FEDERAL REFORM: THE CASE FOR SUPPORTIVE SUBSIDIARITY IN AUSTRALIA

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Reforming Australia's federation is a critical but elusive goal, as the system is plagued by service delivery failures, blame-shifting and inefficiency. The principle of subsidiarity, which aims to localise decision-making and strengthen communities, is sometimes invoked to guide reform efforts, but so far has had little substantive impact. This article argues that previous efforts have applied a decentralist interpretation of subsidiarity as 'decision-making as close to the people as possible', which is too narrow, and that taking a broader approach focussing on supportive elements of the principle would be more successful in the Australian context. This argument is supported by an analysis of how supportive subsidiarity aligns constitutionally and institutionally with Australia's federal structure, and through data from a large-N public attitude survey indicating that supportive subsidiarity is valued more highly than the decentralist interpretation.

I INTRODUCTION

'We're stepping in now. We're not waiting to be asked': Prime Minister Scott Morrison on the Commonwealth's response to the 2019–20 bushfire crisis.[1]

When and how should the national government intervene in state or local issues? These difficult questions arose once again in Australia during a devastating bushfire season in 2019–20. The Commonwealth initially took an uncharacteristically hands-off approach to the state responsibilities of emergency services and fire management. It was hesitant to get involved in the crisis response without explicit requests for assistance from the states, despite its earlier cuts to rural fire service funding, public calls for national leadership as fires raged across

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1 Interview with Scott Morrison (Luke Grant, 2GB, 4 January 2020) <https://www.pm.gov.au/media/interview-luke-grant-2gb>.

the country,[2] and the Commonwealth's approach in recent decades to frame itself as the great 'fixer' in Australian politics.[3] Then, after months of limited action, the Commonwealth backflipped by sending in Australian Defence Force reserves with the rhetoric of taking control of the situation.[4]

Beyond the immediate concerns about how to best respond to the crisis and offer relief to affected communities, the bushfires highlighted the urgent need to revisit system-wide federal reform, an ongoing challenge for public law in Australia.[5] Without clear and consistent ideas about who should do what in the federation, and a principled sense of when the Commonwealth should 'step in' or provide assistance, the fire crisis was poorly handled. Worse, the crisis was symptomatic of broader failures across the system – the same problems arise across the policy spectrum, from education to public housing to health,[6] and everything in between. The questions of when the federal government should step in, and how it should conduct itself in the intervention remain immediate challenges, while the broader issue of reform (constitutional or otherwise) to recalibrate the roles and responsibilities of Australia's governments endures as a problem for scholars and policymakers alike.

The principle of subsidiarity is sometimes invoked as a means of answering these questions. Often defined in Australia as a requirement that government functions are performed as close to the people as possible,[7] the principle aims to guide the allocation of power in society. Notably, the principle was most recently adopted as part of the Terms of Reference for a reform process (which was later abandoned) in 2014–16.[8] Writing in 2016, Aroney provided a compelling case for subsidiarity's place in Australian federalism, both as a guide for reform and as an enduring feature of intergovernmental relations: 'subsidiarity is proposed as a standard according to which the functioning of Australian federalism can be assessed and reformed. On the whole, it is a worthy principle'.[9]

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2 See, eg, Stephanie Convery, 'Morrison's Government on the Bushfires: From Attacking Climate "Lunatics" to Calling in the Troops', *The Guardian* (online, 4 January 2020) <https://www.theguardian.com/australia-news/2020/jan/04/morrisons-government-on-the-bushfires-from-attacking-climate-lunatics-to-calling-in-the-troops>.

3 Jennifer Menzies, 'The Culture of Commonwealth and State Relations' in *A Federation for the 21st Century* (Report, Committee for Economic Development of Australia, 27 October 2014) 64, 68.

4 Interview with Scott Morrison (n 1).

5 For an overview, see Nicholas Aroney, 'The High Court of Australia: Textual Unitarism vs Structural Federalism' in Nicholas Aroney and John Kincaid (eds), *Courts in Federal Countries: Federalists or Unitarists?* (University of Toronto Press, 2017) 29, 29; Paul Kildea, Andrew Lynch and George Williams (eds), *Tomorrow's Federation: Reforming Australian Government* (Federation Press, 2012).

6 Responses to the developing coronavirus pandemic, especially the failure to quarantine or monitor passengers disembarking from the *Ruby Princess* cruise ship in March 2020, are a particularly significant recent example – see, eg, Frances Mao, 'Coronavirus: How Did Australia's Ruby Princess Cruise Debacle Happen?', *BBC News* (online, 24 March 2020) <https://www.bbc.com/news/world-australia-51999845>.

7 See, eg, Anne Twomey and Glenn Withers, 'Federalist Paper 1: Australia's Federal Future' (Report, Council for the Australian Federation, April 2007) 4.

8 'Reform of the Federation' (Draft Discussion Paper, Commonwealth of Australia, 2015).

9 Nicholas Aroney, 'Federalism and Subsidiarity: Principles and Processes in the Reform of the Australian Federation' (2016) 44(1) *Federal Law Review* 1, 5 (citations omitted) ('Federalism and Subsidiarity').

But while the principle commands support from both scholars and policymakers in a federal reform context, it has had little real impact. The federation remains highly centralised, and Evans argues that subsidiarity has been 'disregarded' by the High Court.[10] The consequences of this disregard are evidenced by service delivery failures where the Commonwealth has taken over,[11] or because states have restricted fiscal capacity to respond to problems. But while the need for reform is clear, positive change remains elusive. The last systematic attempt was the 'White Paper on Reform of the Federation' of 2014–16 ('White Paper'),[12] which was unceremoniously abandoned after Tony Abbott was replaced as Prime Minister.[13]

Accordingly, we must confront two key questions. First, why does federal reform matter? And second, how can subsidiarity help fix the federation, with or without a formal reform process? The first question is relatively simple to answer, if harder to address in practice. Recurring examples of service delivery failures, the bushfire crisis highlighted earlier, and issues with coordination and collaboration between jurisdictions (as evidenced by responses to the coronavirus outbreak)[14] demonstrate the need for change. Further, the White Paper process highlighted the problems with Australian federalism in a series of issues papers, and then showcased those very obstacles to reform: the project became increasingly centralised in the Commonwealth Executive, the states failed to reach a consensus view of their position, and the process ultimately fell victim to political churn. In short, the White Paper demonstrated all the problems with our federation and resolved none of them.

Thus, this article focuses on answering the second question: how can subsidiarity help? It does so by proposing a broader understanding of the principle; one that is better suited to Australia's needs and is therefore more likely to offer greater clarity in addressing roles and responsibilities in the federation. Specifically, it argues that the common approach to the principle in Australia (government at the lowest competent level) only captures part of the principle's

10 Michelle Evans, 'Subsidiarity and Federalism: A Case Study of the Australian Constitution and Its Interpretation' in Michelle Evans and Augusto Zimmermann (eds), *Global Perspectives on Subsidiarity* (Springer, 2014) 185, 195.

11 Two recent examples include fish kills in the Murray-Darling Basin, and breakdowns in communication and responsibility in responding to bushfires in 2019–20.

12 Commonwealth, 'White Paper on Reform of the Federation' (Press Release, 28 June 2014) <https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/3252545/upload_binary/3252545.pdf;fileType=application%2Fpdf#search=%22media/pressrel/3252545%22>.

13 Jacob Deem and Anne Tiernan, 'Beyond the Canberra Bubble: Rebuilding Trust in Federal Australia' in Mark Evans, Michelle Grattan and Brendan McCaffrie (eds), *From Turnbull to Morrison: The Trust Divide* (Melbourne University Press, 2019) 93, 99. Notably, Abbott's successor Malcolm Turnbull pursued his own version of federal reform, although as Deem and Tiernan observe, Turnbull's approach was more ad hoc, and often left states out of the conversation.

14 For example, while Australia's federal model provided flexibility for some states to close schools and lockdown businesses while other states were able to remain open because of a reduced threat, poor communication from the Prime Minister and Premiers left citizens confused as to what they could or could not do. See, eg, Katharine Murphy and Sarah Martin, 'Confusion Reigns over Australian Coronavirus School Closures after Morrison Press Conference', *The Guardian* (online, 22 March 2020) <https://www.theguardian.com/world/2020/mar/22/victoria-nsw-lockdowns-scott-morrison-coronavirus-national-cabinet>.

full meaning, and that narrowing the principle's interpretation constrains its utility as a constitutional principle and guide to federal reform. Take, for instance, Brennan's claim that '[n]egatively, [subsidiarity] is a principle of non-absorption of lower societies by higher societies'[15] – this is the sense in which the principle is used in Australia.[16] But Brennan continues: 'Positively, subsidiarity demands that when aid is given to a particular society, it be for the purpose of encouraging and strengthening that society'.[17] This article focuses on subsidiarity's positive limb, and explains how 'supportive subsidiarity' provides a better fit for reforming Australia's centralised federation.

The article begins by providing context through two background debates: first, the successes and failures of subsidiarity in Australia, and second, ongoing disputes over the principle's definition and meaning. This background highlights the key argument that although subsidiarity has not worked especially well in Australia, it has only been applied in a narrow, decentralist sense which ignores broader and more supportive attributes of the principle. Accordingly, the remainder of the article is divided into three parts, respectively examining the case for adopting supportive subsidiarity through three lenses: constitutional, institutional and attitudinal. Part III reveals the basis for supportive subsidiarity in the *Australian Constitution*, examining sections 51, 96, 107 and 119 and the associated case law to uncover *how* supportive subsidiarity might be justified as a constitutional principle. From that foundation, Part IV takes on an institutional lens, considering how supportive subsidiarity is ideally suited to the unique challenges of Australia's federation (and to reforming it), and the ways in which supportive subsidiarity might be a more palatable reform pathway than a predominantly decentralist approach. In Part V, the article explores public attachment to the principle as a potential driving force for change, in the absence of judicial sympathy for the principle or any serious political will to affect change. Using evidence from the Australian Constitutional Values Surveys 2008–17 ('ACVS'),[18] a large-N survey of Australian citizens, the article identifies that there is overwhelming support for a model of government that gives effect to supportive subsidiarity. Examining public attitudes towards supportive subsidiarity opens up new ways of interpreting the *Constitution* to reflect societal values. Just as Windeyer J reconciled differing approaches to state immunity before and after

15 Patrick McKinley Brennan, 'Subsidiarity in the Tradition of Catholic Social Doctrine' in Michelle Evans and Augusto Zimmermann (eds), *Global Perspectives on Subsidiarity* (Springer, 2014) 29, 29.

16 The Australian usage also tends to limit itself to a within-governance understanding of subsidiarity (ie, the non-absorption of the functions of lower levels of government by higher levels, as opposed to the non-absorption of private associations, organisations and other groups by governments of any level). Accordingly, this article limits its discussion to subsidiarity within government – for an analysis of subsidiarity's broader potential, see Joseph Drew and Bligh Grant, 'Subsidiarity: More than a Principle of Decentralization' (2017) 47(4) *Publius: The Journal of Federalism* 522.

17 Brennan (n 15) 29.

18 See AJ Brown, 'Australian Constitutional Values Survey 2010: Results Release 1' (Report, Griffith University, April 2010); AJ Brown, 'Australian Constitutional Values Survey 2010: Results Release 2' (Report, Griffith University, October 2010); AJ Brown, 'Australian Constitutional Values Survey 2014: Results Release 1' (Report, Griffith University, October 2014); Centre for Governance and Public Policy, Griffith University, 'Australian Constitutional Values Survey 2017: Results Release 2' (Report, October 2017).

Amalgamated Society of Engineers v Adelaide Steamship Co Ltd ('*Engineers' Case*')[19] on the basis of a shifting, more cohesive Australian society in the twenty years following federation,[20] uncovering strong attachment to supporting communities could justify a more concerted effort to recognise subsidiarity as a constitutional principle. Combining the constitutional, institutional and attitudinal lenses, the article concludes that embracing supportive subsidiarity offers the best chance for achieving meaningful reform and effective federalism in Australia.

II BACKGROUND: SUBSIDIARITY'S USE IN AUSTRALIA AND DEBATES OVER ITS MEANING

A Subsidiarity in Australia

Subsidiarity's uptake in Australia has proved difficult. While scholars and policymakers have readily espoused the principle's benefits, implementing the principle has proved more challenging. The High Court's acquiescence to the centralisation of the Australian federation is an especially well-established barrier to subsidiarity's success. The Court's lack of interest in applying or upholding subsidiarity stems from the fact that there is no explicit reference to the principle in the *Constitution* – the term itself only reached popularity after Pope Pius XI's *Quadragesimo Anno* in 1931,[21] decades after the *Constitution* was written. Nevertheless, some scholars suggest that the principle is implicit in the *Constitution*. For instance, Evans argues that:

> [T]he framers [of the *Constitution*] would not have been expressly aware of the principle of 'subsidiarity' … However, they certainly embraced the principle's sentiment in the *Australian Constitution* … [T]he … characteristic of subsidiarity, is apparent from an examination of the structure and provisions of the *Constitution* itself.[22]

In particular, Evans cites the *Constitution*'s emphasis on preserving state powers,[23] while granting the Commonwealth limited powers.[24] The constitutional framers' intentions, evidenced in the Convention Debates, highlight the desire to ensure power remained decentralised where possible. For example, Sir Samuel Griffith noted the importance of the guiding principle that the colonies only

19 (1920) 28 CLR 129.

20 *Victoria v Commonwealth* (1971) 122 CLR 353, 396 (Windeyer J).

21 Pope Pius XI, *Quadragesimo Anno: Encyclical on Reconstruction of the Social Order* (Encyclical, 15 May 1931) [79]. Here, I emphasise the phrase 'popular usage' – while evidence of the values and ideals underpinning subsidiarity dates back to Aristotle, subsidiarity's use as a political principle gathered most of its momentum following the principle's incorporation into the Catholic Social Doctrine. For more, see Nicholas Aroney, 'Subsidiarity in the Writings of Aristotle and Aquinas' in Michelle Evans and Augusto Zimmermann (eds), *Global Perspectives on Subsidiarity* (Springer, 2014) 9 ('Subsidiarity in the Writings of Aristotle and Aquinas').

22 Evans (n 10) 188–9.

23 See especially *Australian Constitution* ss 106–8.

24 Evans (n 10) 190–1.

delegate or surrender powers 'which may be exercised by the Federal Government with greater advantage than the separate Governments'.[25]

Evans is not alone in insisting that Australia's federation relies on subsidiarity. For instance, Brown saw particular utility for the principle in understanding the role of local government,[26] while Fenna stressed subsidiarity's importance for fiscal relations in federal Australia.[27] Aroney also notes the intended role of the Senate as a states' house as being an important feature for embodying and protecting subsidiarity in the federation.[28]

The High Court has generally shied away from subsidiarity and its animating ideals, however. Beginning with the Court's rejection of the doctrine of reserved state powers in the *Engineers' Case* in 1920, the Court has consistently allowed the powers of the Commonwealth to wax, while the powers of the states waned.[29] This acquiescence to Commonwealth power led Evans to declare that subsidiarity has been 'disregarded' in Australia.[30]

The Court's position on subsidiarity certainly made it difficult for the principle to flourish in Australia. However, the principle's adoption as a guiding principle for federal reforms in 1991 appeared to mark a turning point, leading Brown to comment in 2002 that subsidiarity 'has had a long and difficult birth in Australia. Nevertheless, since the late 1980s it has finally arrived'.[31] Subsidiarity appeared to have found a new use in driving federal reform, providing a rallying point for state and territory leaders as a core principle for intergovernmental relations.[32] However, if subsidiarity's birth was difficult, its upbringing through the '90s and into the 21st century proved neglectful and distant. Successive Prime Ministers continued the 20th century trend of expanding Commonwealth power at the expense of the states, moving further away from the decentralist aims of the principle,[33] while the High Court continued to permit these expansions, culminating in the 'high water mark' of *New South Wales v Commonwealth* (the '*Work Choices Case*') in 2006.[34]

The idea that subsidiarity provides a useful guide to federal reform persists, however. Twomey and Withers' seminal 2007 paper on the future of the federation

25 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 10 February 1890, 10 (Samuel Griffith), cited in Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009) 117–18 ('*The Constitution of a Federal Commonwealth*').

26 AJ Brown, 'Subsidiarity or Subterfuge? Resolving the Future of Local Government in the Australian Federal System' (2002) 61(4) *Australian Journal of Public Administration* 24 ('Subsidiarity or Subterfuge?').

27 Alan Fenna, 'The Division of Powers in Australian Federalism: Subsidiarity and the Single Market' (2007) 2(3) *Public Policy* 175.

28 Aroney, 'Federalism and Subsidiarity' (n 9) 4.

29 David Hume, Andrew Lynch and George Williams, 'Heresy in the High Court? Federalism as a Constraint on Commonwealth Power' (2013) 41(1) *Federal Law Review* 71, 73.

30 Evans (n 10) 195.

31 Brown, 'Subsidiarity or Subterfuge?' (n 26) 39.

32 Brian Galligan, *A Federal Republic: Australia's Constitutional System of Government* (Cambridge University Press, 1995) 205.

33 Deem and Tiernan (n 13).

34 (2006) 229 CLR 1; Hume, Lynch and Williams (n 29) 92.

invoked subsidiarity as a driver for change,[35] while in 2014 Evans argued that '[w]here federalism has been diminished in favour of centralisation, such as in the Australian federation, subsidiarity should be resurrected to inspire reforms'.[36] As highlighted above, 2014 also saw the Abbott Government initiate a White Paper on federal reform, with subsidiarity as a guiding Term of Reference.[37] In 2016, Aroney outlined subsidiarity's value to the reform process, using international comparisons to emphasise the importance of encouraging stakeholders to agree on general reform principles (such as subsidiarity) to promote consensus on which to build meaningful reform.[38]

Despite the persuasive arguments, and the broader need for federal reform, the White Paper lost momentum and was formally announced as having been abandoned during a Senate Estimates hearing in April 2016.[39] Subsidiarity had again failed to achieve anything of substance in Australia. The White Paper was unsuccessful for a wide range of reasons, many of which are not related to subsidiarity; Tony Abbott's ailing leadership, the inability of states to present a united front, the failure to engage a wider audience beyond elite stakeholders, hyper-partisanship, and the tendency towards short-term thinking all undermined meaningful reform.[40] But on the specific issue of subsidiarity, it is possible that the principle failed to resonate with policymakers and stakeholders – in the White Paper and previously – because it was applied in a very narrow sense that is inconsistent with other values that underpin the Australian federal system. Accordingly, it is important that we engage with broader debates about subsidiarity's definition and meaning in order to uncover an interpretation of the principle that is more useful in the Australian context.

B A Broader Perspective of Subsidiarity

Scholars widely acknowledge that 'subsidiarity' is a contested term. According to Aroney, it 'mean[s] different things … in different contexts',[41] and in his 2016 work on using the principle to guide federal reform, Aroney cautioned that 'we have to be careful what we mean by it'.[42] However, when it comes to reform in Australia, the nuances of subsidiarity's meaning have been lost and subsidiarity is synonymous with decentralism in most reform settings. Take, for instance, Evans' comment that resurrecting subsidiarity to inspire reforms will '[m]ost often … involve measures (both constitutional and otherwise) to achieve decentralisation'.[43] According to Chaplin, 'while this is not an illegitimate usage … to rely primarily on such a [definition] can lead to significant

35 Twomey and Withers (n 7).
36 Evans (n 10) 186.
37 Commonwealth (n 12) 3.
38 Aroney, 'Federalism and Subsidiarity' (n 9).
39 Evidence to Senate Finance and Public Administration References Committee, Parliament of Australia, Canberra, 27 April 2016, 30 (Alison Larkins).
40 See generally Mark Bruerton et al (eds), *A People's Federation* (Federation Press, 2017).
41 Aroney 'Subsidiarity in the Writings of Aristotle and Aquinas' (n 21) 10.
42 Aroney, 'Federalism and Subsidiarity' (n 9) 5.
43 Evans (n 10) 186.

misunderstandings of the principle'.[44] Hittinger agrees with this perspective, stating that subsidiarity 'is proposed as a principle of non-absorption, not a principle that necessarily requires devolution'.[45]

Opening up to a broader understanding of subsidiarity creates new opportunities for the principle to be useful. Most importantly, as highlighted earlier, Brennan describes subsidiarity as having both negative (decentralist and non-absorptionist) and positive (supportive and empowering) elements.[46] The negative limb is the focus in Australia, and as outlined above, has not proved especially successful. By contrast, the positive limb offers more potential. The positive limb of subsidiarity is often neglected, but forms a critical part of understanding (and applying) the principle.

The word 'subsidiarity' has its roots in Latin, although there is some debate as to its precise lineage. Some scholars claim 'subsidiarity' is derived from *subsidium*, which 'means the same as assistance or help'.[47] Others credit the coining of 'subsidiarity' to 19th century scholar Luigi Taparelli, who derived it from *sub sedeo*,[48] which refers to subordinate clauses in a sentence,[49] where a subordinate clause provides additional information, detail or colour to the independent clause, but cannot stand alone as its own sentence. Regardless of the etymological concerns, it is clear that the idea underpinning this Latin usage is one of aid and support – a *positive* duty to provide assistance in a way that strengthens and empowers. For instance, Komonchak argues that 'subsidiarity requires *positively* that all communities not only permit but enable and encourage individuals to exercise their own self-responsibility and that larger communities do the same for smaller ones',[50] and that '[i]ntervention … is only appropriate as "helping people help themselves"'.[51]

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44 Jonathan Chaplin, 'Subsidiarity and Social Pluralism' in Michelle Evans and Augusto Zimmermann (eds), *Global Perspectives on Subsidiarity* (Springer, 2014) 65, 66.

45 Russell Hittinger, 'Social Pluralism and Subsidiarity in Catholic Social Doctrine' in Jeanne Heffernan Schindler (ed), *Christianity and Civil Society: Catholic and Neo-calvinist Perspectives* (Lexington, 2008) 1, 16. See also Kenneth L Grasso, 'The Subsidiary State: Society, the State and the Principle of Subsidiarity in Catholic Social Thought' in Jeanne Heffernan Schindler (ed), *Christianity and Civil Society: Catholic and Neo-calvinist Perspectives* (Lexington Books, 2008) 31.

46 Brennan (n 15) 35.

47 Michelle Evans and Augusto Zimmermann, 'The Global Relevance of Subsidiarity: An Overview' in Michelle Evans and Augusto Zimmermann (eds), *Global Perspectives on Subsidiarity* (Springer, 2014) 1, 1.

48 Russell Hittinger, 'The Coherence of the Four Basic Principles of Catholic Social Doctrine: An Interpretation' in Margaret S Archer and Pierpaolo Donati (eds), *Pursuing the Common Good: How Solidarity and Subsidiarity Can Work Together* (Vatican City, 2008) 75, 109 ('Four Basic Principles').

49 Thomas C Behr, 'Luigi Taparelli D'Azeglio, SJ (1793–1862) and the Development of Scholastic Natural-Law Thought as a Science of Society and Politics' (2003) 6(1) (Spring) *Journal of Markets & Morality* 99, 105.

50 Joseph A Komonchak, 'Subsidiarity in the Church: The State of the Question' (1988) 48(1) *Jurist* 298, 302 (emphasis in original). While Komonchak's argument is directed towards the question of private associations being protected from state interference, the logic applies equally well to an intergovernmental setting. For further discussion of the distinction between subsidiarity in public and private settings, see Drew and Grant (n 16).

51 Komonchak (n 50) 302.

This notion of support is furthered by *sub sedeo's* dual meaning: while it refers to subordinate clauses in a sentence, it also describes auxiliary troops in the Roman legions.[52] The Roman auxiliaries were separate to, but not entirely independent from, the legion proper.[53] They provided specialised troops to supplement the Roman army and compensate for the legion's weaknesses (usually through providing cavalry and archers).[54] But while the auxiliaries were a crucial component to Roman military success, they in turn relied on the might of the legion; auxiliary troops alone could not have hoped to stand against Rome's enemies. Thus, as with sentence clauses, *sub sedeo* in the military sense implied support and the coming together of constituent elements to achieve a greater outcome.

However, this view is contested. Specifically, John F Cox argues that 'subsidiarity' derives from *subsidiarius*, meaning 'of or belonging to the reserves'.[55] According to Cox, the term referred to troops in the Roman legion stationed in the third line of battle, who were held in reserve, only intervening if they were absolutely required.[56] While they still played a supporting role, the emphasis here is clearly on non-intervention unless necessary.

Australia's increasingly centralised federation often foregrounds Commonwealth involvement in policy and service delivery. As highlighted in the introduction of this article, this approach has failed time and time again. Adopting a supportive subsidiarity approach to the Australian federation, with the Commonwealth as an auxiliary, supportive third wave, offers a compelling fresh perspective to understanding the Commonwealth's function in the federal system. In particular, it gives the Commonwealth a role that is more than simply responsible for national issues like defence (which is all that decentralist subsidiarity would permit), but still holds back the tide on unnecessary centralism. With their superior fiscal power and ability to take a big picture view of the nation, the Commonwealth can play a crucial role in empowering state and local governments to make decisions for their community, without needing to dictate policy or deliver services. To further interrogate this potential, the next three Parts respectively examine the constitutional basis for supportive subsidiarity, how it would strengthen institutional structures, and how it is likely to tap into public values.

52 Behr (n 49) 105.

53 See, eg, Petru Ureche, 'About the Tactics and Fighting Particularity of the Auxiliary Infantry in Roman Dacia' (2008) 43–44 *Acta Musei Napocensis* 247, 247–8.

54 Ibid.

55 John F Cox, *A Thomistic Analysis of the Social Order* (Catholic University of America Press, 1943) 117 quoted in Edmund Aku, *Solidarity, Subsidiarity and Common Good: Fundamental Principles for Community and Social Cohesion* (Xlibris Corporation, 2012) 39.

56 Ibid.

III CONSTITUTIONAL BASIS FOR SUPPORTIVE SUBSIDIARITY

Finding a constitutional grounding for supportive subsidiarity is important because even if the principle is adopted to guide federal reform, the reforms will not be long-lasting or may be undermined if the High Court does not have a reason to sustain the principle. While there are strong principled reasons to apply supportive subsidiarity in Australia and in reforming the federation, there is also a clear constitutional basis for such an approach, and this Part examines that basis for embracing supportive subsidiarity. It proceeds with two caveats. The first is that, as noted earlier, there is no explicit reference to 'subsidiarity' in the *Constitution*, as the term was yet to achieve popular usage when the *Constitution* was drafted. We must therefore find implicit reference to supportive subsidiarity in the constitutional text. The second caveat is an acknowledgement of the High Court's documented hesitance towards endorsing principles of federalism in its interpretation of the *Constitution*. While the Court has sometimes engaged with principles underpinning the *Constitution* (eg, democracy and the resulting implied right to vote), it is unwise to assume that the Court would adopt or endorse a supportive subsidiarity principle. Take, for instance, McHugh J's comments in *Re Wakim* that 'co-operative federalism is not a constitutional term. It is a political slogan, not a criterion of constitutional validity or power'.[57] It is easy to imagine a judgment replacing 'co-operative federalism' with 'supportive subsidiarity'. Such comments offer a stark contrast to examples from Canada, where Supreme Court Justices have referred to '[t]he unwritten constitutional principle of federalism and its underlying principles of co-operative federalism and subsidiarity',[58] and later described it as 'an interpretive principle that derives … from the structure of Canadian federalism'.[59] The Australian High Court's longstanding resistance to the doctrine of reserved state powers is further evidence of the problems with relying on the Court to take a principled approach. Despite more recent examples of some High Court Justices engaging with federal principles,[60] it is safer to find a means of adopting the principle within the *Constitution* itself. This Part of the article analyses section 96 as the primary avenue for doing so, but also examines sections 51(vi), 107 and 119 as supplementary means of finding supportive subsidiarity in the *Constitution*.

Section 96 allows the federal government to grant money to the states. On the text of the *Constitution* alone, this would pave the way for supportive subsidiarity, as it allows the Commonwealth to provide the lower levels with the financial means to carry out their responsibilities, and to ensure a fair distribution of wealth

57 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 556 (McHugh J).

58 *Quebec (Attorney General) v Lacombe* [2010] 2 SCR 453, 458 (Deschamps J), cited in Eugénie Brouillet, 'Canadian Federalism and the Principle of Subsidiarity: Should We Open Pandora's Box?' (2011) 54 *Supreme Court Law Review* 601, 627.

59 *Reference re Assisted Human Reproduction* [2010] 3 SCR 457, 576–7 (LeBel and Deschamps JJ), cited in Brouillet (n 58) 630.

60 See, eg, French CJ's references to state competence and authority in *Williams v Commonwealth [No 1]* (2012) 248 CLR 156, 192–3. For a further discussion, see Hume, Lynch and Williams (n 27) 76–7.

between communities. Of course, the actual operation of section 96 has taken a different course, as the Commonwealth used the flexibility of the grants power as a tool of centralisation to disempower states by imposing conditions on the grants awarded to the states. The High Court's position on those efforts has been notably hands-off, led by Latham CJ's opinion in *Deputy Commissioner of Taxation (NSW) v WR Moran Pty Ltd* that section 96 is virtually unreviewable by the Court because of the lack of restrictions on the conditions the Commonwealth could impose in making a grant.[61] This approach was strengthened and confirmed in *South Australia v Commonwealth* ('*First Uniform Tax Case*')[62] and *Victoria v Commonwealth* ('*Second Uniform Tax Case*')[63] which consolidated income tax collection in the hands of the Commonwealth, strengthening its financial dominance. This was more recently confirmed in *Pape v Federal Commissioner of Taxation*,[64] *Williams v Commonwealth [No 1]*[65] and *Williams v Commonwealth [No 2]*.[66]

It is extremely unlikely that the Court would reverse its approach and force the Commonwealth to use section 96 only to support and empower the lower levels (although Dixon CJ made the interesting observation in the *Second Uniform Tax Case* that a narrower view might have been preferable were it not for the cumulative effect of earlier decisions).[67] However, if the Commonwealth itself were to consistently use section 96 as a means of allocating resources consistent with supportive subsidiarity,[68] the High Court's hands-off approach to section 96 would enable to Commonwealth to do so without interference. Latham CJ's comments in the *First Uniform Tax Case* about the apparent unfairness of states losing tax powers to the Commonwealth are revealing: 'These are arguments to be used in Parliament and before the people. They raise questions of policy which it is not for the Court to determine or even to consider'.[69] Adopting supportive subsidiarity as a guide to federal reform and to Commonwealth-state relations is therefore a question of policy that is unlikely to be challenged by the Court. The reasons why the Commonwealth might or should adopt such an approach are detailed in the next Parts of this article, which deal with arguments properly put to 'Parliament and … the people'[70] by examining the institutional and attitudinal strengths of supportive subsidiarity.

While section 96 is the prime example of supportive subsidiarity in the *Constitution*, other sections offer further implicit provision of the principle.

61 (1939) 61 CLR 735, 763.
62 (1942) 65 CLR 373 ('*First Uniform Tax Case*').
63 (1957) 99 CLR 575 ('*Second Uniform Tax Case*').
64 (2009) 238 CLR 1.
65 (2012) 248 CLR 156 ('*Williams [No 1]*').
66 (2014) 252 CLR 416.
67 *Second Uniform Tax Case* (1957) 99 CLR 575, 609.
68 As explained below, untied grants such as GST allocations are a current example of an allocation of resources consistent with supportive subsidiarity. However, more often grants made under section 96 are 'tied' or conditional upon states taking certain actions, agreeing to certain terms or meeting certain requirements – in other words, the grants are provided to carry out Commonwealth policy, not to support state functions.
69 *First Uniform Tax Case* (1942) 65 CLR 373, 409.
70 Ibid.

Sections 51(vi) and 119, which respectively allow the Commonwealth to legislate for the defence of Australia and require the Commonwealth to protect the states from invasion and domestic violence, give the Commonwealth a clear role in supporting the states by ensuring their safety. Notably, the defence power is often referred to in discussions of decentralist subsidiarity as an example of the kind of responsibility that should be centralised;[71] in other words, the national government is the lowest level that can competently defend the nation. However, the High Court's approach to the defence head of power – specifically, the observation that the power waxes and wanes with the threat of war[72] – means that the Commonwealth's power and responsibilities under section 51(vi) are better understood with reference to the supportive aspects of subsidiarity than its decentralist conception. Like the Roman auxiliaries, the Commonwealth's defence power is held in reserve, existing only for defence preparedness when it is not needed,[73] but when a threat emerges the power expands, and the support offered to states expands because the Commonwealth fulfils a function that under the *Constitution* the states cannot.

Finally, section 107 of the *Constitution* preserves the power and sovereignty of the states. Together with the limited range of powers conferred on the Commonwealth Parliament in sections 51 and 52, section 107 positions the federal government as playing a supporting role in the federation.[74] Aroney notes that '[t]he legislative powers of the Commonwealth were specifically enumerated not in order to give them interpretive priority, but to ensure that the Commonwealth would remain a legislature of limited powers'.[75]

Overall, the analysis of the High Court's approach to constitutional principles, and sections 96, 51(vi), 119 and 107, suggests that supportive subsidiarity can succeed in Australia. Faced with the High Court's general historical reluctance to endorse federalist principles in the *Constitution*, supportive subsidiarity is likely to be more successful than decentralist subsidiarity because it focuses on the supportive relationship between Commonwealth and states, rather than the decentralist question of how power is divided between governments (which the High Court has consistently resolved in favour of expanded Commonwealth power). While the Court's relatively hands-off approach to interpreting section 96 and its flexible approach to the Commonwealth's defence powers and responsibilities do not create a constitutional requirement for supportive subsidiarity, they equally do not present a barrier to adopting supportive subsidiarity as a constitutional principle. In other words, supportive subsidiarity *can* succeed as a constitutional principle in Australia. We can be reasonably confident that the High Court would not block such an approach, if the Australian governments, especially the Commonwealth and states, choose to adopt supportive

71 See, eg, Evans (n 10) 188.
72 See, eg, *Andrews v Howell* (1941) 65 CLR 255, 278 (Dixon J).
73 See, eg, *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.
74 See also Aroney, *The Constitution of a Federal Commonwealth* (n 25) 365.
75 Ibid 365–6. See also *A-G (Cth) v Colonial Sugar Refining Co Ltd* (1913) 17 CLR 644, 651–6 (Viscount Haldane LC for the Court) (Privy Council).

subsidiarity. Accordingly, the next two Parts present the case for why supportive subsidiarity should be adopted.

IV INSTITUTIONAL STRENGTHS OF SUPPORTIVE SUBSIDIARITY IN AUSTRALIA

Despite the difficulties of operationalising decentralist subsidiarity highlighted in Part II, supportive subsidiarity offers a good fit for Australian federal reform. Supportive subsidiarity has two key benefits: its suitability for addressing unique problems within the Australian federation, and the fact that supportive subsidiarity can be operationalised in Australia with a small number of key reforms, rather than the widescale, sweeping reforms needed for decentralist subsidiarity.

Scholars and practitioners have long recognised that the Australian federation faces several unique and/or complex challenges: a small population dispersed unevenly between large major cities on the coast and smaller rural, regional and remote communities, across a vast continent; a relatively homogenous cultural identity, at least in terms of the kinds of regional attachments and divisions federations seek to address; a high degree of vertical fiscal imbalance; and an increasingly executive-driven form of intergovernmental relations.[76] Supportive subsidiarity offers useful benefits and solutions to these unique features, both in its own right, and in comparison to more decentralist or traditional approaches. For example, governing Australia's regional areas presents a difficult challenge, especially in the geographically large states. Economies of scale make localised governance prohibitively expensive, and expertise hard to obtain in some instances, while conversely the remoteness of distant state capitals, let alone Canberra, makes it hard for centralised decision-makers to accurately assess the needs of the community. At the state level, vertical fiscal imbalance produces similar issues – despite strong state capacity and expertise in service delivery and policy design, funding shortfalls in resource-hungry domains like health and infrastructure mean that states are frequently unable to provide services solely on their own revenues. Accordingly, centralism is inappropriate, but decentralist subsidiarity is equally problematic. Supportive subsidiarity offers a more viable way forward. In helping local communities help themselves, state and federal governments can offer financial resources, expertise, data collection and advice, without taking over responsibility for the decision (thereby retaining the benefit of local knowledge).

In the context of federal reform, supportive subsidiarity also offers a viable pathway for realigning federal and state responsibilities. We can expect supportive approaches to be more successful than previous (decentralist) approaches because supportive subsidiarity is a better fit for the trend of collaborative federalism in Australia. In general, the trend in Australia has been to pursue increased shared

76 For a broad overview, see Cheryl Saunders 'Federalism is a Natural Fit for Australia, But We Need to Make It Work', *The Conversation* (online, 24 September 2014). <http://theconversation.com/federalism-is-a-natural-fit-for-australia-but-we-need-to-make-it-work-31846>.

rule or cooperation between governments.[77] In 1998, Martin Painter observed a 'fundamental reshaping' of Australian federalism, whereby collaboration between state and federal governments was increasingly common.[78] Nearly two decades later, Arklay, Bruerton and Hollander noted that the trend of collaboration continued to dominate, noting that 'in the current climate of collaborative federalism … cooperation between governments across different jurisdictions is essential'.[79] The establishment of the Council of Australian Governments ('COAG') in 1992 was a key development in collaborative federalism in Australia. COAG was designed to provide a more cooperative and collaborative forum than the previous Special Premiers' Conferences, operating on the basis of consensual decision-making.[80] In the years since its creation, COAG took on an increasingly important role in Australia's federal system and, while its exact influence has waxed and waned with the priorities of various Prime Ministers,[81] the Council remained a dominant force in favour of collaborative federalism in Australia. In May 2020, the National Cabinet, which was formed two months earlier to respond to the evolving coronavirus pandemic, permanently replaced COAG as the prime forum for collaboration and cooperation between First Ministers. The National Cabinet therefore stands as a further example of a collaborative federal institution.[82] While its precise decision-making capacities and responsibilities remain uncertain,[83] its importance to Australia's response to the crisis is an encouraging sign that federalism and federal reform will be an important topic in the coming years.

However, while collaborative federalism and cooperation between jurisdictions have been positive features of intergovernmental relations in recent decades, some scholars take issue with the tendency for cooperation to only be viewed as a means to standardisation in policymaking: Commonwealth and state governments only collaborate to create nationally consistent policy, legislation or regulation. Saunders refers to this 'urge to … uniformity' as a key threat to

77 Jörg Broschek, 'Pathways of Federal Reform: Australia, Canada, Germany and Switzerland' (2014) 45(1) *Publius: The Journal of Federalism* 51, 59–60.

78 Martin Painter, *Collaborative Federalism: Economic Reform in Australia in the 1990s* (Cambridge University Press, 1998) 1.

79 Tracey Arklay, Mark Bruerton and Robyn Hollander, 'Working Together: Policy Makers' Opinions on Improving Intergovernmental Collaboration in Australia' in Mark Brueton et al (eds), *A People's Federation* (Federation Press, 2017) 101.

80 Painter (n 78) 104–5; see also ibid 103; Meredith Edwards and Alan Henderson, 'Council of Australian Governments: A Vehicle for Reform' in Peter Carroll and Martin Painter (eds), *Microeconomic Reform and Federalism* (Federalism Research Centre, Australian National University, 1995) 21, 23; Michael Keating and John Wanna, 'Remaking Federalism?' in Michael Keating, John Wanna and Patrick Weller (eds), *Institutions on the Edge? Capacity for Governance* (Allen & Unwin, 2000) 126, 137–8.

81 Arklay, Bruerton and Hollander (n 79) 104.

82 Scott Morrison, 'Transcript 15 March 2020 Prime Minister' (Press Conference, 15 March 2020) <https://www.pm.gov.au/media/transcript-press-conference>.

83 Jennifer Menzies, 'Explainer: What Is the National Cabinet and Is it Democratic?', *The Conversation* (online, 31 March 2020) <https://theconversation.com/explainer-what-is-the-national-cabinet-and-is-it-democratic-135036>. While the Prime Minister's announcement that the National Cabinet would replace COAG included a mind map of the National Cabinet's functions, at the time of publication these functions are yet to be officially documented and have not been acted upon while the National Cabinet focuses on the coronavirus pandemic.

successful federal reform because obsessing over uniform policymaking stifles the benefits of diversity and policy learning and experimentation federalism provides.[84] Thus, for all its benefits, 'collaborative federalism' and 'cooperative federalism' may be problematic terms in Australia because they have come to encourage a particular form of uniform policymaking that is not always desirable or necessarily federal.

Supportive subsidiarity is therefore a good fit for Australian federal reform because it captures the collaborative approach but avoids the urge to uniformity associated with collaborative and cooperative federalism. In other words, supportive subsidiarity is similar in effect to collaborative federalism, but is free of the common perception that collaboration or cooperation must result in nationally consistent or uniform policy. Under supportive subsidiarity, higher levels have a duty to provide assistance or aid, and assistance necessarily involves collaboration between parties to determine what help is needed and how it should be delivered. However, there is no requirement that the level or kind of support be uniform across the country. In fact, to be genuinely supportive, the assistance provided should be tailored to local conditions.

Intergovernmental relations under supportive subsidiarity can also be contrasted with decentralist subsidiarity. Decentralist approaches tend to be more conflictual because they evoke a more rigid perspective towards structuring responsibility in the federation – preferring decision-making at the lowest level competent to do so creates a contest as to which level is the most competent. Sometimes, this conflict is necessary and even desirable in a healthy federation. But in Australian federalism, it has failed because state and local governments often cannot compete with the federal government in a contest of competence – vertical fiscal imbalance in particular has impaired state competence, while the absence of subsidiarity in the *Constitution* and the High Court's approach to centralism create further obstacles. Supportive subsidiarity overcomes or bypasses these problems because it encourages bona fide collaboration between levels.

Importantly, however, this collaboration should not be an invitation for central or higher levels to take over. Their role is to support, not usurp. For example, in the Australian context we can draw a distinction between tied (eg, specific purpose payments) and untied grants (eg, GST distributions) from the Commonwealth to the states. The latter is a form of assistance because it empowers the grantee – they are able to take ownership of the decision and apply the funds according to their needs. But the former is not supportive, because it removes all agency from the lower level. Further, even the GST has its own issues, as the rate is set by the Commonwealth government, further restricting states' agency to leverage sources of revenue.

Offering support is an important shift in role for the Commonwealth, which has 'cast itself as the great "fixer"' in recent decades,[85] but has increasingly found itself out of its depth in dealing with the complexities of program design and

84 Saunders (n 76).
85 Menzies (n 3) 68.

service delivery.[86] As the 'great supporter' instead, the federal government would serve a useful role in empowering state and local governments and building up communities. The supportive role reflects what American federal scholars have identified as a 'learning role and a leadership role', where federal agencies show leadership, not by taking over, but by identifying what works, disseminating findings, and sharing the fruits of innovation and policy transfer at the state and local levels.[87]

This is an important lesson for federal reform, as it suggests that previous attempts to use subsidiarity have failed because they focused on decentralist approaches which are unsupported by the *Constitution* and the High Court. Further, attempts to make states 'sovereign in their own sphere' and devolve power offered few incentives for the Commonwealth to let go, a fact that the White Paper process itself acknowledged as a potential issue yet did nothing to address.[88] Conversely, supportive subsidiarity is more likely to succeed because it embraces the trend of collaboration in Australian federalism, while still retaining the desirable benefits of localised decision-making.

V ATTITUDES TOWARDS SUPPORTIVE SUBSIDIARITY IN AUSTRALIA

In addition to the constitutional and institutional factors that are conducive to adopting supportive subsidiarity in Australia, evidence from public attitude surveys also suggests that supportive subsidiarity will resonate with citizens. Finding a way to engage the public is an important but often overlooked part of federal reform. For instance, one of the key problems with the White Paper was its failure to engage the general public. Part of the issue is that 'many political leaders and commentators presume that … public awareness of federalism is unsophisticated'.[89] For example, John Howard once argued that Australians 'are not particularly fussed about which level of government delivers [good] outcomes'.[90] However, evidence from public attitude studies rebut this view, highlighting that citizens do have sophisticated ideas about how the system works now and how it should work in the future.[91] Experiments with focus groups and deliberative exercises show that with a small amount of expert education, these

86 Rick Wallace, 'ALP Schemes "Beyond Bureaucrats"', *The Australian* (online, 28 April 2014) <https://www.theaustralian.com.au/national-affairs/alp-schemes-beyond-bureaucrats/news-story/91ecefe8b78284e857caea9697a0ff89>.

87 See, eg, Shelley H Metzenbaum, 'From Oversight to Insight: Federal Agencies as Learning Leaders in the Information Age' in TJ Conlan and P Posner (eds), *Intergovernmental Management for the 21st Century* (Brookings Institution Press, 2008) 209, 209.

88 Commonwealth (n 12) 2.

89 Ian Gray and AJ Brown, 'The Political Viability of Federal Reform: Interpreting Public Attitudes' in AJ Brown and Jennifer Bellamy (eds), *Federalism and Regionalism in Australia: New Approaches, New Institutions?* (Australian National University Press, 2007) 33, 33.

90 John Howard, 'Tasmanian Hospital Announcement' (Speech, Tasmania, 1 August 2007) <https://pmtranscripts.pmc.gov.au/release/transcript-15227>.

91 Jacob Deem, 'Deliberating Federalism: Can the Australian Public Help Resolve Federalism's Triple Challenge?' in Mark Bruerton et al (eds), *A People's Federation* (Federation Press, 2017) 230.

views become even more nuanced.[92] Accordingly, including public perspectives is critical to successful federal reform.[93]

Here, it is important to focus on the values and ideals that underpin subsidiarity, rather than the term itself. In the UK context, then Prime Minister David Cameron claimed that 'nobody knows what [subsidiarity] means', before promising not to use the term again.[94] 'Subsidiarity' is a technical term that even experts struggle to define, so expecting the general public to engage with 'subsidiarity' would be unreasonable. But just as citizens can understand (and express support for) the idea that money should be transferred from richer parts of the country to poorer areas without knowing the term 'horizontal fiscal equalisation' or understanding the technical minutiae, they are more than capable of engaging with the ideas and values that underpin subsidiarity.[95]

A Method

Arguments for supportive subsidiarity's resonance in public attitudes and values are reinforced by data from the ACVS measuring Australian citizens' attachment to subsidiarity values. The ACVS was run biennially as a Computer Assisted Telephone Interview from 2008–14, and as an online survey in 2016 and 2017. The surveys draw on a large-N, randomised national sample of over 1000 respondents representative of the Australian population as a whole.[96]

The ACVS is the first survey of its kind to measure public attitudes towards the principle of subsidiarity, representing a significant international innovation. Notably, however, the surveys take the approach of avoiding express use of the word 'subsidiarity', for the reasons outlined above. Of course, this necessarily means that the survey items will be an approximation of attitudes towards the core values of subsidiarity, and in some ways prevents respondents from bringing their own meaning to the term. However, restricting respondents in this way allows clarity in assessing how the values that underpin subsidiarity are meaningful to citizens, and is therefore a preferable approach.

To further assist participants' understanding, the surveys presented respondents with a pair of dichotomous options, asking them to pick which one they prefer or aligns more closely with their views. This approach is easy to understand, because it takes complex ideas about subsidiarity and government responsibility, and turns them into a simple question: 'would you rather government be more like X, or more like Y?' However, this approach is limited because it does not allow for much variation within the sample. To retain the benefit of the 'X or Y' questioning, but still introduce some more variance in the

92 Scott Brenton and Sophie Reid, 'Deliberating about Reform: Involving "Ordinary" Citizens in Federation Redesign' in Mark Bruerton et al (eds), *A People's Federation* (Federation Press, 2017) 244, 244.

93 Mark Bruerton and Robyn Hollander, 'Introduction' in Mark Bruerton et al (eds), *A People's Federation* (Federation Press, 2017) 1, 12.

94 David Cameron, 'PM Speech on EU reform' (Speech, Wiltshire, 2 February 2016) <https://www.gov.uk/government/speeches/pm-speech-on-eu-reform-2-february-2016>.

95 For more information, see 'Regionalism, Federalism and Devolution', *Griffith University, Centre for Governance and Public Policy* (Web Page) <https://www.griffith.edu.au/centre-governance-public-policy/our-research/regionalism-federalism-and-devolution>.

96 Respondents were sampled as a stratified random sample, with quotas set for state, gender, and age.

sample, an 'unfold' question was added. After participants nominated their preferred option (eg, 'it is better for decisions to be made at the lowest level …'), they were then asked whether they were 'strongly' of that view, or 'tend to be' of that view. Combining the two parts of the item produces a 4-point scale of attitudes towards subsidiarity.

Since 2008, the ACVS has measured public attitudes towards subsidiarity through the following measure:[97]

Table 1: Decentralist subsidiarity survey item[98]

Thinking of the federal government as being the highest level of government, and state and then local as being lower levels of government, which one of the following comes closes to your view?			
It is better for as many decisions as possible to be made at the higher levels of government (Anti-subsidiarity)		It is better for decisions to be made at the lowest level of government competent to deal with the decision (Pro-subsidiarity)	
1 (Strongly hold view)	2 (Tend to hold view)	3 (Tend to hold view)	4 (Strongly hold view)

However, as demonstrated in Part IV, while this focus on decentralist subsidiarity fits with the dominant usage in Australia, it does not capture the principle's full meaning. Accordingly, the 2016 and 2017 surveys included two further items to provide a more holistic measure of subsidiarity. The first measured 'non-absorptionist' aspects of the principle, following comments from scholars like Chaplin and Hittinger that subsidiarity is not necessarily a principle of decentralism, but rather that it resists higher orders absorbing the functions of lower orders.[99] This article focuses on the decentralist and supportive elements of subsidiarity, rather than non-absorptionist interpretations, but the non-absorptionist results are presented below for completeness.

Table 2: Non-absorptionist subsidiarity survey item

Imagine a situation where a lower level of government is responsible for a particular task, but a higher level of government thinks it could do a better job and wants to take over the task itself:			
The higher level should be able to just take over the task itself, whether the lower level likes it or not (Anti-subsidiarity)		A higher level of government should not be able to just take over a task that is the responsibility of a lower level, simply because it thinks it could do a better job (Pro-subsidiarity)	
1 (Strongly hold view)	2 (Tend to hold view)	3 (Tend to hold view)	4 (Strongly hold view)

97 AJ Brown, 'Measuring the Mysteries of Federal Political Culture in Australia' in Paul Kildea, Andrew Lynch and George Williams (eds), *Tomorrow's Federation: Reforming Australian Government* (Federation Press, 2012) 310.

98 Note that options to nominate whether respondents 'strongly' or 'tend to' hold the view were introduced in 2016 and 2017.

99 Chaplin (n 44); Hittinger, 'Four Basic Principles' (n 48) 119.

The second new item captures attitudes towards supportive subsidiarity. Two features of the item warrant explanation. First, the item asks about 'resources' to strike a balance between the fact that often the kind of support provided will be financial, but that support need not be limited to funding; expertise, labour, training or data can all be forms of support, and are equally well-captured by the label 'resources'. Second, the anti-subsidiarity option refers to lower levels of government 'finding' rather than 'having' their own resources to fulfil their needs. The distinction is important because the realities of Australia's vertical fiscal imbalance mean that without support from higher levels, lower levels must often work to find necessary resources. Conversely, a question that asked about lower levels 'having' their own resources would likely have been interpreted as asking whether governments should have enough resources (to which the answer invariably would be 'yes'), rather than tapping into the difficult structural question of which level of government should bear the onus of sourcing and providing resources.

Table 3: Supportive subsidiarity survey item.

Which of these statements comes closest to your view?			
Lower levels of government should find their own resources to fulfil their responsibilities, without relying on support from higher levels of government (Anti-subsidiarity)		It's part of the job of higher levels of government to support lower levels with the resources they need to fulfil their responsibilities (Pro-subsidiarity)	
1 (Strongly hold view)	2 (Tend to hold view)	3 (Tend to hold view)	4 (Strongly hold view)

B Results

Since 2008, the ACVS has detected a stable level of attachment to the idea that decisions of government should be made as closely to the people as possible: consistently around 50–55% of respondents endorse that view. Already, these results give some explanation for why subsidiarity, invoked in a decentralist sense, has struggled to resonate in Australia. On average, for every person who agrees with the basic tenet that decisions should be made as locally as possible, another person disagrees. By contrast, non-absorption and support are much more highly valued, with as much as 82.3% of respondents believing that '[i]t's part of the job of higher levels of government to support lower levels', with 48.5% strongly holding that view – Figure 1 illustrates the difference in attachment between decentralist and supportive subsidiarity in 2017, although the results obtained in 2016 were almost identical.

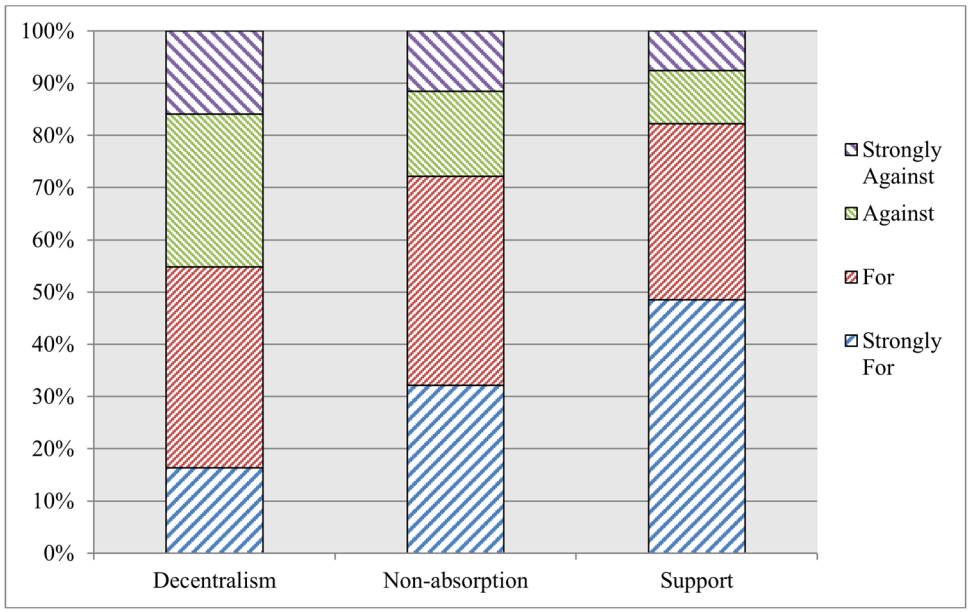

Figure 1: Attitudes towards three elements of subsidiarity (decentralism, non-absorption and support).

Importantly, the high value respondents place on supportive subsidiarity appears to transcend demographic and political ideals – a linear regression capturing age, gender, level of education, household income and self-rated place on the left-right political spectrum showed that together these variables account for less than 3% of the total variation in attitudes towards supportive subsidiarity.[100] In other words, the high value Australians place on supportive subsidiarity is across a wide cross-section of society, rather than being limited to a particular group (eg, political conservatives, or highly-educated citizens). The results presented in this study therefore suggest that Australians place a high value on supportive elements of subsidiarity, which focus on empowering communities and building them up to a level playing field. This is an encouraging sign, as it suggests that reform that uses and pursues supportive subsidiarity will find better traction, both institutionally and in the community.

VI IMPLICATIONS, LIMITATIONS AND CONCLUSIONS

Australia faces an uncertain future as it deals with the impacts of natural disaster, pandemic and economic shock. In the face of these challenges, Australia

100 Adjusted R2 = 0.027. Age captured in five age brackets: 18–24; 25–34; 35–44; 55–64; 65+. Level of education options: year 9 or below; year 10–12; a diploma from a TAFE or similar; a degree from a university. Household income coded in brackets of $9,999 starting at $30,000–$39,999 up to $110,000–$119,999, with further options for 'less than $30,000' and 'more than $120,000'. Political views measured on a scale of 1 (Left) to 10 (Right) on the political spectrum.

needs a legal and political system that can respond to local needs quickly and effectively, but can also harness national capabilities and resources. In short, it needs a thriving federation, perhaps more than ever. This article has demonstrated how supportive subsidiarity, which emphasises community empowerment, offers a means of reworking the federation that is more likely to succeed than previous attempts to invoke subsidiarity in its decentralist sense. It has done so across three pillars: constitutional, institutional and attitudinal. Combined, they justify supportive subsidiarity as a principle of reforming the legal and federal system.

Constitutionally, section 96 provides the main textual basis for supportive subsidiarity, even if the Commonwealth's use of the grants power has so far been far removed from applying the subsidiarity principle. Additionally, the Commonwealth's defence responsibilities under sections 51(vi) and 119, and the preservation of state power in section 107 offer further opportunities to recognise supportive subsidiarity in the *Constitution*. The High Court's mostly hands-off approach to these sections indicate that if the Australian governments were to practice supportive subsidiarity, the Court would not interfere.

Examining the institutional basis for the principle reveals why governments, especially the Commonwealth, should choose to adopt supportive subsidiarity. In particular, policy and service delivery failures, exacerbated and highlighted by recent crises, have revealed that the Commonwealth's centralising approach as the great 'fixer' in the federation has failed. In the context of renewed emphasis on federal structures such as the National Cabinet formed to respond to the coronavirus pandemic, supportive subsidiarity guides us to a federated model where states and local governments are empowered to make decisions based on the needs of their communities, rather than relying on the Commonwealth to provide finance, policy and service delivery. Additionally, empowering states reinforces the importance of recognising state competence and authority within the federation,[101] and can only improve Australia's cooperative and collaborative federalism.

Last, attitudinally, the overwhelming attachment to supportive subsidiarity amongst Australian citizens demonstrates public approval for such an approach. Apart from being politically expedient, recognising public attitudes in this space brings us full circle to a constitutional argument that as a document enlivened by popular sovereignty, the *Constitution* (and the federal model it provides) should allow for and even emphasise the community empowerment that citizens support. This is a perfect opportunity to revisit and reframe how we think about federalism in Australia in both legal and political spheres, and how supportive subsidiarity offers the means to do so.

Clearly then, subsidiarity has strong potential to assist in reforming Australia's ailing federal system. But, extending Aroney's caution that we need to be careful about what we mean by 'subsidiarity',[102] we can more specifically say that we should be careful to apply a supportive interpretation of the principle. The overwhelming public attachment to supportive subsidiarity is encouraging because

101 *Williams [No 1]* (2012) 248 CLR 156, 193 [37] (French CJ).
102 Aroney, 'Federalism and Subsidiarity' (n 9) 5.

it suggests that change can be achieved outside a formal and publicised reform process: incremental but consistent changes that give the Commonwealth a more supportive role in empowering lower levels are likely to align with broad community values, and therefore be built up more slowly, rather than a radical, potentially unpopular decentralising shift that would require strong institutional coordination and a formal reform process.

The freedom to build up change over time is further reinforced by the scope of reform needed to achieve supportive subsidiarity (compared to a more decentralist approach). In particular, this article's consideration of the institutional strengths of supportive subsidiarity revealed that the principle fits well with the trend towards collaboration in Australian federalism, and promises to provide a structure that facilitates collaboration while protecting against undue Commonwealth interference.

Of course, adopting supportive subsidiarity alone will not cure the federation. Specifically, supportive subsidiarity must overcome two key limitations and three challenges in order to have a strong impact on Australian federal reform. In terms of limitations, supportive subsidiarity is prone to accountability deficits and relies heavily on agreement between levels of government. All federal systems face problems with accountability where two or more levels of government work together. But supportive subsidiarity potentially amplifies this problem by blurring the lines of responsibility. When local services are insufficient, does blame lie with the local service provider, or with higher levels for not providing adequate resources to support the lower levels? When higher levels provide financial support to lower levels, but these resources are misapplied, does blame solely lie with the lower level, or does the higher level bear some responsibility for ensuring the money was properly spent? These are serious questions, but in the context of Australia's vertical fiscal imbalance, they are not new problems for the federation. Indeed, state government petitions for Commonwealth funding are so common that former Prime Minister Malcolm Turnbull repeatedly argued that the federal government is 'not an ATM' for the states.[103] Accordingly, the challenge of accountability in the federation is one that Australia must confront whether supportive subsidiarity is adopted or not. While supportive subsidiarity would not help improve accountability in terms of a 'clean lines' approach to responsibility, it could provide a system of accountability where lower levels are responsible for the way in which they use the resources allocated to them, and higher levels' responsibility only extends as far as the provision of adequate support.

The second limitation of supportive subsidiarity is that it relies on agreement between levels of government. On specific policy issues, the supporter (usually the

103 See, eg, 'Federal Government Is "Not an ATM", PM Tells State Leaders at COAG', *SBS News* (online, 9 December 2016) <https://www.sbs.com.au/news/federal-government-is-not-an-atm-pm-tells-state-leaders-at-coag>; 'PM Malcolm Turnbull Tells Queensland His Government is "Not an ATM"', *The Sydney Morning Herald* (online, 17 May 2017) <https://www.smh.com.au/politics/federal/pm-malcolm-turnbull-tells-queensland-his-government-is-not-an-atm-20170517-gw6nc1.html>; Michael Safi, 'Malcolm Turnbull: "Days of Passive ATM Handouts for Infrastructure Are Over"', *The Guardian* (online, 11 March 2016) <https://www.theguardian.com/australia-news/2016/mar/11/malcolm-turnbull-days-of-passive-atm-handouts-for-infrastructure-are-over>.

Commonwealth government) must agree that the action proposed by state or local governments is worth supporting, but more broadly all levels of government must be in agreement about their respective roles under supportive subsidiarity within the federation. Achieving this level of agreement takes time, but this article represents an important first step in doing so. Further, the strong relationships between jurisdictions forged at the National Cabinet, and heightened sense of accord between them, represents an important opportunity to reach a principled agreement on adopting supportive subsidiarity and laying the foundation for greater agreement between levels.

Even if these limitations are addressed, supportive subsidiarity faces three challenges. Mustering the political will to engage with the federal balance beyond ad hoc policymaking and crisis response is the first, at times seemingly insurmountable hurdle, despite the desperate need for reform outlined at the beginning of this article and elsewhere. There is a chance, however, that the incremental, subtler shifts sustained by supportive subsidiarity could succeed where widescale (decentralist) reform is relegated to the too-hard basket, but there is no question that energising the need for change is important.

Protecting any change that is achieved presents a second important challenge. Political churn, hyper-partisanship, and a focus on short-term 'wins' threaten any policymaking, but the risks are heightened when it comes to federal reform because those factors play out across multiple governments, any one of whom could threaten any progress made. Additionally, while this article has demonstrated that section 96 could sustain supportive subsidiarity as a constitutional principle, the High Court's reluctance to examine grants made under that section means that the Court cannot be relied upon to enforce subsidiarity. The popularity of supportive subsidiarity identified in this study may encourage policymakers to protect the principle, but it would be optimistic to suggest that this would have strong clout over the opportunity for a political win. Instead, genuine bipartisan commitment and good-faith intergovernmental relations, perhaps supplemented by strengthened institutions, will also be needed.

A third challenge is the scope of the term 'subsidiarity' itself. This article's focus on the principle's supportive element is undoubtedly in the minority in the Australian subsidiarity literature. It is possible that in the Australian context, 'subsidiarity' is now inseparable from 'decentralism', and that efforts to apply a broader meaning to the term will be tainted by the failings of decentralist subsidiarity. Thus, despite this article's best efforts to broaden the approach to subsidiarity as a guide to federal reform, it might be more fruitful to pursue a new term to capture the role higher levels of government play in supporting and empowering lower levels. If such a term is pursued, the ACVS's avoidance of the word 'subsidiarity' in its questionnaire is an important strength, and the evidence of attachment to supportive subsidiarity will apply to whichever term is used.

This article has demonstrated subsidiarity's use and importance as a principle for federal reform, albeit not in the way it is commonly applied. Rebutting the usual decentralist approach to subsidiarity, this article has argued that the supportive element of the principle offers a pathway to reform that is constitutionally sound, institutionally palatable, and popular with the general

public, and therefore more likely to be successful than previous approaches. The analysis presented in this article also indicates that supportive subsidiarity can be a vehicle for reform outside of a sweeping, formal process like the attempted White Paper. Accordingly, there is no reason why policymakers cannot immediately start looking for ways to help people help themselves and implement supportive subsidiarity in Australia.