament to legislate with respect to (1) State exclusive powers and (2) State powers which are concurrent with Commonwealth powers. But it is a fundamental and fatal error to read sec. 107 as reserving any power from the Commonwealth that falls fairly within the explicit terms of an express grant in sec. 51, as that grant is reasonably construed, unless that reservation is as explicitly stated⁴⁵.

The joint majority continued on to discuss 'the supremacy [...] established by express words of the *Constitution*'⁴⁶, or rather s 109 specifically, which they declared illustrated Commonwealth supremacy:

That section, which says 'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid,' gives supremacy, not to any particular class of Com-

monwealth Acts but to *every* Commonwealth Act, over not merely State Acts passed under concurrent powers but *all* State Acts, though passed under an exclusive power, if any provisions of the two conflict; as they may — if they do not, then *cadit quaestio*⁴⁷.

They said that s 109 could be used to justify some of the previous decisions, concerning taxation laws, where the implied immunity of instrumentalities doctrine has been applied⁴⁸. However, as is commonplace throughout this decision, little reasoning or justification is given for the elevation of s 109, contrary to early High Court authorities which regarded s 107 as the more crucial provision.

The *Engineers* majority irreparably altered the federal balance by rejecting any implication from the Constitutional text; eliminating the doctrine of immunity of instrumentalities and with it, the reserved powers doctrine, whilst at the same time expressly proclaiming the 'supremacy' of the Commonwealth over the states. Instead of the Commonwealth and the states being recognised as independent and autonomous in their own spheres, the *Engineers* majority endorsed Commonwealth interference in state matters, thus jeopardising their sovereignty as provided by the federal nature of the *Constitution*⁴⁹.

2.7. *The Dissenting Judgment*

Gavan Duffy J was alone in dissent, and his dissent is very far from a valiant attempt to save the federal balance from its future demise. Discussion of Gavan Duffy J's dissent is largely omitted from academic commentary on the *Engineers* decision. This is per-

haps because it is inherently weak in terms of its failure to address the matters raised in the majority judgments and its failure to consider and address thoroughly the earlier line of cases that the High Court was being asked to reconsider. This point is noted by Booker and Glass, who also comment that ‘Gavan Duffy J’s dissent has been forgotten and for good reason’⁵⁰.

Gavan Duffy J commented on the importance of the states in the federal compact and the intent of the framers of the *Constitution*:

The existence of the States as a polity is as essential to the *Constitution* as the existence of the Commonwealth. The fundamental conception of the Federation as set out in the *Constitution* is that the people of Australia, who had theretofore existed in several distinct communities under distinct polities, should thenceforward unite for certain specific purposes in one Federal Commonwealth, but for all other purposes should remain precisely as they had been before Federation⁵¹.

He also remarked upon the operation of ss 106 and 107, which he noted evidenced the intention of the colonies⁵² prior to federation to preserve state sovereignty after federation had occurred:

secs. 106 and 107 preserve the *Constitution* of each State as it existed at the establishment of the Commonwealth, and every power of a State Parliament unless it is by the *Constitution* exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State. In this case it is not disputed that the industrial operations conducted by the Crown in Western Australia are within the *Constitution* of that State. They are authorised under its legislative power and conducted under its executive power, and therefore free from the authority conferred upon the Federal Parliament by sec. 51⁵³.

However, these comments were made in the context of Gavan Duffy J’s argument that any laws made by the Federal Parliament were required by the *Constitution* to be ‘subject to this *Constitution*’⁵⁴. As a result, the question for Gavan Duffy J then became whether a law made pursuant to s 51 could bind the Western Australian Crown. This reasoning was premised on the common law rule that the Crown was not bound by a statute unless the statute itself purported to bind the Crown — so like the majority, Gavan Duffy J treated the *Constitution* as if it was a British statute. He concluded that as s 51 (xxxv) was not expressed to bind the Crown it did not bind the Western Australian government Crown.

3. Engineers: A Radical Departure From Precedent

In the words of Geoffrey de Q Walker, the *Engineers* decision ‘switched the entire enterprise of Australian federalism onto a diverging track that carried it to destinations far removed from those intended by the generation that had brought the federation into being’⁵⁵. In order to examine why this may have occurred, and why the High Court was so willing in *Engineers* to deviate from precedent, this section will discuss the role of precedent, specifically, *stare decisis*, in the High Court. It will also seek to examine why the High Court was so readily able to part with it in *Engineers*, yet felt so bound to follow *Engineers* in subsequent cases. In fact, some commentators have suggested that the way *Engineers* treated precedent is nothing short of alarming and was therefore tantamount to judicial

activism. Geoffrey de Q Walker, quoting Dr Colin Hughes, notes, 'After nearly twenty years' experience the ruling criterion for the construction of the *Constitution* was rejected and a new one put in its place'⁵⁶. He also notes that despite the fact that the dismissal of the reserved powers doctrine was obiter dicta, and never formally overruled, its dismissal has subsequently been taken as binding precedent⁵⁷.

The starting point of this discussion should be to define the terms 'precedent' and '*stare decisis*'. The terms are often used interchangeably. However, sometimes 'precedent' is defined in a broader sense, for example, as 'a broad class of practices employed in rendering judicial decisions'⁵⁸. At a general level, Duxbury notes that: 'A precedent is a past event — in law the event is nearly always a decision — which serves as a guide for present action'⁵⁹. Precedent requires that the '*ratio decidendi*' from prior cases of the same or higher courts must be followed to ensure consistency, and some degree of predictability in judicial decision-making⁶⁰. '*Ratio decidendi*' means the 'reason for deciding'⁶¹. This does not refer to all of the Judge's reasoning, some of which could be incidental to the outcome or not directly related to the facts in issue. This reasoning is known as 'obiter dicta', which translates as 'saying by the way'⁶².

The doctrine of precedent and *stare decisis* originated in medieval England⁶³ and was developed further during the eighteenth century, when William Blackstone stated, 'it is an established rule to abide by former precedents, where the same points come again in litigation', and in the nineteenth century⁶⁴. In an American context, its importance was even noted by Alexan-

der Hamilton in *Federalist Paper* number 78⁶⁵.

The term '*stare decisis*' refers to the binding nature of precedent. That is, where a legal rule has been applied in a particular way in a previous decision, it must be applied again if the same issues come before the court again⁶⁶. It provides that a court should follow prior decisions, except in exceptional circumstances⁶⁷. Despite this, a departure from precedent can be readily found in constitutional cases⁶⁸, perhaps due to the High Court's primary role as the guardian of the *Constitution* and the lack of any direction in the *Constitution* as to how they must interpret it⁶⁹. In addition, the High Court has held that it is not bound by its own previous decisions⁷⁰ but nevertheless should be reluctant to overturn them. As an example of this reluctance, Moens and Trone cite *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* where the High Court refused to reconsider two prior decisions because government had acted in reliance on them, to maintain certainty, and because they had been applied by the High Court in numerous preceding decisions⁷¹.

In contrast, as Kirby points out, there is a willingness on the part of some High Court Justices to overrule past decisions because, in their opinion, they are, to use the words from High Court judgments that have done so, 'manifestly wrong', 'fundamentally wrong' or 'plainly erroneous'⁷². As we saw in the discussion of *Engineers* above, the majority and joint majority made statements like these. For example, Higgins J stated: 'I fully accept the view that it is fitting *stare decisis* unless the decision, to our minds, is manifestly wrong'⁷³. The joint majority provided another justifica-

tion for overruling the implied intergovernmental immunities and reserved powers doctrines, asserting that, 'the utmost confusion and uncertainty exist as the decisions now stand'⁷⁴.

However, as Boeddu and Haigh suggest, the very nature of constitutional decision-making, including the very serious effects of overturning precedent, and the fact that a decision of the High Court cannot be overruled or corrected by Parliament, suggest that Justices in constitutional cases should be reluctant to overrule previous constitutional precedent⁷⁵. In this context, the decision in *Engineers* can be seen as somewhat radical and activist in nature because it was a complete reversal from precedent.

The 'diametrically opposed approaches' in the attitude of the High Court to the issue of overruling precedent are also highlighted by Moens and Trone⁷⁶. Moens and Trone cite Gibbs J in *Queensland v Commonwealth*, who espoused a cautious approach to overruling precedent:

No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court [...] It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his own opinion in preference to an earlier decision of the Court⁷⁷.

In contrast, Moens and Trone cite Isaacs J in *Australian Agricultural Co Ltd v Federated Engine Drivers and Firemen's Association of Australasia*, as an example of the readiness of some Justices to depart from established precedent:

Our sworn loyalty is to the law itself, and to the organic law of the *Constitution* first of all. If, then, we find the law to be plainly in conflict with what we or any of our predecessors erroneously thought it to be, we have, as I conceive, no right to choose between giving effect to the law, and maintaining an incorrect interpretation. It is not, in my opinion, better that the Court should be persistently wrong than it should be ultimately right⁷⁸.

Given Isaacs J's leading role in the fundamental departure from precedent in the majority's decision in *Engineers*, these comments are quite appropriate and show a marked determination to pursue his own interpretive agenda. Perhaps these comments can be attributable to the fact that the doctrine of *stare decisis* is a 'self imposed legal duty'⁷⁹ that is viewed as a policy or guideline⁸⁰, rather than a binding interpretive method.

In fact, Craven has openly accused the High Court of deliberately pursuing a centralist agenda, and in fact, of a 'centralist revolution' by its furtherance of *Engineers*-inspired literalism⁸¹. Craven suggests that the easiest way to make sense of the demise of the federal balance is to view the High Court as a political, rather than an impartial institution. It was perhaps the self-assuredness of the correctness of the majority judgments in *Engineers*, and the fact that Isaacs and Higgins JJ remained on the bench until 1931 and 1929 respectively (some eleven and nine years after *Engineers*), that they were able to consolidate their centralist agenda, helping to ensure that *Engineers* became binding precedent, and not simply a mistaken departure from established precedent that would have been corrected in subsequent decisions.

The increased centralist agenda of the High Court may also have been encouraged

by changing social and political conditions and their own growing sense of nationalism after the First World War⁸². To expand on the possible motivations for this centralist agenda, Walker's comments about the possible sources of centralist ideology are relevant. Walker stated the first of these to be the anti-federalist writings from communists such as Marx, Lenin and Harold Laski. According to Walker, Marx, who disapproved of federal constitutions and approved of large unitary governments, became well-regarded in 'Australian intellectual circles'⁸³. Secondly, Walker noted the importance of the work of A V Dicey who advocated the plenary power of the unitary British Parliament and was a 'violent opponent of federalism'⁸⁴. He stated that Dicey's 'anti-federalist message was taught to generations of Australian law students with no pro-federalist material to balance it'⁸⁵. Walker noted that this was coupled with Australia being allied with Britain in the First World War, whose government was presented as the 'ideal'⁸⁶. Thirdly, with the effect of the world becoming 'smaller' due to the advent of new technologies and globalisation, there was a growing perception that power could be more efficiently concentrated in a centralised government⁸⁷.

4. Conclusion

Whatever the reasons behind the centralist agenda of the High Court in *Engineers*, it became binding precedent from which Justices in subsequent judgments were unwilling to depart. Subsequently, *Engineers* provided the justification for the pursuit of a centralist agenda that has continued up until the present time. In fact, Craven has described the success of the Commonwealth in these decisions as one which 'must rival any win-loss ratio in the history of either professional sport or dubious umpiring'⁸⁸. These 'legal triumphs' include the expansion of Commonwealth financial powers through a broad definition of duties of excise and the expansion of Commonwealth legislative powers such as the corporations power and the external affairs power. The High Court's interpretation of the *Constitution*, post-*Engineers*, has resulted in the federal balance of power between the Commonwealth and the states being displaced to such an extent that Australia's system of government can no longer be described as truly federal.

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

² G. Craven, *The High Court of Australia: A Study in the Abuse of Power*, in «University of New South Wales Law Journal», vol. 22, 1999, p. 222.

³ For an overview of the evolution of federalism in Australia, the centralisation of legislative

powers and vertical fiscal imbalance, see A. Fenna, *Australian Public Policy* (2nd ed.), Pearson Longman, 2004, pp. 171-175.

⁴ The first case to recognise Commonwealth immunity from state legislation was *D'Emden v Pedder* (1904) 1 CLR 91 and the first case to recognise state immunity from Commonwealth

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

⁵ See, for example, *Peterswald v Bartley* ('*Peterswald*') (1904) 1 CLR 497; *R and the Minister of State for the Commonwealth Administering the Customs v Barger*;

- The Commonwealth and AW Smart, Collector of Customs v McKay* ('R v Barger') (1908) 6 CLR 41; and *Huddart, Parker & Co v Moorehead* ('Huddart') (1909) 8 CLR 330.
- ⁶ G. Sawer, *Australian Federalism in the Courts*, Melbourne, Melbourne University Press, 1967, p. 130.
- ⁷ A recent example of the centralist ramifications of *Engineers* was *Work Choices* (2006) 229 CLR 1 where the majority used an *Engineers* based literalist approach.
- ⁸ This section provided that if a case involved matters arising from the constitution or involving its interpretation it could be remitted to the High Court for consideration.
- ⁹ J. Douglas, *Sir Charles Powers: His Contribution to the High Court*. Paper presented at the Supreme Court of Queensland Library Conference, 29 March 2003, p. 16, at <http://archive.sclqld.org.au/judgepub/2007/douglas290403.pdf>.
- ¹⁰ Sawer, *Australian Federalism in the Courts* cit., p. 129.
- ¹¹ K. Booker and A. Glass, *The Engineers Case*, in H.P. Lee and G. Winterton (edited by), *Australian Constitutional Landmarks*, Cambridge, Cambridge University Press, 2003, p. 34 and p. 39.
- ¹² *Engineers* (1920) 28 CLR 129, pp. 141-142, per Knox CJ, Isaacs, Rich and Starke JJ.
- ¹³ Ivi.
- ¹⁴ Ivi.
- ¹⁵ *Engineers* (1920) 28 CLR 129, 161, per Higgins J.
- ¹⁶ *Engineers* (1920) 28 CLR 129, 149, per Knox CJ, Isaacs, Rich and Starke JJ.
- ¹⁷ Ivi.
- ¹⁸ *Hodge v The Queen* 9 App. Cas. 117.
- ¹⁹ *Hodge v The Queen* 9 App. Cas. 117, p. 132 cited in *Engineers* (1920) 28 CLR 129, p. 153, per Knox CJ, Isaacs, Rich and Starke JJ.
- ²⁰ *Engineers* (1920) 28 CLR 129, 162, per Higgins J.
- ²¹ *Engineers* (1920) 28 CLR 129, 154, per Knox CJ, Isaacs, Rich and Starke JJ.
- ²² *Engineers* (1920) 28 CLR 129, pp. 162-163, per Higgins J.
- ²³ *Engineers* (1920) 28 CLR 129, p. 171, per Higgins J.
- ²⁴ *Engineers* (1920) 28 CLR 129, p. 154, per Knox CJ, Isaacs, Rich and Starke JJ.
- ²⁵ S. Gageler, *Foundations of Australian Federalism and the Role of Judicial Review*, in «Federal Law Review», vol. 17, 1987, p. 178.
- ²⁶ Ivi, pp. 219-220.
- ²⁷ Ivi, p. 222.
- ²⁸ G. de Q Walker, *The Seven Pillars of Centralism: Federalism and the Engineers' Case*, in «The Australian Law Journal», vol. 76, 2002, p. 684.
- ²⁹ Ivi, p. 688.
- ³⁰ Ivi, p. 689.
- ³¹ G. Craven, *The Engineers Case: Time for a Change?* Paper presented at the Eighth Conference of the Samuel Griffith Society, University House, Canberra, 7-9 March 1997, pp. 75-79.
- ³² Ivi, p. 76.
- ³³ *Engineers* (1920) 28 CLR 129, p. 145, per Knox CJ, Isaacs, Rich and Starke JJ.
- ³⁴ Ivi, p. 155.
- ³⁵ Ivi, p. 153.
- ³⁶ *Engineers* (1920) 28 CLR 129, p. 146, per Knox CJ, Isaacs, Rich and Starke JJ.
- ³⁷ S. Ratnapala, *Government Under the Law: The Ebb and Flow of Sovereignty in Australia*, in «University of New South Wales Law Journal», vol. 24, n. 3, 2001, p. 670.
- ³⁸ Ivi, p. 670.
- ³⁹ Ivi, p. 674.
- ⁴⁰ Walker, *The Seven Pillars of Centralism: Federalism and the Engineers' Case* cit., p. 691.
- ⁴¹ Craven, *The High Court: A Study in the Abuse of Power* cit., p. 221.
- ⁴² *Engineers* (1920) 28 CLR 129, pp. 161-162, per Higgins J.
- ⁴³ Ivi, p. 144, per Knox CJ, Isaacs, Rich and Starke JJ.
- ⁴⁴ Craven, *The Engineers Case: Time for a Change?* cit., pp. 86-91.
- ⁴⁵ *Engineers* (1920) 28 CLR 129, p. 155, per Knox CJ, Isaacs, Rich and Starke JJ.
- ⁴⁶ Ivi, pp. 154-155.
- ⁴⁷ Ivi, p. 155.
- ⁴⁸ Ivi, p. 154.
- ⁴⁹ Ivi, p. 155.
- ⁵⁰ K. Booker and A. Glass, *The Engineers Case* in Lee and Winterton (edited by), *Australian Constitutional Landmarks* cit., p. 41.
- ⁵¹ *Engineers* (1920) 28 CLR 129, p. 174, per Gavan Duffy J.
- ⁵² Prior to federation, the states were known as 'colonies'.
- ⁵³ *Engineers* (1920) 28 CLR 129, p. 174, per Gavan Duffy J.
- ⁵⁴ Ivi, pp. 173-174, per Gavan Duffy J.
- ⁵⁵ Walker, *The Seven Pillars of Centralism: Federalism and the Engineers' Case* cit., p. 678.
- ⁵⁶ Ivi, p. 682 (no source cited for Dr Hughes).
- ⁵⁷ Ivi, p. 682.
- ⁵⁸ L.A. Kornhauser, *An Economic Perspective on Stare Decisis*, in «Chicago-Kent Law Review», vol. 65, 1989, p. 66.
- ⁵⁹ N. Duxbury, *The Nature and Authority of Precedent*, Cambridge, Cambridge University Press, 2008, p. 1.
- ⁶⁰ M. Kirby, *Precedent Law, Practice and Trends in Australia*, in «Australian Bar Review», vol. 28, 2007, pp. 243 and 245.
- ⁶¹ P. Butt (edited by), *Butterworths Concise Australian Legal Dictionary* (3rd ed.), Sydney, LexisNexis Butterworths, 2004, p. 363.
- ⁶² Duxbury, *The Nature and Authority of Precedent* cit., pp. 67-68.
- ⁶³ M-F. Kuo and K. Wang, *When is an Innovation in Order?: Justice Bader Ruth Ginsberg and Stare Decisis*, in «University of Hawai'i Law Review», vol. 20, 1998, p. 839.
- ⁶⁴ R. Barnhart, *Principled Pragmatic Stare Decisis in Constitutional Cases*, in «Notre Dame Law Review», vol. 80, 2005, p. 1912. For a discussion of the development of the doctrine of precedent in the eighteenth and nineteenth century, see J. Evans, *Change in the Doctrine of*

- Precedent During the Nineteenth Century*, in L. Goldstein (edited by), *Precedent in Law*, Oxford, Clarendon Press, 1987, p. 35.
- ⁶⁵ Kuo and Wang, *When is an Innovation in Order?: Justice Bader Ruth Ginsberg and Stare Decisis* cit., p. 839.
- ⁶⁶ Duxbury, *The Nature and Authority of Precedent* cit., p. 12.
- ⁶⁷ The full latin maxim has been translated as, 'stare decisis et non quieta movere' translated as 'stand by the thing decided and do not disturb the calm': See G. Boeddu and R. Haigh, *Terms of Convenience: Examining Constitutional Overrulings by the High Court*, in «Federal Law Review», vol. 31, 2003, p. 167. Duxbury translates the maxim as, 'abide by earlier decisions and do not disturb settled points': Duxbury, *The Nature and Authority of Precedent* cit., p. 12.
- ⁶⁸ R.C. Springall, *Stare Decisis as Applied by the High Court to its Previous Decisions*, in «Federal Law Review», vol. 9, 1978, pp. 488-489.
- ⁶⁹ Kirby, *Precedent Law, Practice and Trends in Australia* cit., p. 247.
- ⁷⁰ *Nguyen v Nguyen* (1990) 169 CLR 245, 269 cited in G.A. Moens and J. Trone, *Lumb and Moens' The Constitution of the Commonwealth of Australia Annotated* (7th ed.), Sydney, LexisNexis Butterworths, 2007, p. 34.
- ⁷¹ *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* ('*Capital Duplicators*') (1993) 178 CLR 561, pp. 592-593, cited in Moens and Trone, *Lumb and Moens' The Constitution of the Commonwealth of Australia Annotated* cit., p. 34.
- ⁷² M. Kirby, *Precedent Law, Practice and Trends in Australia*, in «Australian Bar Review», vol. 28, 2007, p. 247. See also Springall, *Stare Decisis as Applied by the High Court in its Previous Decisions* cit., p. 483.
- ⁷³ *Engineers* (1920) 28 CLR 129, p. 170, per Higgins J.
- ⁷⁴ *Engineers* (1920) 28 CLR 129, p. 159, per Knox CJ, Isaacs, Rich, Starke JJ.
- ⁷⁵ Boeddu and Haigh, *Terms of Convenience: Examining Constitutional Overrulings by the High Court* cit., pp. 167-168.
- ⁷⁶ Moens and Trone, *Lumb and Moens' The Constitution of the Commonwealth of Australia Annotated* cit., p. 28.
- ⁷⁷ *Queensland v Commonwealth* (1977) 139 CLR 585, p. 599, per Gibbs J, cited in Moens and Trone, *Lumb and Moens' The Constitution of the Commonwealth of Australia Annotated* cit., p. 28.
- ⁷⁸ *Australian Agricultural Co Ltd v Federated Engine Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261, p. 278, per Isaacs J, cited in Moens and Trone, *Lumb and Moens' The Constitution of the Commonwealth of Australia Annotated* cit., p. 28.
- ⁷⁹ J. Hardisty, *Reflections on Stare Decisis*, in «Indiana Law Journal», vol. 55, 1979, p. 48.
- ⁸⁰ M.S. Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, in «North Carolina Law Review», vol. 86, 2008, p. 1170.
- ⁸¹ G. Craven, *The High Court of Australia: A Study in the Abuse of Power*, in «University of New South Wales Law Journal», vol. 22, n.1, 1999, p. 223.
- ⁸² J. Goldsworthy, *Justice Windeyer on the Engineers' Case*, in «Federal Law Review», vol. 37, 2009, pp. 363-365; H. Patapan, *Politics of Interpretation*, in «Sydney Law Review», vol. 2, 2000, p. 253.
- ⁸³ Walker, *The Seven Pillars of Centralism: Federalism and the Engineers' Case* cit., p. 684.
- ⁸⁴ Ivi, p. 685.
- ⁸⁵ Ivi.
- ⁸⁶ Ivi.
- ⁸⁷ Ivi.
- ⁸⁸ G. Craven, *Conversations with the Constitution: Not Just a Piece of Paper*, Sydney, University of New South Wales Press, 2004, p. 78.