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of People with Disability

Research Report

Persons with Disability and the Australian Constitution

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Executive Summary

This report examines the constitutional context within which Australian governments interact with persons with disability. Specifically, we investigate the extent and use of the Commonwealth's legislative powers that enable it to provide support for and protect the rights of persons with disability. In particular, we explore changing normative approaches over time and the related issues of constitutional authority. We also address cooperative mechanisms involving the Commonwealth, states and territories regarding persons with disability. We conclude that there is considerable constitutional scope for the Australian government to expand its existing support for and protection of the rights of persons with disability. We also identify potential constitutional limits that might arise from the impact on the states of potential expanded Commonwealth legislation regarding persons with disability.

1. Three eras of Australian government interaction with persons with disability

Our analysis draws on our categorisation of evolving social conceptions of the Commonwealth's obligations towards persons with disability – and the resulting treatment of persons with disability under the *Constitution* and Commonwealth laws – into three distinct chronological periods. In the first period, which spans from the drafting of the Constitution to the Second World War, the Commonwealth's obligations were seen as limited to support of the 'deserving and aged poor', and thus s 51(xxiii) of the *Constitution* assigned legislative power to the Commonwealth to make laws with respect to 'invalid and old-age pensions'. This power was first exercised in the *Invalid and Old-Age Pensions Act 1908* (Cth) to provide financial support to persons aged over 16 years who were 'permanently incapacitated for work'. The first evidence of a change in attitude in favour of more wide-ranging support for some persons with disability can be seen in the establishment of the Repatriation Commission and the provisions made (under the defence power) for returned servicemen after the First World War.

The second period commenced with the arrival of the welfare state in Australia after the Second World War, and saw a broader conception arise that the Commonwealth should support persons with disability as part of the institution of 'welfare schemes for social and economic post-war reconstruction'. This could not be supported under existing legislative powers and was reflected in constitutional change – the insertion of s 51(xxiiiA) giving the Commonwealth legislative power with respect to 'pharmaceutical, sickness and hospital benefits, medical and dental services'.¹ This new power enabled the Repatriation Commission to be expanded into the Commonwealth Rehabilitation Service in 1948, offering its services to all persons of working age with disability. Legislation providing for various forms of support for persons with disability in this period included the *Aged and Disabled Persons Homes Act 1954* (Cth), *Home Nursing Subsidies Act 1956* (Cth) and *Social Services Act 1967* (Cth).

The third period, which commenced from the 1970s and 80s, saw an even broader view of the Commonwealth's obligations to persons with disability. Without any constitutional change, the Australian government expanded its support for persons with disability, and started to legislate for the protection of the rights of persons with disability. Support would be seen through a rights lens – persons with disability should receive 'proper recognition of rights and dignity and opportunity for the fullest possible participation in the community'. The first significant steps in this direction were taken in the *Handicapped Persons Assistance Act 1974* (Cth), and further increases in the Commonwealth's role in providing support to persons with disability came in the *Home and Community Care Act 1985* (Cth) and *Disability Services Act 1986* (Cth). There would also be express legislative protection of the rights of persons with disability through the *Disability Discrimination Act 1992* (Cth). The *National Disability Insurance Scheme Act 2013* (Cth) represents the current culmination of viewing the Commonwealth's obligations towards persons with disability through a rights lens.

2. The constitutional basis for an expanding role for the Australian government without constitutional change

The changes of the third period have included what the Prime Minister described as ‘substantial and enduring reform that will fundamentally change the nature of disability care and support in this nation’. This has occurred without constitutional change, and we examine the sources of constitutional power that have enabled the Commonwealth to expand both its support for and its legislative protection of the rights of persons with disability.

We demonstrate that this has primarily been the result of the external affairs power permitting the Commonwealth to implement within Australia a range of obligations to persons with disability that it has assumed under international law. The widest-ranging of these international obligations arise under the *Convention on the Rights of Persons with Disabilities*, which Australia ratified in 2008. In addition to the considerable scope available to the Commonwealth under the external affairs power, we also explore the potential use of a range of other legislative powers. We find that the corporations power offers considerable scope to regulate the activities of trading, financial and foreign corporations providing disability services. The Commonwealth can also exercise the grants power to provide support to the states on conditions which give it the capacity to affect the treatment of persons with disability. The Commonwealth also has considerable powers to assist First Nations peoples with disability. Aside from the Commonwealth’s powers, models of cooperative federalism provide considerable opportunities for joint action by the Commonwealth and states.

3. Potential constitutional limits on Commonwealth laws relating to persons with disability

We examine the question of whether there may be constitutional limitations on the scope of Commonwealth laws relating to persons with disability. In particular, we identify the possibility that a situation could arise in which Commonwealth legislation might impair a state’s functions sufficiently to engage the doctrine of intergovernmental immunities. Second, we consider an objection to the creation of substantial unfunded mandates, finding this a relevant policy consideration that has yet to receive significant judicial support as a constitutional issue in Australia. We also examine potential issues arising from the separation of judicial power. Our

conclusion, however, is that these potential constitutional limitations are unlikely to prevent most of the legislation that the Commonwealth might choose to implement in respect of persons with disability.

Conclusion

To date, the *Constitution* has kept pace with the desire of successive Australian governments to evolve and expand their activities regarding persons with disability – whether through constitutional amendment, through the use of existing Commonwealth powers in new contexts, or through enhanced Commonwealth-state cooperation. There remains considerable constitutional scope for the Commonwealth to further expand its support for persons with disability and its legislative protection of their rights. While there is a possibility that some constitutional issues may arise in the case of legislation imposing extensive obligations on states, the use of a range of Commonwealth legislative powers appears to us to leave the door open for extended Commonwealth regulation if it is thought desirable in the future.

Introduction

Persons with disability have, in some respects, been relegated to the margins of Australian constitutional law. In the main, this is because in the original distribution of legislative powers between the states and the Commonwealth in the *Constitution*, disability was not specifically allocated to the Commonwealth but remained in the general residue of powers left to the states. There is, however, much that should be better understood about the position of persons with disability under the *Constitution*. This research begins to speak into that silence.

We categorise the social conceptions of the Commonwealth's obligations towards persons with disability – and the resulting treatment of persons with disability under the *Constitution* and Commonwealth laws – into three distinct chronological periods. At the time of the drafting of the *Constitution*, the Commonwealth's obligation was seen as limited to support of the 'deserving and aged poor',² and thus s 51(xxiii) of the *Constitution* assigned legislative power to the Commonwealth to make laws with respect to 'invalid and old-age pensions'.³ In sections II and III of this paper, we examine the reasons for the insertion of this legislative power in the *Constitution*, and explore the scope of this power and its relevance to persons with disability.

With the arrival of the welfare state in Australia after the Second World War, we identify a second conception of the Commonwealth's obligation to persons with disability – that they would need to be supported as part of broad-based 'welfare schemes for social and economic post-war reconstruction'.⁴ This altered conception was reflected in constitutional change – the insertion of s 51(xxiiiA) giving the Commonwealth legislative power with respect to 'pharmaceutical, sickness and hospital benefits, medical and dental services'.⁵ Sections IV and V of this paper examine the reasons for this constitutional amendment, and explore the scope of the resulting power and its relevance to persons with disability.

The third conception of the Commonwealth's obligation to persons with disability prevails today, and is rooted in concern for giving effect to the rights of persons with disability. Two great milestones of this rights era are the introduction of the *Disability Discrimination Act 1992* (Cth), and the establishment of the National Disability Insurance Scheme (NDIS) in 2012. The underlying conception that persons with disability have rights which must be respected finds expression in Prime Minister

Gillard's statement, while introducing legislation to establish the NDIS, that 'while the promise of fairness and equality that lies at the core of our national ethos is denied to some Australians, we are all diminished'.⁶

An important but under-explored constitutional question arises in this third era – given there has been no amendment to the *Constitution* (unlike that which occurred with the emergence of the welfare state), what is the constitutional basis for the Commonwealth legislation which implements this new approach? If the Prime Minister's statement that the NDIS was 'a substantial and enduring reform that will fundamentally change the nature of disability care and support in this nation'⁷ is correct, how did the *Constitution* facilitate such a drastic change? These questions are examined in section VI of this paper.

A further potential milestone in this rights era may await the conclusion of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability. If it makes recommendations that seek to advance the scope of the Commonwealth's coordination or authority, what are the constitutional issues that could confront any expansion of Commonwealth regulation of the provision of support to persons with disability? Will the existing powers that have brought the Commonwealth this far be able to support any future extensions of Commonwealth regulation that may be desired? Is there a point at which Commonwealth protection of the rights of persons with disability could impose a burden on the states which the *Constitution* does not permit? These are the questions we address in section VII of this paper.

Our analysis traces the evolution of social and legal understandings of the position of persons with disability under the *Constitution*. To date, the *Constitution* has kept pace with the desire for reform of successive Australian governments – whether through constitutional amendment (as at the start of the welfare state era), through the use of existing Commonwealth powers in new contexts (as thus far in the rights era), or through enhanced Commonwealth-state cooperation (as has been an increasing feature across the second and third eras). While we find that there is considerable scope for the Commonwealth to further expand or augment its regulation of the provision of support to persons with disability in order to further reflect a rights-based approach to disability, we also identify some areas where the potential impact on the states might raise either policy or constitutional limitations.

I. Disability and the drafting of the Australian Constitution

With British colonisation of Australia came the attitudes to disability prevailing in Britain at that time and ‘the practices consequent upon these views’.⁸ Disability in any form was seen as a ‘manifestation of divine disfavour’, and it was ‘supposed that moral and mental defects were synonymous’.⁹ This viewpoint led to the neglect of persons with disability, or condemning them in hospitals, gaols or asylums.¹⁰ This sprang from the inherited mentality in the Australian colonies that ‘every “decent” man was expected to provide for himself and his family’, as a result of which ‘[n]o attempt was made to understand the causes of poverty’ and there was a fear that ‘undeserving” poor would take advantage of state or charitable care’.¹¹

However, where private philanthropists and charities played a significant role in the provision of welfare in Britain, the lack of established private wealth in the early Australian colonies meant that government institutions were initially required to provide a minimum level of welfare services.¹² In the first half of the nineteenth century, this included services such as the issuing of rations and the establishment of hospitals for those unable to work as a result of infirmity, age, or physical disability.¹³ Admission required payment from those who could afford it, or else certification as ‘destitute’ for those unable to pay but requiring essential care.¹⁴

This system continued to change throughout the nineteenth century as new groups in society emerged in need of care – including ageing convicts, widowed mothers, destitute immigrants, and a growing population of children. However, the family was still regarded as the primary source of support for those unable to care for themselves. For example, the *Deserted Wives and Children Act 1840* (NSW) and *Maintenance Act 1843* (SA) placed responsibility for wives and children on husbands and fathers, and enabled Justices of the Peace to order relatives to pay maintenance if they could ‘reasonably afford’ to.¹⁵ A growing upper and middle class was also able to increasingly fund private philanthropy and religious charities to deliver welfare services.

Accommodation institutions, known as ‘destitute’ and ‘lunatic’ asylums, were established or subsidised by colonial governments for the aged and physically infirm, destitute ex-convicts, and persons with mental illness.¹⁶ Government grants also subsidised the work of voluntary and religious charities, and some rations and cash

payments were still provided in South Australia, Western Australia, and Tasmania.¹⁷ Together, this patchwork of public and private welfare provision created a rudimentary – and often punitive – ‘safety net’ for some of the colonial population.¹⁸ Thus, in the nineteenth century, the Australian colonies ‘developed and maintained a system of care and benevolence that, while rooted in the values of Britain, was unique’ to Australia.¹⁹ This system involved a combination of government and private support, where ‘institutional care was provided predominantly by government’ while “‘outdoor” (that is, home-based) relief was dominated by voluntary, non-profit and charitable agencies’.²⁰

The framers of the *Constitution* commenced the process of its drafting by drawing largely upon the circumstances and experiences in their colonies. What legislation that existed was influenced by its British inheritance. For instance, the treatment of mental health in the various colonies was regulated through various asylums themselves organised through bureaucratic fiat of a Dickensian kind.²¹

Moreover, the framers proceeded on the basis that the new Commonwealth would emerge through the redistribution of existing authority held within the colonies. Those matters which were dependent on the coordination of a national government would be assigned to it. However, other matters, such as social welfare, would remain at the local level.

Also associated with the drafting of the new *Constitution* was a commitment to existing institutional arrangements. With the exception of federalism, the framers were content to maintain the system of parliamentary democracy and trust in the policy evolution and protection of rights through the operation of that system.

Credit for the inclusion in the *Constitution* of a legislative power for ‘invalid and old age pensions’ is largely attributable to the South Australian delegate, James Henderson Howe. Born in Scotland, Howe emigrated to South Australia aged 17 in 1856 and established himself first as a member of the mounted police, a publican and then a farmer in the north of the province.²² A conservative by inclination, he had a genuine concern for the situation of the poor. He was a member of the South Australian delegation to the 1897/8 federal convention.

Howe doggedly proposed the inclusion of the power over pensions in the *Constitution* against formidable opposition. At his first speech at the Adelaide Convention in March 1897 he told delegates that:

I believe every Statesman in these colonies has given deep thought to what is known as old-age pensions. It is a question that is coming, and would have come in Australia before, if we had been united. Among the workers all over the world there is a fear that in their old age they will be dependent upon the cold charity of the State in which they live, or be a drag upon their kindred, who can little afford to keep them in the declining years of their lives.²³

Howe's enthusiasm for the topic failed to capture the attention of the 'leading legal members' of the Convention, who believed pensions to be a matter best left for the states.²⁴ Undaunted, Howe renewed his efforts at the Sydney session of the Convention in September 1897 and formally proposed the inclusion of the section. In introducing the case for the section, he appealed to the mobility of Australia's migratory population and the fact that this was a matter of national concern. 'The poor', he told his fellow delegates,

have to be kept by the state in any case, and I want the Commonwealth to say to those of its citizens who have attained a certain age, or who have been maimed for life by some accident, that they shall not want, and need not be a burden upon friends, who, perhaps, are not able to keep them, but that the Commonwealth shall provide the means from this fund to which they have contributed whereby they can live. I hope the Convention will agree to these words being inserted. I am sure that if they do so, the federal parliament will be able to formulate a scheme whereby my object can be achieved, and thereby crown itself with glory.²⁵

Howe's desire to advance the amendment prompted seasoned parliamentarians such as Charles Cameron Kingston (South Australia) and George Reid (New South Wales) to publicly counsel against pressing the matter.²⁶ Undoubtedly there was genuine interest in the issue of state pensions, however the federal implications as well as the numbers on the convention floor had not been tested. Faced with these calm warnings from potentially influential delegates, Howe reluctantly heeded the interventions.

Unbowed, Howe would re-present his amendment at the long 1898 session in Melbourne. In the first major debate on the proposed clause, Howe was well armed with both facts and rhetorical entreaties to his fellow delegates.²⁷ Citing the many commissions of inquiry into the question in the various colonies as well as England, he laid out the case for the inclusion of the provision. Of note was his reference to

the German federal system of social insurance, established in 1889.²⁸ Howe set himself no greater object than to

wipe away pauperism altogether so far as the working and deserving poor of Australia are concerned. That will be done some day. All the philanthropists and the leading statesmen of the world recognise that fact, and why should we in Australia lag behind? Are we afraid to give power to the representatives who will be elected by the whole people of Australia to carry out the humane system of which I have been speaking?²⁹

The opposition to Howe's proposal would draw from a disparate coalition of both conservative and progressive voices. Edmund Barton cautioned against the inclusion of the clause on the basis that it was a matter best left to the states.³⁰ With an eye for how this possible rejection would be portrayed to the public, and the strong lever it would provide to those who opposed the draft constitution Bill, Barton urged that the question not be put to a vote, worrying that '[i]t will be supposed that the Convention is a conservative body which callously disregards the necessity for relieving human suffering'.³¹ Kingston, a supporter of the amendment, offered a simple and curt solution to Barton's dilemma – vote in favour of the amendment.³²

The only representative of the labour movement at the Convention, William Trenwith from Victoria, also spoke in opposition to the amendment. While he endorsed Howe's sentiment that 'the offence of becoming old without becoming rich' should be rectified, he could not support the amendment.³³ Given existing progress in developing old-age pensions in the colonies, and in particular Victoria, Trenwith was concerned that the conservative forces in the new federal parliament would hold back progress. As he said, 'instead of expediting the adoption of old-age pensions the placing of this proposal in the Constitution is calculated to retard it long beyond the existence of any person here'.³⁴

When Howe's motion was first put to the vote it was narrowly defeated, by 25 to 20.³⁵ Those voting against the amendment included influential framers such as Barton, Reid, HB Higgins (Victoria), Richard O'Connor (New South Wales) and John Downer (South Australia).³⁶

Remarkably, Howe's amendment returned for further consideration on 7 March 1898.³⁷ As Howe noted, it only came about after encouragement from those who had voted against it in January.³⁸ In reintroducing the amendment, Howe repeated his previous arguments in favour of inclusion, and reminded delegates that the clause was 'not the nebulous matter some members of the Convention think it is. It is a real live matter, and something tangible'.³⁹ Of those who spoke in the short debate, only Barton maintained his view that pensions were not a federal matter. Higgins and Trenwith, two progressively-minded delegates who initially voted against the clause, briefly expressed the reasoning for their reassessment. Higgins was convinced that the mobility of the workforce made the matter of pensions a national issue. Trenwith maintained his view that the federal parliament would retard the passage of a universal old age pension, but after consulting with others he was of the view that

the widespread feeling amongst the working classes that this question is so important, and can be so much more effectively dealt with collectively than separately as regards the states, I have resolved to vote for the amendment, and hope it will be included in the Constitution.⁴⁰

When the amendment was put on this second occasion, it was agreed to by a margin of 26 to 4. Barton and O'Connor maintained their opposition.⁴¹

The historian of the making of the Australian *Constitution*, John La Nauze, highlighted the curious events behind the inclusion of s 51(xxiii).⁴² The relatively short debate belies the significance that the power would one day accrue with the emergence of the modern welfare state. Moreover, the division of opinion within the Convention cannot be easily characterised as merely a division between progressive or conservative ideologies. Rather, the positions of delegates depended upon fine calculations as to the role of the federal government, public support for the draft constitution Bill and the capacity for experimentation amongst the states.⁴³

Ultimately, disability was not regarded as a federal issue by the framers of the *Constitution*. Nonetheless, the provision for the Commonwealth to make laws with respect to invalid and old-age pensions represented a limited step towards Commonwealth responsibility for supporting a limited class of persons with disability.

II. The first era of Commonwealth regulation of disability: the Deserving Poor

The power granted by s 51(xxiii) of the *Constitution* was first exercised by the Commonwealth with the enactment of the *Invalid and Old-Age Pensions Act 1908* (Cth), which provided financial support to persons aged over 16 years who were 'permanently incapacitated for work',⁴⁴ replacing existing state schemes for invalid pensions. Whilst important to recipients, this represented a relatively limited model of support, in which the Commonwealth required medical assessments of incapacity⁴⁵ and simply provided financial support consequent upon these.⁴⁶ It nonetheless represented the start of the Commonwealth assuming 'responsibility for income support for people unable to provide for themselves, among whom people with severe disabilities are a significant group'.⁴⁷

Over the course of the early twentieth century, the Commonwealth came to rely on s 51(xxiii) to legislate with respect to a wider scope of social services, including maternity allowances, child endowments, widows' pensions, unemployment and sickness benefits.⁴⁸ For example, the *Maternity Allowance Act 1912* (Cth) allowed for a payment of five pounds from the Consolidated Revenue Fund to all women who had given birth,⁴⁹ and the *Widows' Pensions Act 1924* (Cth) created an allowance for widowed women out of the same fund.⁵⁰

With the First World War, the need to care for incapacitated servicemen (and their dependents) led to Commonwealth financial support and the establishment of the Repatriation Commission,⁵¹ which was important 'both in providing practical assistance to returning soldiers with disabilities and also in contributing to a change in community attitudes to disability from fear, blame and neglect to growing acceptance of the need for community support'.⁵² The *Australian Soldiers' Repatriation Act 1920* (Cth) also introduced a pension for members of the armed forces who were incapacitated by reason of a range of disabilities specified in the Act, including the loss of limbs, 'lunacy', total deafness or loss of vision.⁵³

Constitutionally, however, what could be done in respect of returned servicemen would enjoy support from the defence power (s 51(vi)), whereas any broader support for persons with disability would require an alternative constitutional basis.

Another small step towards broader Commonwealth involvement with disability came with the establishment of the Vocational Training Scheme for Invalid Pensioners in

1941. This was given effect through an amendment to the *Invalid and Old-Age Pensions Act 1908* (Cth) enabling the termination of invalid pensions to recipients who refused to undertake such vocational training.⁵⁴

However, the constitutional validity of this legislation and other desired legislation came into doubt in November 1945 when the High Court declared the *Pharmaceutical Benefits Act 1944* (Cth) invalid.⁵⁵ The High Court found that the payment of pharmaceutical benefits, presumptively authorised by the appropriations power in s 81 of the *Constitution*, was limited by the properly constructed scope of s 51(xxiii), and as such did not extend beyond the making of payments with respect to invalid and old-age pensions.⁵⁶

This finding placed ‘serious doubts’ on the constitutional validity of the remaining body of social services legislation which the Commonwealth had created under the apparent authority of s 51(xxiii).⁵⁷ Recognising the need to maintain the system of social services which was now seen as the responsibility of the federal government, the Chifley Labor government sought to amend the *Constitution* to include an additional social services power – now s 51(xxiiiA) – in the September 1946 referendum.

III. Disability and s 51(xxiiiA) of the Australian Constitution

The outbreak of the Second World War in 1939 dramatically transformed the previously-held assumptions regarding the distribution of legislative authority and political responsibility within the nation. As with the First World War, the Australian community would mobilise civil society to support the necessities of total war. The defence power (s 51(vi)), and the *National Security Act 1939* (Cth) passed under it, would reshape the Australian economy as well as social norms. As with the First World War, the federal division of power would be largely subsumed by the expanded imperative of national defence. As Isaacs J noted in the First World War case of *Farey v Burvett*,

[t]he power to make laws with respect to defence is, of course, a paramount power, and if it comes into conflict with any reserved State rights the latter must give way.⁵⁸

Acknowledging the difficulty confronting the judiciary in determining the constitutional facts upon which the executive could have based a particular measure for the

defence of the Commonwealth, Isaacs J proposed a notable stance on the part of the High Court. He said:

If the measure questioned may conceivably in such circumstances even incidentally aid the effectuation of the power of defence, the Court must hold its hand and leave the rest to the judgment and wisdom and discretion of the Parliament and the Executive it controls.⁵⁹

While the Menzies (1939-41), Curtin (1941-45) and Chifley (1945-49) governments advanced the preparation and execution of the war effort, the Parliament passed many of the foundational legislative measures associated with the modern welfare state. As Geoffrey Sawer noted of the 1940-1943 parliament,

war notwithstanding, much concerned with social services, and this was so both in the period of the non-Labor governments and in the period after October 1941 when Labor held office. The Menzies government established child endowment, the Curtin government established widows' pensions, and the main new impost – payroll tax – was to finance social services, not the war effort.⁶⁰

A significant constitutional development during the war was the Curtin government's ambitious proposal to expand the Commonwealth's authority through constitutional amendment in 1944. Largely driven by the Attorney-General, Dr HV Evatt, the 'Post-War Reconstruction and Democratic Rights' amendment attempted to give to the Commonwealth, for a period of five years, sweeping powers in fourteen areas including the rehabilitation of ex-servicemen, national health, family allowances and 'the people of Aboriginal race'.⁶¹ The government's education program about the proposed changes 'was mired in controversy, the referendum campaign fared no better'.⁶² When the amendment was put to the electorate on 14 August 1944, it found support only in South Australia and Western Australia, and was defeated at the Commonwealth level 54 per cent to 46 per cent.⁶³ The defeat of the 1944 amendment, and the Commonwealth's diminishing wartime powers, provide the backdrop to the successful 1946 social security amendment which resulted in the inclusion of s 51(xxiiiA).

The passage of the *Pharmaceutical Benefits Act 1944* (Cth) was an element of the post-war reconstruction policy of the Labor government and set out a significant role for the Commonwealth in the provision of services that had previously been left largely to the states. Under the Act, £30 million was appropriated to the National

Welfare Fund which would make free to all people resident in the Commonwealth medicines through approved chemists and hospitals.⁶⁴

The Act was challenged by members of the Medical Society of Victoria with the support of the Attorney-General of that state.⁶⁵ Publicly, the society objected to its members being co-opted into the scheme and having their professional judgment limited to only prescribing the free drugs from the Commonwealth scheme.

The challenge before the High Court rested on two points. The first was whether the scheme that required doctors and chemists to act in accordance with the regulation was authorised by a legislative head of power in the Constitution. In short, did the Commonwealth have the power to regulate medical services? The second point was whether the Commonwealth scheme was in fact merely the appropriation and spending of funds authorised by the Parliament, and thus supported by the incidental powers under the *Constitution*.⁶⁶

The High Court (Latham CJ, Rich, Starke, Dixon and Williams JJ) upheld the challenge to the Act with only McTiernan J dissenting. On the first point, the majority held that the Act was beyond power. As Latham CJ noted, the appropriation was for the purpose of: '[p]ublic health, doctors, chemists, hospitals, drugs medicines and medical and surgical appliances. The Commonwealth Parliament has no such power'.⁶⁷

While Dixon J acknowledged the position of a national government in the polity, he nevertheless recalled the 'basal consideration' found in the distribution of powers and function between the Commonwealth and the states.⁶⁸ He briskly noted that:

The *Pharmaceutical Benefits Act* emerges as a statute which must be held completely invalid upon the simple ground that it is not relevant to any power which the Constitution confers upon the Parliament.⁶⁹

Given the Court's decision on the first point, there was no need to consider the question of the ability of the Parliament to appropriate funds for the 'purposes of the Commonwealth'.⁷⁰

Justice McTiernan, however, approached the validity of the Act on the basis that the Parliament had wide authority to appropriate and spend funds on such matters as it saw fit. As he said, the 'Constitution puts the power of the purse in the hands of the

Parliament, not in the hands of the Courts'.⁷¹ Adopting an organic approach to the development of the nation and its interests, McTiernan J concluded that:

As the Constitution is an instrument of government it has the quality of adaptability to new needs and conditions. The purposes of the Commonwealth are not fixed or immutable. They expand and change with the growth and development of the nation. As the Constitution is an instrument of government it should not be construed as if it were merely an act of Parliament or a contract.⁷²

The implications of the High Court's decision in the *Pharmaceutical Benefits Act Case* were profound. Beyond the particular Act in question, the validity of other measures including the *Maternity Allowance Act 1912 (Cth)*, *Child Endowment Act 1941 (Cth)*, *Widows' Pensions Act 1942 (Cth)*, and *Unemployment and Sickness Act 1944 (Cth)* were now in grave doubt. The Cabinet moved to seek opinions from leading constitutional lawyers to determine the impact of the *Pharmaceutical Benefits Act Case*⁷³ and hinted that the decision provided a strong case for constitutional amendment.⁷⁴

The result of the High Court's decision provides the background to the Chifley government's determination to seek again far-reaching constitutional amendment. In March 1946 the Attorney-General, Dr HV Evatt, introduced legislation to alter the Constitution in three areas. As well as social services, the government wished to expand the Commonwealth's powers over the marketing of primary products and industrial employment. These areas, which had been vital for the war effort, would soon return to the control of the states with the ending of the war and the attendant waning of the defence power.

In his second reading speech, Evatt noted that he had long warned the Parliament and the country that the constitutional foundations of the Commonwealth's raft of social security legislation were 'doubtful and insecure'.⁷⁵ For the benefit of the House, Evatt reviewed the judgments of his former High Court colleagues and noted the serious ramifications of the decision. He tabled for the House legal opinions obtained from Sir Robert Garran KC, David Maughan KC, Garfield Barwick KC, WL Ham KC and Dr EG Coppel KC. All opinions placed in doubt the validity of significant legislative initiatives and convinced the government that amendment of the *Constitution* was necessary. Evatt stressed the limits of the amendment, and the fact that its primary aim was to support legislation already on the statute books.⁷⁶ He

cooly responded to an interjection from the Opposition as to whether the amendment would enable the Parliament to nationalise medical and dental services.⁷⁷ In proposing the amendment Evatt anticipated an argument that the Commonwealth, in cooperation with the states, could achieve similar policy outcomes. 'The government feels strongly', he said

that the effective and harmonious administration of such benefits is best ensured by the Commonwealth-wide administrative organisation, and that the Commonwealth should have the power to carry out directly, and in its own way, the social service schemes on which the Parliament decides.⁷⁸

In replying to the proposed constitutional amendments, the Leader of the Opposition, Robert Menzies, outlined areas of support and objection. Menzies was in his own right a leading constitutional lawyer and dissected the impact of the High Court's decision in the *Pharmaceutical Benefit Act Case* and its possible ramifications for the statute book.⁷⁹ Menzies' objections were based on both process and substance. He objected to the fact that the government had not taken up the Opposition's offer of a constitutional convention to review the 'structure and workings of the Constitution'.⁸⁰ He also objected to the timing of the proposed constitutional referendum which was to be combined with the forthcoming general election. He accused the Government of opening the way to 'a great mass of skilful propaganda' where the merits of the constitutional issues may 'entirely disappear'.⁸¹

In terms of the Opposition's support of the substance of the social security amendment, Menzies drew a number of distinctions. He said that there was 'no argument at all' in regard to the removal of doubt over the validity of legislation associated with widows' pensions, maternity allowances, child endowment and family allowances.⁸² While he believed it was 'most desirable' that the Commonwealth establish a system for unemployment and sickness benefits, hospital services and medical and dental services, the Opposition's preferred approach was to amend the Commonwealth's insurance power (s 51(xiv)).⁸³

In a sign of what was to come, Menzies believed that Evatt's response to the accusation that the government wished to nationalise medical and dental services was 'inadequate'.⁸⁴ Given the language of the amendment, and other High Court decisions, Menzies concluded that, 'the medical and dental professions could be

nationalised by making all doctors and dentists members of one government service which had a monopoly of medical and dental treatment'.⁸⁵

Lastly, Menzies criticised the 'piecemeal and rather ambiguous' language in the proposed amendment associated with 'sickness and medical benefits' as well as 'benefits to students'.⁸⁶ He questioned the uncertainty in the scope of this language.⁸⁷ Again he would have wished this to be considered by his preferred constitutional convention.

In the last stages of the debate Menzies moved an amendment to the proposed clause to insert after 'medical and dental services' the words '(but not so as to authorize any form of civil conscription)'.⁸⁸ Cleverly Menzies adopted the language from the terms of the government's *Constitutional Alteration (Industrial Employment) Bill 1946*, thus denying it the opportunity to quibble as to its meaning.⁸⁹ Without the inclusion of the amendment, Menzies maintained 'grave doubts' as to whether the 'power does not authorize the nationalisation of these two professions'.⁹⁰ Evatt accepted, with pleasure, the amendment. When the Bill had its final vote in the House it was passed 54 to 1.⁹¹ Only the tempestuous Archie Cameron, member for Barker in South Australia, voted against the motion in the House of Representatives.⁹² He was joined in the Senate by fellow South Australians, James McLachlan and Ted Mattner, in opposing the proposed constitutional amendment.

Yes and No cases

Voting on the three referendum questions by the electorate was to be in conjunction with the general election set down for 28 September 1946. As expected, the contest for government dominated the campaign with the referendum being relegated to a secondary question. As the Leader of the Opposition, Robert Menzies, told a Brisbane rally in August 'he would vote "Yes" on the social services question at the referendum, and "No" on organised marketing and terms and conditions of employment.'⁹³

By early August the government printer had produced a 32-page pamphlet setting out the 'Yes' and 'No' cases for the electorate to consider at the referendum.⁹⁴ Given the overwhelming positive vote in the Parliament for the social security changes, it

was left to Mr Cameron and Senators McLachlan and Mattner to craft the text for the 'No' case.

The 'Yes' case argued the necessity of the amendment given the High Court's decision in the *Pharmaceutical Benefits Act Case* and highlighted that social security legislation introduced by both the Non-Labor and Labor governments was 'all in danger of being declared invalid' at any moment.⁹⁵ The 'Yes' case responded to the charge of the socialisation of the medical and dental services by noting that the power to establish any particular method or mode of medical service was in the hands of Parliament. Moreover, the case highlighted the limitation proposed by Menzies in relation to 'civil conscription'.⁹⁶ The case concluded with the rhetorical call to arms:

There is really no room for doubt about how you should vote. The need for maternity allowances, child endowment, widows' pensions and other social services is no longer disputed by any thinking person. There is no doubt about the grave danger that is threatening them now. In Australia's interests, and in your own family's interests, the only vote is YES.⁹⁷

The 'No' case argued against the amendment on a number of grounds. First, that the High Court's decision did not place the various benefits or endowments in doubt. 'That case was decided last year', the authors reassured, 'but you are still regularly receiving every one of the established Commonwealth Social Service Benefits'.⁹⁸ The proponents of the change, they said, were 'trying to panic the electors into granting further powers to the Commonwealth'.⁹⁹ In aid of its arguments, the 'No' case selectively quoted from Chief Justice Latham's judgment in the *Pharmaceutical Benefits Act Case*.

Second, the 'No' case provided three reasons against the constitutional alteration. They were:

- (1) Because through them the Commonwealth can gain further far-reaching controls over your daily lives
- (2) Because they will enable the States to be ousted from their present role of providing additional social services and
- (3) Because they are one step further towards the centralisation of all controls and powers in Canberra.¹⁰⁰

The first public exchange between the ‘Yes’ and ‘No’ campaigns commenced with accusations by Senator McKenna, Minister for Health and Social Services, that the ‘No’ case was ‘misleading and guilty of suppression and misrepresented the views of one justice of the High Court’. In particular Senator McKenna said that the authors were ‘guilty of the worst type of suppression by improperly cutting short a sentence of the Chief Justice and omitting the most relevant portion of that sentence’.¹⁰¹ Moreover, they had neglected the views of the ‘four justices, on whose findings the decision of the High Court had turned.’¹⁰² The ‘No’ case retorted by issuing a statement suggesting that Senator McKenna had ‘completely misrepresented the Pharmaceutical Benefits Act case decision, and he was apparently hoping to “get away” with it’.¹⁰³ Such was the elevated debate on this amendment to the *Constitution*. Others who participated in the public debate included influential academics such as Professor Francis Armand Bland¹⁰⁴ and Dr Lloyd Ross.¹⁰⁵ They took opposing positions.

Of the three amendments proposed in 1946 only the social security question secured the requisite support to amend the constitution. It passed in all states and the Commonwealth.

Table 1: Results of the 1946 Referendum¹⁰⁶

Jurisdiction	Enrolled	Votes	For	Percent (%)	Against	Percent (%)	Informal
New South Wales	1 858 749	1 757 150	897 887	54.00	764 723	46.00	94 540
Victoria	1 345 537	1 261 374	671 967	55.98	528 452	44.02	60 955
Queensland	660 316	612 170	299 205	51.26	284 465	48.74	28 500
South Australia	420 361	399 301	197 395	51.73	184 172	48.27	17 734
Western Australia	300 337	279 066	164 017	62.26	99 412	37.74	15 637
Tasmania	154 553	144 880	67 463	50.58	65 924	49.42	11 493
Total for Commonwealth	4 739 853	4 453 941¹⁰⁷	2 297 934	54.39	1 927 148	45.61	228 859

The other two amendments relating to the Marketing of Primary Products and Industrial Employment both failed.¹⁰⁸ The successful amendment of the *Constitution* to insert s 51(xxiiiA) represented the twentieth attempt at formal reform of the *Constitution* since federation in 1901. In those nearly 50 years, only in 1906, 1910 and 1928 had the requirements of s 128 of the Constitution been met and the text of the framers been changed.¹⁰⁹ Thus s 51(xxiiiA) was inserted into the *Constitution*:

Section 51 (xxiiiA)

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances;

This new power gave the Commonwealth the constitutional ability to expand its support and regulation of disability beyond invalid pensions, or measures tied to defence, to consider more generally the position of persons with disability.

IV. The second era of Commonwealth regulation of disability: the welfare state

One early piece of legislation relevant to persons with disability in this era was the *Unemployment and Sickness Benefits Act 1944* (Cth).¹¹⁰ In addition to introducing an unemployment and sickness benefit for persons unable to find work or temporarily incapacitated from working, this scheme also introduced a 'special benefit' which could be paid to persons unable to earn a 'sufficient livelihood' for themselves by reason of 'age, physical or mental disability or domestic circumstances'.¹¹¹ The illustrates a step away from the previous justification for the federal provision of invalid and old age pensions, which had been limited to those who had contributed to the productivity and wealth of Australia.

The new power granted by s 51(xxxiiiA) has been held to give the Commonwealth the ability to provide the supports it identifies itself or through the means of contributing to their provision by others,¹¹² and extends to the regulation of medical care incidental to the provision of any of the services identified in s 51(xxiiiA).¹¹³ However, s 51(xxiiiA) is 'no general power to legislate for social services.'¹¹⁴ Accordingly, while it expands the scope of potential Commonwealth financial support to persons with disability, there are extreme limitations on the capacity of s 51(xxiiiA) to permit Commonwealth regulation of the rights of persons with disability.

In this second era, an early expansion by the Commonwealth related to the Repatriation Commission. The question of the rehabilitation of disabled servicemen and women was considered at an earlier stage of the Second World War, with the Inter-Departmental Reconstruction Advisory Committee setting up a sub-committee on repatriation, training and placement in March 1941.¹¹⁵ A comparison of Part IV of

the *Re-establishment and Employment Act 1945* (Cth) to its First World War counterpart illustrates a change in the government's approach to defining disability. Rather than specifying a list of specific physical injuries, the Act provides a general definition, describing a 'disabled person' as a discharged service member 'who, by reason of injury, disease or deformity, is substantially handicapped in obtaining, or maintaining himself in, employment'.¹¹⁶ The Act also sets out certain allowances for disabled service members, including the payment of weekly benefits and any other special treatment required in training or employment.¹¹⁷ After the Second World War, the Repatriation Commission was expanded into the Commonwealth Rehabilitation Service (CRS) in 1948. The CRS delivered vocational training for not only returning servicemen, but people of work force age with disabilities.¹¹⁸ The Commonwealth administered the CRS providing 'vocational education, training and employment programs for people with disabilities',¹¹⁹ while the states were responsible for medical rehabilitation.¹²⁰

These arrangements led to an increase in the number of sheltered workshops, usually charitable or religious institutions which provided employment opportunities for people with disabilities in a segregated environment.¹²¹ Subsequently in 1967, the Sheltered Employment Allowance was introduced under the *Social Services Act 1967* (Cth).¹²² This allowed for the payment of wages significantly below the usual award to persons with a disability employed in approved sheltered workshops. Wages were paid at the same rate as the Invalid Pension, and means-tested to prevent persons earning more than they would have earned from the Invalid Pension.¹²³

A gradual expansion of Commonwealth legislation occurred in this second era. The provision of subsidised medical care to persons with disability was legislated in the *National Health Act 1954* (Cth); subsidies to private providers of accommodation and services for persons with disability were introduced in the *Aged and Disabled Persons Homes Act 1954* (Cth) and *Home Nursing Subsidies Act 1956* (Cth) respectively. The power granted by s 51(xxxiiiA) was further utilised in a range of later legislation.¹²⁴

The emergence of the modern welfare state in Australia is closely linked to the aftermath of the two global conflicts of the twentieth century. The impact of the two world wars prompted the Australian governments to reconfigure their role in the

provision of services that until that time had been seen as the exclusive purview of the states. This new circumstance would have important ramifications for persons with disability.

V. The third era of Commonwealth regulation of disability: using legislative powers to implement an emerging rights framework

It was not until the Whitlam government in the 1970s, with the Handicapped Person's Welfare Program,¹²⁵ that disability policy was first addressed as a national social policy priority.¹²⁶ Over the following decade, there was growing international and national attention on the rights and entitlements of people with disabilities. At an international level, in 1975 the United Nations endorsed the Declaration of the Rights of Disabled Persons, and 1981 was proclaimed the International Year of Disabled Persons. At a domestic level, in the same year, the Survey of Handicapped Persons was conducted by the Australian Bureau of Statistics, for the first time providing information on the numbers of people with disabilities.¹²⁷ Further, Australia's first national representative body for disabled people – Disabled People's International (Australia) – was established in 1983 during the Hawke government.¹²⁸ Given the organisation's receipt of a government grant, this 'marked a period of large gains for disabled people, particularly in terms of policy representation'.¹²⁹ These developments on the international and domestic stage ultimately led to the Hawke government establishing a national consultation to review the Handicapped Person's Welfare Program, which subsequently led to the repeal of the *Handicapped Persons Assistance Act 1974* (Cth).¹³⁰

In replacing the Act, a wave of new legislation emerged, with first the passage of the *Home and Community Care Act 1985* (Cth), followed by the enactment of the *Disability Services Act 1986* (Cth), which provided a comprehensive framework for the funding and provision of disability services across Australia. The *Disability Services Act 1986* (Cth) 'marked a turning point' in the Commonwealth's legislation of services for persons with disability,¹³¹ with an objective of the Act being to 'assist persons with disabilities to receive services necessary to enable them to work towards full participation as members of the community'.¹³² In his second reading speech on the Bill, the then Minister for Community Services Don Grimes said that

the new Act provided ‘proper recognition of [people with disabilities’] rights and dignity and opportunity for the fullest possible participation in the community’.¹³³

A major step forward occurred when the Commonwealth passed the *Disability Discrimination Act 1992* (Cth). Section 3 of the Act outlines the objects of the Act, which are:

- to eliminate, as far as possible, discrimination against persons on the ground of disability in the areas of:
 - (i) work, accommodation, education, access to premises, clubs and sport; and
 - (ii) the provision of goods, facilities, services and land; and
 - (iii) existing laws; and
 - (iv) the administration of Commonwealth laws and programs; and
- to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community; and
- to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community.

This rights-based approach ‘reflected changing attitudes toward disability and recognised disability as a dimension of human diversity like gender, race and culture’.¹³⁴ The Act began its life as a limited scheme to improve the employment opportunities of persons with disability,¹³⁵ leading the Minister for Health, Housing and Community Services, Brian Howe, to commission a report on the barriers to employment for persons with disability.¹³⁶ The report recommended the Commonwealth enact ‘national, comprehensive legislation’ prohibiting discrimination based on disability in employment,¹³⁷ incited by results from a national consultation where 95 per cent of participants supported some form of federal disability discrimination legislation.¹³⁸ As a result of this recommendation, the scope of the proposed legislation was broadened to include areas other than employment.¹³⁹ This led to the Disability Advisory Council undertaking consultation to ‘consider the need for anti-discrimination legislation, to assess the required scope of the legislation and determine appropriate modes of redress’.¹⁴⁰ The support for national legislation was again overwhelming.¹⁴¹ Along with the previous commissioned report, the Australian government held this indicated ‘strong support for the introduction of national,

comprehensive legislation'.¹⁴² Further, the Senate Committee on Community Affairs also recommended the anti-discrimination legislation be introduced.¹⁴³

Prior to 1992, anti-discrimination legislation for people with disabilities rested with the state and territory jurisdictions. However, not all disabilities were covered by the legislation,¹⁴⁴ and some jurisdictions did not even have such legislation in place.¹⁴⁵ The Australian government intended the *Disability Discrimination Act 1992* (Cth) to not only 'clarify and amalgamate' disability discrimination laws,¹⁴⁶ but go further than the states and territories with action plans and disability standards to 'encourage systematic change and reduce reliance on individual complaints'.¹⁴⁷ In his second reading speech, Howe stated that the legislation was inspired by a

vision [of] a fairer Australia where people with disabilities are regarded as equals, with the same rights as all other citizens, with recourse to systems that redress any infringements of their rights ... where difference is accepted, and where public instrumentalities, communities and individuals act to ensure that society accommodates such difference.¹⁴⁸

Critical to the third period of disability legislation in Australia has been the willingness of the Australian government to propose schemes drawing upon novel uses of existing constitutional sources of power and the growing international framework of conventions and treaties.

The *Disability Discrimination Act 1992* (Cth) relies upon a number of heads of Commonwealth legislative power for its implementation: trade and commerce (s 51(i)); banking and insurance (ss 51(xiii) and (xiv)); corporations (s 51(xx)); external affairs (s 51(xxix)); and Territories (s 122).¹⁴⁹ With respect to the use of the external affairs power, particular reliance is placed on the Commonwealth legislative power to implement treaty obligations, and specifically the *ILO Discrimination (Employment and Occupation) Convention*, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, and the *Convention on the Rights of Persons with Disabilities*. Of course, at the time that the Act was initially enacted the *Convention on the Rights of Persons with Disabilities* was yet to exist. Australia ratified the *Convention on the Rights of Persons with Disabilities* on 17 July 2008 and the *Disability Discrimination Act 1992* (Cth) was amended shortly thereafter.

After ratifying the *Convention on the Rights of Persons with Disabilities*, Australia was required to establish and designate a framework to promote, protect and monitor implementation of the treaty.¹⁵⁰ The Rudd government began to develop a National Disability Strategy to ensure Australia's national policy framework met Australia's obligations under the *Convention on the Rights of Persons with Disabilities*. As part of the strategy, the government asked the Productivity Commission to investigate the 'feasibility of new approaches for funding and delivering long-term disability care and support'.¹⁵¹ In 2011, the Productivity Commission released the report *Disability Care and Support*, and found that 'disability support arrangements are inequitable, underfunded, fragmented and inefficient, and give people with a disability little choice'.¹⁵² They therefore recommended the establishment of a new National Disability Insurance Scheme to provide insurance for all Australians with a significant disability.¹⁵³ In response, the Council of Australian Governments (COAG) recognised the 'need for major reform of disability services through an NDIS'¹⁵⁴ and in 2012 an Intergovernmental Agreement was signed to pave the way for the NDIS launch.¹⁵⁵ By 2013, the 'much feted'¹⁵⁶ National Disability Insurance Scheme was created, intended to redefine how support is provided to persons with disability by enabling persons with disability to exercise greater choice and control over the planning and delivery of the support they receive.¹⁵⁷ This insurance framework being the 'only national scheme of its kind in the world'.¹⁵⁸

The *National Disability Insurance Scheme Act 2013* (Cth) seeks to give effect to Australia's obligations under the *Convention on the Rights of Persons with Disabilities*, the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on the Rights of the Child*, the *Convention on the Elimination of All Forms of Discrimination Against Women*, and the *International Convention on the Elimination of All Forms of Racial Discrimination*.¹⁵⁹ While this suggests that the external affairs power will support the legislation, the *National Disability Insurance Scheme Act 2013* (Cth) also contains in s 206 a provision saving its application with respect to other heads of legislative power including: pharmaceutical, sickness or hospital benefits or medical and dental services (s 51(xxiiiA)); Territories (s 122) and Commonwealth places (s 52(i)); postal, telegraphic, telephonic and other like services (s 51(v)); and census and statistics (s 51(xi)).

The Commonwealth has thus taken regulatory steps to protect the rights of persons with disability, and to fulfil the rights of persons with disability through the provision of appropriate funding. In both respects, the Commonwealth has moved beyond the scope of the power granted by s 51(xxiiiA). This section therefore examines the additional sources of legislative power that now underlie Commonwealth engagement with persons with disability.

The external affairs power s 51(xxix)

The High Court has recognised that the external affairs power provides the Commonwealth with the power to make laws that: affect Australia's relations with other nation states;¹⁶⁰ relate to matters geographically external to Australia;¹⁶¹ or implement a treaty or customary international law.¹⁶²

The executive arm of government has the power to negotiate and enter into international agreements.¹⁶³ This power is not limited as to subject matter.¹⁶⁴

Australia's entry into an international agreement does not mean that the agreement becomes part of Australia's domestic law as international agreements 'do not have the force of law unless they are given that effect by statute'.¹⁶⁵ The Commonwealth's legislative power with respect to 'external affairs' allows the Parliament to implement treaties entered into by the executive.¹⁶⁶ The power has been exercised in the *Disability Discrimination Act 1992* (Cth), which implements relevant treaties including the *Convention on the Rights of Persons with Disabilities*,¹⁶⁷ and in the *National Disability Insurance Scheme Act 2013* (Cth).

The High Court has outlined that a treaty may be implemented under the external affairs power if the treaty is bona fide,¹⁶⁸ creates binding obligations on the Commonwealth,¹⁶⁹ and is sufficiently specific and not merely aspirational.¹⁷⁰ The implementing legislation must be reasonably appropriate and adapted to the implementation of the treaty.¹⁷¹ There is no reason to doubt that the relevant provisions of the *Disability Discrimination Act 1992* (Cth) and *National Disability Insurance Scheme Act 2013* (Cth) could be supported by the external affairs power as an implementation of the *Convention on the Rights of Persons with Disabilities* and other relevant treaties to which Australia is party.

One issue that may arise is the extent to which the Commonwealth could implement observations or recommendations of the Committee on the Rights of Persons with Disabilities to the extent that its work may be thought to expound an expansive view of the requirements of the *Convention on the Rights of Persons with Disabilities* itself. It has been argued that the Commonwealth's legislative power with respect to 'external affairs' may extend to also include the implementation of recommendations or requests from international organisations. This view was expressed as early as 1936 in *R v Burgess; Ex parte Henry*, when Evatt and McTiernan JJ suggested:

The Parliament may well be deemed competent to legislate for the carrying out of "recommendations" as well as the "draft international conventions" resolved upon by the International Labour Organization or of other international recommendations or requests upon other subject matters of concern to Australia as a member of the family of nations.¹⁷²

Acknowledging those remarks, Deane J in the *Tasmanian Dam Case* in 1983 went on to note:

Circumstances could well exist in which a law which procured or ensured observance within Australia of the spirit of a treaty or compliance with an international recommendation or pursuit of an international objective would properly be characterized as a law with respect to external affairs notwithstanding the absence of any potential breach of defined international obligations or the letter of international law.¹⁷³

In that case, Murphy J thought that the external affairs power extended beyond treaty implementation to also include the implementation of

any recommendation or request of the United Nations organization or subsidiary organisations such as the World Health Organisation, the United Nations Education, Scientific and Cultural Organisation, the Food and Agriculture Organisation or the International Labour Organisation.¹⁷⁴

However, the view that the implementation of recommendations by international organisations can be supported by the external affairs power is yet to be endorsed by a majority of the High Court, and was been criticised by Heydon J in *Pape v Federal Commissioner of Taxation* where his Honour stated that 'legislation enacted to carry out the recommendations of international agencies made otherwise than in order to give effect to the terms of the treaty' cannot be supported by the external affairs power 'because mere recommendations do not create international obligations'.¹⁷⁵

In our opinion, the better view is that the external affairs power extends to permit the implementation of observations or recommendations of the Committee on the Rights of Persons with Disabilities, even if these might be challenged as extending beyond the clear words of the *Convention on the Rights of Persons with Disabilities*, but there is no definitive authority resolving this point.

The external affairs power offers very considerable scope for Commonwealth legislation relating to persons with disability addressing the myriad matters contained in the *Convention on the Rights of Persons with Disabilities* and other relevant treaties. The Commonwealth has enormous scope under the external affairs power to increase its regulation of disability matters if it wishes to do so.

The corporations power s 51(xx)

Section 51(xx) of the *Constitution* provides the Commonwealth with the power to make laws with respect to ‘foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth’.

Since the High Court’s decision in *WorkChoices* in 2006,¹⁷⁶ it is clear that the Commonwealth has very broad legislative power in relation to the regulation of trading, financial and foreign corporations (‘constitutional corporations’). The Commonwealth’s legislative power with respect to constitutional corporations extends to

the regulation of the activities, functions, relationships and the business of a corporation ... the creation of rights, and privileges belonging to such a corporation, the imposition of obligations on it and, in respect of those matters, to the regulation of the conduct of those through whom it acts, its employees and shareholders and, also, the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business.¹⁷⁷

However, there are limits on the Commonwealth’s power with respect to constitutional corporations. A law merely authorising the Commonwealth to pay money to a constitutional corporation is not a law with respect to constitutional corporations.¹⁷⁸ Nonetheless, to the extent that services to persons with disability are provided by constitutional corporations, the Commonwealth could expand its regulatory reach by legislating with respect to the activities, functions, relationships and the business of the corporation, and regulate those whose conduct can affect these matters.

For the Commonwealth to expand their legislative reach over organisations that provide disability support and services, one practical question that would need to be considered in this context is whether those organisations are ‘constitutional corporations’ within the meaning of s 51(xx) of the *Constitution*. A corporation will be a trading corporation if it engages in trading activities and those activities are ‘not insubstantial’¹⁷⁹ or form ‘a sufficiently significant proportion of its activities’.¹⁸⁰ The fact that a corporation carries out activities beyond these trading activities does not mean the corporation ceases to be a trading corporation. As Mason, Murphy and Deane JJ noted in *State Superannuation Board* a corporation’s trading activities

do not cease to be trading activities because they are entered into in the course of, or for the purpose of, carrying on a primary or dominant undertaking not described by reference to trade.¹⁸¹

In *E v Australian Red Cross Society*,¹⁸² the Federal Court held that the Australian Red Cross and the Prince Alfred Hospital were ‘trading corporations’. In the case of the Red Cross, the Court noted that, while the supply of blood to hospitals was not a trading activity (but was rather a ‘gratuitous provision of a public welfare service’),¹⁸³ the Red Cross did, however, engage in a number of other activities that could be described as ‘trading activities’. In determining whether the Red Cross was a trading corporation it was not relevant that the organisation was not motivated by private gain,¹⁸⁴ nor was it necessary for the trading activities to be profitable or intended to be profitable.¹⁸⁵ That the Red Cross earned considerable sums through the sale of goods (through the operation of its opportunity shops) and provision of services (such as first aid courses) meant it was a trading corporation within the meaning of s 51(xx) of the *Constitution*.

Charitable organisations (that have been established as incorporated associations) might still be ‘trading corporations’ even if the services they provide are not charged at market rates,¹⁸⁶ or if the trading activities are carried out for educative or welfare purposes.¹⁸⁷

Further, the Federal Court in *E v Australian Red Cross Society* held that the Prince Alfred Hospital was engaged in substantial trading activities, noting:

It seems to me that the critical question is the nature of the Prince Alfred Hospital’s activities at the relevant time. Accepting that its predominant activity was the provision of medical and

surgical care to patients, they were not objectives antithetical to the notion of trade. Many trading corporations supply services rather than goods. Many privately owned hospitals provide medical and surgical care for reward with the purpose of thereby trading profitably.¹⁸⁸

Similarly, corporations providing disability services may still be 'trading corporations' and therefore within the legislative reach of the Commonwealth, even if they are not driven by making a profit or if the trading activities that they provide are carried out for a welfare purpose. While not all non-government disability services are provided by constitutional corporations, it is likely that a significant proportion are. To that extent, the corporation's power would provide an alternative basis for the Commonwealth to regulate the provision of some disability services.

The spending power

The Commonwealth's general 'spending power' was once thought to arise implicitly from a combination of ss 81 and 83.¹⁸⁹ Section 81 treats all moneys acquired by the Commonwealth as forming 'one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner ... imposed by this Constitution'. Section 83 provides that no money can be drawn from the Treasury without an appropriation 'made by law'. This combination of obligations and authority provides the Parliamentary oversight of the executive and expenditure of funds. In *Pape v Commissioner of Taxation*,¹⁹⁰ the validity of the Rudd government's 2009 global financial crisis 'fiscal stimulus package' was challenged. The High Court held that ss 81 and 83 alone did not confer a power to spend, but the power to spend appropriated moneys must be found elsewhere in the Constitution or in statutes made under it.¹⁹¹ This decision had significant implications for the Commonwealth and its ability to frame policy objectives in areas where it lacked direct legislative or executive authority.

Following *Williams v Commonwealth (No 1)*,¹⁹² the Commonwealth only has authority to expend public money that has been legally appropriated when the expenditure is: authorised by the Constitution; made in the execution or maintenance of a statute or expressly authorised by a statute; supported by a common law prerogative power; made in the ordinary administration of the functions of government; or supported by the nationhood power.¹⁹³

The more constrained view of the spending power taken in these cases has emphasised the predominant practice of instead providing financial support through s 96 grants.¹⁹⁴

The grants power s 96

The Commonwealth's ability to collect revenue – through income tax,¹⁹⁵ company tax, GST revenue, and customs and excise duties – far exceeds that of the states. This creates what is often described as a 'vertical fiscal imbalance' between the Commonwealth and the states. A significant portion of the revenue collected by the Commonwealth is, however, passed on to the states through a variety of grants. These grants are made by virtue of s 96 of the *Constitution*, which provides the Parliament with the power to 'grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.'¹⁹⁶

The distribution of revenue from the Commonwealth to the states takes two forms: 'general revenue assistance' and 'payments for specific purposes'. The general revenue assistance that the Commonwealth provides to the states (largely made up of GST revenue) is 'untied funding', which the states can spend as they see fit. The Commonwealth also makes payments for specific purposes ('tied funding'). These latter types of grants are further divided into two categories: National Specific Purpose Payments and National Partnership Payments. National Partnership Payments are usually made to the states to fund a particular project or provide a particular service over a fixed period of time.¹⁹⁷ National Specific Purpose Payments (SPP) provide states with funding in areas that are typically the states' domain – for example, health, education or housing.

As part of the National Disability Agreement between the Commonwealth and the states,¹⁹⁸ the Commonwealth provides National Disability Specific Purpose Payments (SPP) to the states.¹⁹⁹ Where the NDIS has been fully implemented within a state, the National Disability SPP is redirected to the National Disability Insurance Agency, and instead of receiving the National Disability SPP, the state receives National Partnership payments from the DisabilityCare Australia Fund. The National Partnership payments from the DisabilityCare Australia Fund are intended to partially reimburse the states' expenditure incurred in relation to their responsibilities under the NDIS.²⁰⁰

Section 96 grants offer the Commonwealth considerable scope to regulate the provision of services that it is funding through grants to the states. The Commonwealth is able to set the terms and conditions if the state is to accept the funding. The High Court has held that there is 'no real reason for limiting in any way the nature of the conditions which may be imposed'.²⁰¹ The result has been to allow the Commonwealth to play an influential role in the provision of services that are outside the areas of legislative power listed in s 51 of the *Constitution*. As Barwick CJ noted in the *AAP Case*:

Section 96 ... as interpreted by this Court, has enabled the Commonwealth to intrude in point of policy and perhaps of administration into areas outside Commonwealth legislative competence. ... But a grant under s. 96 with its attached conditions cannot be forced upon a State: the State must accept it with its conditions.²⁰²

The conditions of the grant can provide the state with little or no discretion as to how the funding is to be directed once received by the state. With the consent of the state, s 96 allows the Commonwealth to use the state as a 'conduit pipe' through which funding can be channelled to third parties (such as schools, hospitals or disability service providers).²⁰³

Thus, where the Commonwealth is providing financial backing for the provision of support to persons with disability under s 96 of the *Constitution*, it may do so 'on such terms and conditions as the Parliament thinks fit', even if the state becomes a mere conduit for the payment. If the states are willing to accept the Commonwealth's money on the conditions the Commonwealth offers it, which the vertical fiscal imbalance strongly encourages them to do, then the Commonwealth finds not only a means to encourage activities that it desires, but a means to regulate those activities through conditions attached to the grant. This offers the Commonwealth considerable scope to regulate the provision of services that it is funding, in the area of disability just as it has in education and health (amongst other areas). In practice, the consent of the states has rarely been withheld when s 96 grants were on offer, no matter what conditions the Commonwealth chose to attach to the grants. Of course, the observance of the obligations that these arrangements create is not without tension between the Commonwealth and the states.

Additional relevant legislative powers

The combined scope of the external affairs, corporations and grants powers has supported all of the Commonwealth's steps to regulate disability in Australia thus far. They are likely to also be sufficient to support any further steps it may wish to take in future. However, it is appropriate to note some additional legislative powers that may be relevant to Commonwealth regulation of disability. In the next section of this paper, we will address the races power (s 51(xxvi)) with reference to First Nations peoples with disability. In this section, we briefly review a range of powers of potential relevance (albeit often to narrow areas or issues), including:

- pharmaceutical, sickness and hospital benefits, medical and dental services (s 51(xxiiiA))²⁰⁴
- Territories (s 122)²⁰⁵ and Commonwealth places (s 52(i))²⁰⁶
- postal, telegraphic, telephonic or other like services (s 51(v))²⁰⁷
- census and statistics (s 51(xi))²⁰⁸
- the Commonwealth, its employees and instrumentalities (s 51(xxxix) in conjunction with s 61)²⁰⁹
- banking (s 51(xiii)) and insurance (s 51(xiv))²¹⁰
- trade and commerce (s 51(i))²¹¹ and
- aliens (s 51(xix)).

Only a few of these require comment. First, there is a connection of particular relevance between the aliens power and disability. Permanent visa applicants must meet public interest criteria, which includes a requirement that an applicant not create the risk of 'a significant cost to the Australian community in the areas of health care and community services'.²¹² This requirement has been criticised as being unfairly discriminatory.²¹³ Second, the census and statistics power would clearly permit the gathering of data regarding the experiences of persons with disability – the present difficulties with reliable data on some aspects of disability relate to relevant information not being collected, and not to a lack of legislative power to authorise such collection. Third, the trade and commerce power is limited to interstate (or international) trade, and will only 'extend to such intrastate trade and commerce as is inseparably connected with interstate trade and commerce'.²¹⁴ This is likely to mean it is of limited relevance in the disability context.

Models of cooperative federalism

The analysis above relates to exercises of Commonwealth legislative power which could be unilateral (or, in the case of s 96 grants, involve the state only to the extent that it is willing to serve as a conduit for funds). However, the Commonwealth could also achieve regulatory goals in respect of disability through cooperative endeavours with the states.

First, the Commonwealth could seek a reference of legislative power by the states, as envisaged by s 51(xxxvii) which gives the Commonwealth Parliament power to make laws with respect to:

matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.²¹⁵

Accordingly, the states could refer legislative power over disability to the Commonwealth, as they have done regarding corporations, de facto relationships and other matters.²¹⁶

Second, agreement might be reached on a scheme of uniform national legislation regarding disability matters. A limited example of this with respect to persons with cognitive impairments is s 31 of the *Uniform Evidence Acts* – which provides some protections for witnesses with hearing or speaking impairments in criminal proceedings.²¹⁷

Third, intergovernmental agreements might be reached with the states. The purpose of intergovernmental agreements is to combine the authority of two or more jurisdictions to pursue a mutually agreed outcome.²¹⁸ The Commonwealth's power to pursue such agreements is sourced from s 61 of the *Constitution*.²¹⁹ As the Commonwealth does not have express power to legislate with respect to the provision of disability services, these services are often provided with the cooperation of the states. This cooperation may take the form of an intergovernmental agreement. This raises the question: what if there is a dispute over giving effect to the agreement? Indeed, the absence of a forum, other than the political arena, means that intergovernmental agreements are largely based on political goodwill.

The mere fact that there is a dispute between the states and the Commonwealth will not automatically bring the dispute within the jurisdiction of the High Court. The jurisdiction of the High Court is defined by Chapter III of the *Constitution* and the Court can only exercise judicial power.²²⁰ The judicial power of the Court is limited to the determination of 'matters'.²²¹ A dispute over an intergovernmental agreement will only be justiciable if the agreement creates legal rights and obligations.

As Cheryl Saunders has explained, intergovernmental agreements may take a variety of forms, and not all of these will be legally enforceable:

The provisions of an intergovernmental agreement may have legal effect when implemented by statute and an agreement itself may acquire the force of law if a statute so provides: although this is relatively rare. Conceptually, an intergovernmental agreement usually falls between [a treaty and a contract], bearing the hallmarks of a political agreement, but between parties who lack the sovereign status of treaty partners. An intergovernmental agreement may in some circumstances be able to be enforced as a contract. Usually, however, lack of precision in the terms of the agreement, or the political nature of the undertakings in it, dispel an intention to create binding legal relations and place it beyond the normal authority of courts to enforce. Even where the conditions for enforcement as a contract otherwise are right, an agreement may specifically deny an intention to create legal relations.²²²

The seminal case in this respect is *South Australia v Commonwealth*,²²³ a 1962 decision of the High Court concerning two earlier agreements between South Australia and the Commonwealth. In 1907, South Australia and the Commonwealth entered into an agreement in which the Commonwealth agreed to construct a railway line between Darwin and the northern border of South Australia. In 1949, they entered into a Rail Standardisation Agreement, in which South Australia agreed to convert its railway to standard gauge, and the Commonwealth agreed to take steps that would allow part of the railways between Peterborough and Broken Hill that belonged to a private company to be vested in the South Australian Commissioner for Railways, and also to convert and construct a standard gauge line from Port Augusta to Darwin. South Australia contended that the Commonwealth was in breach of the 1949 agreement and commenced proceedings in the High Court. The Court dismissed South Australia's claim on the basis that these were political agreements and not enforceable by the High Court. As McTiernan J noted:

[N]either of these agreements constitutes an obligatory contract. It does not produce legal rights or obligations. It is apparent from their terms that they embody plans for construction of publicly-owned railways. The carrying out of these intended works is a matter of governmental

policy. The promises of either side are of a political nature, and both parties would understand at the time the agreements were made, that this was the true nature of the promises.²²⁴

The legal position that intergovernmental agreements are generally not justiciable is often acknowledged in the drafting of these agreements. For example, the final clause in the *Intergovernmental Agreement for the National Disability Insurance Scheme (NDIS) Launch* provides: ‘The Parties do not intend any of the provisions of this Agreement to be legally enforceable. However, that does not lessen the Parties’ commitment to this Agreement’.²²⁵

Accordingly, there is considerable scope for the Commonwealth to advance a disability rights agenda and provide for the provision of disability services in cooperation with the states. Such cooperation could take a range of forms, from a formal reference of power to the Commonwealth, to agreement on uniform national legislation, to intergovernmental agreements. The limit inherent in all such measures is their reliance on cooperation – references must be granted and can be withdrawn, uniform legislation must be agreed upon and implemented and can be altered or repealed, and intergovernmental agreements have to be struck and do not generally give rise to justiciable obligations. None of these limits may be a relevant weakness if there is consensus amongst the Commonwealth and the states, but each of these forms of cooperation (and s 96 grants are in a similar position) is forever dependent on the acquiescence of the states in a way that the direct exercise of power by the Commonwealth is not.

First Nations peoples with disability

The Commonwealth’s power to make laws with respect to ‘the people of any race for whom it is deemed necessary to make special laws’²²⁶ has, since the 1967 referendum, given the Parliament the power to make laws with respect to First Nations peoples.

It is a matter for Parliament to determine whether a law should be passed under this section, with the only issue for a court being whether or not legislation is a ‘special law’ within the meaning of this section.²²⁷ As Deane J explained in the *Tasmanian Dam Case*:

The power conferred by s 51(xxvi) remains a general power to pass laws discriminating against or benefiting the people of any race. Since 1967, that power has included a power to make laws benefiting the people of the Aboriginal race.²²⁸

The exercise of this power might be positively influenced if the call by those First Nations peoples represented in the *Uluru Statement from the Heart* for the establishment of ‘a First Nations Voice enshrined in the Constitution’ is given effect in coming years.

A law may be a special law even when it confers a benefit generally, provided the benefit is of special significance to the people of a particular race.²²⁹ Thus, ‘a special law appears to be merely a law that treats one race differently from others’.²³⁰ The Commonwealth, therefore, has a legislative power granting it ample authority to make laws with respect to First Nations peoples with disability. The existence of such a power is of particular importance in the context of the intersectional challenges faced by First Nations peoples with disability.²³¹

VII. The future of Commonwealth regulation of disability: constitutional limitations

The Commonwealth has only dipped its toe in the water of regulating disability in Australia. Its most significant regulatory act remains the *Disability Discrimination Act 1992* (Cth). The NDIS is primarily a funding scheme, not a regulatory device. The scope of rights reflected in the *Convention on the Rights of Persons with Disabilities* which are not expressly protected in Commonwealth law gives an indication of the unexplored potential. However, with potential expansion of Commonwealth regulatory authority over disability comes the possibility that constitutional limitations might be transgressed. These potential limitations are the primary focus of this section.

Inconsistency

There is no issue with Commonwealth regulation of disability being potentially inconsistent with state law. In such a case, s 109 of the *Constitution* ensures that a valid Commonwealth law will prevail.²³² However, these issues arise only where laws cannot be given consistent effect. While it is possible this will happen in the disability context, to date the Commonwealth has legislated to preserve the operation of state disability laws whenever they are ‘capable of operating concurrently with’ Commonwealth laws.²³³ However, the Commonwealth may need to guard against unforeseen consequences.²³⁴

Intergovernmental immunities

One potential limit on Commonwealth capacity to regulate disability arises from the doctrine of intergovernmental immunities. The limit arises only in relatively extreme situations – when a Commonwealth law impairs the capacity of a state (or states) to function.²³⁵ For example, the Commonwealth can regulate the industrial conditions of lower-level state employees,²³⁶ but not those of more senior staff ‘critical to a state’s capacity to function as a government’.²³⁷ It remains unclear to what extent interferences with state instrumentalities (for example, by requiring state schools to follow particular educational approaches in respect of persons with disability) could breach this principle.

The concept of intergovernmental immunities is potentially relevant whenever a Commonwealth law applies to a person or organisation that is part of a state government. As Dixon J explained in *Melbourne Corporation*, ‘a power to legislate with respect to a given subject enables the Parliament to make laws which, upon that subject, affect the operations of the States and their agencies.’²³⁸ However, as his Honour went on to hold, a Commonwealth law would be invalid if it ‘discriminates against States, or ... places a particular disability or burden upon an operation or activity of a State, and more especially upon the execution of its constitutional powers’.²³⁹ As Gleeson CJ pointed out in *Austin*:

It was the disabling effect on State authority that was the essence of the invalidity ... It is the impairment of constitutional status, and interference with capacity to function as a government, rather than the imposition of a financial burden, that is at the heart of the matter, although there may be cases where the imposition of a financial burden has a broader significance.²⁴⁰

Existing authorities expounding these principles provide little guidance as to whether, for example, a Commonwealth law regulating the manner in which a state provides education to persons with disabilities and which imposes significant burdens on a state might breach the *Melbourne Corporation* principle.

Cases have tended to address interferences with relationships between the state and its employees. Thus, in *Re Australian Education Union; Ex parte Victoria* Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ said:

critical to a State's capacity to function as a government is its ability, not only to determine the number and identity of those whom it wishes to engage at the higher levels of government,

but also to determine the terms and conditions on which those persons shall be engaged. Hence, Ministers, ministerial assistants and advisers, heads of departments and high level statutory office holders, parliamentary officers and judges would clearly fall within this group.²⁴¹

However, Commonwealth regulation of disability is unlikely to affect a state's relationships with its high-level employees. At a lower level of interaction, it is clear that the Commonwealth is entitled to tax state employees and instrumentalities.²⁴²

Setting aside laws which impose a special burden on states, the key issue that may be posed by Commonwealth regulation of disability relates to laws which 'operate to destroy or curtail the continued existence of the States or their capacity to function as governments'.²⁴³

In *Purvis*, Callinan J alone considered this issue, stating that:

It is arguable that federal legislation imposing upon a State educational authority the adoption of measures which would appear to require it to tolerate behaviour which is otherwise proscribed as criminal, or is detrimental to the education of the general body of students, or which requires the State to alter the manner in which it ordinarily provides educational services²⁴⁴, may have a capacity to burden or affect a State government in the performance of its functions²⁴⁵, or unduly interfere with them. The effect of such legislation could be, as Gaudron, Gummow and Hayne JJ put it in *Austin v Commonwealth*²⁴⁶, that in substance and operation it may cause in a significant manner "curtailment or interference with the exercise of State constitutional power[s]", here, over the provision of education and the criminal law. Such legislation, even if of general application, may be beyond the legislative power of the Commonwealth.²⁴⁷

That an interference with the state must rise to the level of impacting its 'capacity to function as a government' seems to us to be a high barrier. While Callinan J's speculation in *Purvis* means that we cannot rule out the possibility that a Commonwealth law regulating disability might impose such onerous obligations on states that it breaches the *Melbourne Corporation* principle, in our view this is unlikely to be an impediment to increased Commonwealth regulation of disability.

Unfunded mandates

Australian constitutional law knows no express prohibition on the creation by the Commonwealth of unfunded mandates to be fulfilled by the states. Accordingly, it is

not a valid objection to a law made by the Commonwealth regarding disability that it imposes onerous financial (or other) obligations on states. Nonetheless, legislation respecting disability may raise this issue, and the Full Court of the Federal Court in *Purvis* criticised HREOC's interpretation of the *Disability Discrimination Act 1992* (Cth) as: 'impos[ing] positive duties on the school to manage the conduct of the student, presumably regardless of cost or impact upon other school activities'.²⁴⁸

Although there is no clear constitutional objection in Australia to an unfunded mandate, there is a more developed jurisprudence and scholarship on this issue in the United States, where unfunded mandates have been seen as an abuse of power by the federal government.²⁴⁹ The concept of unfunded mandates rose to prominence during the 1970s and 80s when American state and local government advocates argued that a 'dramatic shift' occurred in the way the federal government dealt with states and localities. They argued that unfunded mandates were unconstitutional because they violate the Tenth Amendment²⁵⁰ and related principles of federalism (particularly the idea that it is based on cooperation, not compulsion).²⁵¹

There is Supreme Court authority in support of this objection. In *Printz v United States*,²⁵² the Supreme Court objected to federal law compelling state officials to administer a federal regulatory program.²⁵³ Justice Scalia particularly articulated these concerns, noting that

[t]he power of the Federal Government would be augmented immeasurably if it were able to impress into its service – and at no cost to itself – the police officers of the 50 States.²⁵⁴

His Honour went on to articulate a policy justification for this position:

By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher federal taxes.²⁵⁵

The High Court in *O'Donoghue v Ireland*²⁵⁶ examined the question whether the *Extradition Act 1988* (Cth) impermissibly imposed Commonwealth administrative functions on state magistrates. Each of the judgments considered *Printz v United States*. The majority Justices concluded that there was no duty (as opposed to power) imposed on the state magistrate,²⁵⁷ so did not have to resolve the potential constitutional problem. Justice Kirby, dissenting, held that there is a constitutional barrier to any Commonwealth law which would 'impose "functions" on State office-

holders ... without the approval of the State Parliament'.²⁵⁸ This issue has not been the subject of further judicial elaboration to date.

The resolution of these objections in the United States is found in the *Unfunded Mandates Reform Act 1995*, which provides a framework for the Congressional Budget Office to estimate the direct costs of mandates in legislative proposals to state and local governments and to the private sector. During floor debate on the legislation, sponsors emphasised its role in bringing 'our system of federalism back into balance, by serving as a check against the easy imposition of unfunded mandates'.²⁵⁹ The Act's primary purpose is 'to end the imposition, in the absence of full consideration by Congress, of Federal mandates on State, local and tribal governments without adequate Federal funding'.²⁶⁰ Accordingly, the UMRA does not prohibit the creation of unfunded mandates, but imposes increased transparency.

The UMRA post-dates the Americans with Disabilities Act of 1990 (ADA), to which it would not apply in any event.²⁶¹ However, the ADA imposes significant financial obligations on state institutions (with regard to accessibility of public facilities, accommodations for employees, and the like).²⁶² A study found that the mandates imposed by ADA would cost an estimated USD2.2 billion between 1994 and 1998,²⁶³ making it one of 'the more costly unfunded mandates'.²⁶⁴ This offers a clear illustration of the potential significance of the unfunded mandates objection to federal disability legislation.

Attempts to advance arguments limiting federal legislative power in Australia by reason of concerns of federalism were rejected by the High Court in *WorkChoices*.²⁶⁵ Further, the Commonwealth has chosen in the NDIS to fund, rather than regulate, disability – although the *Disability Discrimination Act 1992* (Cth) remains a regulatory regime which imposes burdens on the states. Based on current authorities, it appears that a Commonwealth law is unlikely to be held unconstitutional because it imposes an unfunded mandate. However, novel objections on this basis could arise if the Commonwealth explores the full potential of its legislative capacity to regulate disability.

Chapter III issues

To the extent that Commonwealth regulation of disability might impose obligations on state courts, for example regarding the treatment of persons with disability who might be victims of crime or involved in civil or criminal matters as parties and/or witnesses, issues may arise regarding the independence of the exercise of judicial power by state courts (raising separate issues to whether the Commonwealth regulation might breach an intergovernmental immunity or be invalid for another reason explored above).

Section 77(iii) of the *Constitution* permits the Parliament to invest state courts with federal jurisdiction. In doing so, the Commonwealth must ‘take such courts as it finds them’.²⁶⁶ In other words, while s 77(i) empowers the Commonwealth to decide the structure, organisation and composition of federal courts, and to choose whether or not to invest federal jurisdiction in state courts under s 77(iii), state parliaments retain plenary legislative power over the structure, organisation and composition of their state courts – even when those courts are exercising federal jurisdiction.

Interference with state court processes by Commonwealth legislation could, at least in theory, violate the *Kable* principle. Although *Kable* dealt with state legislation with respect to its own courts, the approach of the High Court since *NAALAS v Bradley* has focussed on the idea that state courts must exhibit a ‘minimum level of institutional integrity’ in their structure, organisation and process so as to remain suitable repositories of federal jurisdiction.²⁶⁷ These minimum characteristics have not been conclusively defined, but include themes of institutional independence, the nature of powers exercised, and whether judicial process is observed (including elements such as process autonomy, giving reasons, and procedural fairness).²⁶⁸ Where state executives have enjoyed the capacity, under state legislation, to dictate aspects of the process of state courts, courts have struck down the state legislation empowering such action.²⁶⁹ However, in our view it is unlikely that Commonwealth action to facilitate better access to justice by persons with disability in state courts would breach the *Kable* principle. This is because the principle is only directed to the conferral of *incompatible* functions:

the legislative power of the Commonwealth does not extend to the conferral of functions upon State courts which are repugnant to or incompatible with the exercise by those courts of the judicial power of the Commonwealth.²⁷⁰

On the present state of authorities, it is not certain whether, if the Commonwealth were to regulate disability matters to the maximum extent that the external affairs (and other heads of) power would permit, it would come up against other constitutional limitations. Issues of intergovernmental immunity may arise, as Callinan J hinted in *Purvis*. There could also be objections on the basis of unfunded mandates, although these would require a principle of constitutional interpretation to be accepted which to date finds expression only in Kirby J's dissent in *O'Donoghue v Ireland*. There are also, in respect of potential Commonwealth legislation affecting state courts, Chapter III limitations that may come into play. The broader conclusion, though, is that the Commonwealth is likely to find few of these potential impediments actually restrain it from expanding the scope of its regulation of disability in the areas that it is most likely to consider such additional legislation.

Conclusion

Since Federation in 1901, conceptions of the Commonwealth's obligations to persons with disability have evolved significantly. With this evolution has come an expansion in the role that the Commonwealth plays in the support provided to persons with disability, and its regulatory measures designed to protect and promote the rights of persons with disability. This expansion of Commonwealth influence and regulation has come about through a variety of means: constitutional amendment; co-operative federalism; an expansion of Australia's international obligations as a result of treaty obligations; and judicial interpretation of the *Constitution* that has provided the Commonwealth with broader scope for legislation. Through a combination of these means, the Commonwealth has assumed greater prominence in the lives of persons with disability, notwithstanding the fact that its enumerated powers do not include any express legislative power with respect to persons with disability.

In the drafting of the Australian *Constitution*, the Commonwealth's obligation to persons with disability was seen as limited to support of the 'deserving and aged poor', and thus s 51(xxiii) of the *Constitution* assigned legislative power to the Commonwealth to make laws with respect to 'invalid and old-age pensions'.

Providing support to servicemen returning from the First World War with disability (under the defence power s 51(vi)) was the Commonwealth's first foray into using its other legislative powers to support persons with disability.

The first major expansion of the Commonwealth's role came by way of constitutional amendment. With the arrival of the welfare state in Australia after the Second World War came a second and broader conception of the Commonwealth's obligation – that persons with disability would need to be supported as part of broad-based 'welfare schemes for social and economic post-war reconstruction'.²⁷¹ This changed conception was reflected in constitutional change – the insertion of s 51(xxiiiA) giving the Commonwealth legislative power with respect to 'pharmaceutical, sickness and hospital benefits, medical and dental services'.²⁷²

The Commonwealth's role in providing support to persons with disability has also relied heavily on co-operation between the Commonwealth and the states. While the scope of the Commonwealth's legislative power might have expanded over time, it is not unlimited. The Commonwealth – by way of s 96 grants – has often provided funding to the states on the condition it be used to implement specific programs to support persons with disability. This power to give financial grants has allowed the Commonwealth to implement programs via the states where it might not itself have the legislative power to do so directly.

A further expansion of the Commonwealth's regulation in respect of persons with disability arises in giving effect to the rights of persons with disability, particularly those rights that arise from Australia's treaty obligations. Two great milestones of this rights era were the introduction of the *Disability Discrimination Act 1992* (Cth), and the establishment of the National Disability Insurance Scheme (NDIS) in 2012. The legislative power to bring about these milestones relies on (at least in part) the Commonwealth's ability to give effect to international treaty obligations through the external affairs power (s 51(xxix)). The High Court's interpretation of the Commonwealth's legislative powers – not just the external affairs power, but also other powers such as the corporation's power (s 51(xx)) – has led to the possibility of a further expanded role for the Commonwealth in providing support to persons with disability.

There remains considerable constitutional scope for the Commonwealth to further expand its support for persons with disability and its legislative protection of their rights. While there is a possibility that some constitutional issues may arise in the case of legislation imposing extensive obligations on states, the use of a range of Commonwealth legislative powers appears to us to leave the door open for extended Commonwealth regulation if it is thought desirable in the future.

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¹ *Constitution* s 51(xxiiiA).

² *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 21 January 1898, 6 (J H Howe).

³ *Constitution* s 51(xxiii).

⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 9 March 1943, 1360–1 (Francis Patrick Baker).

⁵ *Constitution* s 51(xxiiiA).

⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 29 November 2012, 13877–8 (Julia Gillard, Prime Minister).

⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 29 November 2012, 13877 (Julia Gillard, Prime Minister).

⁸ Mary Lindsay, 'Can Good Intentions Ensure Good Outcomes? Commonwealth Disability Policy, 1983-1995' (Background Paper No 6, Parliamentary Library, Parliament of Australia, 17 April 1996) 7.

⁹ Mary Lindsay, 'Can Good Intentions Ensure Good Outcomes? Commonwealth Disability Policy, 1983-1995' (Background Paper No 6, Parliamentary Library, Parliament of Australia, 17 April 1996) 7.

¹⁰ Mary Lindsay, 'Can Good Intentions Ensure Good Outcomes? Commonwealth Disability Policy, 1983-1995' (Background Paper No 6, Parliamentary Library, Parliament of Australia, 17 April 1996) 7.

¹¹ Australian Heritage Council, *A Thematic Heritage Study on Australia's Benevolent and other Care Institutions* (Commonwealth of Australia, 2016) 14.

¹² Australian Heritage Council, *A Thematic Heritage Study on Australia's Benevolent and other Care Institutions* (Commonwealth of Australia, 2016) 12.

¹³ Australian Heritage Council, *A Thematic Heritage Study on Australia's Benevolent and other Care Institutions* (Commonwealth of Australia, 2016) 13.

¹⁴ Australian Heritage Council, *A Thematic Heritage Study on Australia's Benevolent and other Care Institutions* (Commonwealth of Australia, 2016) 13.

¹⁵ Under s 2 of the *Maintenance Act 1843* (SA), a Justice of the Peace could summons a father of a destitute person 'to show cause why he should not relieve and maintain or contribute to the relief and maintenance of such poor destitute person'. See: Australian Heritage Council, *A Thematic Heritage Study on Australia's Benevolent and other Care Institutions* (Commonwealth of Australia, 2016) 24.

¹⁶ Australian Heritage Council, *A Thematic Heritage Study on Australia's Benevolent and other Care Institutions* (Commonwealth of Australia, 2016) 17.

¹⁷ Australian Heritage Council, *A Thematic Heritage Study on Australia's Benevolent and other Care Institutions* (Commonwealth of Australia, 2016) 24. See, e.g., *Destitute Persons Relief and Industrial and Reformatory Schools Act 1872* (SA) s 25 'The [Destitute] Board shall, subject to the regulations of the Public Service, have the administration of all funds voted by Parliament for the relief of the destitute poor'.

¹⁸ Australian Heritage Council, *A Thematic Heritage Study on Australia's Benevolent and other Care Institutions* (Commonwealth of Australia, 2016) 46.

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- ¹⁹ Australian Heritage Council, *A Thematic Heritage Study on Australia's Benevolent and other Care Institutions* (Commonwealth of Australia, 2016) 46.
- ²⁰ Mary Lindsay, 'Can Good Intentions Ensure Good Outcomes? Commonwealth Disability Policy, 1983-1995' (Background Paper No 2, Parliamentary Library, Parliament of Australia, 17 April 1996) 7.
- ²¹ For instance, the *Lunatics Act 1864* (SA) created a system of committal of 'persons of unsound mind' or 'idiots' to various state institutions.
- ²² Rob Van Den Hoorn, 'Howe, James Henderson (1839–1920)' in *Australian Dictionary of Biography* (Melbourne University Press, 1983) vol 9, 378.
- ²³ *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 31 March 1897, 355 (J H Howe).
- ²⁴ See, e.g., *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 22 September 1897, 1086 (E Barton).
- ²⁵ *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 22 September 1897, 1086–7 (E Barton).
- ²⁶ See, e.g., *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 22 September 1897, 1088 (C C Kingston); *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 22 September 1897, 1088–9 (G H Reid).
- ²⁷ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 21 January 1898, 6 (J H Howe).
- ²⁸ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 21 January 1898, 18 (J H Howe).
- ²⁹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 21 January 1898, 13 (J H Howe).
- ³⁰ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 21 January 1898, 18 (E Barton).
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- ³² *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 21 January 1898, 20 (C C Kingston).
- ³³ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 21 January 1898, 23 (W Trenwith).
- ³⁴ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 21 January 1898, 24 (W Trenwith).
- ³⁵ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 7 March 1898, 29.
- ³⁶ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 7 March 1898, 29.
- ³⁷ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 7 March 1898, 1918 (J H Howe).
- ³⁸ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 7 March 1898, 1991 (J H Howe).
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- ⁴⁰ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 7 March 1898, 1996 (W Trenwith).
- ⁴¹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 7 March 1898, 1996 (W Trenwith). They were joined with William McMillan (NSW) and Neil Lewis (Tas.). There was one pair recorded: John Gordon (SA) (Aye) and Henry Dobson (Tas.) (No).
- ⁴² J A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 204–6.
- ⁴³ A point made by Higgins when considering the advantages of leaving the authority with the states: *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 7 March 1898, 1994 (W Trenwith).
- ⁴⁴ *Invalid and Old-Age Pensions Act 1908* (Cth) s 20.
- ⁴⁵ *Invalid and Old-Age Pensions Act 1908* (Cth) s 23(2).
- ⁴⁶ There was also a racially-based exclusion, preventing 'Asiatics (except those born in Australia), or aboriginal natives of Australia, Africa, the Islands of the Pacific, or New Zealand' from eligibility for the invalid and old-age pension: *Invalid and Old-Age Pensions Act 1908* (Cth) s 21(1) (b).
- ⁴⁷ Mary Lindsay, 'Can Good Intentions Ensure Good Outcomes? Commonwealth Disability Policy, 1983-1995' (Background Paper No 6, Parliamentary Library, Parliament of Australia, 17 April 1996) 8.

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- ⁴⁸ Danuta Mendelson, 'Devaluation of a Constitutional Guarantee: The History of Section 51(xxiiiA) of the Commonwealth Constitution' (1999) 23(2) *Melbourne University Law Review* 308; citing Commonwealth, *Parliamentary Debates*, House of Representatives, 27 March 1946, 647–8 (Herbert Evatt, Attorney-General).
- ⁴⁹ *Maternity Allowance Act 1912* (Cth) s 4.
- ⁵⁰ *Widows' Pension Act 1924* (Cth) s 46.
- ⁵¹ See: *War Pensions Act 1914* (Cth), *Australian Soldiers' Repatriation Fund Act 1916* (Cth), *Australian Soldiers' Repatriation Act 1917* (Cth), *Australian Soldiers' Repatriation Act 1920* (Cth).
- ⁵² Mary Lindsay, 'Can Good Intentions Ensure Good Outcomes? Commonwealth Disability Policy, 1983-1995' (Background Paper No 6, Parliamentary Library, Parliament of Australia, 17 April 1996) 9.
- ⁵³ *Australian Soldiers' Repatriation Act 1920* (Cth) sch 4.
- ⁵⁴ *Invalid and Old-Age Pensions Act 1908* (Cth) s 23A, inserted by *Invalid and Old-Age Pensions Act 1941* (Cth).
- ⁵⁵ *Attorney-General (Victoria) (at the relation of Dale and others) v Commonwealth* ('*Pharmaceutical Benefits Act Case*') (1945) 71 CLR 237.
- ⁵⁶ *Pharmaceutical Benefits Act Case* (1945) 71 CLR 237, 282 (Williams J).
- ⁵⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 27 March 1946, 647–8 (Herbert Evatt, Attorney-General).
- ⁵⁸ (1916) 21 CLR 433, 441.
- ⁵⁹ *Farey v Burvett* (1916) 21 CLR 433, 455.
- ⁶⁰ Geoffrey Sawer, *Australian Federal Politics and Law 1929-1949* (Melbourne University Press, 1974) 131.
- ⁶¹ *Constitution Alteration (Post-War Reconstruction and Democratic Rights)* 1944; Department of Parliamentary Services, *44th Parliamentary Handbook of the Commonwealth of Australia* (Commonwealth of Australia, 2015) 390.
- ⁶² Stuart Macintyre, *Australia's Boldest Experiment: War and reconstruction in the 1940s* (New South, 2015), 267.
- ⁶³ Department of Parliamentary Services, *44th Parliamentary Handbook of the Commonwealth of Australia* (2015) 390.
- ⁶⁴ *Pharmaceutical Benefits Act 1944* (Cth) ss 9, 17; *National Welfare Fund Act 1943* (Cth) s 5(1).
- ⁶⁵ *Pharmaceutical Benefits Act Case* (1945) 71 CLR 237.
- ⁶⁶ *Constitution* s 51(xxix) 'matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth'.
- ⁶⁷ *Pharmaceutical Benefits Act Case* (1945) 71 CLR 237, 263. See also 266 (Starke J), 280 (Williams J).
- ⁶⁸ *Pharmaceutical Benefits Act Case* (1945) 71 CLR 237, 271-2.
- ⁶⁹ *Pharmaceutical Benefits Act Case* (1945) 71 CLR 237, 267. Rich J agreed with Dixon J (at 264).
- ⁷⁰ *Pharmaceutical Benefits Act Case* (1945) 71 CLR 237, 266 (Starke J).
- ⁷¹ *Pharmaceutical Benefits Act Case* (1945) 71 CLR 237, 274.
- ⁷² *Pharmaceutical Benefits Act Case* (1945) 71 CLR 237, 274. We return later to the High Court's current approach to the spending power.
- ⁷³ J D Corbett, 'May Affect Many Federal Activities: Free Medicine Case Judgment' *The Argus*, (Melbourne, 24 November 1945) 19.
- ⁷⁴ 'Social Benefits: Government to Seek Legal Advice' *The Age*, (Melbourne, 21 November 1945) 3.
- ⁷⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 27 March 1946, 647 (Dr H V Evatt, Attorney-General).
- ⁷⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 27 March 1946, 648 (Dr H V Evatt, Attorney-General).
- ⁷⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 27 March 1946, 648 (Dr H V Evatt, Attorney-General). The interjection was from Percy Spender.
- ⁷⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 27 March 1946, 649 (Dr H V Evatt, Attorney-General).
- ⁷⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 3 April 1946, 897 (R Menzies).
- ⁸⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 3 April 1946, 897 (R Menzies).
- ⁸¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 3 April 1946, 899 (R Menzies).
- ⁸² Commonwealth, *Parliamentary Debates*, House of Representatives, 3 April 1946, 899 (R Menzies).
- ⁸³ Commonwealth, *Parliamentary Debates*, House of Representatives, 3 April 1946, 899 (R Menzies).
- ⁸⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 3 April 1946, 899 (R Menzies).
- ⁸⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 3 April 1946, 900 (R Menzies).

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- ⁸⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 3 April 1946, 900 (R Menzies).
- ⁸⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 3 April 1946, 900 (R Menzies).
- ⁸⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 9 April 1946, 1214 (R Menzies).
- ⁸⁹ Evatt reminded Menzies that he had in fact borrowed the set of words from the *National Security Bill 1939* introduced by Menzies when he was the Attorney-General. 'I believe that one good turn deserves another': Commonwealth, *Parliamentary Debates*, House of Representatives, 9 April 1946, 1215 (R Menzies).
- ⁹⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 9 April 1946, 1215 (R Menzies).
- ⁹¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 9 April 1946, 1217–18.
- ⁹² John Playford, 'Cameron, Archie Galbraith (1895–1956)' in *Australian Dictionary of Biography* (Melbourne University Press, 1993) vol 13, 346–8.
- ⁹³ 'Referendum Vote' *Sydney Morning Herald*, (Sydney, 27 August 1946) 3.
- ⁹⁴ *Referendums to be taken on the proposed laws 1946: The case for and against* (Commonwealth Electoral Office, 1946); see 'Pamphlets on Referendums' *Sydney Morning Herald*, (Sydney, 7 August 1946) 3.
- ⁹⁵ *Referendums to be taken on the proposed laws 1946: The case for and against* (Commonwealth Electoral Office, 1946) 6.
- ⁹⁶ *Referendums to be taken on the proposed laws 1946: The case for and against* (Commonwealth Electoral Office, 1946) 7.
- ⁹⁷ *Referendums to be taken on the proposed laws 1946: The case for and against* (Commonwealth Electoral Office, 1946) 8.
- ⁹⁸ *Referendums to be taken on the proposed laws 1946: The case for and against* (Commonwealth Electoral Office, 1946) 19.
- ⁹⁹ *Referendums to be taken on the proposed laws 1946: The case for and against* (Commonwealth Electoral Office, 1946) 19.
- ¹⁰⁰ *Referendums to be taken on the proposed laws 1946: The case for and against* (Commonwealth Electoral Office, 1946) 20.
- ¹⁰¹ 'Suppression of Fact: Charge Against Opposition' *The Age* (Melbourne, 14 August 1946) 5.
- ¹⁰² 'Suppression of Fact: Charge Against Opposition' *The Age* (Melbourne, 14 August 1946) 5.
- ¹⁰³ 'Reply on "No" Case' *Sydney Morning Herald* (Sydney, 22 August 1946) 4.
- ¹⁰⁴ Referendum campaign: The Case for 'No', *Sydney Morning Herald* (Sydney, 16 August 1946) 5. Bland described the proposals as a 'dishonest attempt on the part of the Government to destroy the Federal system'.
- ¹⁰⁵ Dr Lloyd Ross, 'The 'Yes' Case', *Sydney Morning Herald* (Sydney, 26 September 1946) 4.
- ¹⁰⁶ Commonwealth of Australia, *Parliamentary Handbook of the Commonwealth of Australia: 45th Parliament* (Parliamentary Library, 34th ed, 2017) 399.
- ¹⁰⁷ Including 37 021 votes by members of the Forces of which 22 824 were for, 13 211 against and 986 informal.
- ¹⁰⁸ In the case of the Marketing amendment it was supported in three States (NSW, Victoria and Western Australia). It also gained overall support (50.57% in favour and 49.43% against). It failed to have a majority of the States. Similarly, the Industrial Employment amendment was supported in three States (NSW, Victoria and Western Australia). It also gained overall support (50.30% in favour and 49.70% against). It again failed to have a majority of the States.
- ¹⁰⁹ The constitutional amendments were: 1906 (Senate elections, s 13), 1910 (State debts, alterations to s 105) and 1928 (State debts, insertion of s 105A).
- ¹¹⁰ *Unemployment and Sickness Benefits Act 1944* (Cth) ss 15–16.
- ¹¹¹ *Unemployment and Sickness Benefits Act 1944* (Cth) s 36.
- ¹¹² *Federal Council of the British Medical Association in Australia v Commonwealth* ('Second Pharmaceutical Benefits Case') (1949) 79 CLR 201, 261 (Dixon J).
- ¹¹³ *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth* (1987) 162 CLR 271, 281-4.
- ¹¹⁴ *Pharmaceutical Benefits Act Case* (1945) 71 CLR 237, 282 (Williams J); *Victoria v Commonwealth* ('AAP [Australian Assistance Plan] Case') (1975) 134 CLR 338, 363-4 (Barwick CJ), 377-8 (Gibbs J), 300 (Mason J).
- ¹¹⁵ Graeme T Powell and Stuart Macintyre, *Land of Opportunity: Australia's post-war reconstruction* (National Archives of Australia, 2015) ch 6.
- ¹¹⁶ *Re-establishment and Employment Act 1945* (Cth) s 55.
- ¹¹⁷ *Re-establishment and Employment Act 1945* (Cth) part IV.

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- ¹¹⁸ Mary Lindsay, 'Can Good Intentions Ensure Good Outcomes? Commonwealth Disability Policy, 1983-1995' (Background Paper No 6, Parliamentary Library, Parliament of Australia, 17 April 1996) 9.
- ¹¹⁹ Mary Lindsay, 'Can Good Intentions Ensure Good Outcomes? Commonwealth Disability Policy, 1983-1995' (Background Paper No 6, Parliamentary Library, Parliament of Australia, 17 April 1996) 9.
- ¹²⁰ Mary Lindsay, 'Can Good Intentions Ensure Good Outcomes? Commonwealth Disability Policy, 1983-1995' (Background Paper No 6, Parliamentary Library, Parliament of Australia, 17 April 1996) 9.
- ¹²¹ Greg McIntosh and Janet Phillips, *Disability Support and Services in Australia* (March 2001) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/disability>.
- ¹²² *Social Services Act 1967* (Cth) pt VIIA.
- ¹²³ *Social Services Act 1967* (Cth) s 133J.
- ¹²⁴ See, e.g., *Disabled Persons Accommodation (Assistance) Act 1963* (Cth), *Sheltered Employment (Assistance) Act 1967* (Cth), *States Grants (Home Care) Act 1969* (Cth), *States Grants (Paramedical Services) Act 1969* (Cth), *States Grants (Nursing Homes) Act 1969* (Cth), *Delivered Meals Subsidy Act 1970* (Cth), *Handicapped Children's Assistance Act 1970* (Cth), *Child Care Act 1972* (Cth), *Nursing Homes Assistance Act 1974* (Cth).
- ¹²⁵ See *Handicapped Persons Assistance Act 1974* (Cth).
- ¹²⁶ Karen Soldatic and Barbara Pini, 'Continuity or Change? Disability Policy and the Rudd Government' (2012) 11(2) *Social Policy & Society* 183, 184.
- ¹²⁷ Mary Lindsay, 'Can Good Intentions Ensure Good Outcomes? Commonwealth Disability Policy, 1983-1995' (Background Paper No 6, Parliamentary Library, Parliament of Australia, 17 April 1996) 13.
- ¹²⁸ Karen Soldatic and Barbara Pini, 'Continuity or Change? Disability Policy and the Rudd Government' (2012) 11(2) *Social Policy & Society* 183, 184.
- ¹²⁹ Karen Soldatic and Barbara Pini, 'Continuity or Change? Disability Policy and the Rudd Government' (2012) 11(2) *Social Policy & Society* 183, 184.
- ¹³⁰ Karen Soldatic and Barbara Pini, 'Continuity or Change? Disability Policy and the Rudd Government' (2012) 11(2) *Social Policy & Society* 183, 184.
- ¹³¹ Australian Law Reform Commission, *Making Rights Count: Services for people with a disability* (Report No 79, 1996).
- ¹³² *Disability Services Act 1986* (Cth) s 3(1) (b).
- ¹³³ Commonwealth, *Parliamentary Debates*, Senate, 12 November 1986, 1983 (Don Grimes, Minister for Community Services).
- ¹³⁴ Productivity Commission, *Review of the Disability Discrimination Act 1992* (Inquiry Report, No 3, April 2004) 1.
- ¹³⁵ Melissa Conley Tyler, 'The Disability Discrimination Act 1992: Genesis, Drafting and Prospects' (1993) 8 *Melbourne University Law Review* 211, 218.
- ¹³⁶ Melissa Conley Tyler, 'The Disability Discrimination Act 1992: Genesis, Drafting and Prospects' (1993) 8 *Melbourne University Law Review* 211, 218.
- ¹³⁷ Chris Ronalds, *National Employment Initiatives for people with Disabilities: A Discussion Paper* (Discussion Paper, 1990) 101.
- ¹³⁸ Melissa Conley Tyler, 'The Disability Discrimination Act 1992: Genesis, Drafting and Prospects' (1993) 8 *Melbourne University Law Review* 211, 218.
- ¹³⁹ Melissa Conley Tyler, 'The Disability Discrimination Act 1992: Genesis, Drafting and Prospects' (1993) 8 *Melbourne University Law Review* 211, 218.
- ¹⁴⁰ Melissa Conley Tyler, 'The Disability Discrimination Act 1992: Genesis, Drafting and Prospects' (1993) 8 *Melbourne University Law Review* 211, 219.
- ¹⁴¹ Maureen Shelley, *Report of the National Consultations with People with a Disability* (Report, 1991) 8–9.
- ¹⁴² Australian Institute of Health and Welfare, *Australia's Welfare 1993: Services and Assistance* (AGPS, 1993) 278.
- ¹⁴³ Melissa Conley Tyler, 'The Disability Discrimination Act 1992: Genesis, Drafting and Prospects' (1993) *Melbourne University Law Review* 8, 219.
- ¹⁴⁴ For example, South Australia did not include intellectual handicap as a disability in the *Handicapped Persons Equal Opportunity Act 1981* (SA).
- ¹⁴⁵ Productivity Commission, *Review of the Disability Discrimination Act 1992* (Inquiry Report, No 3, April 2004) 41.
- ¹⁴⁶ Alastair McEwin, '25 years of the Disability Discrimination Act: Success, stagnation & strengthening the law' (2018) 42 *Law Society of New South Wales Journal* 71, 71.

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- ¹⁴⁷ Productivity Commission, *Review of the Disability Discrimination Act 1992* (Inquiry Report, No 3, April 2004) 41.
- ¹⁴⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 26 May 1992, 2755 (Brian Howe, Minister for Health, Housing and Community Services).
- ¹⁴⁹ See *Disability Discrimination Act 1992* (Cth) s 12.
- ¹⁵⁰ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 3.
- ¹⁵¹ Department of Treasury, 'Australian Government to consider new approaches to disability' (Media Release 092/09, 23 November 2009).
- ¹⁵² Productivity Commission, *Disability Care and Support* (Inquiry Report, No 54, July 2011) 98.
- ¹⁵³ Productivity Commission, *Disability Care and Support* (Inquiry Report, No 54, July 2011) 2.
- ¹⁵⁴ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Report No 124, November 2014) 131.
- ¹⁵⁵ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Report No 124, November 2014) 131.
- ¹⁵⁶ Fleur Beaupert, Linda Steele and Piers Gooding, 'Introduction to Disability, Rights and Law Reform in Australia: Pushing Beyond Legal Futures' (2017) 35(2) *Law in Context* 1, 4.
- ¹⁵⁷ *National Disability Insurance Scheme Act 2013* (Cth) s 3(e).
- ¹⁵⁸ Paul Ramcharan, 'Understanding the NDIS: a history of disability welfare from "deserving poor" to consumers in control' *The Conversation* (online, 6 July 2016) <<https://theconversation.com/understanding-the-ndis-a-history-of-disability-welfare-from-deserving-poor-to-consumers-in-control-58069>>.
- ¹⁵⁹ *National Disability Insurance Scheme Act 2013* (Cth) s 3(i).
- ¹⁶⁰ *R v Sharkey* (1949) 79 CLR 121, 136-7 (Latham CJ), 157 (McTiernan J); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 258 (Brennan J).
- ¹⁶¹ *New South Wales v Commonwealth* ('*Seas and Submerged Lands Case*') (1975) 135 CLR 337, 360 (Barwick CJ); *Polyukhovich v Commonwealth* ('*Polyukhovich*') (1991) 172 CLR 501, 632 (Dawson J); *Victoria v Commonwealth* ('*Industrial Relations Act Case*') (1996) 187 CLR 416, 485 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).
- ¹⁶² *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 220-221 (Stephen J), 234 (Mason J); *Commonwealth v Tasmania* ('*Tasmanian Dam Case*') (1983) 158 CLR 1, 131 (Mason J), 171 (Murphy J), 222 (Brennan J), 258 (Deane J); *Polyukhovich* (1991) 172 CLR 501, 560 (Brennan J).
- ¹⁶³ *Seas and Submerged Lands Case* (1975) 135 CLR 337, 364 (Barwick CJ).
- ¹⁶⁴ *Tasmanian Dam Case* (1983) 158 CLR 1, 303 (Dawson J).
- ¹⁶⁵ *Kioa v West* (1985) 159 CLR 550, 570 (Gibbs CJ).
- ¹⁶⁶ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.
- ¹⁶⁷ Also, *ILO Discrimination (Employment and Occupation) Convention*; *International Covenant on Civil and Political Rights*; *International Covenant on Economic, Social and Cultural Rights*.
- ¹⁶⁸ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.
- ¹⁶⁹ The existence of an international obligation on Australia is a question of fact for the court: *Queensland v Commonwealth* (1989) 167 CLR 232, 239. The existence of the obligation will depend upon the international community's construction of the agreement and the operation of the agreement: *Queensland v Commonwealth* (1989) 167 CLR 232, 241. This power supports legislation with respect to not only known obligations, but also reasonably apprehended obligations: *Richardson v Forestry Commission* (1988) 164 CLR 261, 295.
- ¹⁷⁰ *Industrial Relations Act Case* (1996) 187 CLR 416, 489.
- ¹⁷¹ *Tasmanian Dam Case* (1983) 158 CLR 1, 259-60 (Deane J).
- ¹⁷² *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, 687.
- ¹⁷³ *Tasmanian Dam Case* (1983) 158 CLR 1, 259 (Deane J).
- ¹⁷⁴ *Tasmanian Dam Case* (1983) 158 CLR 1, 171-2 (Murphy J).
- ¹⁷⁵ *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 165 (Heydon J).
- ¹⁷⁶ *New South Wales v Commonwealth* ('*WorkChoices Case*') (2006) 229 CLR 1.
- ¹⁷⁷ *WorkChoices Case* (2006) 229 CLR 1 [178] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), quoting *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346, 375 (Gaudron J).
- ¹⁷⁸ *Williams v Commonwealth [No 2]* (2014) 252 CLR 416, 461 [50] (French CJ, Hayne, Kiefel, Bell and Keane JJ).
- ¹⁷⁹ *R v Federal Court of Australia; Ex parte The Western Australian National Football League (Inc.)* ('*Adamson's Case*') (1979) 143 CLR 190, 239 (Murphy J).

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- ¹⁸⁰ *Adamson's Case* (1979) 143 CLR 190, 233 (Mason J). This approach was endorsed in *State Superannuation Board v Trade Practices Commission* ('*State Superannuation Board*') (1982) 150 CLR 282 where Mason, Murphy and Deane JJ held (at 304) that 'the fact that a corporation carries on independent trading activities on a significant scale will not result in its being properly categorized as a trading corporation if other more extensive non-trading activities properly warrant its being also categorized as a corporation of some other type.'
- ¹⁸¹ *State Superannuation Board* (1982) 150 CLR 282, 304.
- ¹⁸² (1991) 99 ALR 601.
- ¹⁸³ *E v Australian Red Cross Society* (1991) 99 ALR 601, 633 (Wilcox J).
- ¹⁸⁴ *E v Australian Red Cross Society* (1991) 99 ALR 601, 634.
- ¹⁸⁵ *E v Australian Red Cross Society* (1991) 99 ALR 601, 632.
- ¹⁸⁶ *Thurling v Glossodia Community Information and Neighbourhood Centre Inc.* (2019) 288 IR 53, 69.
- ¹⁸⁷ *Orion Pet Products Pty Ltd v Royal Society for the Prevention of Cruelty to Animals (Vic) Inc.* (2002) 120 FCR 191, 219.
- ¹⁸⁸ *E v Australian Red Cross Society* (1991) 99 ALR 601, 635.
- ¹⁸⁹ Gabrielle Appleby, 'There Must Be Limits: The Commonwealth Spending Power' (2009) 37 *Federal Law Review* 93, 93.
- ¹⁹⁰ (2009) 238 CLR 1.
- ¹⁹¹ *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 55-56 (French CJ), 70 (Gummow, Crennan and Bell JJ), 133 (Hayne and Kiefel JJ), 213 (Heydon J).
- ¹⁹² *Williams v Commonwealth (No 1)* (2012) 248 CLR 156.
- ¹⁹³ Anne Toomey, 'Post-*Williams* Expenditure – When Can the Commonwealth and States Spend Public Money Without Parliamentary Authorisation?' (2014) 33(1) *University of Queensland Law Journal* 9, 10.
- ¹⁹⁴ See also: Andrew Hanna, 'Nationhood and Judicial Review: A Bridge Too Far?' (2015) 39(2) *University of Western Australia Law Review* 327.
- ¹⁹⁵ While the States could technically collect income tax, since World War II the Commonwealth has been the sole collector of income tax: see *South Australia v Commonwealth* (1942) 65 CLR 373 and *Victoria v Commonwealth* ('*Second Uniform Tax Case*') (1957) 99 CLR 575.
- ¹⁹⁶ *Constitution* s 96.
- ¹⁹⁷ 'National Partnership Payments', *Department of Finance* (Web Page, 7 August 2019) <<https://www.finance.gov.au/about-us/glossary/pgpa/term-national-partnership-payments>>.
- ¹⁹⁸ Council of Australian Governments, *National Disability Agreement* (Web Page) <http://www.federalfinancialrelations.gov.au/content/npa/national_agreements/national-disability-agreement.pdf>.
- ¹⁹⁹ In 2019-20, the Commonwealth provided \$172.9 million to Western Australia through the National Disability SPP. WA was the only state to be provided with National Disability SPP, as the other States had all transitioned over to the NDIS full scheme.
- ²⁰⁰ Department of Treasury, *Budget 2019-20 Paper No 3* (2 April 2019) <<https://budget.gov.au/2019-20/content/bp3/download/bp3.pdf>>.
- ²⁰¹ *Second Uniform Tax Case* (1957) 99 CLR 575, 656 (Fullagar J).
- ²⁰² *AAP Case* (1975) 134 CLR 338, 357.
- ²⁰³ *Deputy Federal Commissioner of Taxation (NSW) v WR Moran Pty Ltd* (1939) 61 CLR 735, 785 (Evatt J).
- ²⁰⁴ *National Disability Insurance Scheme Act 2013* (Cth) s 206(1).
- ²⁰⁵ *Disability Discrimination Act 1992* (Cth) s 12(3).
- ²⁰⁶ *National Disability Insurance Scheme Act 2013* (Cth) s 206(2).
- ²⁰⁷ *National Disability Insurance Scheme Act 2013* (Cth) s 206(4).
- ²⁰⁸ *National Disability Insurance Scheme Act 2013* (Cth) s 206(5).
- ²⁰⁹ *Disability Discrimination Act 1992* (Cth) s 12(5), (7); *National Disability Insurance Scheme Act 2013* (Cth) s 206(7).
- ²¹⁰ *Disability Discrimination Act 1992* (Cth) s 12(11).
- ²¹¹ *Disability Discrimination Act 1992* (Cth) s 12(12).
- ²¹² *Migration Regulations 1994* (Cth) Sch 4, Pt 1, PIC 4005.
- ²¹³ See, e.g., Mary Crock, 'Many sick and disabled people are refused permanent visas. We need compassion not discrimination' (Web Page, 5 September 2019) <<https://theconversation.com/many-sick-and-disabled-people-are-refused-permanent-visas-we-need-compassion-not-discrimination-122311>>. See also: Joint Standing Committee on Migration, 'Enabling Australia: Inquiry into the Migration Treatment of Disability' (November 2012).
- ²¹⁴ *Redfern v Dunlop Rubber Australia Ltd* (1964) 110 CLR 194, 220 (Menzies J).

²¹⁵ *Constitution* s 51(xxxvii).

²¹⁶ See, e.g., *Commonwealth Powers (De Facto Relations) Act 2009* (SA), *Water (Commonwealth Powers) Act 2008* (NSW), *Terrorism (Commonwealth Powers) Act 2003* (Vic).

²¹⁷ See, e.g., *Evidence Act 1995* (Cth) s 30; *Evidence Act 1995* (NSW) s 31; *Evidence Act 2008* (Vic) s 31.

²¹⁸ Cheryl Saunders, *The Scope of Executive Power* (Papers on Parliament No. 59, April 2013).

²¹⁹ *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535, Mason J at 560.

²²⁰ *R v Kirby; Ex parte Boilermakers Society of Australian* (1956) 94 CLR 254, 271-2 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

²²¹ *Australian Constitution* ss 75 and 76. Sections 75 and 76 of the *Constitution* define the original jurisdiction of the High Court. Of particular relevance to the resolution of disputes between the Commonwealth and the States is s75(iii), which provides: 'In all matters ... in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party ... the High Court shall have original jurisdiction'. If the dispute over an intergovernmental agreement were between two States, s 75(iv) would be relevant. Section 75 states:

In all matters:

(i) arising under any treaty;

(ii) affecting consuls or other representatives of other countries;

(iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;

(iv) between States, or between residents of different States, or between a State and a resident of another State;

(v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;

the High Court shall have original jurisdiction.

Section 76 states:

The Parliament may make laws conferring original jurisdiction on the High Court in any matter:

(i) arising under this Constitution, or involving its interpretation;

(ii) arising under any laws made by the Parliament;

(iii) of Admiralty and maritime jurisdiction;

(iv) relating to the same subject-matter claimed under the laws of different States.

²²² Cheryl Saunders, 'Intergovernmental Agreements and the Executive Power' (2005) 16 *Public Law Review* 294, 299

²²³ (1962) 108 CLR 130.

²²⁴ *South Australia v Commonwealth* (1962) 108 CLR 130, 148-9. See also at 141 (Dixon CJ, with whom Kitto J agreed), 149 (Taylor J), 150 (Menzies J), 153 (Windeyer J), 157 (Owen J).

²²⁵ *Intergovernmental Agreement for the National Disability Insurance Scheme (NDIS) Launch* (2012) cl 134.

²²⁶ *Constitution* s 51(xxvi).

²²⁷ For example, it cannot be a law of general application: *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168, 187.

²²⁸ *Tasmanian Dam Case* (1983) 158 CLR 1, 273.

²²⁹ *Western Australia v Commonwealth ('Native Title Act Case')* (1995) 183 CLR 373, 461; *Tasmanian Dam Case* (1983) 158 CLR 1, 158 (Mason J), 244-5 (Brennan J).

²³⁰ Justin Malbon, 'The Race Power Under the Australian Constitution: Altered Meanings' (1999) 21(1) *Sydney Law Review* 80.

²³¹ See, e.g., Justin Malbon, 'Indigenous Rights under the Australian Constitution: A Reconciliation Perspective' (PhD thesis, University of New South Wales, 2002); Clare Townsend et al, 'Making every Australian count: challenges for the National Disability Insurance Scheme (NDIS) and the equal inclusion of homeless Aboriginal and Torres Strait Islander Peoples with neurocognitive disability' (2018) 42 *Australian Health Review* 227; Scott Avery, 'Indigenous people with disability have a double disadvantage and the NDIS can't handle it' *The Conversation Australia* (online, 8 October 2018) <<https://theconversation.com/indigenous-people-with-disability-have-a-double-disadvantage-and-the-ndis-cant-handle-that-102648>>; Subhari Ravindran et al, 'Conceptualising disability: A critical comparison between Indigenous people in Australia and New South Wales disability service agencies' (2017) 52(4) *Australian Journal of Social Issues* 367.

²³² Section 109 of the *Constitution* states: 'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.'

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- ²³³ *National Disability Insurance Scheme Act 2013* (Cth) s 207(1); *Disability Discrimination Act 1992* (Cth) s 13.
- ²³⁴ *Viskauskas v Niland* (1983) 153 CLR 280, *Metwally v University of Wollongong* (1985) 158 CLR 447.
- ²³⁵ *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31; *Austin v Commonwealth* (2003) 215 CLR 185.
- ²³⁶ *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188.
- ²³⁷ *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, 232.
- ²³⁸ *Melbourne Corporation v Commonwealth* (1974) 74 CLR 31, 78 (Dixon J).
- ²³⁹ *Melbourne Corporation v Commonwealth* (1974) 74 CLR 31, 79 (Dixon J).
- ²⁴⁰ *Austin v Commonwealth* (2003) 215 CLR 185, 217 [24] (Gleeson CJ).
- ²⁴¹ (1995) 184 CLR 188, 233.
- ²⁴² *Victoria v Commonwealth* (1971) 122 CLR 353 (pay-roll tax); *State Chamber of Commerce and Industry v Commonwealth* (1987) 163 CLR 329 (fringe benefits tax).
- ²⁴³ *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192, 217 (Mason J).
- ²⁴⁴ See ss 5(2) and 22(2) of the Act.
- ²⁴⁵ See *Austin v Commonwealth* (2003) 215 CLR 185, 218 [26] (Gleeson CJ), 264–5 [166] (Gaudron, Gummow and Hayne JJ).
- ²⁴⁶ *Austin v Commonwealth* (2003) 215 CLR 185, 265 [168].
- ²⁴⁷ *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92, [266].
- ²⁴⁸ *Purvis v New South Wales (Department of Education and Training)* (2002) 117 FCR 237, [26] (Spender, Gyles and Conti JJ).
- ²⁴⁹ Robert Adler, 'Unfunded Mandates and Fiscal Federalism: A Critique' (1997) 50 *Vanderbilt Law Review* 1137, 1137.
- ²⁵⁰ 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people': US *Constitution*, 10th Amendment.
- ²⁵¹ Robert Adler, 'Unfunded Mandates and Fiscal Federalism: A Critique' (1997) 50 *Vanderbilt Law Review* 1137, 1193.
- ²⁵² 521 US 898 (1997).
- ²⁵³ The 1993 Brady Handgun Violence Prevention Act (the Brady Act) was an amendment to the Gun Control Act of 1968. The Brady Act temporarily required local law enforcement officials to conduct background checks as a condition of handgun sales, pending development and implementation of a federal system for such checks.
- ²⁵⁴ *Printz v United States* 521 US 898, 922 (1997).
- ²⁵⁵ *Printz v United States* 521 US 898, 930 (1997). See also: Stacy Anderson and Russell Constantine, 'Unfunded Mandates' *Harvard Law School Federal Budget Policy Seminar* (Briefing Paper No 7, May 2005) <http://www.law.harvard.edu/faculty/hjackson/UnfundedMandates_7.pdf>.
- ²⁵⁶ (2008) 234 CLR 599.
- ²⁵⁷ *O'Donoghue v Ireland* (2008) 234 CLR 599, [24] (Gleeson CJ), [57] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).
- ²⁵⁸ *O'Donoghue v Ireland* (2008) 234 CLR 599, [166] (Kirby J).
- ²⁵⁹ *Unfunded Mandates Reform Act: History, Impact, and Issues*, Congressional Research Service (January 2 2020) <<https://fas.org/sgp/crs/misc/R40957.pdf>>.
- ²⁶⁰ 2 U.S.C. 1501(2).
- ²⁶¹ Exceptions to the UMRA include any provision in a bill, joint resolution, amendment, motion or conference before Congress that:
- Section 422 – Exclusions
- (2) establishes or enforces any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national original, age, handicap or disability.
- (7) relates to the old-age, survivors and disability insurance program under Title II of the Social Securities Act.
- ²⁶² For example, Title III of the ADA requires that all public infrastructure must be accessible to people with disabilities, including those that existed prior to the legislation.
- ²⁶³ 'Unfunded Mandate Reform Act of 1995', *House of Representatives* (1995) 104(1) <<https://www.congress.gov/congressional-report/104th-congress/house-report/1/1>>.
- ²⁶⁴ CATO Institute, 'Unfunded Mandates' in *Handbook for Congress* (1997) <<https://www.cato.org/sites/cato.org/files/serials/files/cato-handbook-policy-makers/1995/9/104-7.pdf>>.
- ²⁶⁵ *WorkChoices Case* (2006) 229 CLR 1 ('*WorkChoices*').

²⁶⁶ *Leeth v Commonwealth* (1992) 174 CLR 255, 469 (Mason CJ, Dawson and McHugh JJ); *Brown v The Queen* (1986) 160 CLR 171, 198–9 (Brennan J), 218–19 (Dawson J); *Commonwealth v Hospital Contribution Fund of Australia* (1982) 150 CLR 49, 61 (Mason J).

²⁶⁷ *Kable v Director of Public Prosecutions* (1996) 189 CLR 51, as restated in *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146, 162–4 [26]–[32]; *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45, 76 [63]–[64].

²⁶⁸ See, e.g., *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501.

²⁶⁹ *Re Criminal Proceeds Confiscation Act 2002* [2004] 1 Qld. R 40; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319.

²⁷⁰ *DPP v Kamal* (2011) 248 FLR 64, 69 [9] (Martin CJ).

²⁷¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 9 March 1943, 1360–1 (Francis Patrick Baker).

²⁷² *Constitution* s 51(xxiiiA).



Royal Commission
into Violence, Abuse, Neglect and
Exploitation of People with Disability