AUSTRALIA

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I. OVERVIEW

The Australian federation comprises a national or Commonwealth government and six States. Australia also has three self-governing territories and several dependent territories. The self-governing territories are often treated in the same way as the States for practical purposes but they do not have the same measure of constitutional autonomy as the States and will not be dealt with further in this report. The Commonwealth Constitution enumerates 40 legislative powers that are assigned to the Commonwealth, primarily in section 51. Unless a Commonwealth power is exclusive, expressly or by necessary implication,[1] the States retain concurrent power in these areas. In the event of inconsistency between Commonwealth and State law, the former prevails, under section 109 of the Constitution.

The High Court of Australia sits at the apex of the Australian judiciary as the final appellate court in both federal and State jurisdiction. The Court also interprets and applies the Commonwealth Constitution, both in its original jurisdiction and on appeal from other courts. The High Court's interpretative method has changed significantly over time, with implications for the federal division of power. For two decades from the time of federation in 1901, two interpretative techniques tended to favour State over Commonwealth power. The doctrine of implied immunity of instrumentalities proceeded on the assumption that the Commonwealth and States generally were immune from each other's laws.[2] In resolving ambiguities in the meaning and scope of Commonwealth powers, the doctrine of reserved State powers drew on an assumption that the Constitution reserved to the States all powers not expressly conferred on the Commonwealth.[3]

The *Engineers' Case*[4] marked the end of this phase of judicial federalism. The High Court overturned previous authority and held that the Constitution should be interpreted literally, without preconceived notions about federalism or reserved State powers. In conjunction with an interpretive principle associated with Justice O'Connor in *Jumbunna*,[5] that the words of a Constitution should be interpreted broadly, this literal and generous approach to constitutional interpretation has produced a progressive expansion of Commonwealth legislative power. The High Court now gives full effect to the literal terms of the enumerated heads of Commonwealth power. Attempts to limit their scope in the interests of federal "balance" typically are rejected - with rhetorical flourish - as invoking the discredited reserved powers doctrine.[6]

Despite this prevalent trend, conceptions of federalism retain some influence at the margin. Although the *Engineers' Case* repudiated reliance on implications drawn from federalism, by 1947 earlier hints[7] that there might after all be implied limitations on Commonwealth powers crystallized. In *Melbourne Corporation*,[8] the Court held that the Commonwealth cannot use its power to discriminate against a State

[1] Australian Constitution, ss 52, 90, 114.
[2] The most cited case for this is *D'Emden v Pedder* (1904) 1 CLR 91.
[3] See, e.g., *R. v. Barger* (1908) 6 CLR 41; *Huddart Parker & Co Pty Ltd v. Moorehead* (1909) 8 CLR 330.
[4] *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd* (1920) 28 CLR 129 ('*Engineers' Case*').
[5] *Jumbunna Coal Mine NL v. Victorian Coal Miners' Association* (1908) 6 CLR 309.
[6] See, e.g., *Commonwealth v. Tasmania* (1983) 158 CLR 1 ('Tasmanian Dam Case'). The most recent example of the High Court's categorical rejection of federalism arguments as a potential restriction on Commonwealth power is the 'Workchoices' decision: see NSW v. the Commonwealth (2006) 229 CLR 1.
[7] *West v. Commissioner of Taxation (NSW)* (1937) 56 CLR 657; *Federal Commissioner of Taxation v. Official Liquidator of EO Farley Ltd* (1940) 63 CLR 278.
[8] *Melbourne Corporation v. Commonwealth* (1947) 74 CLR 31.

or States or to threaten the continued existence of the States or their capacity to function. The principle has occasionally been applied to invalidate Commonwealth law, most recently in 2009.[9]

II. The Federal Distribution and Exercise of Lawmaking Power

1. *Central Legislative Jurisdiction Section 51 Confers the Following, Largely Concurrent Powers on the Commonwealth*

- (i) trade and commerce with other countries, and among the States
- (ii) taxation
- (iii) bounties
- (iv) borrowing money on the public credit of the Commonwealth
- (v) postal, telegraphic, telephonic and other like services, including telecommunications
- (vi) defence
- (vii) lighthouses
- (viii) astronomy and meteorology
- (ix) quarantine
- (x) fisheries beyond territorial limits
- (xi) census and statistics
- (xii) currency
- (xiii) banking other than State banking
- (xiv) insurance other than State insurance
- (xv) weights and measures
- (xvi) bills of exchange and promissory notes
- (xvii) bankruptcy and insolvency
- (xviii) intellectual property
- (xix) naturalisation and aliens
- (xx) foreign corporations and trading or financial corporations formed within the limits of the Commonwealth (It has been held that this power does not enable the Commonwealth to form corporations.)
- (xxi) marriage
- (xxii) divorce
- (xxiii) invalid and old-age pensions
- (xxiiiA) various social security allowances and benefits
- (xxiv) service and execution of process
- (xxv) recognition of laws throughout Australia
- (xxvi) the people of any race for whom it is deemed necessary to make special laws
- (xxvii) immigration and emigration
- (xxviii) influx of criminals
- (xxix) external affairs
- (xxx) relations with Pacific islands
- (xxxi) acquisition of property on just terms for any purpose in respect of which the Parliament has power to make laws
- (xxxii) railways for military purpose
- (xxxiii) acquisition of railways, with State consent
- (xxxiv) railway construction, with State consent
- (xxxv) conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limit of any one State

[9] *Queensland Electricity Commission v. Commonwealth* (1985) 159 CLR 192; *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188; *Victoria v. Commonwealth* (1996) 187 CLR 416 (‘*Industrial Relations Act Case*’); *Austin v. Commonwealth* (2003) 215 CLR 185; Clarke v Commissioner of Taxation (2009) 240 CLR 272.

- (xxxvi) matters where the Constitution states 'until the Parliament otherwise provides', for example, in respect of the electoral system and the qualifications of Members of Parliament.
- (xxxvii) matters referred by the Parliaments of the States
- (xxxviii) exercise of power that the United Kingdom could have exercised in 1901, on the request of the States
- (xxxix) matters incidental to the execution of any power vested by the Constitution in the Parliament, the government or the judiciary.

Section 52 confers exclusive power on the Commonwealth over:

- (i) choosing the seat of government
- (ii) matters relating to the public service
- (iii) other matters declared to be within the exclusive power of the Parliament. This includes imposition of customs and excise duties and bounties[10] and the raising of military forces.

The Commonwealth also has a spending power, the precise scope of which is unclear[11] and may also make grants to States 'on such terms and conditions as the Parliament thinks fit'.[12]

The powers in section 52 are expressed to be exclusive to the Commonwealth, as is the power to impose customs and excise duties and bounties.[13] Most of the powers specified in section 51 are concurrent, but some are exclusive to the central government in practice. Section 114 precludes the States from raising or maintaining a military force and thus effectively makes the defence power exclusive. Section 115 does the same for the power over currency, by prohibiting the States from coining money. Other powers are inherently available only to the Commonwealth. Borrowing on the public credit of the Commonwealth is an example.

The most important and frequently used constitutionally-specified sources authorizing central government regulation are taxation (section 51(ii)), corporations power (section 51(xx)), and external affairs (section 51(xxix)).

In practice, anything falling within the specified heads of power in section 51 is an important area of central government regulation. Of particular importance are the areas of competition law, consumer protection, corporations and securities regulation, intellectual property, most aspects of social security, higher education, immigration, maritime law, broadcasting and telecommunications, aviation, bankruptcy, banking, marriage, superannuation, the postal service, and indigenous affairs.

2. *State Legislative Jurisdiction*

The Constitution does not expressly allocate any legislative jurisdiction to the States, but provides that their pre-federation legislative powers continue subject to the provisions of the Commonwealth Constitution.[14] Thus the States have any power that is not expressly withdrawn from them, exclusively vested in the Commonwealth, or which the Commonwealth does not validly exercise (in a manner that excludes State power under section 109). In general, most areas of power allocated to the Commonwealth

[10] Australian Constitution s 90.
[11] *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1
[12] Australian Constitution s 96.
[13] Australian Constitution s 90.
[14] Australian Constitution s 107.

are concurrent powers. Notably, however, the areas of 'state banking' and 'state insurance' are reserved to the States as explicit exceptions from the powers conferred on the Commonwealth.

In the event of inconsistency between the two laws, the exercise of central concurrent power renders the State law invalid. Conflicts between central and component state laws are resolved under the principle of supremacy of federal law.[15]

In practice, the most important areas of predominant State regulation are in education, health, housing, transport, workplace accidents, civil (e.g., tort, contract, property) and criminal law, agriculture, municipal law, and water law. The most important areas in which central and component State regulation co-exist are consumer protection, industrial relations, anti-discrimination, human rights, and the environment.

The municipalities do not have significant law-making power. Their principal powers are garbage collection, some local planning, parks, gardens, and roads.

III. THE MEANS AND METHODS OF LEGAL UNIFICATION

1. *Unification and harmonization through the exercise of central power (top down)*

There are a few constitutional norms, which in varying degrees apply to both Commonwealth and State legislation, and which may have a harmonizing effect. An implied freedom of political communication has led to some harmonization of laws, particularly with respect to defamation. Limitations derived from Chapter III of the Constitution regarding the separation of powers require States to have a Supreme.

Court with supervisory jurisdiction in the State sphere and preclude the States from enacting legislation that would impair the integrity of the State court systems. Section 92 of the Constitution also requires the freedom of interstate trade and commerce and precludes both spheres of government from enacting legislation that infringes that express freedom, as interpreted by the courts.

Commonwealth legislation typically involves unification, as it generally applies equally to all States and renders inconsistent State law invalid. While the Commonwealth has never mandated that the States pass conforming implementing legislation and could not constitutionally do so it may induce the States to regulate by conditioning central funding on compliance with central standards. This is an important means of legal unification or harmonization, since the Commonwealth has very substantial capacity to induce states to regulate pursuant to the grants power,[16] which allows the central government to give financial grants to any State on such conditions as it sees fit. Using this power, the Commonwealth effectively took over tertiary education and has achieved a degree of harmonization of school curricula. It should be noted that in some instances the imposition of conditions on financial grants from the Commonwealth is related to a set of agreed principles or criteria developed in consultation with the states. For example, provision of financial assistance by the Commonwealth to the States is made conditional upon progress in the implementation of the National Competition Policy- a policy developed by way of inter-governmental agreement under the auspices of the Council of Australian Governments (COAG).[17]

Occasionally, the Commonwealth will indirectly force the States to regulate by threatening to take over the field in the face of state inaction or state action that does not conform to the Commonwealth's standards. This happened, for example, in the field of environmental protection. Another example is in the

[15] Australian Constitution s 109.
[16] Australian Constitution s 96.
[17] Agreement to Implement the National Competition Policy and Related Reforms, 11 April 1995.

field of defamation, where, following a number of unsuccessful attempts at establishing uniform law, the then federal Attorney-General threatened in 2004 to introduce a national defamation law if the states were unable to agree on a set of uniform laws. Ultimately, in 2005 each state enacted uniform defamation legislation effective from 1 January 2006. Most recently, the Commonwealth government has threatened to take over State health systems if the States do not deal with some of the more obvious problems themselves. This example, however, deals more with forcing states to administer services to a specified standard rather than forcing them to regulate.

The judicial branch plays a substantial role in creating unified norms. The High Court is the final appellate court for all Australian jurisdictions, and since High Court rulings bind all state judiciaries, there is only one common law in Australia. For example, in a case on appeal from the New South Wales Supreme Court, the High Court abandoned the 'proximity' test for determining a duty of care in the tort of negligence, adopting a 'salient features' approach. As a result, all jurisdictions in Australia have followed suit.

2. *Unification through voluntary coordination among the states (bottom up)*

A considerable amount of uniformity and harmonization occurs in the Australian federation through voluntary co-ordination between States. For example, in 1993 the six states and two territories entered into the Australian Uniform Credit Laws Agreement, in which they acknowledged that it is in the interests of the public for laws regulating the provision of consumer credit to be uniform. Accordingly, they agreed to establish and implement a co-operative scheme, the objects of which are to ensure that "the legislation relating to the Scheme is, and continues to be, either uniform throughout Australia; or in any State or Territory where it is not uniform, consistent with the uniform laws". Accordingly, 'template' legislation was passed in Queensland in 1995,[18] and all other states and territories have passed enabling legislation which adopts the template legislation and applies it in the State or Territory 'as in force from time to time'. It should be noted, however, that more often than not the Commonwealth also is involved in such co-operative models of regulation.

It may be noted that the Commonwealth Constitution also provides a "reference" power,[19] which gives the Commonwealth Parliament power to legislate on any matter referred to it by a State or States. References are voluntary; the Commonwealth cannot compel States to refer issues. The reference power has been used not merely for harmonization but also to ensure reciprocal recognition of standards through the enactment of the mutual recognition legislation. In 1992, the Heads of Government at the Commonwealth, State and Territory levels agreed 'to establish a scheme for implementation of mutual recognition principles for goods and occupations for the purpose of promoting the goal of freedom of movement of goods and service providers in a national market in Australia.'[20] In accordance with this agreement, the States referred legislative power to the Commonwealth to enable the enactment of the *Mutual Recognition Act 1992* (Cth).

Depending on whether the issue in the particular case involves the common law or statute, a State court may contribute to the harmonization of laws through consideration of prior decisions of courts in a sister State.. Where a case involves the determination of principles of the common law, the interpretation or application of uniform national legislation, or even the interpretation of an 'identical or substantially similar' statute to that of another state, the reasoning of an earlier court in another State will likely be

[18] Consumer Credit (Queensland) Act 1994.
[19] Australian Constitution s 51 (xxxvii).
[20] Agreement Relating to Mutual Recognition, 1992, Recital A.

followed on the basis of comity, unless the previous decision is clearly wrong or if particular considerations of justice apply in the instant case.[21]

Australia has a network of intergovernmental ministerial councils with the central government as a key player. The ministerial councils coordinate action across a range of government fields with varying degrees of effectiveness. The most important body is the Council for Australian Governments (COAG), which is the peak intergovernmental forum in Australia, comprising the Prime Minister, State Premiers, Territory Chief Ministers and the President of the Australian Local Government Association (ALGA). Another Ministerial Council of particular relevance to law reform is the Standing Committee of Attorneys-General (SCAG) which is composed of the federal Attorney-General as well as the state and territory Attorneys-General and the New Zealand Attorney-General. This is sometimes the forum through which uniform or model laws are developed.

3. *Legal Unification Through Non-State Actors*

While non-State actors do play a role in legal unification, this does not occur in the same way or to the same extent as in the United States. There are very few non-state actors that contribute to legal unification. Two examples are the Law Council of Australia and Standards Australia. There are some groups dedicated to a very particular issue: for example, the Property Law Reform Alliance is a coalition of legal and industry associations 'committed to bring about uniformity and the reform of property law and procedures in Australia'.[22] Certain State actors should be noted also, including the Australian Law Reform Commission and the equivalent State Commissions. These bodies are established within the public sector, but they are largely independent of the government. They prepare reports proposing reform of various areas of law which may lead to unification, although this is not a necessary consequence.

Non-State actors also do not systematically propose uniform or model laws, although again, the Law Reform Commissions may propose uniform law from time to time. The *Australian Law Reform Commission Act* 1996 (Cth), for example, provides that its functions include the consideration of proposals for "uniformity between state and territory laws in relation to matters referred to it by the Attorney" and "for complementary Commonwealth, state and territory laws about those matters".[23] An example of the ALRC's role in producing harmonization of laws is in respect of the laws of evidence. In a 1987 report, the ALRC recommended that there should be a uniform law of evidence throughout Australia and appended draft legislation to its report. In 1995, the Commonwealth and NSW parliaments each enacted legislation substantially based on the ALRC's draft legislation.[24] In 2001, Tasmania passed broadly similar legislation and Victoria followed suit in 2008.[25] Concrete steps gradually are being taken in other jurisdictions towards the harmonization of evidence laws in line with the uniform model.

There is some unification through industry standards and practices. Many industries have a common code of practice, such as the insurance industry code of practice. Standards Australia is a non-State body which develops industry standards. It is recognized as the peak standard setting body in Australia by the Commonwealth government.

[21] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89
[22] Submission to the Standing Committee on Legal and Constitutional Affairs, House of Representatives, 31st March 2005.
[23] Section 21 of the Act.
[24] See the Evidence Act 1995 (Cth) and Evidence Act 1995 (NSW). The Acts are in most respects identical.
[25] Evidence Act 2001 (Tas); Evidence Act 2008 (Vic)

Although few non-state actors contribute to legal unification, the work of the Law Reform Commissions provide a significant amount of input, albeit in a small range of areas due to the need for referrals and the time needed to prepare reports. The extent to which the reports are adopted varies.

4. *The Role of Legal Education in Unification of Law*

Australian law schools draw students from throughout the federation, although the vast majority still attend university in their home state. The focus of legal education will depend first on whether the particular area of law studied is regulated by the common law or by statute, and if the latter, then under which statutory scheme. If the common law is predominant in a given area, legal education will focus on pronouncements of the common law by the High Court, in the context of developments throughout the common law world, and will also look at relevant judgments of other States. By contrast, if Commonwealth legislation is primary in the area, legal education will focus on this. And if State legislation is primary in the area, legal education will focus on the State statute with little reference to the legislation of other States.

Testing for and admission to the bar is by component state, with mutual recognition of qualifications between the States. It is a fairly simple process for barristers to be cross-admitted to other States. When admitted to practice in a component state, it is then possible upon registration to practice in the federal courts wherever they sit in Australia at the time.

Graduates will often practice within the State of their education for a variety of personal reasons. For instance, having studied in that State, their network of friends and contacts would likely be similarly based in that state. One additional factor is that graduates will have been taught the legislation of that particular state, which might to some degree influence them to practice within the State of their education. However, there is no organized system whereby graduates must practice in the State of their education.

Some institutions of legal education also play a unifying role in the country. Central courts will take clerks from potentially anywhere in Australia. There also exists the College of Law, which runs continuing legal education courses and traineeships after university. This College only operates in Queensland, New South Wales and Victoria (thus, covering the most populated eastern states) as well as Western Australia. While this may not unify the substance of the law, it is likely to unify practice.

5. *External Influences on Legal Unification*

International law does not have immediate effect on Australian domestic law, which requires legislation first to be passed giving effect to both treaty and custom. However, the Commonwealth has broad power to implement treaties through domestic legislation, as bona fide international obligations trigger central power, through the 'external affairs' head of power.[26] An example is the *International Criminal Court Act 2002* (Cth) which was enacted in order to facilitate compliance with Australia's obligations following ratification of the Statute of the International Criminal Court. [27] States also may pass laws giving effect to international law, relying on the broad plenary power enjoyed by State parliaments.[28] One recent example is the Victorian Charter of Human Rights and Responsibilities Act 2006, which gives effect to the ICCPR. International law may also indirectly influence domestic law, through interpretation of statutes to

[26] Australian Constitution s 51(xx).
[27] See also the *International Criminal Court (Consequential Amendments) Act 2002*, which amended the Criminal Code Act 1995 and other legislation as a consequence of the *International Criminal Court Act 2002*.
[28] *See e.g.*, Section 16 of the Victorian Constitution.

comply with international norms. A prominent example of the impact of international law is the *Mabo* case, in which indigenous native title to land was recognized at common law on the basis of reasoning that took into account international human rights principles.[29]

Voluntary participation in international harmonization projects plays a role in legal unification. Australia's participation in the Hague Conference on Private International Law, the International Institute for the Unification of Private Law (UNIDROIT) and the United Nations Commission for International Trade Law (UNICITRAL) has supported federal legislation in a range of areas (which necessarily has a harmonizing effect), including civil aspects of international child abduction.[30] It has also had a role in the area of Intellectual Property through the Berne Convention, the Paris Convention, and WIPO.

IV. INSTITUTIONAL AND SOCIAL BACKGROUND

1. *The Judicial Branch*

The High Court of Australia has the power to determine whether central legislation exceeds the lawmaking powers allocated to the Commonwealth. The High Court also has the power authoritatively to interpret component State law, and to resolve differences in legal interpretation among central and component state courts.

The High Court regularly polices constitutional limitations, although its interpretative method favours central power. A prominent and recent example is *Workchoices*,[31] in which the Court held that the corporations power (s 51(xx)) supported extensive regulation of industrial relations in Australia. There are examples where central power was checked: for example, the *Incorporation Case*,[32] where the Commonwealth was held not to have the power to regulate incorporation of corporations, and *Austin*,[33] which invalidated a federal tax in its application to members of State judiciaries. The effectiveness of these limitations in restraining central power varies between each restriction.

There are both central and state courts, which are organized as follows: The central court system is made up of the High Court, Federal Court, Family Court, and Federal Magistrates Court. All have trial and appellate divisions except for the Federal Magistrates Court. Each State has a district court as well as a Supreme Court and Court of Appeal. Each Territory has only a Supreme Court and Court of Appeal.

2. *Relationship Between the Central and Component State Governments*

The central government has no power to force component states to legislate. However, by use of the grants power,[34] the central government may offer a monetary incentive to legislate. The central government is responsible for executing central government law.

The States are represented in the Upper House (the Senate) of the bicameral legislature by Senators directly elected in each State. The States are equally represented, although in practice Senators vote along party lines. The system of proportional representation that is used for Senate elections enables independent candidates and minor parties to gain greater representation than is possible in the House of Representatives. As a result, the Senate has developed a role as a "house of review". The Senate has equal

[29] *Mabo v. Queensland [No 2]* (1992) 175 CLR 1.
[30] See R.G. Mortensen, Private International Law in Australia (Butterworths, 2006) at 23.
[31] *New South Wales v. Commonwealth* (2006) 229 CLR 1.
[32] *New South Wales v. Commonwealth* (1990) 169 CLR 482.
[33] *Austin v. Commonwealth* (2003) 215 CLR 185.
[34] Australian Constitution s 96.

powers with the House of Representatives except with respect to bills appropriating money or imposing taxation, which cannot originate in the Senate, and most of which cannot be amended by the Senate, although such bills may be rejected.[35]

The Senate is directly elected by the people, in a manner which differs from elections for the House of Representatives in the following ways: (1) The Senate is elected on the basis of proportional representation, whereas elections for the House of Representatives use preferential voting, a modification of the first past the post system; (2) Senators are elected for six years, with half retiring every three years. Members of the House of Representatives are elected for a maximum of three years. (3) Senators are chosen from the State as a single electorate.

Both the central government and the component states have a general taxing power. In practice, it is impossible for the States to impose income tax following the *Uniform Tax Cases.*[36] The power to impose customs and excise duties is exclusively vested in the central government and therefore cannot be exercised by the States.[37] This is significant as it effectively gives the Commonwealth exclusive authority over the taxation of commodities.

There is no prohibition against multiple taxation in the Constitution. Nevertheless, multiple taxation is politically highly unpopular and tends not to occur.

The Constitution provides that any surplus is to be distributed as the Parliament 'deems fair' amongst the States.[38] This provision is a dead letter as the Commonwealth parliament can validly appropriate any surplus revenue into trust funds, leaving nothing to distribute to the States.[39] However, the States and Commonwealth agreed, following the introduction of the Commonwealth Goods and Services Tax (GST) in 2000, that all GST revenue would be distributed to the States (Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations 1999). This agreement is scheduled to the legislation which carries it into effect.[40] The *Grants Commission Act* provides for the allocation of such moneys between the States on fiscal equalization principles.

3. *Other Formal or Informal Institutions for Resolving Intergovernmental Conflicts*

Ministerial Councils are the main alternative to the judiciary in resolving conflicts between component States or between the central government and component States. The party system may also play a role. Australia has a strong two-party system, and so political homogeneity between the governments of the States and of the Central federation may play a role in avoiding confrontation in some circumstances.

4. *The Bureaucracy*

The civil service of the central government is separate from the civil services of the component states.

There is a small but not major degree of movement between systems. It is not systematic or organized. Any movement between systems would be the result of any one or a combination of several factors: (a) general competition between systems for good staff; and (b) some public sector employees might move jurisdictions to follow political party preferences. For example, a Liberal party supporter might wish to

[35] Australian Constitution s 53.
[36] *First Uniform Tax Case* (1942) 65 CLR 373; *Second Uniform Tax case* (1957) 99 CLR 575.
[37] Australian Constitution s 90.
[38] Australian Constitution s 94.
[39] *New South Wales v. Commonwealth* (1908) 7 CLR 179.
[40] *A New Tax System (Commonwealth-State Financial Arrangements) Act* 1999 (Cth), Schedule 2.

work for a Liberal State government. Procedures exist to allow accrued employment entitlements to be recognized.

5. *Social Factors*

Australia has a diverse population with differences in origin, religion and socio-economic conditions. Yet diversity does not correlate to State boundaries except with regards to the Northern Territory, as 28% of the population of the Northern Territory are indigenous, which has an impact on policy making. The indigenous population is largely in the Northern Territory, Western Australia and northern Queensland, although groups can be found in all regions; this does not have an impact on the structure of the federal system.

The vast majority of the Australian population lives in the eastern States, and in particular New South Wales and Victoria, whose capital cities have traditionally been the centres of commerce in Australia. The difference in size between the States led to each State having equal representatives in the Upper House (the Senate) of the Federal legislature. Without this stipulation, the smaller colonies (which became the States upon federation) may not have federated from fear of the power of New South Wales and Victoria.

There is also significant resource asymmetry both in terms of the type of resources and the value of them. Tasmania and the Northern Territory receive the most fiscal equalization funds, followed by South Australia.

V. Recent Developments in Uniformity

We note that until recently there was quite a high degree of diversity and inconsistency in the law and practice relating to security interests in personal property, due to the fact that it is an area that is regulated by each individual state and territory. However, there has been a move in recent years towards a national or harmonized scheme, which has largely been driven by the work of the Standing Committee of Attorneys General (discussed above). A new national system commenced in 2011 relying on Commonwealth legislation based upon both explicit Commonwealth legislative power and a reference from the States. [41]

The law of succession has traditionally been an area of state responsibility, with the result that each State and territory has its own, not necessarily consistent, scheme. However the Standing Committee of Attorneys-General has initiated a project on Uniform Succession Laws, which is being coordinated by the Queensland Law Reform Commission and overseen by a national committee. In 1997 a report by the national committee on the Law of Wills was finalized which included model legislation. This has now been largely adopted in the Northern Territory, New South Wales, Victoria and Queensland. More recently, in April 2007, the NSW Law Reform Commission (the body given responsibility for the intestacy aspect of the project) released Report 116 (2007) - Uniform Succession Laws: Intestacy, which includes a model Bill. The final report by the Queensland Law Reform Commission was completed in April 2009, however as yet no uniform scheme is in place.

The Australian Constitution contains very few express fundamental rights which limit Commonwealth power and even fewer that expressly limit the power of state parliaments. However, as mentioned above in section III.1. ('directly applicable constitutional norms'), the High Court has implied some limited rights from the text and structure of the Constitution that apply also to state parliaments (e.g., freedom of political communication and some limitations derived from Ch III concerned with the separation of

[41] See Personal Property Securities Act (2009).

powers). To the extent that these norms apply to the states, they have a harmonizing effect. On the other hand, in recent years a move away from harmonization in this area has occurred as a result of two jurisdictions, namely, the Australian Capital Territory and Victoria, adopting a Bill of Rights (see Human Rights Act 2004 (ACT) and Charter of Human Rights and Responsibilities Act 2006 (Vic).

VI. CONCLUSION

The history of Australian federation has been one of a gradual but definite move towards centralization of power. This has been achieved, as explained above, primarily by the High Court's wide and expansive interpretation of Commonwealth legislative power, especially regarding the corporations and external affairs powers. In addition, decisions of the High Court have permitted the Commonwealth to take over the field of income taxation, and have removed other important revenue-raising opportunities from the States. Combined with a wide view of the 'grants power', this has produced an extremely strong Commonwealth government. In terms of the specific topic of this study, it has also produced a relatively high degree of unification of law, either because the Commonwealth is able to regulate an area directly (and thus impose uniformity throughout the federation) or to induce the states to conform to Commonwealth (uniform) policy in return for grants. In addition, in recent decades there has been increasing recognition that inconsistencies in laws between states on a range of topics leads to inefficiencies, unnecessary complexity and unfairness. This has led to calls for harmonization from a variety of constituents including industry bodies, law reform commissions and in some instances, the general public. For example, the relationship between the states and the Commonwealth, and the impact of our federal system on the ability of the nation to respond to many important contemporary issues was a significant feature of the 2007 federal election campaign. Thus, our conclusion is that the trend of the last century towards harmonization and unification will no doubt continue into the twenty-first century, ensuring that Australia will continue to be one of the most centralized federations in the world.