RE-ENGINEERING THE FEDERAL BALANCE

Dale Atkinson*

Constitutional Law—Literalism—Engineers Case—Constitutional Interpretation—Federalism—Corporations Power

Since the landmark case of Amalgamated Society of Engineers v Adelaide Steamship Co, the High Court has adopted a strict literal interpretation of s 51 of the Australian Constitution, which excludes any overt consideration of history or broader context. In conflict with the constitutional framers' intended strict division of power between the Commonwealth and the States, the contemporary application of constitutional literalism provokes an extreme aversion to any consideration of federal balance in the interpretation of Commonwealth heads of power. This centralising trend is particularly evident in the High Court's treatment of the corporations power under s 51(xx). Although not arguing for a return to the discredited 'reserved powers doctrine', this article suggests that the current emphasis on literalism not only neglects the significance of federalist principles in the Australian Constitution, but has also mutated beyond its original purpose into an unmerited form of 'ultra-literalism'.

I INTRODUCTION

Despite being charged with preserving Australia's constitutionally mandated system of government, the High Court has been branded one of federalism's 'greatest antagonists'.[1] Since the decision in *Amalgamated Society of Engineers v Adelaide Steamship Co*[2] ('*Engineers*'), the Court's literalist approach to constitutional

* Dale is a 3rd year Juris Doctor student at the University of Western Australia.

[1] Greg Craven, 'The High Court and the Founders: An Unfaithful Servant' (Papers on Parliament No 30, Senate, Parliament of Australia, 1997) 76.

[2] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

interpretation has been subject to vocal and persistent criticism. Although Australia's constitutional framers originally formulated a strict division of power between the Commonwealth and the States, the contemporary application of literalism by the judiciary demonstrates an extreme aversion to any consideration of federal balance in the interpretation of Commonwealth heads of power. Instead, the '*Engineers* methodology' has come to mean not only giving the constitutional text a literal meaning, but also the widest meaning the words can possibly bear. The impact of this orthodoxy has been the near-complete transfer of legislative power to the Commonwealth. Recent judicial treatment of the corporations power,[3] for example, has seen the States' residual sphere of legislative competency shrink so far that commentators now question whether Australia's system of government can continue to be described as a truly constitutional federation, rather than merely a political one.[4]

Although not disputing literalism's pedigree, this article seeks to explore the constitutional rationale behind the interpretative device of literalism. Paying particular attention to its centralising influence on s 51(xx) in recent decades, this article argues that literalism not only neglects the significance of federalist principles in the Constitution, but has also mutated beyond its original purpose into an unmerited form of 'ultra-literalism'.[5]

II FEDERAL INTENT?

While the *Australian Constitution* was the 'vehicle for the achievement of Australia's incipient nationalism',[6] this vision was qualified by 'an over-riding commitment to federalism'.[7] Influenced by the American model of dual federalism,[8] Australia's constitutional drafters held the achievement of national sovereignty as 'absolutely subject to a satisfactory safeguarding of the positions

[3] *Commonwealth of Australia Constitution Act* s 51(xx) ('*Australian Constitution*').
[4] Geoff Gallop, 'Australian Federalism – A Case Study in Pride and Prejudice', *The Sydney Morning Herald* (Sydney), 1 March 2011.
[5] Craven, above n 1, 65.
[6] Ibid.
[7] Ibid.
[8] George Williams, Sean Brennan and Andrew Lynch, *Australian Constitutional Law & Theory* (6th ed, The Federation Press, Sydney, 2014), 237 [2.56].

of the States'.[9] The federalist intentions of the framers are manifest throughout the text and structure of the *Australian Constitution*. The Preamble reveals their ambition: the States forming 'one indissoluble Federal Commonwealth'.[10] From a States' Senate to the double majority requirement in s 128,[11] the *Australian Constitution* advocates a strong federal balance. The provisions in s 51 ensure a stable division of legislative power. Through denying the Commonwealth general legislative authority, the States retained residual legislative competence through ss 106 and 107. As Craven put it:

> Years of amplification of these powers by the High Court have tended to make us believe that the capacities delineated in s 51 are broad and untrammelled…the unbiased reader of s 51 quickly will appreciate that its words...are, in short, richly redolent of a desire to confine the power of the Commonwealth strictly within its sphere.[12]

After Federation, the newly inaugurated High Court adopted a narrow interpretative approach to the *Constitution*, which closely reflected the framers' federalist objectives. Enunciated in *R v Barger*,[13] the 'reserved powers doctrine' held that certain legislative powers were impliedly reserved to the States. This doctrine was subsequently clarified in *Huddart, Parker & Co Pty Ltd v Moorehead*[14] ('*Huddart Parker*'), which concerned the validity of Commonwealth legislation relying upon s 51(xx) to prevent constitutional corporations from engaging in restrictive trade practices. Accepting that the corporations power was capable of multiple interpretations, the majority looked to the intentions of the framers as well as the *Australian Constitution's* broader federalist structure to hold that s 51(xx) 'ought not be constructed as

[9] Greg Craven, 'Cracks in the Façade of Literalism: Is There An Engineer in the House?' (1992) 18(3) *Melbourne University Law Review* 540, 546.
[10] *Australian Constitution,* Preamble.
[11] Shipra Chordia and Andrew Lynch, 'Federalism in Australian Constitutional Interpretation: Signs of Reinvigoration?' (2014) 33(1) *University of Queensland Law Journal* 83, 91.
[12] Craven, above n 1, 66.
[13] *R v Barger* (1908) 6 CLR 41; *Peterswald v Bartley* (1904) 1 CLR 497.
[14] (1909) 8 CLR 330.

authorising the Commonwealth to invade the field of State law as to domestic trade'.[15]

III ENGINEERS CASE

As the composition of the High Court changed, and Australia's sense of nationhood grew,[16] the preoccupation with the federal balance began to slip. In its place emerged the approach taken by the High Court in *Engineers*, a landmark decision, which Walker contends:

> switched the entire enterprise of Australian federalism onto a diverging track that carried it to destinations far removed from those intended by the generation that had brought the federation into being.[17]

'Exploding' the reserved powers doctrine,[18] *Engineers* introduced a new method of constitutional interpretation: literalism.[19] Emphasising that the *Australian Constitution* should be understood as a British statute, its legal authority flowed 'not from the will of the people…but rather by delegation from the Imperial Parliament'.[20] Interpreting the Constitution in accordance with the 'settled rules on construction'[21] meant that meaning was to be 'discerned from the actual words used in the text of the Constitution, understood in their ordinary and natural sense'.[22] Provisions were to be construed without any consideration of external factors such as historical context or implied theories of federalism.[23] In terms of the discredited reserved powers doctrine, the competencies left to the States were 'merely the "residue" of powers that remain after full

---

[15] Ibid 354.
[16] *Victoria v Commonwealth* (1971) 122 CLR 353, 396 (Windeyer J).
[17] Geoffrey De Q Walker, 'The Seven Pillars of Centralism: Engineers' Case and Federalism' (2002) 76 *The Australian Law Journal* 678, 678.
[18] *Airlines of New South Wales Pty Ltd v New South Wales [No 2]* (1965) 113 CLR 54, 79 (Barwick CJ).
[19] *Amalgamated Society of Engineers v Adelaide Steamship Co* (1920) 28 CLR 129, 148–150.
[20] Chordia and Lynch, above n 11, 90.
[21] *Amalgamated Society of Engineers v Adelaide Steamship Co* (1920) 28 CLR 29, 148.
[22] Ibid 142.
[23] Angus O'Brien, 'Wither Federalism: The Consequences and Sustainability of the High Court's Interpretation of Commonwealth Powers' (2008) 23(2) *Australasian Parliamentary Review* 166, 170.

effect is given to all of the powers positively conferred upon the Commonwealth'.[24]

While *Engineers* marked a substantial departure from the Court's previous approach,[25] Craven suggests that literalism's legacy—that is, its role in overseeing an extraordinary shift towards centralism—can only be fully understood with reference to the 'covering the field' test of inconsistency under s 109, and the 'Jumbanna principle' which states that terms of a written constitution be interpreted broadly.[26] In the context of s 51(xx), the cumulative effect of these interpretative creeds has been to 'provoke suggestions that the corporations power was a sleeping, and later a stirring, giant'.[27]

IV THE CORPORATIONS POWER

The *Engineers* principle has 'been invoked in virtually every major case in which the scope of the Commonwealth's legislative power has been at issue, including the relatively modest number of cases that have considered the scope of the corporations power'.[28] The first of these was *Strickland v Rocla Concrete Pipes*[29] ('*Concrete Pipes*'), which assessed the validity of legislation which made anti-competitive agreements subject to examination. In that case, the Court unanimously overturned *Huddart Parker,* and along with it, the proposition that federal balance should play a role in constitutional interpretation.[30] A literal approach meant s 51(i) could not prevent regulation of intrastate trade under an expanded corporations power.[31]

Although *Concrete Pipes* shifted the interpretative approach of s 51(xx) away from the reserved powers doctrine of constitutional

---

[24] Nicholas Aroney, 'Constitutional Choices in the Work Choices Case, or What Exactly is Wrong with the Reserved Powers Doctrine?' 2008 32(1) *Melbourne University Law Review* 1, 20.
[25] *Amalgamated Society of Engineers v Adelaide Steamship Co* (1920) 28 CLR 129.
[26] *Jumbunna Coal Mine No Liability v Victoria Coal Miners' Association* (1908) 6 CLR 309, 367.
[27] Greg Craven, 'Industrial Relations, the Constitution and Federalism: Facing the Avalanche' (2006) 29(1) *UNSW Law Journal* 203, 204.
[28] Aroney, above n 24, 22.
[29] *Strickland v Rocla Concrete Pipes* (1971) 124 CLR 468.
[30] *Huddart Parker* (1909) 8 CLR 330.
[31] Sarah Joseph and Melissa Casten, *Federal Constitutional Law* (4th ed, Thomson Reuters, Prymont, 2014) 967 [3.10].

originalism and towards a more literalist meaning, the exact scope of the corporations power rested upon an, at the time, unresolved debate as to which types of corporations fell under the head of power and which corporate functions could be regulated.[32] As to the first issue, s 51(xx) applies to 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'. While the definition of foreign corporations is relatively straightforward,[33] the meaning of 'trading and financial corporations' is more ambiguous. The Court has applied a generous 'current activities' test to determine if a corporation is validly classified as a constitutional corporation.[34] This liberal approach means that a 'very wide range of corporations, including public sector entities will be…within the meaning of s51(xx)'.[35]

As to the class of activities of which the Court will regard as regulable activities,[36] in *Concrete Pipes*, two divergent approaches emerged. [37] The first, a 'narrow' view, suggested that the Commonwealth may only regulate those functions which closely relate to the characteristics bringing the corporation within the head of power. The second approach, a 'broad view', constructed s 51(xx) as a plenary power. Defining this broader concept, Mason J commented in *Actors and Announcers Equity Association v Fontana Films Pty Ltd*[38] ('*Actors Equity*') that 'the power is not expressed as one with respect to the activities of corporations, let alone activities of a particular kind. A constitutional grant of power should be construed liberally and not in any narrow or pedantic fashion'.[39]

Although these divergent approaches to interpreting s 51(xx) were not conclusively resolved until *New South Wales v Commonwealth*[40] ('*WorkChoices*'), the scope of the corporations power nevertheless grew incrementally. In *Actors Equity*, the Court unanimously held

---

[32] See eg, *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190.
[33] Ibid 97 [3.20].
[34] *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190; *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282; *Commonwealth v Tasmania* (1983) 158 CLR 1.
[35] Craven, above n 27, 205.
[36] Ibid.
[37] (1971) 124 CLR 468.
[38] (1982) 150 CLR 169.
[39] *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169, 207–8 (Mason J).
[40] (2006) 229 CLR 1.

that s 51(xx) enabled the Commonwealth to regulate secondary boycotts in order to protect the trading activities of constitutional corporations. Going further, in *Commonwealth v Tasmania* [41] ('*Tasmanian Dams*'), the majority held that the Commonwealth could not only regulate the trading activities of trading corporations, but also the non-trading functions done in preparation of trading activities, such as constructing a dam preliminary to the sale of electricity.[42]

This trend towards centralisation reached new heights in *WorkChoices*.[43] Craven claims that 'not since the 1920s has the High Court struck such a devastating blow against Australian federalism'.[44] Attempting to introduce a national system of industrial relations, the Commonwealth relied on s 51(xx), even though there was no obvious nexus between industrial relations and trading activities.[45] Challenged by five States and several trade unions, the High Court held, by a 5:2 majority, that the broader interpretation of s 51(xx) supported the impugned legislation.[46] The majority rejected arguments supporting a narrow interpretation of the head of power—that the character of the law should relate to the character of the corporation—as well as more general submissions that s 51(xx) should be interpreted by reference to the underlying federal structure of the Constitution.[47] Dismissing these arguments for containing 'no more than faint echoes' of the reserved powers doctrine,[48] the majority emphasised the pre-eminence of the *Engineers* orthodoxy.[49] Relying on 'accepted principles of constitutional interpretation',[50] namely literalism, the joint judgment focused almost entirely on the language of s 51(xx).[51] In holding that the corporations power should be read in sufficiently broad terms to permit the Commonwealth government to enact the *Workplace Relations Amendment (Work*

[41] (1983) 158 CLR 1.
[42] Joseph and Casten, above n 31, 107 [3.50].
[43] (2006) 229 CLR 1.
[44] Aroney, above n 24, 3 citing ABC Radio National, 'Work Choices Shipwreck', *Perspective*, 6 December 2006 <http://www.abc.net.au/rn/perspective/stories/2006/1803817.htm>.
[45] Craven, above n 27, 205.
[46] *New South Wales v Commonwealth* (2006) 229 CLR 1, 1.
[47] Ibid, 112.
[48] Ibid, 85.
[49] Ibid.
[50] Ibid.
[51] Aroney, above n 24, 9.

Choices) Act 2005 (Cth), the majority opinion emphasised that the starting point in interpreting heads of power must always be the constitutional text, which should be read 'with all the generality which the words used admit'.[52]

According to Aroney, *WorkChoices* is both revolutionary and orthodox.[53] On the one hand, the decision is a logical application of the accepted *Engineers* methodology. On the other, it radically altered the commonly assumed balance of industrial relations power between the States and the Commonwealth.[54] Writing before the case was heard, Craven warned of the potentially profound implications to the federal balance of power that would arise if the High Court adopted a broad interpretation of s51(xx). They extend not only to what might be termed their wider 'industrial envelope'—which is the object of WorkChoices—but effectively permit the regulation of the entire operational environment of trading corporations. This is significant, given the pervasiveness in Australia of the corporate form as a means of business and governmental organisation.[55]

V CRITIQUING LITERALISM

At its core, the principle of literalism is beyond reproach. Where the meaning of the *Australian Constitution* is clear, no other definition but that provided by the text can, nor should, be accommodated: 'if the text is explicit, the text is conclusive'.[56] In *Engineers*, the majority justified literalism on the basis that the *Australian Constitution* derived its authority from the Imperial Parliament. Construing the *Australian Constitution* solely by methods of British statutory interpretation, however, without any reference to history or federal implications, has profound weaknesses. As Latham wrote, such methods 'cut off Australian law from American precedents, a copious source of thoroughly relevant learning, in favour of the crabbed English rules of statutory interpretation, which are one of the

[52] *New South Wales v Commonwealth* (2006) 229 CLR 1, 103–104.
[53] Aroney, above n 24, 3–4.
[54] Ibid 3.
[55] Craven, above n 27, 206.
[56] *Attorney-General for Ontario v Attorney General for Canada* [1912] AC 571, 583.

sorriest features of English law, and are…particularly unsuited to interpretation of a rigid constitution'.[57]

Particularly in recent decades, the suggestion that the *Australian Constitution* is a mere British statute has come under attack.[58] Principles such as the nationhood principle and implied freedom of political communication[59] drew on the 'idea that the Constitution is…founded on popular, rather than imperial sovereignty'.[60] Given these developments, it appears inappropriate to continue the charade that s 51 should be seen solely through the lens of statutory literalism while other aspects of the Constitution now implicitly take into account the federalist principles and structures which helped harness the popular will of the colonies to federate.

Perhaps for this reason, the majority in *WorkChoices* justified their literal interpretation of s 51(xx) on the basis of *Engineers'* prominent place in the case law, rather than any explicit conception of the *Australian Constitution's* imperial heritage.[61] However, their argument that literalism prohibits any other kind of interpretative methodology lacks firm underpinnings; as stated by Chordia and Lynch, it is 'somewhat circular to justify that same orthodoxy on the basis that it accords with the course of recent Australian history'.[62]

More generally, the *Australian Constitution* should not be understood as a mere statute, easily amended and easily interpreted. Instead, it was drawn on 'large and simple lines, and its provisions were embodied in general language, because it was felt to be an instrument not to be lightly altered'.[63] In particular, the meaning of s 51(xx) is far from self-evident.[64] Although the characterisation of

---

[57] Richard Latham (ed), 'The Law and the Commonwealth, in WK Hancock', *Survey of British Commonwealth Affairs: Problems of Nationality 1918–1936* (Oxford University Press, Oxford, 1937) vol 1, 510.
[58] Aroney, above n 24, 21.
[59] See, eg, *Williams v Commonwealth* (2012) 252 CLR 416; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96, 112.
[60] Aroney, above n 24, 21.
[61] Murray Gleeson, 'The Constitutional Decisions of the Founding Fathers' (Speech delivered at the Inaugural Annual Lecture, University of Notre Dame, Sydney, 27 March 2007).
[62] Chordia and Lynch, above n 11, 89.
[63] Gleeson, above n 61 citing Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10965 (Alfred Deakin).
[64] Ibid.

corporations as either foreign, trading or financial is reasonably straightforward, whether s 51(xx) is meant to encompass every corporate activity or merely a limited few cannot be easily deciphered from the words of the provision alone.

A Ultra-Literalism

While the High Court has nevertheless persisted with a near-blanket approach to literal construction, pure literalism cannot fully explain the centralising tendencies of the Court in recent decades. Even Gageler J, an advocate of legalism, notes that a strict application of literalism would likely dictate a narrow reading of Commonwealth legislative competency.[65] An objective reading of the s 51 heads of power shows they 'are expressed in cautious words, inconsistent with any intention to create an all-powerful national authority'.[66] This is at odds with the High Court's record of centralisation. The fact that the High Court emphasises a literal construction of the *Australian Constitution* does not automatically mean that the Commonwealth's legislative competency should be open-endedly expanded at the expense of the federal balance.[67]

Instead, the judicial history of s 51(xx) reveals an approach where Commonwealth powers are not only interpreted as literally as possible but also as widely as possible.[68] Labelled 'ultra-literalism',[69] this is an interpretative methodology which asserts not only 'the conclusiveness of the text over other considerations, but does so with a single-minded disregard of surrounding context and circumstance in considering what the text itself is to mean'.[70] Writing extra-curially, Sir Daryl Dawson claimed this ultra-literal approach turned *Engineers* on its head: 'instead of the forbidden preconception of the States' residual powers there is a required preconception that the widest meaning, regardless of context, must be given to Commonwealth's powers'.[71]

---

[65] Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17 *Federal Law Review* 162, 181.
[66] Walker, above n 17, 683.
[67] Craven, above n 9, 546.
[68] Craven, above n 1, 77.
[69] Ibid.
[70] Craven, above n 9, 547.
[71] Sir Daryl Dawson, 'The Constitution – Major Overhaul or Simple Tune-up?' (1984) 14 *Melbourne University Law Review* 353, 361.

B The importance of context

The effect of the ultra-literal methodology is innately anti-federal.[72] Broadly interpreting the corporations power solely according to the words of the impugned provision promotes centralisation at the expense of the unexpressed residue of State powers. This specific-grant-then-residue approach, however, has been severely criticised:

> To find that there is nothing left for a residuary legatee after specific bequests have been distributed is by no means absurd…so far as the testator's intention is concerned….It is, however, unbelievable, having regard to the attention given to the States in the Constitution, that they were…to be left as impotent governmental ornaments with plenty of glory and no power.[73]

In his dissenting judgment in *WorkChoices,* Callinan J argued that the literal approach 'does not deserve the reverence which has been accorded to it'.[74] While not arguing for a return to the discredited reserved powers doctrine, his Honour made a powerful argument that considerations of federal balance should nonetheless enter the High Court's reasoning:

> The answer is the objective ascertainment of the drafters' intentions by reference to the structure of the document, the interrelationship of the parts and sections of it within one another, in the setting in which it was drawn, on the basis of the assumptions underlying it, and the manifest purposes to which it was to give effect, relevantly here a new nation comprising a federation in which the States would not be deprived of powers they formerly possessed, except as identified.[75]

This method of reading s 51(xx) as part of a broader constitutional scheme has its roots in *Huddart Parker*, where the High Court made it clear that the corporations power was constrained by the limits of other heads of power such as the intrastate trade restriction found in s 51(i). This holistic interpretative approach is not novel. The High Court has subsequently accepted that certain prohibitions written into individual heads of power can imply limits on the scope of other s 51 powers. For example, the positive limitation in s 51(xxxi) that

[72] Craven, above n 1.
[73] Walker, above n 17, 683.
[74] *New South Wales v Commonwealth* (2006) 229 CLR 1, 308 [747].
[75] Ibid 335 [802] (Callinan J).

property may only be acquired on just terms has been applied to other heads of power.[76]

While there 'is no more basic rule of legal interpretation than the one requiring that a document be read as a whole',[77] this is seemingly forgotten by the *Engineers* orthodoxy. In *WorkChoices*, the majority turned to *Engineers* to dismiss arguments that the conciliation and arbitration power under s 51(xxxv) was intended to cover the field of industrial relations. Reading each head of power independently of the others, the *WorkChoices* decision meant the Commonwealth could rely on s 51(xx) to comprehensively legislate employer-employee relations. In coming to this decision, the majority took no notice of the fact that a wide reading of s 51(xx) would render s 51(xxxv) entirely redundant. As Kirby J said:

> Clearly, it was not intended that…the important restrictions imposed on the federal exercise of legislative powers in para (xxxv), with respect to laws on industrial disputes, should be set at nought by invoking another head of power.[78]

Given the Commonwealth had unsuccessfully attempted to expand the scope of s51(xxxv) by referendum no less than six times, Justice Callinan added that the majority's approach would undermine the sanctity of the constitutional amendment mechanism contained in s 128 of the *Australian Constitution*.[79]

C Saving the States

While the High Court was right to reject the reserved powers doctrine, this is not to say that federalism has no place in the *Australian Constitution*. As Campbell notes, 'there is no need to find any implied theory of federalism when there is one expressed in the Constitution'.[80] Sections 106 and 107 explicitly guarantee the constituted existence of the States. While the High Court has drawn a fine distinction between 'the need to preserve the existence of the

---

[76] *W H Blakeley & Co Pty Ltd v Commonwealth* (1953) 87 CLR 501.
[77] Harry Gibbs, 'The Threat to Federalism' (1993) 2 *Upholding the Australian Constitution* 183, 185.
[78] *New South Wales v Commonwealth* (2006) 229 CLR 1, 511 (Kirby J).
[79] Ibid 733 (Callinan J).
[80] Walker, above n 17, 688 citing Campbell Sharman, *Federalism and the Liberal Party*, in J R Nethercote (ed) *Liberalism and the Australian Federation* (Federation Press, Leichhardt) 301.

States and the need to preserve the States' powers',[81] the dissenting judges in *WorkChoices* questioned whether the ever-increasing centralisation of power would fatally undermine the nation's federal balance.[82] Relying on the resurgent implied immunities doctrine,[83] Kirby J suggested that 'similar reasoning sustains the inference that repels the expansion of a particular head of power so that it would swamp a huge and undifferentiated field of State lawmaking'.[84] Given the pervasive spread of corporate structures in both the private and government sectors, in order to sustain the constitutionally-mandated federal hierarchy, 'the States must be able to exercise real powers of government independently from the Commonwealth'.[85]

VI CONCLUSION

While the *Engineers* orthodoxy was intended to overcome the static restraints of the flawed reserved powers doctrine, the centralising impact of ultra-literalism has led to a similarly untenable result: it has created an interpretation of the Constitution which sees power inevitably shift towards the Commonwealth. The progressive expansion of s 51(xx), reaching its peak with *WorkChoices*, reveals a situation where Higgins' 'horribles' are being realised.[86] While some have argued that an expanded corporations power is necessary to meet the evolving needs of the nation, it is not the role of the High Court to push this activist agenda,[87] especially under the guise of literalism. Notwithstanding its limitations and weaknesses, it is not appropriate to completely disregard the literalist methodology; its entrenched place in constitutional orthodoxy reveals its inherent value when the text of the *Australian Constitution* is clear. However, given federalist principles clearly pervade the text, structure, and history of the *Australian Constitution*, it would be a disservice to continue the apparent charade of ultra-literalism that federal balance has no place in constitutional interpretation.

---

[81] O'Brien, above n 23, 176.
[82] *New South Wales v Commonwealth* (2006) 229 CLR 1, 167–168 (Kirby J).
[83] *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1.
[84] *New South Wales v Commonwealth* (2006) 229 CLR 1, 229–230 (Kirby J).
[85] O'Brien, above n 24, 178.
[86] *Huddart Parker* (1909) 8 CLR 330, 409–410.
[87] Craven, above n 1.