

Introduction

There has been much debate recently about the future of federalism in Australia.¹ One of the key issues in any federal system is the allocation of responsibilities over business activity, or trade and commerce. Of course, s51(1) of the *Constitution* allows the Commonwealth to make laws with respect to trade and commerce among the states and overseas. In the past, this power has been interpreted quite narrowly,² with a corresponding reduction in the ability for the Commonwealth to regulate business. This difficulty was in the past compounded by an interpretation given to s92 which created difficulties for both Federal and State Governments in their attempts to regulate business.³ The High Court has not followed the same path as has its American equivalent in interpreting the clause on which s51(1) was based. This paper will summarise the position in both Australia and the United States in terms of the federal government's commerce power, before arguing that the interpretation given to the Australian version should be broader than considered by a majority of the High Court in the past, and closer to the American interpretation.

There is a view that, following the Commonwealth's victory in *New South Wales v Commonwealth*,⁴ there is no necessity in order that the Commonwealth can 'properly' regulate business and commercial activity in Australia that the reach of s51(1) be widened. On that view, the High Court has given the Commonwealth the keys to significant expansion of business regulation, provided it can base the legislation on something to do with a corporation. On one view, this should be quite straightforward, given that 85-90% of non-farm labour in Australia is employed by corporations.⁵ Clearly, much commerce in Australia relates to corporations. However, it will be argued that there remains a need for the Commonwealth to be given a broader power over trade and commerce – clearly not every business or thing related to, or affecting, business occurs through a corporation. As will be seen, a wider interpretation of trade and commerce may allow the Commonwealth to do directly what presently it must pursue indirectly, for example through the use of tied s96 grants. Despite the introduction of the GST, specific purpose grants remain a very significant feature of Australia's federal system.⁶ The author's argument is that if the s51(1) power were interpreted more broadly, there would be less need for the Commonwealth to resort to a s96 grant to control an area, with the associated blurring of responsibilities and accountabilities which can follow.⁷

¹ See for example the Business Council of Australia's *Reshaping Australia's Federation: A New Contract for Federal-State Relations* (2006) and *Intergovernmental Relations in Federal Systems*, Access Economics *The Costs of Federalism* (2006), and Anne Twomey and Glenn Withers *Federalist Paper 1: Australia's Federal Future* (Report for the Council for the Australian Federation)(2007)

² *Eg Beal v Marrickville Margarine Pty Ltd* (1966) 114 CLR 283; *Wragg v New South Wales* (1953) 88 CLR 353; *Attorney-General (WA)(ex rel Ansett Transport Industries (Operations) Pty Ltd v Australian National Airlines Commission* (1976) 138 CLR 492

³ *Commonwealth v Bank of New South Wales* (1949) 79 CLR 497; *North Eastern Dairy Co Ltd v Dairy Industry Authority of New South Wales* (1975) 134 CLR 559; *Hughes and Vale Pty Ltd v New South Wales (No 1)*(1954) 93 CLR 1; cf *Cole v Whitfield* (1988) 165 CLR 360

⁴ (2006) 81 ALJR 34; the joint reasons considered the main cases involving the corporations power, expressing their agreement with the broad view of Gaudron J in *Re Pacific Coal Ltd* that the power extended to regulation of the activities, functions, relationships and business of the corporation, including the creation of rights and privileges of a corporation, the imposition of obligations on it, the regulation of the conduct of those through whom it acts, its employees and shareholders, as well as the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business.

⁵ Peter Reith, then Minister for Employment, Workplace Relations and Small Business, *Breaking the Gridlock: Towards a Simpler National Workplace Relations System – Discussion Paper 1: The Case for Change* (2000)

⁶ Despite all GST revenues (which are growing sharply) going to the States pursuant to the *Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations*, specific purpose grants to the States under s96 remain substantial, with payments either to or through the States totalling almost \$27 billion in the 2006-2007 year, an increase from about \$25.5 billion in the 2005-2006 year. This is more than 25% of States' expenditure.

⁷ Eg Cheryl Saunders 'Fiscal Federalism – A General and Unholy Scramble' in Greg Craven ed *Australian Federalism – Towards the Second Century* (1992) pp120-121; Walsh, C 'Vertical Fiscal Imbalance – The Issues' in Collins, D J ed *Vertical Fiscal Imbalance and the Allocation of Taxing Powers* Australian Tax Research Foundation Conference Series No13 p41, Walsh, C 'Federal Reform and the Politics of VFI' (1992) 27 *Australian Journal of Political Science* (Special Issue)

A narrow view of the trade and commerce power (and for a time the corporations power)⁸ has not allowed the Commonwealth's control over business transactions to increase, even as changes in society and the way business has been conducted have demanded it. As a result, desirable uniformity in other areas of business regulation has had to occur through other, indirect and frequently tortuous means given the need to obtain consent of sometimes hostile state governments, who often squabble among themselves and who do not generally have a proud record of agreement on legal reform. These have included (eventual) referrals of power,⁹ or the eventual passage of mirror legislation.¹⁰

The article will firstly briefly outline the past approach that has been taken to interpretation of s51(1); then I examine commerce clause jurisprudence from the United States with a view to suggesting how a broader interpretation of the Australian head of power might be justified (and needed). I conclude with particular areas of responsibility over which the Commonwealth might then take control, making a business case also for such a development.

Past Interpretation of s51(1) Power

It is fair to say that the Commonwealth's power with respect to trade and commerce among the States and with other countries has been interpreted narrowly in the past by the High Court. This has occurred via two main means; (a) a narrow conception of what is encompassed by trade and commerce; and (b) an insistence on a strict division between interstate and overseas trade and commerce on the one hand (hereafter 'constitutional trade and commerce', and intrastate trade and commerce (hereafter non-constitutional trade and commerce) on the other.

(a) narrow conception of what is meant by trade and commerce

The High Court has expressed the view that the concept of trade and commerce is not a term of art but a commercial term, and includes all the commercial arrangements of which transportation is the direct and necessary result; including mutual communings, negotiations, the bargain, transport and delivery.¹¹ It includes financial transactions.¹² By virtue of the power, the Federal Government itself can participate in trade and commerce.¹³ There is an incidental aspect to the power, allowing the Commonwealth to regulate peripheral matters, consistent with the interstate/intrastate distinction.¹⁴ It can include the absolute prohibition of trade and it doesn't matter that the law also concerns other topics.¹⁵

pp24-26; Walsh, C 'State Taxation and VFI: Radical Reform Options' in *Issues in State Taxation* (1990) p63, Working Party on Tax Powers (1991) 'Taxation and the Fiscal Imbalance Between Different Levels of Australian Government Responsibility, Accountability and Efficiency', *Access Economics An Access Economics Study on the Distribution of Federal/State Financial Powers* (1995), Howard, C *The Federal Fiscal Imbalance* Centre for Research on Federal Financial Relations (1984), and Access Economics *The Costs of Federalism* (2006) p33-37

⁸ Originally, the Commonwealth was not thought to be competent under its corporations power to regulate anti-competitive practices of trading corporations: *Huddart Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330; eventually this was overruled in *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468.

⁹ This came eventually, after past successful constitutional challenges to national corporate regulation: *State of New South Wales v Commonwealth* (1990) 169 CLR 482; see now the *Corporations Act 2001* (Cth) and *Australian Securities Investment Commission Act 2001* (Cth).

¹⁰ Prior to harmonisation of credit laws, there existed 'different forms of credit, penalties, notification requirements and liabilities, which led to inconsistencies across State and Territory boundaries ... harmonisation was required': Vermeesch and Lindgren *Business Law of Australia* (2005) 11th ed, p745-746. Each State has now adopted the Consumer Credit Code which appears as an appendix in the *Consumer Credit (Queensland) Act 1994*.

¹¹ *W and A McArthur Ltd v Queensland* (1920) 28 CLR 530, 546-547 (Knox CJ, Isaacs and Starke JJ); some of the earlier cases are discussed in Jim Herlihy 'Constitutional Restraints on Trade and Commerce in Australia and Canada' (1976) 9 *University of Queensland Law Journal* 188

¹² *Commonwealth v Bank of New South Wales* (1949) 79 CLR 497

¹³ *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29

¹⁴ *R v Foster; Ex Parte Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256 (Commonwealth regulating the employment conditions of workers involved in interstate trade and commerce); see further on this issue David McCann 'First Head Revisited: A Single Industrial Relations System under the Trade and Commerce Power' (2004) 26 *Sydney Law Review* 75

¹⁵ *Murphyores Incorporated Pty Ltd v The Commonwealth* (1976) 136 CLR 1, 22 (Mason J)

However, the High Court has generally not allowed the Commonwealth to regulate production or manufacture, pursuant to the s51(1) power. In *Beal v Marrickville Margarine Pty Ltd*,¹⁶ the Court insisted that production was not part of s51(1):

There is the clearest break between the manufacture and the inter-state movement by means of which the manufactured margarine is got to the proper place for delivery to the buyer in fulfilment of the contract, and the break is such that to treat the steps in manufacture and the interstate movement as one continuous piece of trade is artificial and unreal ... Even where a specific batch of material can be identified in the factory as being in course of manufacture for the specific purpose of being applied to fulfilment of a specific contract with a buyer in another state, it is not logically possible to affirm that any trade in respect of that material or any interstate movement has begun¹⁷

A slightly broader approach was evident in *O'Sullivan v Noarlunga Meats Ltd*,¹⁸ where Fullagar J concluded that regulations prescribing conditions in slaughterhouses were a valid exercise of s51(1),

Even if counsel for the State of South Australia be right in saying that the course of commerce with other countries does not begin until a later stage ... the objectives for which the power is conferred may be impossible of achievement by means of a mere prescription of standards for export and the institution of a system of inspection at the point of export. It may very reasonably be thought necessary to go further back, and even to enter the factory or the field or the mine.¹⁹

Fullagar J justified his broader reading by referring to American authorities on the commerce clause, noting that while in the past production had been excluded from its reach, the American Supreme Court had broadened its view.²⁰

(b) rejection of commingling doctrine

Perhaps the most pressing issue for any adjudicative body called on to interpret a power confined to interstate and overseas trade and commerce is to decide what to do about a law that impacts this kind of commerce, as well as other kinds of commerce. Is it only valid in its application to the interstate and overseas part? Is it completely valid? What happens if the 'constitutional' and 'non-constitutional' trade and commerce are integrated, physically and/or economically? What if the non-constitutional commerce 'affects' or may affect the constitutional trade and commerce in one way or another?

The High Court has traditionally insisted that the distinction be maintained. As Dixon CJ put it in *Wragg v State of New South Wales*,²¹

The distinction which is drawn between inter-state trade and the domestic trade of a State for the purpose of the power conferred upon the Parliament by s51(1) to make laws with respect to trade and commerce with other countries and among the states may well be considered artificial and unsuitable to modern times. But it is a distinction adopted by the Constitution and it must be observed, however much interdependence may now exist between the two divisions of trade and commerce which the Constitution thus distinguishes ... even in the application of the (incidental power) the distinction which the Constitution makes between the two branches of trade and commerce must be maintained. Its existence makes impossible any operation of the incidental power which would obliterate the distinction²²

¹⁶ (1966) 114 CLR 283

¹⁷ Kitto J, 304; to like effect Menzies J 'to manufacture is not, of itself, to trade' (306); refer also to *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55, 72 'the complaint of the defendant company remains a complaint against a restriction upon the production of table margarine, not against a restriction on inter-state trade' (Dixon CJ, McTiernan, Webb and Kitto JJ)

¹⁸ (1954) 92 CLR 565

¹⁹ 597-598

²⁰ Quoting cases such as *National Labour Relations Board v Laughlin Steel Corporation* (1936) 301 US 1; *United States v Darby* (1941) 312 US 100; and *McCullough v Maryland* (1819) 4 Wheat 316. In *Mandeville Island Farms Inc v American Crystal Sugar Co* (1948) 334 US 219, the United States Supreme Court was emphatic that 'the artificial and mechanical separation of 'production' and 'manufacturing' from 'commerce', without regard to their economic continuity, the effects of the former two upon the latter, and the varying methods by which the several processes are organised, related and carried on in different industries or indeed within a single industry, no longer suffices to put either production or manufacturing and refining processes beyond reach of Congress authority' (229).

²¹ (1953) 88 CLR 353, 385-386

²² Refer for similar comments to *R v Burgess; ex parte Henry* (1936) 55 CLR 608, 628-629 (Latham CJ), 672 (Dixon J), Evatt and McTiernan JJ (677); *Swift Australian Co Pty Ltd v Boyd Parkinson* (1962) 108 CLR 189, 203 (McTiernan J), Kitto J

Kitto J in *Airlines (No 2)*,²³ referring to American precedent on the commerce clause accepting that Congress might be able to regulate constitutional and non-constitutional trade and commerce where it was commingled, rejected these developments for Australian law:

The Australian union is one of dual federalism, and until the Parliament and the people see fit to change it, a true federation it must remain. This Court is entrusted with the preservation of constitutional distinctions, and it both fails in its task and exceeds its authority if it discards them, however out of touch with practical conceptions or with modern conditions they may appear to be in some or all of their applications. To import the doctrine of the American cases into the law of the Australian Constitution would in my opinion be an error.²⁴

However, in that case the High Court went on to conclude that where there was physical integration such that regulation of constitutional trade and commerce could not be effective without also regulating non-constitutional trade and commerce, the Commonwealth could regulate the entirety. As Menzies J put it, 'if control of intra-State trade is necessary to make effectual the exercise of Commonwealth power, that control may be exercised by the Commonwealth regardless of the control exercised by a State'.²⁵ To like effect was the High Court's verdict in *Redfern v Dunlop Rubber Australia Ltd*,²⁶ a restraint of trade case involving three companies, two of which were national and had one factory in Victoria, and the other wholly Victorian based. The plaintiff, a Victorian company, alleged that the others were involved in anti-competitive agreements to not supply them. The High Court found that the agreements, involving both interstate and intrastate trade, were regulatable under s51(1); this was because the two were 'inseparably connected'. The court found the Commonwealth could prohibit or regulate acts which relate to intra-state trade if they relate to constitutional trade.²⁷

By majority, the Court has in the past maintained a distinction between physical and economic necessity in assessing the Commonwealth's claims to be able to regulate both constitutional and non-constitutional trade and commerce. While the former was acceptable reasoning to the court in *Airlines (No 2)*, the fact that an intra-state journey may economically be required in order that an interstate service run has not been sufficient to allow the Commonwealth to regulate the entirety. This was the view of the majority in the *Ansett* case.²⁸ However, Mason and Murphy JJ dissented from this position. Mason J concluded that

The notion of what is reasonably necessary to the fulfilment of the legislative power cannot be confined to that which is physical, excluding all that which is economic. No distinction can or should be drawn between what is physically necessary and what is economically necessary ... the inquiry, if it is to have any practical reality, must have regard to the volume of traffic likely to be available and the economics of operation. In this sense the physical and economic considerations are both

(208), Taylor J (212), Windeyer J (224); *Attorney-General (WA) ex rel Ansett Transport Industries (Operations) Pty Ltd v Australian National Airlines Commission* (1975) 138 CLR 492, 502-503 (Gibbs J), 509 (Stephen J)

²³ *Airlines of NSW Pty Ltd v New South Wales (No 2)*(1965) 113 CLR 54, 115; although Windeyer J in the same case said that the strict approach to the differentiation of constitutional and non-constitutional commerce 'has been criticised, and perhaps justly in some cases, as a legalistic concept inharmonious today with economic realities' (149)

²⁴ Cf Lino Graglia 'United States v Lopez: Judicial Review Under the Commerce Clause' (1996) 74 *Texas Law Review* 719, 722 who argues that the *Constitution* (US, but submitted to be equally applicable locally) does not provide for divided sovereignty, and the *Constitution* provides that in the event of conflict between central and regional law, Congress must prevail. He concludes that 'the only practical basis for the continuance of a degree of local autonomy is the forbearance of the central government' (723); and Leanne Wilson (again in the United States context) who in 'The Fate of the Dormant Foreign Commerce Clause After Garamendi and Crosby' (2007) 107 *Columbia Law Review* 746, 785 who concludes that 'dual federalism, however, is no longer accepted as a valid form of federal-state structure ... the assumptions that underlie the dual federalism justification are invalid'; Edward Corwin 'The Passing of Dual Federalism' (1950) 36 *Virginia Law Review*. 1; Stephen Gardbaum 'New Deal Constitutionalism and the Unshackling of the States' (1997) 64 *University of Chicago Law Review* 483; Justice O'Connor (dissenting) recently used dual sovereignty reasoning in *Gonzalez v Raich* (2005) 125 S Ct 2195

²⁵ 143; see to like effect Barwick CJ (78), Kitto J (117), Taylor J (127), Windeyer J (151), Owen J (166)

²⁶ (1964) 110 CLR 194

²⁷ Taylor J, 221. In *Swift*, McTiernan and Owen JJ thought the Commonwealth could exclusively regulate the conditions in slaughterhouses, even though some of the animals slaughtered were not constitutional commerce: 220, 227

²⁸ *Attorney-General of the State of Western Australia (ex rel Ansett Transport Industries (Operations) Pty Ltd) v Australian National Airways Commission* (1975) 138 CLR 492

relevant and indispensable elements to be taken into account in assessing what is reasonably necessary for the particular end in view²⁹

Murphy J noted that s51(1) did not make constitutional and non-constitutional trade and commerce mutually exclusive; the *Constitution* did not give the States exclusive power over intrastate trade and commerce. He found the insistence on the division and the refusal to allow the incidental power to extend into intrastate trade and commerce as ‘keep(ing) the pre-Engineers ghosts walking, minimising the trade and commerce power and inhibit(ing) its use’.³⁰ Refusal to take into account commercial considerations when interpreting the trade and commerce power was illogical; no-one would suggest that in interpreting the defence power, defence considerations were irrelevant. The *Constitution* contained no express delineation between physical and economic necessity.

Commerce Clause in the United States

The lengthy United States jurisprudence on that country’s commerce clause will now be considered. Despite the express refusal of some members of the High Court to consider the commerce clause interpretation in terms of their s51(1) deliberations,³¹ it is submitted that this jurisprudence is directly relevant. Of course, the Founding Fathers were influenced by the United States *Constitution* as a model constitution for a federal system, and incorporated many of its features. In relation to trade and commerce, s51(1) was based on the United States commerce clause.³² The United States version was copied to a large extent by the Founding Fathers.³³ The need to advance inter-regional trade was one of the main reasons for both countries creating a central government.³⁴ In fundamental respects, our constitutional principles are similar, from the acceptance of judicial review,³⁵ to the appropriate means of characterising a law as being within power. As Marshall CJ said famously in *McCullough v Maryland*³⁶

²⁹ 523; refer also to Sir Anthony Mason ‘The Australian *Constitution* 1901-1988’ (1988) 62 *Australian Law Journal* 752, 755-756

³⁰ 530; Sir Leslie Zines would agree with Murphy J, dismissing the idea of a distinction between economic and physical effects as ‘lacking in logic unless one adopts a doctrine of reserved powers’: *The High Court and the Constitution* (1997) p77. See also Peter Hanks ‘The Political Dimension of Constitutional Adjudication’ (1987) 10 *University of New South Wales Law Journal* 141, 145-148

³¹ Most famously Kitto J in *Airlines (No 2) Pty Ltd* (115); see also in that case Barwick CJ (77), Menzies J (144), Windeyer J (149); *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55, 77 (Dixon CJ McTiernan Webb and Kitto J); *Swift Australia Co Pty Ltd v Boyd Parkinson* (1962) 108 CLR 189, 203 (McTiernan); *Redfern v Dunlop Rubber Australia Ltd* (1965) 110 CLR 194, 220 (Menzies J); *Ansett* (1976) 138 CLR 492, 502-503 (Gibbs J); *Australian Coastal Shipping Commission v O’Reilly* (1962) 107 CLR 46, 66 (Menzies J); *R v Foster; Ex Parte Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256, 310 (Windeyer J)

³² As George Winterton, HP Lee, Arthur Glass and James Thomson say in *Australian Federal Constitutional Law: Commentary and Materials* (2007), the words in the United States Commerce Clause ‘closely parallel those of s51(1) of the Australian *Constitution*, so interpretations of the American commerce clause have obvious relevance for Australia’ (p172). Zines, to like effect, mentions the ‘United States provision, from which the Australian position was largely taken’: *The High Court and the Constitution* (1997) p55

³³ Federation Debates (Official Record)(Sydney, 3/4/1891), p662-665; *Ansett* per Murphy J (529)

³⁴ As the Supreme Court noted in *Gibbons v Ogden* (1824) 22 US 1, 224 the ability of the States to lay tariffs on the goods of other States produced a conflict of commercial regulations destructive of unity among the States, and undermined the confederation; refer also to *The Federalist No 6* at xv (Hamilton). As Marshall CJ wrote in *Brown v Maryland* (1827) 25 US 419, 446: ‘It may be doubted whether any of the evils proceeding from the feebleness of the federal government, contributed more to that great (constitutional) revolution which introduced the modern (constitutional) system, than the deep and general conviction, that commerce ought to be regulated by Congress’. In the Australian context, Sir John Cockburn noted that ‘absolute freedom of trade is the goal towards which federal efforts of the past ten years have been chiefly directed ... the dominant motive has been the promptings of utility towards removal of the border customs houses and the desire to attain that commercial and industrial expansion which must ensue from the removal of artificial limitations’ (Australian Federation 1901, p14); John Quick and Robert Garran *Annotated Constitution of the Australian Commonwealth* (1901) p83 (they quote an 1849 Privy Council Committee Report commenting on the ‘evil obstruction of intercolonial trade’; Michael Coper *Encounters With the Australian Constitution* (1987) p58.

³⁵ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 and *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476, 492 and 513, citing *Marbury v Madison* (1803) 5 US 137

³⁶ (1819) 4 Wheat 316, 421; this quote was recently expressly approved of by Gummow and Crennan JJ in *Thomas v Mowbray* [2007] HCA 33, para 102

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, what are not prohibited, but consist with the letter and spirit of the constitution are constitutional

These words have been expressly adopted by the High Court as the correct means of interpreting the heads of power given to the Commonwealth by the Australian *Constitution*.³⁷ They were made in the specific context of the Commerce Clause. Both countries have dealt with the difficulties caused by State regulation which discriminates against interstate trade.³⁸ Of course, there are differences between the Australian and the American versions.³⁹ However, for the reasons given, it is submitted to be legitimate to refer in some detail to the United States case law and commentary on the Commerce Clause, in considering the Australian equivalent.⁴⁰ It will be no surprise that the American courts have grappled with many of the issues mentioned in my discussion of the Australian authorities in this area.

*Interpretation of the Commerce Clause*⁴¹

The classic early statement of Congress' power over commerce appears in the judgment of Chief Justice Marshall in *Gibbons v Ogden*,⁴² where he said Congress could act

To all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular state; which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the (Federal) Government

The focus on whether the legislation was conducive to a trade and commerce purpose⁴³ is evident in decisions upholding legislation removing barriers to the use of a river for interstate commerce,⁴⁴

³⁷ *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55, 76 (what we now call the 'reasonably appropriate and adapted test').

³⁸ In Australia, this is through s92, which has been interpreted to prohibit protectionist laws which discriminate against interstate trade and commerce: *Cole v Whitfield* (1988) 165 CLR 360. In the United States, this has occurred indirectly, through the development of dormant commerce clause jurisprudence prima facie denying States the ability to discriminate against interstate commerce: *Welton v Missouri* (1875) 91 US 275; *Oregon Waste Systems Inc v Department of Environmental Quality* (1994) 511 US 93; *Granholm v Heald* (2005) 125 S Ct 1885; refer for more on the dormant commerce clause to Leanne Wilson 'The Fate of the Dominant Foreign Commerce Clause After Garamendi and Grosby' (2007) 107 *Columbia Law Review* 746; Norman Williams 'Why Congress May Not Overrule the Dominant Commerce Clause' (2006) 53 *University of California Law Review* 153; Andrew Thompson 'Public Health, Environmental Protection and the Dormant Commerce Clause: Maintaining State Sovereignty in the Federalist Structure' (2005) 55 *Case Western Reserve Law Review* 213

³⁹ The Australian words are broader, in allowing laws 'with respect to' not merely those 'regulating' trade and commerce. It is true that there are more specific heads of power available to the Federal Government in Australia, meaning that government in Australia is less reliant on its commerce powers than its American equivalent. It is also true that there is no equivalent to s92 in the United States *Constitution*. Murphy J believed that one of the reasons the High Court had interpreted trade and commerce narrowly in Australia was its concern for the impact on the interpretation of s92: *Ansett* p529. One of the reasons given for interpreting the United States Commerce Clause broadly has been to encourage free trade between states, and to avoid the kinds of protectionist problems that plagued the confederation (see for example Justice Harlan in *Guy v Baltimore* (1879) 100 US 434, 440-442. This objective has also been met through the development of the dormant commerce clause (see n34): *Granholm v Heald* (2005) 125 S Ct 1885, 1896. This reasoning does not apply to the interpretation of s51(1), given that s92 already prevents discriminatory burdens of a protectionist kind (although clearly both sections concern 'trade and commerce' and those words must be read consistently). The Australian commerce clause includes the word 'trade' while the United States clause does not. The United States Supreme Court has shown a greater willingness to defer to the 'rational basis' for Congress' reliance on the Commerce Clause (*National Labor Relations Board v Jones and Laughlin* (1937) 301 US 1); while the Australian High Court will not allow the Commonwealth to 'recite itself into power': *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1; *Thomas v Mowbray* [2007] HCA 33

⁴⁰ Recently in *Re Maritime Union of Australia; ex parte CSL Pacific Shipping Inc* (2003) HCA 43, the High Court referred approvingly to United States commerce clause decisions as allowing something *relating to* constitutional commerce to be regulated.

⁴¹ There is an extensive literature, including Richard Friedman 'The Sometimes Bumpy Stream of Commerce Clause Doctrine' (2003) 55 *Arkansas Law Review* 981; Barry Cushman 'Continuing and Change in Commerce Clause Jurisprudence' (2003) 55 *Arkansas Law Review* 1009; 'Formalism and Realism in Commerce Clause Jurisprudence' (2000) 67 *University of Chicago Law Review* 1089; Grant Nelson and Robert Pushaw 'Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations But Preserve State Control Over Social Issues' (1999) 85 *Iowa Law Review* 1; Jesse Choper 'Taming Congress' Power Under the Commerce Clause: What Does the Near Future Portend?' (2003) 55 *Arkansas Law Review* 731; Ronald Rotunda 'The Implications of the New Commerce Clause Jurisprudence: An Evolutionary or Revolutionary Court?' (2003) 55 *Arkansas Law Review* 795

⁴² (1824) 22 US 1

legislation creating a bank,⁴⁵ and regulations making interstate trade and commerce (as well as other trade and commerce) safer.⁴⁶ Congress' removal of a State-introduced financial advantage given to intrastate commerce over interstate commerce was also validated in the *Shreveport Rates Cases*:⁴⁷

Congressional power ... embraces the right to control (interstate carriers' operations) in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, *to the efficiency of the interstate service* (emphasis added), and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance.

The above quote endorses the 'effects' test from *Ogden*. There is some use of such a test in Australian jurisprudence on the commerce clause.⁴⁸ However, contrary to the findings of the High Court in *Ansett*, the above quote from the American case notes the importance of *economic arguments* in assessing the Federal Government's power to regulate intrastate commerce. The State law had the effect of providing an economic advantage to intrastate trade, and an economic penalty to interstate trade. Congress could counteract this.

For many years, however, the Supreme Court insisted, as the Australian courts have insisted, that production or manufacture was not part of commerce. This was to preserve the position of the States.⁴⁹ Legislation seeking to deal with anti-competitive practices relating to sugar refineries,⁵⁰ and legislation prohibiting the shipment of goods produced contrary to child labour laws was struck down based on this principle.⁵¹ Some saw these cases as a product of their times, when laissez-faire economics was in vogue and regulation of the market frowned upon.⁵² Arguments that legislation which affected production also indirectly affected commerce did not initially succeed,⁵³ because the Court required that the effect on commerce had to be direct.⁵⁴ The direct/indirect distinction was a means to limit Congress power over commerce, and reserve an area of legislative responsibility for the states.⁵⁵

⁴³ The Canadian courts, although their view of the federal government's trade powers has been more limited than in the United States, will also consider whether the purpose of the law is inter-provincial: *Citizens Insurance of Canada v Parsons* (1881) 7 App Cas 96; *General Motors of Canada Ltd v City Nationwide Leasing* 1 S.C.R. 641; Greg Taylor 'The Commerce Clause – Commonwealth Comparisons' (2001) 24 *Boston Comparative International and Comparative Law Review* 235

⁴⁴ *The Daniel Ball* (1871) 77 US 557

⁴⁵ *McCullough v Maryland* (1819) 17 US 316

⁴⁶ *Southern Railway Co v United States* (1911) 222 US 20

⁴⁷ (1914) 234 US 342

⁴⁸ In *O'Sullivan v Noarlunga Meats* (1954) 92 CLR 565, Fullagar J concluded that by virtue of the overseas trade and commerce aspect of s51(1), 'all matters which may *affect* (emphasis added) beneficially or adversely the export trade of Australia ... must be the legitimate concern of the Commonwealth' (597).

⁴⁹ For example in *Kidd v Pearson* (1888) 128 US 1, 21 'if it be held that the term commerce includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, *to the exclusion of the States*, with the power to regulate ... every branch of human activity ... a situation more paralysing of the state governments, and more provocative of conflicts between the general government and the States ... would be difficult to imagine'

⁵⁰ *United States v E C Knight Co* (1895) 156 US 1; cf *Swift and Co v United States* (1905) 196 US 375, where the *Sherman Act*'s application to wholly intrastate agreements was upheld on the basis that they affected interstate commerce.

⁵¹ *Hammer v Dagenhart* (1918) 247 US 251

⁵² Eg Justice Souter in *United States v Morrison* (2000) 529 US 598, 644

⁵³ *Carter v Carter Coal Co* (1936) 298 US 238. For example, the law invalidated in *E C Knight* proscribed monopolies over manufacture, which could not be regulated by Congress because the effect on later trade was indirect and incidental only. The result is described by one author as an example of 'dual federalism' that the Court was right in later cases to reject: Donald Regan 'How to Think About the Federal Commerce Power And Incidentally Rewrite *United States v Lopez*' (1996) 94 *Michigan Law Review* 554

⁵⁴ *Diamond Glue Co v United States Glue Co* (1903) 187 US 611; *Superior Oil Co v Mississippi* (1929) 280 US 390

⁵⁵ On this basis, Congress could not require increased wages for employees of a poultry slaughterhouse; although most of the poultry came from interstate, the commerce 'stream' had come to an end. The effect of the law on interstate commerce was found to be indirect and insufficient: *Schechter Poultry Corp v United States* (1935) 295 US 495. Graglia dismisses the direct/indirect distinction as a 'standard approach to the problem of confining the scope of a rule that threatens to be all embracing – proves in practice to be almost entirely subjective': Lino Graglia '*United States v Lopez*: Judicial Review Under the Commerce Clause' (1996) 74 *Texas Law Review* 719, 731. Readers may draw parallels with the High Court's past use of the direct/indirect distinction in interpreting the s92 freedom of trade, commerce and intercourse section, for example in

A different view was taken in *Stafford v Wallace*, where legislation concerning production of livestock was held valid under the commerce clause. As Chief Justice Taft said,

The object to be secured by the Act is the free and unburdened flow of livestock from the ranges and farms of the West and Southwest through the great stockyards and slaughtering centres on the borders of that region; and thence in the form of meat products to the consuming cities of the country in the Middle West and East.⁵⁶

These arguments were also accepted in *National Labour Relations Board v Jones and Laughlin Steel Corp.*,⁵⁷ where legislation which sought to regulate work activity of workers engaged in intrastate trade in a steel company operating nationally was validated by the Supreme Court. The Court found that

Constitutional commerce extends to all those activities that have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions.⁵⁸

As well as abandoning the direct/indirect test,⁵⁹ the court overturned the past distinction between commerce and manufacture/production. The limit of the court's power of judicial review was to consider whether there was a rational basis for the view of Congress that the thing being regulated affected interstate commerce. It was not for the court to substitute its view of the merits of the law, or to seek to achieve other ends by invalidating such legislation. Links have been made between these legal developments and changes in the United States.⁶⁰

Congress was then found to be able to regulate minimum wages of a largely intrastate manufacturer, because otherwise interstate commerce competition might be harmed by differential wages in different states.⁶¹ It could even regulate hours and wages of employees of schools and hospitals, because these institutions made purchases from other states.⁶² Congress could regulate the use of land for production, because it affected commerce.⁶³ An exercise of the commerce power could, like in Australia, include the prohibition of an activity.⁶⁴

The Court accepted the principle of aggregation, so that it could look at the general impact of the particular conduct on interstate commerce if it were allowed; rather than the impact of the particular conduct of the person who was challenging the law. In this way, Congress was able to regulate wheat consumed by a farmer on the farm under the commerce power – because these acts of private consumption had the ability to affect wheat prices generally.⁶⁵ Similarly, if discrimination were allowed in restaurants,⁶⁶ or in motels,⁶⁷ it might affect interstate commerce in relation to employees travelling

Commonwealth v Bank of New South Wales (1949) 79 CLR 497; *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55; *Wragg v New South Wales* (1953) 88 CLR 353

⁵⁶ (1922) 258 US 495, 514-516

⁵⁷ (1937) 301 US 1; see also *Stafford v Wallace* (1922) 258 US 495

⁵⁸ 37

⁵⁹ *Wickard v Filburn* (1942) 317 US 124-125

⁶⁰ For example, Joseph Kallenbach in *Federal Cooperation with the States Under the Commerce Clause* (1968) notes that 'powerful economic forces ... industrialisation and improvement in transportation facilities, with an accompanying extension of trade horizons, demanded the freedom from state regulation of commerce .. the effect was to cause the grant of power to be interpreted as generally exclusive by the Supreme Court' (31); and Barry Cushman 'Formalism and Realism in Commerce Clause Jurisprudence' (2000) 67 *University of Chicago Law Review* 1089, 1101: 'as the national economy became increasingly integrated in the years following the Civil War, the Court began a conscious and increasingly aggressive campaign to break down local barriers to interstate trade through a 'free-trade' construction of the dormant Commerce Clause'.

⁶¹ *United States v Darby* (1941) 312 US 100

⁶² *Maryland v Wirtz* (1968) 392 US 183; however a challenge to such regulation on the ground that it breached principles of intergovernmental immunity was successful in *National League of Cities v Usery* (1976) 426 US 833, though this case was itself overruled in *Garcia v San Antonio Metropolitan Transit Authority* (1985) 469 US 528; refer also to *New York v United States* (1992) 505 US 144

⁶³ *Hodel v Virginia Surface Mining and Reclamation Association* (1981) 452 US 264

⁶⁴ *Champion v Ames* (1903) 188 US 321; similar to *Murphy v Cth* (1976) 136 CLR 1

⁶⁵ *Wickard v Filburn* (1942) 317 US 111

⁶⁶ *Katzenbach v McClung* (1964) 379 US 294

from one state to another, or travellers generally. Congress could also regulate extortionate credit transactions, because loan sharking could lead to organised crime across state lines.⁶⁸

Some recent cases have indicated the outer limits of the ‘affect’ or ‘substantial effect’ test, though it should be noted that the decisions also strongly re-affirm the test.⁶⁹ In *United States v Lopez*,⁷⁰ Congress had passed a law criminalising gun possession within a school zone. By a majority of 5-4,⁷¹ the Supreme Court held the commerce power did not support the legislation. The act did not regulate a commercial activity; there was no demonstrable link between guns and interstate commerce.⁷² Floodgates arguments appealed to the majority:

Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law, for example. Under these theories, it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government’s arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate

The Court identified three broad categories of constitutional use of the commerce power:

- (a) Congress could regulate the use of the channels of interstate commerce;
- (b) Congress could regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, although the threat may come only from intrastate activity; and
- (c) Congress could regulate those activities with a substantial relation to interstate commerce.

The dissenters argued that gun possession could impose costs, increasing insurance (which was commerce) costs. Violent crime could lessen interstate movement of citizens; it might impede education, thereby affecting commerce.

Similar issues arose for an identical Supreme Court in *United States v Morrison*, involving the constitutionality of a law conferring a civil remedy on the victim of domestic violence. Also by 5-4, and for similar reasons as the *Lopez* decision, the Court invalidated the legislation. The majority confined commerce clause regulation to economic activity, and gender motivated violence was not economic activity. Although Congress in this case had attempted to justify its use of the commerce power,⁷³ this did not make unconstitutional laws somehow valid. Four controlling factors were mentioned as being relevant to the substantial affect test:

- (a) whether the statute regulates commerce or any sort of economic enterprise;
- (b) whether the statute contains any express jurisdictional element that might limit its reach to a discrete set of cases;
- (c) whether the statute or its history contains express congressional findings that the regulated activity affects interstate commerce; and
- (d) whether the link between the regulated activity and a substantial effect on interstate commerce is attenuated.⁷⁴

⁶⁷ *Heart of Atlanta Motel Inc v United States* (1964) 379 US 241

⁶⁸ *Perez v United States* (1971) 402 US 146

⁶⁹ Only Justice Thomas would reject the continuing applicability of the test.

⁷⁰ (1995) 514 US 549; refer to Jeremy Philips ‘*United States v Lopez*: Constitutional Interpretation in the United States and Australia’ (1995) 18(2) *University of New South Wales Law Journal* 532; Donald Regan ‘How to Think About the Federal Commerce Power and Incidentally Rewrite *United States v Lopez*’ (1996) 94 *Michigan Law Review* 554; Jefferson Powell ‘Enumerated Means and Unlimited Ends’ (1996) 94 *Michigan Law Review* 651; Anna Cramer ‘The Right Results for All the Wrong Reasons: An Historical and Functional Analysis of the Commerce Clause’ (2000) 53 *Vanderbilt Law Review* 271

⁷¹ Rehnquist CJ, together with Justices Kennedy, O’Connor, Scalia and Thomas; Justices Breyer, Stevens, Souter and Ginsburg dissenting

⁷² Later, the legislation was re-drafted to confine its operation to guns that had crossed a state border; this legislation was upheld in *United States v Danks* 221 F 3d 1037 (8th Cir); cert den (2000) 528 US 1091

⁷³ It argued that gender-motivated violence affected interstate commerce by deterring potential victims from travelling interstate, from engaging in interstate business, and from transacting with business, and in places involved in interstate commerce, by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.

⁷⁴ 612

In dissent, Justice Souter claimed the majority's new test was inconsistent with past cases such as *Wickard* and *Hodel*, which were not based on 'economic activity'. Viewing earlier cases limiting the commerce clause as being based on now-discredited laissez faire economics, he compared the restriction posed by the majority in *Lopez* and *Morrison*

Just as the old formalism had value in the service of an economic conception (laissez faire), the new one is useful in serving a conception of federalism. It is the instrument by which assertions of national power are to be limited in favour of preserving a supposedly discernible, proper sphere of state autonomy to legislate or refrain from legislating as the individual states see fit⁷⁵

Breyer J dismissed the supposed distinction between economic activity and non-economic activity as random, creating fine distinctions which did little to further the federalist interests that called it into being in the first place.⁷⁶ The minority was willing to defer to the judgment of Congress as to the need for the law, and that there was a reasonable basis for linking it with constitutional commerce.

We see then a progressive move away from restrictions on Congress' commerce clause. The American courts have had to consider many of the issues that the Australian High Court has had to consider, and there is some alignment in views. However, the United States Supreme Court has shown a greater willingness to defer to Congress' assessment of what is required; and accorded it a very broad power to regulate any activities which might in the judgment of Congress 'affect' interstate trade and commerce. Recent American cases invalidating commerce clause-invoking legislation do not call into question these well-established doctrines.

Requirements Have Changed Since the Constitution Was Written

Although some seek to confine the commerce power of the United States and Australia to what was intended by the Founding Fathers,⁷⁷ the High Court is increasingly unconvinced by such arguments, most recently in the context of the corporations power.⁷⁸ The joint reasons in *New South Wales v Commonwealth* dismiss the idea of pursuing the intention of the founding fathers as 'much more often than not, .. pursu(ing) a mirage'.⁷⁹ Others have noted how nations have changed in the intervening years, meaning that interstate and overseas trade and commerce is much broader in scope than in the past, and the requirement to divide constitutional and non-constitutional commerce becomes more and more difficult to maintain. Some of the original reason for doing so may have correspondingly disappeared. As Sir Anthony Mason puts it

At Federation, the States were separate communities with their own economies. Interstate trade did not loom so large. But now, with the advent of rapid transportation and communications and modern technology, trade within each State has been inextricably integrated with interstate and overseas trade. As a result, the economic concept of interstate trade which might be distinguished in a meaningful way from local interstate trade at the turn of the century has necessarily expanded to embrace activities and transactions formerly having local significance only ... What was within the contemplation of interstate trade in 1901 when the Australian economy was a series of loosely connected local or regional economies was a fairly small group of activities. The reach of the Commonwealth's power over trade and commerce was accordingly limited.

⁷⁵ 644-645

⁷⁶ 659

⁷⁷ Justice Thomas in *Lopez* and *Morrison*; Raoul Berger 'Judicial Manipulation of the Commerce Clause' (1996) 74 *Texas Law Review* 695; Johnathan O'Neill 'Raoul Berger and the Restoration of Originalism' (2001) 96 *Northwestern University Law Review* 253; Randy Barnett 'The Original Meaning of the Commerce Clause' (2001) 68 *University of Chicago Law Review* 101; 'New Evidence of the Original Meaning of Commerce' (2003) 55 *Arkansas Law Review* 847; Richard Epstein 'The Proper Scope of the Commerce Power' (1987) 73 *Virginia Law Review* 1387; 'Constitutional Faith and the Commerce Clause' (1996) 71 *Notre Dame Law Review* 167; cf H Jefferson Powell 'The Original Understanding of Original Intent' (1985) 98 *Harvard Law Review* 885 (stating the original Founding Fathers did not expect their intentions would influence subsequent interpretation of the Constitution)

⁷⁸ *New South Wales v Commonwealth* (2006) 81 ALJR 34, para 145-147

⁷⁹ Para 127; the joint reasons add that it is not acceptable to decide the constitutionality of an Act by asking whether a common subjective intention can be attributed to the founding fathers.

Since then, the logistical barriers between local economies have dissolved with the improvements in transportation and communication and these once separate economies have largely melded into one national economy⁸⁰

As Windeyer J noted in *Victoria v The Commonwealth*

The colonies which in 1901 became States in the new Commonwealth were not before then sovereign bodies in any strict legal sense; and certainly the Constitution did not make them so. They were self-governing colonies which, when the Commonwealth came into existence as a new Dominion of the Crown, lost some of their former powers and gained no new powers. They became components of a federation, the Commonwealth of Australia. It became a nation. Its nationhood was in the course of time to be consolidated at war, by economic and commercial integration, by the unifying influence of federal law, by the decline of dependence on British naval and military power and by a recognition and acceptance of external interests and obligations. With these developments the position of the Commonwealth, the federal government, has waxed; and that of the States has waned. In law, that is a result of the paramount position of the Commonwealth Parliament in matters of concurrent power. And this legal supremacy has been reinforced in fact by financial dominance. That the Commonwealth would, as time went on, enter progressively, directly or indirectly, into fields that had formerly been occupied by the States, was from an early date seen as likely to occur.⁸¹

Speaking of a broad reading of the commerce power, Professor Sawyer says that

If the result eventually is to leave the concept of intrastate trade almost empty, as it is now in the United States, this is merely the inevitable consequence of national economic integration.⁸² As Hueglin and Fenna, speaking of global federalism trends, put it recently⁸³

Changing circumstances have meant that the original intentions of founders of federations may not fit with a modern economy because the classic legislative federations were established in an altogether different era when the size and scope of government were limited, and it was relatively easy to divide responsibilities and to imagine two levels of government operating in their own spheres with little clash or overlap ... The mixed economy, the welfare state, the rise of environmental policy, and the enormous increase in taxation have all greatly complicated policy making in a system of divided jurisdiction – as have the vastly greater mobility of labour, geographical scope of economic activity, and quality of communication and transportation

These real world developments were also referred to in the dissenting opinion of Breyer J (with whom Stevens, Souter and Ginsburg JJ agreed) in *United States v Morrison*:⁸⁴

⁸⁰ 'The Australian *Constitution* 1901-1988' (1988) 62 *Australian Law Journal* 752; refer also to 'Towards 2001 – Minimalism, Monarchism or Metamorphism' (1995) 21 *Monash Law Review* 1, 11: 'with the advent of rapid transportation and communication, and the development of modern technology, trade within each State has become inextricably connected with interstate and overseas trade. And the nationalisation of the economy has necessarily expanded the concept of interstate trade to embrace activities and transactions that formerly had local significance only. These developments might conceivably justify a re-interpretation of the trade commerce power, the existing interpretation of which may be anchored in the artifices of legal formalism'.

⁸¹ (Payroll Tax Case)(1971) 122 CLR 353; quoted with approval by Gleeson CJ Gummow Hayne Heydon and Crennan JJ in *New South Wales v Commonwealth* (2006) para 56

⁸² *Australian Federalism in the Courts* (1967) p206; refer also to Leslie Zines *The High Court and the Constitution* (1997) p79: 'if the facts of social life so changed that an important area of activity or enterprise was seen to have a great and obvious impact upon a matter within federal control, it should .. be no answer to an argument in favour of Commonwealth power that it would deprive the States of exclusive law-making capacity in the field; David McCann 'First Head Revisited: A Single Industrial Relations System Under the Trade and Commerce Power' (2004) 26 *Sydney Law Review* 75, 99-100: 'Limiting the Commonwealth's power to only interstate trade is a technical legal idea that is increasingly difficult to apply coherently to the facts. Lines between intrastate and other trade are difficult to draw: exports and interstate trade are now heavily entwined with and affected by intrastate commerce ... The *Constitution* can no longer live for horse shoes when everyone is driving Toyotas'; and the Business Council of Australia *Reshaping Australia's Federation: A New Contract for Federal-State Relations* (2006) p1 'As the world globalises, barriers to the free movement of people, goods and services within Australia become increasingly anachronistic ... The world has changed considerably since federation in 1901 .. Issues that were once clearly the responsibility of the States have taken on a more national character'.

⁸³ TO Hueglin and A Fenna *Comparative Federalism: A Systematic Inquiry* (2006) p315

⁸⁴ (2000) 529 US 598. Refer also to Richard Friedman 'The Sometimes Bumpy Stream of Commerce Clause Doctrine' (2003) 55 *Arkansas Law Review* 981, 1006: 'Before the Civil War, many Americans had greater allegiance to their state than to the nation, but that is true no longer. Now the lines have expanded ... Most Americans expect their national government to be a muscular one, capable of addressing problems of broad impact'; Robert Pushaw 'Methods of Interpreting the Commerce Clause: A Comparative Analysis' (2003) 55 *Arkansas Law Review* 1185, 1210: 'The United States has been transformed from predominantly self-sufficient households in agrarian communities (ie not engaged in interstate commerce) to an

We live in a nation knit together by two centuries of scientific, technical, commercial and environmental change. Those changes, taken together, mean that virtually every kind of activity, no matter how local, genuinely can affect commerce, or its conditions, outside the State – at least when considered in the aggregate ... And that fact makes it close to impossible for courts to develop meaningful subject matter categories that would exclude some kinds of local activities from ordinary Commerce Clause aggregation rules without, at the same time, depriving Congress of the power to regulate activities that have a genuine and important effect upon interstate commerce.

The Bigger Picture – Federal/State Relations

Of course, the debate over regulation of trade and commerce in Australia does not occur in a vacuum and is but one important part of a much broader problem. There has been much debate recently about the future of Australia's governance, and particularly the question of centralised versus regional control over particular responsibilities. Ill-will between levels of government, lack of co-ordination and blurring of lines of responsibility are a hallmark of Australia's federal system. The Business Council of Australia was not exaggerating when it said recently that

The lines of responsibilities between the Commonwealth and States have become chronically blurred and confused. We have a system in which, because of a growing lack of transparency and accountability, the quantity of government has taken precedence over quality⁸⁵

Access Economics conservatively estimated that weaknesses and inefficiencies in Australia's federal structure cost \$9 billion per year,⁸⁶ and noted some estimates that it was \$20 billion per year.⁸⁷ Some of the irregularities in Australia's system of business regulation noted by the Business Council included:

- (a) eight occupational health and safety systems;
- (b) eight sets of environmental approvals;
- (c) eight sets of building product manufacturing requirements, compliance with which said to cost between 1 and 5% of a building company's turnover each year;
- (d) food standards set by State Governments;
- (e) transport regulations in relation to rail and road being set by States;
- (f) restrictions on the ability of a person licensed to work in one state working in another due to different training requirements⁸⁸
- (g) onerous regulation on those who wish to proceed with mining.⁸⁹

Fitzgerald has noted the inefficiencies in Australia's health system caused by blurring of responsibilities and cost shifting between levels of government:

integrated national economy based on commercial agriculture, manufacturing and service. And Congress and the Court cannot help but respond to such changes'.

⁸⁵ *Reshaping Australia's Federation: A New Contract for Federal-State Relations* (2006) iv

⁸⁶ The \$9 billion is comprised of:

\$861 million for overlap and duplication due to the need to administer grants between jurisdictions

\$836 million for cost shifting by the States that results in inefficient Commonwealth spending

\$2296 million spending above efficient levels by the States due to lack of co-ordination and/or inadequacies in Commonwealth oversight and accountabilities

\$913 million in areas where both the State and Federal Government are operating at the same time

\$215 million inefficiencies from horizontal fiscal equalisation (redirecting cash from more successful states to less financially successful states)

\$2782 million in inefficient state taxation

\$866 million efficiency (deadweight) costs of raising taxes to pay for higher than necessary spending levels

\$150 million failure to centralise tax collection of payroll and gambling taxes

⁸⁷ Vii; *The Costs of Federalism* (2006), Report by Access Economics Pty Ltd for the Business Council of Australia

⁸⁸ *Reshaping Australia's Federation*, Business Council of Australia p10-12; these areas, as well as chemicals and plastics, business regulation processes, personal property securities and product safety, were also identified by the Council of Australian Governments (COAG) in their *Communique* 10/2/06 as being areas where overlapping and inconsistent regulatory regimes are impeding economic activity.

⁸⁹ In a survey, the Minerals Council of Australia asked respondents the impact of regulatory duplication and inconsistencies on their investment. The percentage of those who responded negatively, including mildly deterred to decided not to pursue investment, was 51% in Victoria, 43% in New South Wales, 41% in Queensland, 34% in Western Australia, 32% in South Australia, and 10% in Tasmania: *Taskforce on Reducing the Regulatory Burden on Business* (2006)

The two major levels of government share the responsibility to ensure health expenditure is adequate, equitable and cost effective. The complex split in responsibilities for funding and provision of health care leads to poor co-ordination of planning and service delivery, barriers to effective substitution of alternative types and sources of care, and scope for cost shifting. The funding arrangements do not encourage continuity of care, provision of multidisciplinary care, or provision of care in the most clinically appropriate setting. There is a lack of focus on prevention, health promotion and disease management.⁹⁰

Of course, the issue of which level of government is responsible for what in a federation is related to another issue, the question of which level has the ability to raise the revenue required. In the author's view, the issue of which level of government should be responsible for which functions must be addressed first, with discussion of revenue raising responsibilities to follow after the fact. The extent of vertical fiscal imbalance in Australia, whereby there is a mismatch between levels of responsibility and ability to raise revenue, is well documented and requires little elaboration here. In 2005-2006, States raised \$43 billion in taxation revenue, but had total expenditure of \$166 billion.⁹¹ The GST pays for about 25% of States' spending; States remain very reliant on grants from the Commonwealth in order to conduct their activities. Despite all GST revenues (which are growing sharply)⁹² going to the States pursuant to the *Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations*, specific purpose grants to the States under s96 remain substantial, with payments either to or through the States expected to total almost \$27 billion in the 2006-2007 year, an increase from about \$25.5 billion in the 2005-2006 year.⁹³

The system of grants is not, however, without its difficulties. The availability of grants can cause goods and services to be underpriced, leading to an excess in supply.⁹⁴ Further, they create the possibility of competitive bidding over the distribution of grants, with resources wasted in the bidding process and the prospect of politically rather than economically motivated outcomes.⁹⁵ It is claimed that because they can rely on Commonwealth grants for funding, States may have little incentive to exercise financial restraint. Alternatively, it is claimed they are required to account in excessive detail for the funds spent.⁹⁶ Access Economics claimed recently that some conditions attached to grants do not focus appropriately on outcomes.⁹⁷ It is claimed that States become expert at 'gaming' grants, where their contribution to what is intended to be a jointly-funded program may be hard to discern. There was a lack of administrative transparency in some specific purpose payment schemes.⁹⁸

It is said then that a more functional federal system might align responsibilities and spending more directly. The Federal Government has been forced to use circuitous means to regulate areas, including those which some might consider broadly to be within the church of 'trade and commerce', over which

⁹⁰ Fitzgerald, V (2006) Health Reform in the Federal Context, in *Productive Reform in a Federal System*, Roundtable Proceedings, Productivity Commission Canberra

⁹¹ ABS: *Government Finance Statistics*, 2005-2006, Cat No 5512.0

⁹² States received an estimated \$64.6 billion in 2005-2006, and \$67.5 billion in 2006-2007: *Budget Paper No 3, 2006, Commonwealth-State Financial Relations*

⁹³ Budget Paper No 3, 2006, *Commonwealth-State Financial Relations*

⁹⁴ See Walsh, C 'Vertical Fiscal Imbalance: The Issues' in Collins, D J ed *Vertical Fiscal Imbalance and the Allocation of Taxing Power*, Australian Tax Research Foundation Conference Series No 13 (1993) p43. Some refer to this as the flypaper effect of grants: Dollery, B E and Worthington, A C 'Federal Expenditure and Fiscal Illusion: A Test of the Flypaper Hypothesis in Australia (1995) *Publius: The Journal of Federalism* 25; and Grossman, P J 'The Impact of Federal and State Grants on Local Government Spending: A Test of the Fiscal Illusion Hypothesis' (1990) 18 *Public Finance Quarterly* 313

⁹⁵ Walsh, C 'An Economic Perspective' in Brian Galligan ed *Australian Federalism* (1989) p224, and *Fiscal Equalisation, Allocative Efficiency and State Business Undertakings: The Commonwealth Grants Commission 1988 Report on Relativities* (1988) p8, and Brown, H P 'Some Aspects of Federal-State Financial Relations' in Prest, W and Mathews, R L ed *The Development of Australian Fiscal Federalism* (1980) p452

⁹⁶ Harris, C P *Relationships Between Federal and State Governments in Australia* (1979) Advisory Council for Inter-Governmental Relations Info Paper No 6 p72

⁹⁷ *The Costs of Federalism* (2006) p33. It examined the Commonwealth/State Agreement on Skilling Australia's Workforce, noting the funding provides perverse incentives and excessive prescriptiveness from the Commonwealth. The agreement does not provide incentives for improving training quality, rewards States for inefficiency and imposes prescriptive requirements with no link to training outcomes.

⁹⁸ *The Costs of Federalism* (2006) p36

there is an expectation of national and consistent standards. Were the High Court to adopt a broader view of s51(1), the need for the Commonwealth to rely on such circuitous means would be lessened.

Consequences of a Broader Interpretation of the s51(1) Power

Let us examine now the consequences for the Commonwealth and for Australia if the High Court were to embrace the commerce clause jurisprudence in the United States. In particular, we will examine the consequences that would follow if we in Australia embraced the now longstanding American doctrine that the Federal Government can regulate things or activities that *affect* constitutional commerce. I will discuss below some possible future areas for the Commonwealth's reach. Implicit in this discussion is the belief that the recent broader reach given to the Commonwealth under its corporations power is not sufficient of itself to allow the Commonwealth to regulate matters that ought to be nationally run. The Commonwealth currently provides specific purpose grants to the States in each of the areas mentioned below.⁹⁹

(a) Control Over Transportation

As I have indicated, strong concern has recently been expressed by the Business Council of Australia about Australia's hotch-potch and inconsistent transport regulation, particular affecting rail and road transport. The Council found that

An operator of an interstate train in Australia may have to deal with six access regulators, seven rail safety inspectors with nine different pieces of legislation, three transport accident investigators, 15 pieces of legislation covering occupational health and safety rail operations, and 75 pieces of legislation with powers over environmental management. Australia has seven rail safety regulators for a population of around 20 million people. In contrast, the United States, with a population of 300 million people, has one rail safety regulator¹⁰⁰

There is still no consistency, for example, between Victoria and New South Wales, on maximum load capacities. Even in 2006, a truck travelling up the Hume Highway may comply with the maximum load requirements as it passes through Wodonga, but be in breach once it reaches Albury¹⁰¹

As Treasury Secretary Dr Ken Henry found

A particularly farcical example of rail services fragmentation is in train communications. Currently, each State and Territory requires trains within its jurisdictions to have a particular type of radio – for good measure, New South Wales mandates two – meaning that a train cannot operate nationally without eight different radio systems. And even with a cabin full of eight radios, trains cannot talk to each other¹⁰²

Rail safety regulation is one of the 10 priority cross-jurisdictional hotspot areas identified by COAG as being where overlapping and inconsistent regulatory regimes are impeding economic activity.

In the area of air safety, of course already the High Court has recognised that given the physical integration of constitutional and non-constitutional air travel, the Commonwealth must be able to regulate both.¹⁰³

It is submitted that by analogy the Commonwealth should be found to have the power to issue national rail safety regulations, control access to railways, and be able to introduce national road transport regulations to overcome the inefficiencies of business having to comply with a large number of different sets of rules. Of course, Congress has been able to use the commerce clause to regulate aspects of transport, most notably in *Gibbons v Ogden*, the *Shreveport Rate Case*, *The Daniel Ball*, and in *Garcia v San Antonio Metropolitan Transit Authority*. The author agrees with Regan that

⁹⁹ According to Access Economics, in 2004-2005 SPPs in the area of road and other transport and communications was \$2.6 billion, in technical and further education \$1.1 billion, in school education \$7.5 billion and in health including aged care \$9.1 billion: *The Costs of Federalism* (2006) p44

¹⁰⁰ P10

¹⁰¹ P12

¹⁰² 'Time to Get Real on National Productivity Reform', in *Productive Reform in a Federal System*, Roundtable Proceedings, Productivity Commission Canberra, 2006

¹⁰³ Airlines (No 2)

The existence of efficient networks for interstate transportation and communication is one of the general interests of the union, perhaps the most obvious and pre-eminent internal general interest of the union. Efficient interstate transportation and communication is essential to our being a union. Without effective means for the interchange of ideas, people and goods, the people of the various states could hardly have come to consider themselves a single nation. Free interchange continues to be essential for a feeling of national solidarity ... Standards for the safety and financial health of instrumentalities that operate physically in many states are likely to require harmonised and therefore central regulation¹⁰⁴

Given that the desire to promote intercolonial trade was one of the two main reasons for Australia becoming a federal system,¹⁰⁵ as important a factor as the creation of the United States, it seems incongruous that barriers to interstate trade such as different rail and road safety systems should continue to exist. Let the Commonwealth Government be recognised as having the power under s51(1) to introduce a national approach.

(b) *Environmental and Land Regulation*

Of course, the Federal Government lacks direct constitutional power over environmental matters. It has been able to partly regulate the environment through the external affairs power¹⁰⁶ and, to a very limited degree involving the banning of a product for export, through the trade and commerce power.¹⁰⁷ Environmental assessment and approvals processes were one of the 10 cross-jurisdictional hotspots identified by COAG where ‘overlapping and inconsistent regulatory regimes were impeding economic activity’.¹⁰⁸ Global warming requires a national rather than local response.¹⁰⁹ Recently, the Federal Government has proposed a takeover of regulation of the Murray-Darling basin, given the very serious drought facing many parts of Australia, and the misuse of Australia’s water resources in the past. Could the Federal Government, in the name of its trade and commerce power, be seen to have general power over environmental matters?

Some feel that this would be eminently sensible. As Dr Ken Henry from Treasury noted

We do not have a national water market. In fact, we do not even have functioning State water markets. Instead, the majority of trade in water occurs within catchments and even then in insignificant volumes .. water still cannot be traded interstate beyond a limited pilot area ... water is rarely traded between competing uses, being more likely to be traded between producers of similar commodities ... The National Water Initiative (NWI), agreed by COAG in June 2004, sets out to establish a property rights framework for water and to create a national water market. The obstacles are considerable. For example, States have different water entitlement regimes, which create a practical barrier to the development of a national market. These barriers have proved difficult to overcome. But unless and until they are, NWI benchmarks will not be met.¹¹⁰

Access Economics, commenting on Australia’s shrinking share of global mineral exploration, concludes that

In part that is because our federal system makes digging holes rather more complex than it need be. In Australia, State and local governments allocate mineral resources and ensure a return to the public from their utilisation. But land access for Crown land and private land, heritage issues, uranium exploration, mining and export licensing, competition policy, taxes and foreign investment approvals are regulated by both the Commonwealth and the States. This sharing of powers creates confusion, duplication and waster if the requirements set by one Government are different from those set by another – as they all too often are¹¹¹

¹⁰⁴ Donald Regan ‘How to Think About the Federal Commerce Power and Incidentally Rewrite *United States v Lopez*’ (1996) 94 *Michigan Law Review* 554, 571-572; to like effect see Grant Nelson and Robert Pushaw Jr ‘Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues’ (2000) 85 *Iowa Law Review* 1, 119-120

¹⁰⁵ John Quick and Robert Garran *Annotated Constitution of the Australian Commonwealth* (1901) p100

¹⁰⁶ *Commonwealth v Tasmania* (1983) 158 CLR 1

¹⁰⁷ *Murphyores v Commonwealth* (1976) 136 CLR 1

¹⁰⁸ *Reshaping Australia’s Federation* p26

¹⁰⁹ Access Economics (2006) criticises state attempts to deal with the issue: ‘Global warming is obviously a global problem, yet the States are trying to impose a variety of inconsistent (and mostly inefficient) local approaches that have no capacity to solve that which requires a global response. And often they are imposing these inconsistent local regulatory burdens on firms who operate in all jurisdictions around Australia (let alone around the world)(p22).

¹¹⁰ N91, p339

¹¹¹ *The Costs of Federalism* (2006) p23-24

Certainly, there is commerce clause precedent to support such a move. In the *Hodel* cases,¹¹² Congress was permitted under the commerce clause to apply limits on strip mining, and provide for the restoration of ‘steep slopes’ and ‘prime farmland’. This land was not directly part of constitutional commerce; however the court found that it was reasonable for Congress to act on the basis that certain productive activities substantially affected interstate commerce, and were for that reason regulable by the Federal Government. This is defensible policy on the basis that

Threats to air and water quality are no respecters of state lines ... individual states are to some extent flatly incapable of adequately regulating their own environments by their own efforts ... Environmental regulation also requires extensive scientific expertise which is (another reason for federal control) ... States may be reluctant to impose costly environmental regulation on local businesses, for fear of handicapping them in interstate competition¹¹³

The Court recently validated the *Clean Air Act* as it applied to a person renovating an old hospital.¹¹⁴ The renovations had uncovered asbestos in the building. The Court concluded the Act could regulate the disposal of the asbestos, reasoning that asbestos removal was a booming industry, that most asbestos removal had a commercial purpose, there was a national market for asbestos removal, and the nexus between that market and interstate commerce was not attenuated, but direct and apparent.¹¹⁵ Further, clean up orders on contaminated sites were valid, because otherwise permitting a chemical plant to dispose of its waste in an unregulated way could give it a market advantage over companies that lacked this option, thus affecting interstate commerce.¹¹⁶ Congress can even act to secure a threatened species, because failure to act could deprive commercial actors of ‘biodiversity’.¹¹⁷

Thus there is conceptual justification for thinking that laws affecting the environment need to be national, and the American jurisprudence supports the ability of the Federal Government to regulate such matters under the rubric of commerce.

(c) *Employment Matters*

While the Federal Government can regulate at least the working conditions of those who work for corporations,¹¹⁸ perhaps the trade and commerce power could be used to regulate all employment issues, regardless of the form of the employer. There continues to be State-based occupational health and safety regulation, also on the COAG list of troublesome regulatory regimes impeding economic activity. The Business Council also seeks a national approach to workers’ compensation, equal opportunity and anti-discrimination,¹¹⁹ currently regulated at the State level.

McCann, writing before the Federal Government’s WorkChoices legislation, argued in favour of a Commonwealth takeover of industrial relations through s51(1):

¹¹² *Hodel v Virginia Surface Mining and Reclamation Association* (1981) 452 US 264; *Hodel v Indiana* (1981) 452 US 314; *Solid Waste Agency v United States Army Corp of Engineers* (2001) 531 US 159

¹¹³ Donald Regan ‘How to Think About the Federal Commerce Power and Incidentally Rewrite United States v Lopez (1996) 94 *Michigan Law Review* 554, 609; refer also to Andrew Thompson ‘Public Health, Environmental Protection and the Dormant Commerce Clause: Maintaining State Sovereignty in the Federalist Structure’ (2005) 55 *Case Western Reserve Law Review* 213, 217: ‘Environmental externalities present a singular problem within the Constitutional context. An environmental externality can be characterised as a problem of costs and benefits: ‘a state that sends pollution to another state obtains the labour and fiscal benefits of the economic activity that generates the pollution but does not suffer the full costs of the activity. This imbalance in costs and benefits is exacerbated by limitations on a state’s ability to reach beyond its borders to regulate out-of-state actors’; refer also to Grant Nelson and Robert Pushaw Jr ‘Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues’ (2000) 85 *Iowa Law Review* 1, 122-123, 141-147

¹¹⁴ *United States v Ho* 311 F 3d 589 (5th Cir, 2002)

¹¹⁵ 603

¹¹⁶ *United States v Olin Corporation* 107 F 3d 1506 (11th Cir, 1997)

¹¹⁷ *National Association of Home Builders v Babbitt* 130 F 3d 1041 (D.C. Cir, 1997, cert denied (1998) 118 S Ct 2340)

¹¹⁸ *New South Wales v Commonwealth* (2006) 81 ALJR 34

¹¹⁹ P27

(Section 51(1)) provides an effective) ... way for the Commonwealth to implement a system that covers both a wide range of workplace issues ... and a large percentage of Australian workers ... (the system is) conceptually, legally and procedurally complicated and costly¹²⁰

Of course, several of the United States commerce clause cases have involved employment matters, including *NLRB v Jones and Laughlin*, *United States v Darby*, *Katzenback v McClung*, and *Heart of Atlanta Motel Inc v United States*.

A related issue is the requirements to work in particular occupations. These are again primarily state-based, creating numerous anomalies. This is also on COAG's list of the 10 worse regulatory impediments to economic activity. As the Business Council highlights, the fact a person is licensed to work as an electrician in one state does not mean they can necessarily work in another, because the word 'electrician' means different things in different states, with different categories and number of categories across states. A person with a certificate in hairdressing has a nationally recognised qualification, but is not necessarily able to work in all states, since each state has its own requirements in terms of work experience and other matters.¹²¹ There are currently 149 occupational licences in New South Wales, 136 in Victoria, 87 in Western Australia, 69 in the ACT and 47 at the Commonwealth level.¹²² Access Economics is again dismissive

The States often stop the right person being in the right job – or, at least, make them go through duplicated regulatory hoops to do in one State something they have already qualified to practice in another State .. All too often, someone licensed in one State cannot readily practice in another. That is typically a triumph of bureaucracy over common sense.¹²³

The argument that is that the Commonwealth should be responsible for all licensing of those engaged in trades and professions. This would avoid the difficulties inherent in the current system whereby, despite some tentative moves in some fields, professional and trade qualifications in one state may not be recognised in others. State-based licensing of trades and professions operates as a barrier to interstate trade and commerce, and to the movement of people in Australia. Though perhaps challengeable under s92,¹²⁴ it should not be countenanced.

Conclusion

Recent reports have, with justification, called into question the continuing efficacy of Australia's current federal arrangements. Given the difficulty of securing and paucity of successful amendments to the Constitution, the Federal Government has worked around the constraints on its commerce power primarily by using financial inducements to achieve what it wants in particular areas, including in areas that most people would say require a national rather than piecemeal approach. The efficiency of this is open to question. Society has changed and there is a need for increased national regulation over many aspects of commercial activity, and the lines between constitutional and non-constitutional trade and commerce have become almost entirely blurred. Of all statutes, the *Constitution* is the one that must adapt to changes in the requirements of society. The High Court should for these reasons broaden its existing narrow interpretation of the commerce power, drawing support for that step from the experience of its American counterpart. Lines of accountability and responsibility will as a result be clearer in Australia's federal system. We will be better able to respond to the demands of 21st century governance.

¹²⁰ Though WorkChoices is of course now law, these comments are submitted to still be applicable to other areas of employment law not regulated by the WorkChoices legislation: 'First Head Revisited: A Single Industrial Relations System Under the Trade and Commerce Power' (2004) 26 *Sydney Law Review* 75, 82-84; refer also to the Hancock Report *Review Into Australian Industrial Relations Law and Systems (Committee) Australian Industrial Relations Law and Systems: Report of the Committee of Review*, 1985 Vol 2; Peter Reith *Breaking the Gridlock: Towards a Simpler National Workplace Relations System – Discussion Paper 1: The Case for Change* (2000)

¹²¹ *Reshaping Australia's Federation* (2006) p12

¹²² *Licence to Skill* (2002), Australian National Training Authority

¹²³ *The Costs of Federalism* (2006) p30-31

¹²⁴ The author does not explore this view here but will intends to develop it in a subsequent paper.

