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The Constitutionality of Fiat Paper Money in Australia: Fidelity or Convenience?

ABSTRACT: This article finds that the existence of a system of federal government issued paper money in Australia owes more to political rather than constitutional design. Support for this perspective can be found in the text of the Australian Constitution and the monetary history of colonial Australia. The political motivations that drove the establishment of the fiat paper money system in Australia can also be understood through an examination of the historical roots of paper money within the context of the English constitutional tradition and by drawing on the American experience. In the US the prevailing view is that a faithful interpretation of the Constitution in line with the intentions of its framers (be they the drafters, ratifiers in State congresses or public opinion at the time) would require that fiat paper money be deemed unconstitutional. Despite this acknowledgement of the intended original scope of the US Constitution, economic considerations and a pragmatic resignation to the financial State-capitalist status quo means that the paper money question is largely ignored rather than engaged. At a bare minimum, the US position recognises the incongruence between the original intent embodied in the Constitution and prevailing conditions. In Australia, however, not only has the issue of the constitutionality of the paper money system never been openly discussed amongst scholars and the legal establishment, but the High Court seems to be actively avoiding the question.

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INTRODUCTION

A fiat currency is a monetary system where the medium of exchange is untethered from any underlying measure of wealth or commodity. In a state of nature, sophisticated explanations would be needed in order to explain why anyone would accept a fiat currency and ascribe value to otherwise worthless paper.

Indeed why anyone would accept any form of currency that is not constituted by objects that have an immediate utility or qualities that sustain life is a phenomenon that begs explanation. A sociologist might posit that participants in the system accept the currency because of the tacit mutual reciprocity that each contracting party expects of the other.¹ An economist, by contrast, might point to the fungible nature of the currency and the efficiencies realised through being able to transact with a multi-denominational, fungible medium. Notions of co-operation, reciprocity or efficient commercial exchange are no longer required when State power is engaged. The explanation as to why people accept a fiat currency system when State power props up and enforces the system thus becomes abundantly simple — choosing to shun the system or otherwise avoid it will be met with State sanctioned force. When the State demands taxation in a particular currency, that currency effectively becomes the base medium in society.

Australia currently has a system of fiat currency based on monetary notes issued by the federal government through the Reserve Bank of Australia. Yet in 1901, when the colonies joined together in a federation, this arrangement was not created by the Constitution. Nor did the framers of the Australian Constitution intend that the document they were drafting support such an arrangement. Indeed it was not until a decade after the Australian colonies federated that the first elements of the fiat paper money system began to emerge.² Although it was the Labor³ party that instigated the first moves towards a central bank and paper money system in Australia, the political benefits this provided to the financial administration of the federal government meant that all sides of politics were ultimately co-opted.

The Australian Constitution has an implied monetary system embodied in several of its provisions that deal with currency matters. The strongest and clearest manifestation(s) of this underlying monetary system are s 115, s51(xii) and s51(xiii) of the Constitution. Section 115 in particular provides that a State government cannot mandate anything other than gold and silver coin as legal tender in the payment of debts. While critics might argue that the text of the Constitution is anachronistic and it is legitimate for the High Court to ignore the offending provisions or interpret them to meet the requirements of modern times and expectations⁴, it should be noted that the Australian Constitution has a built-in amendment procedure contained in s 128. If critics wish to see the Constitution updated to meet modern expectations, a referendum pursuant to s128 is the only constitutionally legitimate means of achieving such ends.

1 Bruce Carruthers and Laura Ariovich, *Money and Credit: A Sociological Approach* (2010) 51-82.

2 See *Australian Notes Act 1911* (Cth); *Commonwealth Bank Act 1911* (Cth); *Inscribed Stocks Act 1911* (Cth).

3 The Americanised spelling 'Labor' is used in the name of the Australian Labor Party.

4 See, for example, Michael Kirby, 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship' (2000) 24 *Melbourne University Law Review* 1.

In order to uphold the proposition that the Constitution neither creates nor supports a fiat paper money system, two important points need to be established. The first point is that, when plainly read and understood, the text and structure of the Australian Constitution in no way supports the existence of a federally issued fiat currency. Even beyond the plain meaning of the words, a historical contextualisation of the relevant constitutional provisions also tends towards a similarly negative conclusion. Secondly, in order to complete the argument that the Australian Constitution does not create or support a fiat monetary system, this claim must be squared with the prevailing reality that a fiat monetary system nevertheless prevails. As such, this article examines the motives as to why a fiat paper money system eventually emerged in contradiction to the provisions of the Constitution. What were the political forces and incentives driving the Labor movement to seek the centralisation of the monetary system in government hands? And why has such an obvious transgression against constitutional fidelity gone largely for over a century unnoticed by politicians, jurists and the Australian public alike.

By way of comparison, it is worth observing that in the United States of America the existence of a federally issued fiat paper money in the constitutional arrangements is almost an ‘in-joke’ amongst those who understand US constitutional history. Constitutional historians and scholars generally agree that the framers of the US Constitution (however conceived) intended to deny the federal government the power to issue paper money. With complete cognisance, the US Supreme Court has still managed to recognise the existence and constitutionality of federally issued fiat paper money.⁵ In a string of cases in the second half of the 19th century, the US Supreme Court not only allowed a fiat paper money system to prevail, but provided the intellectual and legal foundations for the system.⁶

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- 5 See Kenneth Dam, ‘The Legal Tender Cases’ (1981) *Supreme Court Review* 367, 389; See Gary Lawson, ‘The Constitutional Case against Precedent’ (1994) *Harvard Journal of Law and Public Policy* 23, 33; See also Jonathon Mitchell, ‘Stare Decisis and Constitutional Text’ (2011) 110 *Michigan Law Review* 1, 13; See also Nelson Lund, ‘Stare Decisis and Originalism: Judicial Disengagement from the Supreme Court’s Errors’ (2012) 19 *George Mason Law Review* 1029, 1030.
- 6 *Hepburn v. Griswold*, 75 U.S. 603 (1870); *Knox v. Lee*, 79 US 457 (1872); *Juilliard v Greenman* [1884] 110 US 421; (The ‘Legal Tender Cases’); See also Dam, *Ibid.* In the case of *Hepburn*, the Supreme Court ruled that the *Legal Tender Acts 1862* (which was passed to facilitate the funding by of the Civil War by the North through the issuing of ‘greenbacks’) was unconstitutional. In a 4:3 decision the Supreme Court held that the federal government was not granted such a power by the Constitution. The main argument in support of the constitutionality of the fiat currency was that the Federal government has the power to make War and the currency arrangements were a necessary incidental power to the War power. Republican president Abraham Lincoln oversaw the enactment of the original legislation. When the Supreme Court struck down that legislation, Republican President Ulysses Grant subsequently appointed two more Justices to the Supreme Court (increasing the number of judges from 7 to 8 with a possible maximum of 9 — see *Judiciary Act 1869*). Within 15 months *Hepburn* was explicitly overruled in the case of *Knox* in a 5:3 decision. The constitutionality of the federally issued fiat currency (even in peacetime) was upheld 12 years later in the Supreme Court case of *Juilliard*.

Most constitutional lawyers in Australia take it for granted that the federal government has the power to issue a fiat currency.⁷ Even if one were able to demonstrate on constitutional grounds the fallacy of such a belief, there is little likelihood that a groundswell of support would emerge demanding the abolition of the current system. Why then is this study relevant? Apart from the inherent value of upholding the rule of law — in that the Australian government ought to abide by the terms of the Constitution — there is a more practical reason for enlivening this discussion at this moment in history.

The global economic system is transforming into a world of cyber-cash and online transactions. It seems extremely out of place for one to discuss ideas of gold and silver specie and a return to ‘hard currencies’ in this economic and technological climate. The virtues associated with hard currency systems, however, are timeless and transcend even the borderless realms of cyberspace. Ideas such as limitations on the availability of currency and restrictions on the unilateral manipulation of a money supply are fundamental. These ideas are being incorporated into the developing cyber monetary system, as seen, for example, in the encryption innovations underpinning the ‘bitcoin’ market and the ability to ‘mine’ bitcoins.⁸ Understanding the history behind the monetary arrangements in Australia and how political forces manoeuvred to hijack national finances is an important discussion in this building phase of the new tech-based economic order.

I. WHAT THE CONSTITUTION ACTUALLY SAYS

The phrase ‘paper money’ was used in the drafting of the Australian Constitution but it was not discussed or defined by delegates at the constitutional conventions of the 1890s.⁹ It would appear that the term had a given meaning that was understood by all delegates and there was no need for clarification. What was that meaning? Did ‘paper money’ mean a fiat currency unconnected with an underlying commodity or store of wealth, or did it refer to privately issued

⁷ See *Re Skyring's Application (No 2)* (1985) 59 ALJR 561; *Re Cusack* (1985) 60 ALJR 302, 304.

⁸ See <http://www.forbes.com/sites/kashmirhill/2013/08/15/congress-is-nervous-about-bitcoin/> (accessed on 2/09/2013)

⁹ *National Australasian Convention, Official Record of Proceedings and Debates* (Sydney, 1891) (*Convention Debates*, Sydney, 1891); *National Australasian Convention, Official Record of Proceedings and Debates* (Adelaide, 1897) (*Convention Debates*, Adelaide, 1897); *Australasian Federal Convention, Official Record of the Debates* (Sydney, 1897) (*Convention Debates*, Sydney, 1897); *Australasian Federal Convention, Official Record of the Debates* (Melbourne, 1898) (*Convention Debates*, Melbourne, 1898). These records can be accessed online at: <http://www.aph.gov.au/About_Parliament/Senate/Research_and_Education/Records_of_the_Australasian_Federal_Conventions_of_the_1890s>.

notes that served as a medium of exchange for gold and silver coin? When presented with two alternative and mutually plausible meanings, the interpretation of the Constitution is assigned to the High Court of Australia. The judges of the High Court must resolve such disputes by relying on methods of constitutional interpretation that are consistent with ‘judicial power’ (which is itself a contested notion) as well as being a method that is acceptable to the legal and broader community. For example, determining the meaning of ‘paper money’ based on a game of chance would be unacceptable as a legitimate exercise of ‘judicial power’ and would not accord with what is expected from a judicial tribunal.

For most of Australian history the High Court has adhered to an interpretive approach known as ‘legalism’.¹⁰ Legalism purports to be an interpretive philosophy that puts the plain and ordinary meaning of the text first and applies the ordinary modes of statutory interpretation to the context of the Constitution. A judge would look at the literal meaning of the words used, the textual context in which the words appear and perhaps the legal framework (legislative and case based) within which that provision is to operate. Under the guise of legalism, judges purport to avoid making normative preferences by giving the text of the Constitution its plain and ordinary meaning.¹¹ Although there have been some shifts in the constitutional interpretive philosophy of the High Court in the last two and a half decades, legalism remains a dominant force.¹²

Even when applying this legalist approach, however, and taking a closer look at the text of the Constitution a sound case *against* the fiat currency interpretation can still be maintained. Section 51 of the Constitution defines the powers of the Commonwealth Parliament. It grants the federal Parliament the power to make laws with respect to:

xii) Currency, coinage, and legal tender:

It should be noted that currency, coinage and legal tender appear in the same subsection reflecting that fact that these three concepts are linked.

Subsection 51 (xiii) states that the Commonwealth shall enjoy legislative power with respect to:

xiii) Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money:

10 See generally, Leslie Zines, ‘Legalism, Realism and Judicial Rhetoric in Constitutional Law’ (2002) 5 *Constitutional Law and Policy Review* 21.

11 See generally John Whyte, ‘Normative Order and Legalism’ (1990) 40 *University of Toronto Law Journal* 491;

12 See generally Sean Coyle, ‘Legalism and Modernity’ (2010) 35 *Australian Journal of Legal Philosophy* 55.

Taking the textual approach again, and recognising that paper money and banking appear in the same subsection, it is clear that the concept of paper money is more closely linked to banking than it is to currency, coinage and legal tender.

Another subsection that should be noted is s 51 (xvi) which gives the Commonwealth Parliament power over:

xvi) Bills of exchange and promissory notes

Taken from the fact these instruments are noted separately from those terms referring to 'paper money, currency and legal tender' it would be fair to say that they are distinct from what is meant by 'paper money'.¹³

Finally, and perhaps most damning for those believing that the Constitution permits a fiat currency to prevail, is s 115 of the Constitution. Section 115 provides:

A State shall not coin money, nor make anything but gold and silver coin a legal tender in payment of debts.

The provisions of the Constitution may not explicitly create a monetary system, yet they hint at an underlying system upon which the Constitution was created. Based on the text of the Constitution alone a strong argument can be constructed that a fiat currency arrangement is indeed *not* the underlying system originally contemplated. How, then, did a fiat currency arrangement come about in Australia? There are few if any noteworthy arguments or intellectual defences that posit that the Constitution permits a fiat currency – it seems to be assumed knowledge that it does. To play devil's advocate, the argument in favour of the constitutionality of a fiat currency might be: Given s 51 (xiii) allows the federal parliament to make laws about paper money — that phrase, being read broadly, necessarily includes a federal power not only to regulate privately issued paper money but in fact provides a constitutional basis for the federal Parliament to legislate the issuing of its own paper money. Moreover the federal government, pursuant to s 51 (xii), can then declare that issued paper money legal tender. Section 115, however, provides a clear and insurmountable obstacle in that the individual States are constitutionally restricted from making anything other than gold and silver coin legal tender in the payment of debts.

If it was not constitutional design that permitted the fiat currency arrangement to arise in the Australian context, what were the ultimate motivations and reasons driving this process? The political forces that introduced and justified the fiat paper money system were mainly concerned with unshackling their respective administrations from the constitutional and financial constraints of government. Those involved in establishing such a system in Australia, such as King O'Malley,

13 Although it is acknowledged that some of the provisions within s51 of the Constitution may indeed overlap: *Bank of NSW v Commonwealth* (1948) 76 CLR 1, 193 (Latham CJ).

understood these dynamics and how they played out in both the English and US contexts and explicitly sought to emulate those developments down under.

II. WHAT WERE THE POLITICAL MOTIVATIONS UNTETHERING AUSTRALIA FROM A GOLD AND SILVER CURRENCY?

He who controls the money supply controls the purchasing power of that money. Money, be it a fiat currency or a hard currency, is therefore a means of political control. By creating financial incentives and disincentives, an overt reliance on physical force is unnecessary as people's behaviour can be influenced indirectly. The booming area of 'behavioural economics' is testament to this generally held belief.

The history of paper money in the United Kingdom and the United States demonstrates that controlling the money supply is an important step in the consolidation of power. Australian politicians learned from these episodes and sought to copy them in order to unshackle the central government from the strictures of financial limitations. It is a self-evident fact that fiat currencies are capable of being easily manipulated. By contrast, 'hard currencies' require the creation of physical stores of wealth. The creation of each additional unit of hard money takes time and incurs costs to produce. As such, hard currencies such as gold and silver coin are less susceptible to overt manipulation. They therefore provide an extremely effective limit upon the ambitions of governments seeking to garner greater control through financial means.

This story has been played out many times through the course of history.¹⁴ The English manifestation of this dynamic is acutely relevant to Australia. The Australian Constitution is born of the English tradition and is a branch of that same tree (as are the American and Canadian constitutions). The English experience is also important for another reason. The events of the late 17th and early 18th century in England capture and convey the way in which paper money enhances and concentrates organised state power. Those who wanted to introduce the fiat paper money system into Australia had their eyes fixated upon a strong centralised Commonwealth government capable of establishing a socialist society.

Accomplishing this fiat currency arrangement in Australia was a political victory explicitly framed upon the fiscal strategies established in England immediately following the Glorious Revolution of 1688. A century later these same arrangements were implemented by Alexander Hamilton in the early years of the American republic.¹⁵

14 The American experience is an important chapter in this field of research but it is not examined in this article.

15 For a classic inquiry into the history of paper money in the US see William Gough, *A Short History of Paper Money and Banking in the United States* (1833). The full copy of the 1968 reprinted version can be accessed at <http://library.mises.org>.

A. *The Glorious Revolution and New Financial Order*

The English constitutional changes of 1688 in England are the ultimate origins and inspiration of the Australian system of fiat currency. This period is important because it saw the development of the paper money system as well as significant constitutional changes aimed at addressing profligate, authoritarian and arbitrary monarchical rule. Both of these developments are linked.

The late 17th century is important from a constitutional standpoint because it is the period when the English experimented with various constitutional systems, including republicanism, and finally settled upon the system of limited constitutional monarchy. In 1688 the Protestant William and Mary of Orange were invited to assume the English throne. The settlement of 1688 or the 'Glorious Revolution' saw a shift in executive power from the absolutist model of monarchy to a model characterised by parliamentary sovereignty. Those supporting the changes hoped that Parliament could control Royal authority — if not militarily then at least through the proverbial 'power of the purse'. The real financial power had shifted from the old money characterised by lavish estates and titles to the new money of the commercial classes represented by Parliament. The power of Parliament over the Monarch through its control of Royal finances was well understood at the time. As one English parliamentarian noted 'tis money that makes a parliament considerable & nothing else'.¹⁶

The dynamics between parliamentary restrictions and greater Royal autonomy were thus set in motion. The development of paper money and the system of central bank mediated credit-public finance developed in response to this dynamic as a source of funding enabling executive (royal) power to grow beyond the limitations of the settlement and financial restrictions imposed by the arrangements of 1688.

In the late 17th century Amsterdam was the commercial centre of Europe and William and Mary, being Dutch, were aware of the innovations in finance that were arising on the continent. The settlement of 1688 saw foreign policy and foreign affairs retained as a royal prerogative. Seeking to fund foreign expeditions against Catholic forces and generally shake off the restrictive fiscal limitations of Parliament, William of Orange sought willing creditors and/or other financial arrangements. One of the main innovations that arose in response to this need was the chartering of the Bank of England in 1694. This ignited a rapid chain of social and governmental developments that historians call 'the financial revolution'.¹⁷

16 Anchil Grey, *Debate of the House of Commons from the year 1667 to the year 1694* (10 volumes, London, 1769) Vol. 4 at 115.

17 See Dickson, P.G.M, *Financial Revolution in England: A Study in the Development of Public Credit 1688-1756* (1967); See also Bruce Carruthers, *City of Capital: Politics and Markets in the English Financial Revolution* (1996).

Financial constraints were nothing new for European royalty. But in the past it was not always an assembly that restricted the fiscal power of the monarch but rather the physical scarcity of precious metals. This saw Spain, among other powers, send explorers such as Columbus across the Atlantic and to the ends of the known world in search of treasures to expand the stock of available gold and silver coin. In furtherance of this goal, it was not unknown for Royal houses to invest significant sums of money in the questionable science of alchemy where base metals were to be turned into precious metals in order to expand their wealth and overcome the limitations imposed by the scarcity of monetary resources.

Prior to the Bank of England centralising the banking system and the issuing of paper money, the issuing of paper notes as money had only really been developed and exploited by shrewd independent goldsmiths. These goldsmiths realised the receipts they issued for deposited gold were being circulated as currency and they could issue, use, circulate and loan at interest more receipts than the actual gold they held. The power of such practices did not escape Royal attention and combined with the Dutch innovations, a new system of central bank credit public finance was born. The centralisation provided by the Bank of England allowed for greater flexibility in reserve ratio lending by banking houses resulting in an expansion of credit via the medium of paper money. The Bank of England was also able to issue public bonds to raise funds that it could lend to Parliament or the Crown and the money received for the bond sales could be lent against several fold. When bonds matured they could be rolled over or new bonds issued to pay off the old. In a sense alchemy had finally been perfected. As scholar Carl Wennerlind has argued:

[A]s the practice of transmutation proved insurmountably difficult, an interest developed in credit-money as an alternative method of expanding the money stock. ... In the 1690s, the Bank of England finally engineered a system of credit-money. The success of this system coincided with (or caused) a rapid decline in royal support for alchemy, elevating credit-money to the status of sole tried and reasonably successful mechanism for the expansion of the money stock. Hence, while the prospect of expanding the money stock at will might have been conceived initially in alchemical terms, it only materialized in the form of credit-money...¹⁸

By 1708, a mere 20 years after the Glorious Revolution, the Crown had reasserted itself in fiscal matters by controlling what financial legislation could be introduced into Parliament. The Crown now also enjoyed the services of the Bank of England as a source of independent funding outside the control of Parliament. The new source of credit was greatly empowering the Monarch and re-inflating

18 See Carl Wennerlind, 'Credit Money as the Philosophers Stone: Alchemy and the Coinage Problem in Seventeenth Century England' (2003) 35 *History of Political Economy* 234-61, 255-57.

royal power after the assertion of parliamentary control at the end of the 17th century. The Bank of England, however, was also providing commercial opportunities to those emerging middle classes who benefited most from the settlement of 1688 and sought to defend it — this class is often referred to as Whigs. Having invested in bonds and generally having their commercial lives intertwined with this new settlement these citizens had a vested interest in maintaining the status quo. They could provide no real opposition to the growth of centralised royal power. It would be cutting off their nose to spite their face given the interests they accumulated through their investments facilitated by the credit money system.

The landed gentry and aristocratic classes, however, had their wealth in independent estates and could thus present a more autonomous resistance against the expansion of royal power precisely because their interests were not so tied and dependent upon the new settlement — these were of course known as the Tories.¹⁹ Even these upper classes succumbed to the promise of lucrative returns being generated by corporate investments and touted by the ‘stock jobbers.’ The aristocracy therefore also tied their ancient wealth and their fate into the new system.

With private wealth now vulnerable to the ‘alchemy’ of potentially limitless creation of money by the Bank of England, society was transformed into a polity characterised by a popular patrimony vested in the prevailing system, where financial inter-dependence between society and government sharpened and enhanced royal power to the detriment of *the intended constitutional structure safeguarding English liberty* — that is, parliamentary control of the Executive. The rapid expansion of credit led to several outcomes. Three notable outcomes are:

1. Severe boom and bust cycles ensued as money was loaned out and invested in ever more outlandish schemes such as unnecessary railways projects. One such boom of particular prominence was in relation to the ‘South Sea’ company. In response to the implosion of the ‘South Sea bubble,’ UK Parliament passed the infamous *Bubble Act* of 1720 in an attempt to limit the detrimental outcomes of the financial instability by limiting the ability of joint stock companies to form and operate.²⁰

19 See Bob Harris, ‘The House of Commons, 1707-1800’ in Clyve Jones (eds), *A Short History of Parliament in England, Great Britain, the United Kingdom, Ireland and Scotland*, 172-175.

20 The bubble act made things worse because having stifled the availability of joint stock companies as a vehicle for investment without government consent, people could only raise money from loan capital rather than share capital thereby increasing the demand for available credit — leading to further bubbles. This was exactly the opposite of what was intended when the *Bubble Act* was legislated. See also Douglas French, *Early Speculative Bubbles and Increases in the Money Supply* < <http://library.mises.org/books/Doug%20French/Early%20Speculative%20Bubbles%20and%20Increases%20in%20the%20Supply%20of%20Money.pdf> > last accessed on 14 October 2013.

3. The system of credit money also allowed the United Kingdom to embark on nearly a century of warfare, from Spain, to France to the American colonies as England became what some scholars have called 'a fiscal military state'.²¹
4. Finally, the system of credit creation was corrupting the role of government. By the end of the 18th century British industry was putting out its hand in search of government bailouts and subsidies. Politicians were closely aligned with the commercial interests and money was being doled out to 'prop up' struggling sectors.²²

Severe booms and busts, constant warfare and bailouts are all phenomenon that bear an eerie similarity to occurrences seen in more modern times and recent years.

Passages from a parliamentary debate from the late 18th century capture some of the prevailing concerns and sentiments of that time. The context was one where a parliamentary report had recommended the government take action in response to a credit crisis in the manufacturing sector. This debate captures the constitutional tensions aroused in the context of a credit-money system.²³

As would be familiar to contemporary students of government, several experts fronted the parliamentary committee of 1793 on the credit crisis and explained how many of the industries that needed assistance and money to pay incumbent debts and obligations were interlinked with the broader economy. In a sense, these economic players were 'too big to fail'.²⁴ This prompted the report to conclude that the 'evils were ... likely rapidly to increase to a serious extent, if some extraordinary means were not adopted to restore credit and circulation'.²⁵ The report recommended that up to 20 commissioners should be appointed to administer a scheme of government-funded loans.

When the report was debated in parliament on the 29th and 30th of April 1793 several MPs took serious issue with the bailout recommendation. The arguments

21 See John Brewer, *Sinews of Power War, Money and the English State 1688-1783* (1989).

22 See debates regarding the financial crisis of the 1790s extracted below.

23 In the 1790s the convertibility of paper money into gold or silver coin was ceased in England due to the economic turmoil being faced and a near complete fiat system prevailed during the Napoleonic Wars. It was not until 1821 that convertibility was resumed: See Jagjit Chadha and Elisa Newby, 'Midas, transmuting all, into paper: the Bank of England and the Banque de France during the Napoleonic Wars', 2. This paper is unpublished. For the draft text from the London School of Economics website see http://www.lse.ac.uk/economicHistory/seminars/ModernAndComparative/papers2011-12/MidasMay2012_Chadha.pdf (last accessed 06/09/2013).

24 This was a phrase commonly used in association with the 2008 Global Financial Crisis in relation to banks that were nationalised or given financial assistance.

25 *Ibid*, 5.

against the government loan proposal came from a minority of members. Some notable speeches were from a Mr Jekyll who asked the House that ‘if the executive government is to interfere in such a case are we not beginning a system, where we did not see the end of it?’²⁶ Another member, Mr Fox, then noted:

If the sum now proposed to be raised (£5, 000, 000) should be insufficient — were we to stop? ... Parliament and government were to assume a new character and a new function, the one legislative, the other executive; but now they were about to depart from their natural functions and to support the credit of commercial houses by advancing money upon their stock in trade ... the system was ... dangerous to the constitution ... in a constitutional view the commercial should never be blended with the legislative or the executive ... it was a measure exceedingly alarming to the freedom of Englishmen.²⁷

Mr Fox then implored the House to pause ‘before they sanctioned a system unknown to our constitution and which might subvert our liberties.’²⁸ A Mr Alderman also argued:

How was government to take what related to commercial dealings into its hands, without establishing a precedent of the most dangerous and alarming nature ... How were the committee sure that this would not damp the ardour of commerce, and shake the general principle, which was the life of commerce itself, the control which every man had over his own property ... Was this not opening the door to the most unconstitutional and dangerous patronage? Good God! Did the committee see the extent of the power which this might give to the executive government? - a power which it was the first duty of the House jealously to watch.²⁹

The argument that won the day however is encapsulated by a Mr Pitt who expressed the sentiment that ‘on some occasions the urgency of particular instances must outweigh general principles.’³⁰ On that sentiment, the House of Commons passed the bailout legislation ignoring the constitutional arguments expressed. Even though these views were minority views it was important that the dissenting views were recorded for posterity.

26 Hansard, 756.

27 United Kingdom, *Parliamentary Debates*, House of Commons, 27 April 1793, 756 (Mr Fox).

28 United Kingdom, *Parliamentary Debates*, House of Commons, 27 April 1793, 758 (Mr Pitt).

29 United Kingdom, *Parliamentary Debates*, House of Commons, 27 April 1793, 764 (Mr Alderman Anderson).

30 United Kingdom, *Parliamentary Debates*, House of Commons, 27 April 1793, 758 (Mr Pitt).

The English experience embodies the principle that when the government can control the money supply, government power becomes centralised to an extent that is beyond accountable limits. One of the most important accountability mechanisms that the system of Westminster Parliamentary government is supposed to embody is that of parliamentary control of finances — that is — parliament has the power of ‘supply’. The system of credit-creation and central banking fetters this mechanism by giving the Executive a means of raising funds outside the control of Parliament.

B. The Australian Experience

In this second part of the discussion the focus is shifted to the Australian historical and political context around the turn of the 20th Century — the period when the Constitution was drafted and adopted.

From 1788 the monetary system in the Australian colonies had been quite ad-hoc with Spanish dollars floating in and out of the colonies, promissory notes and other mediums being used to facilitate trade and commerce. The market needed a viable medium of exchange in workable denominations. In response to this need, private currencies started to appear around the 1840s and 1850s. This period up to 1911 has come to be known as the ‘free banking’³¹ era and the Australian colonies generally experienced what has been called the ‘long boom’³² from 1850-1890.

Banks were barred by statute from over issuing against their reserves but also had a market incentive not to over issue currencies lest public confidence in their services be shaken. All paper money was backed and convertible to gold. In this period there was one important banking crisis in 1893 but that was largely due to a perfect storm of land speculation and the availability of English capital through Australian banks. The land bubble burst and the mal-investment was realigned within the space of a few months to a year.

Paper money that was un-backed by bullion or gold coin was unknown and the thought of a government issued fiat currency was outrageous. Imperial authorities just would not allow it. The main example of this imperial predisposition against government issued un-backed legal tender notes can be seen in the controversy surrounding the resignation of Queensland Premier Arthur Macalister in July 1866. The Macalister administration had taken on a program of extensive public works financed by quite substantial loans and debentures

31 See Kevin Dowd, ‘Free Banking in Australia’ in Kevin Dowd (ed) *The Experience of Free Banking* (1992).

32 Ken Buckley and Ted Wheelwright, *No Paradise for Workers. Capitalism and the Common People in Australia 1788-1914* (1988) 8.

issued in London.³³ When the loans dried up Macalister took the dangerous step of initiating legislation that would allow the Queensland colonial government to issue paper money (unsupported by hard currency and not convertible) and declare the issued paper as legal tender in order to pay workers. Governor Bowen made it known that any such legislation would not obtain Royal Assent. Macalister and his administration promptly resigned.³⁴

In the late 1890s the Labor movement in Australia was just starting to get organised. From its earliest years one of the main platforms advocated by the Labor movement was a government owned central bank. Labor was increasingly suspicious of London based capital and the influence it wielded in the Australian colonies through private banking houses. It was thought that a government bank would address this concern and stabilise the economy making life that little bit more bearable for the masses of Australian workers. Furthermore, as with the English experience discussed above, a central government bank could allow the executive government to pursue its own agenda (in this case - socialist ideals) without financial limitations.

Labor quickly set about establishing its influence in the politics of the new Commonwealth. The main political issue dividing Australia at federation, however, was not banking or finance but rather it was trade. Australia's first Prime Minister, Sir Edmund Barton, was part of the Protectionist Party. The Protectionists generally advocated high tariff barriers in order to protect Australian industry. The main political opposition to the Protectionist Party was the Free Trade Party of Sir Henry Parkes (the 'Father of the Federation'). One of the reasons the Protectionist Party was able to form government under Barton was that it received support in Parliament from the newly formed Labor party. Labor's influence in Barton's government, and later when it won office in its own right in 1910 put the issue of banking and currency on the Commonwealth agenda right from the start.

The Australian Labor movement was, in global terms, a ground-breaking development. In 1899, Anderson Dawson of Queensland formed the first Labor led government anywhere in the world.³⁵ Granted, it was a minority government and lasted for one week, but it was a government nonetheless. In 1904 Labor formed a minority government at the federal level, but it was not until 1910 under Andrew Fisher that a majority Labor government ruled federally and in fact for the first time in Australia's short history had a majority in both houses of Parliament, allowing for the radical monetary changes to be enacted.

33 See Sidney J Butlin, *The Australian Monetary System 1851-1914* (1986) 60.

34 See R. B. Joyce, 'Bowen, Sir George Ferguson (1821-1899)', *Australian Dictionary of Biography, Volume 3* (1969) 203-207. English authorities approved of Bowen's actions.

35 See D J Murphy, 'Dawson, Andrew (1863-1910)' *Australian Dictionary of Biography, Volume 9* (1981).

The history of the establishment of the Commonwealth Bank of Australia is closely intertwined with the influence of one man: King O'Malley. O'Malley was known to have considered himself the Australian Alexander Hamilton³⁶ and passionately articulated the case for a Commonwealth Bank. The origins of the idea of a national bank in Australian politics can be traced to the sixteen-plank platform drawn up by Labor leaders in New South Wales in 1891 as they prepared to nominate some of their own to contest parliamentary elections.³⁷ King O'Malley, a Canadian by birth, but American by upbringing, naturally gravitated towards Labor in order to see the plan of a national bank to fruition.³⁸ As noted by Jauncey, though O'Malley first approached anti-Labor forces that were in power after 1901 to promote this idea, he soon abandoned such a path given the business connections such forces had with the private banks;³⁹ it was unlikely that men of such ilk would support a government bank that would directly compete with the private banks. Labor had already been in power once (albeit for a few months) in 1904 but had refused to consider O'Malley's plan. O'Malley's advocacy at party conferences ensured that the next time Labor would be in power a national bank along the lines that he envisioned would be closely considered.

When Labor regained power in its own right in 1910 King O'Malley was part of the Federal Cabinet. O'Malley faced opposition to his plan from within the Labor party and as such, in order to push the idea of a national bank into a viable bill before parliament, O'Malley became the driving force behind a secret caucus movement known as the 'Torpedo Brigade'⁴⁰. The Torpedo Brigade operated in secret and prevented the national bank issue from being openly discussed. This gave the ostensible impression that the matter of a national bank had been settled and this insulated the government from attracting the ire of influential banking interests. The final establishment of the bank was a well-planned development. As Jauncey concludes:

... the Commonwealth Bank cannot justly be said to be the result of a national political upheaval. The bank is the consequence neither of an economic disturbance nor of hasty political action but rather the result of calm conjecture in a time of prosperity.⁴¹

36 A R Hoyle, *King O'Malley The American Bounder* (1981) 108. Hamilton having played an integral part in the establishment of a US national bank in the early 19th century.

37 Robin Gollan, *The Commonwealth Bank of Australia* (1968) 13. Gollan notes that the idea of a national bank is also a feature of Marx and Engel's *Communist Manifesto*.

38 Larry Noye, *O'Malley MHR* (1985) 87-92.

39 L C Jauncey, *Australia's Government Bank* (1933) 47-8.

40 *Ibid* 57. See also Noye, above n 37, 114-20.

41 *Ibid*, 59.

In 1911 a tax was placed on privately issued paper money — driving that part of the banking industry into the ground — and the Treasury directly took over the issuing of paper money. Upon its establishment, the Commonwealth Bank was not established as a central bank. It had the ordinary powers of a chartered bank with the important exceptions that it was the banker to the Commonwealth. The Commonwealth Bank would operate as an ordinary trading bank but would also set up a savings bank business that could take over the post office savings facilities that had to date been at the disposal of the State governments and a source of investment funding open to the States outside the banking sector.⁴²

During the First World War the Australian government determined that large parts of the banking sector were to be brought under the direct control of the government.⁴³ The modalities of this initiative required the Commonwealth Bank to take a leading role in the organisation and administration of the banking industry in line with government requirements. This episode meant that the stature and importance of the Commonwealth Bank to the Federal government was consolidated and its position as an integral institution of national importance confirmed.

The actual issuing of paper money remained the province of the Treasury until 1924 when this function was also handed to the Commonwealth bank.⁴⁴ In 1932 the gold standard was ceased and the notes issued by the Commonwealth bank were no longer backed by gold yet remained legal tender.⁴⁵

The enhancement in royal power experienced in England through the credit money arrangements facilitated by the Bank of England in the late 17th and 18th centuries were mirrored in the establishment of the Commonwealth bank and the expansion of the fiscal scope available to the Federal government in Australia. It is essentially the same trick in a different context.

In recent years the question of paper money under the Australian Constitution has been brought before Australian courts on several occasions and in most cases by the same litigant — Mr Alan George Skyring.⁴⁶ Mr Skyring has

42 Butlin, above n 29, 71.

43 Noye, above 35, 129. The federal government was most likely able to control banking during the war years on the basis of the ‘defense power’: s51 (vi) of the Constitution.

44 Commonwealth Bank Act 1924 (No. 15)

45 Commonwealth Bank Act 1932 (No. 16)

46 *Re Skyrings Application (No 2)* (1985) 59 ALJR 561; *Re Alan George Skyring v Commissioner of Taxation* [1991] FCA 564; *Jones v Skyring* [1992] 66 ALJR 814 (declared a vexatious litigant in the High Court. Justice Toohey extensively details the history of litigation up to 1992 instituted by Mr Skyring in furtherance of his position); *Re Attorney-General (Cth)*; *Jones v Cusack* (1992) 66 ALJR 815; *Re Skyring* [1994] 68 ALJR 618; *Re Attorney General (Cth) Ex parte Skyring* (1996) 135 ALR 29; *Re Skyring* [1995] QSC 55; *Ex Parte Skyring* [1996] HCA 4; (1996) 135 ALR 29; (1996) ALJR 321; *Alan George Skyring v Paul Desmond Sweeney* [1998] FCA 1661; *Gunter v Hollingworth* [2002] FCA 943; *Skyring v Lohe* [2000] QCA 451; *In the Matter of Skyring* [2004] FCA 827; *Clampett v Attorney-General of the Commonwealth of Australia* [2009] FCAFC 151; *Krysiak v McDonagh* [2012] WASC 270 (26 July 2012).

consistently argued that paper money in Australia is unconstitutional. Mr Skyring, an engineer by training, usually represents himself in court proceedings, including proceedings before the High Court. Such are his convictions on this matter that Mr Skyring once defaced Australian bank notes, in order to bring the matter before court and present his argument. Mr Skyring was eventually convicted for the crime and his argument dismissed. On another occasion Mr Skyring attempted to pay registration costs for a state election in Queensland with gold coins (as required by s 115 of the Constitution) and when the coins were refused Mr Skyring took the registrar to court. Again the Queensland court dismissed his argument without it really being taken seriously. The courts have consistently rejected Mr Skyring's submissions on this point and he has now been listed as a vexatious litigant.

To his credit Justice Kirby in 1998 once gave Mr Skyring over an hour to make his submission in chambers. On reading the full transcript of the proceeding it is obvious that Mr Skyring is sincere and indeed knowledgeable about legal procedure but unfortunately his arguments are unfocussed, repetitive and imprecise. The argument he presents is based solely on s 115 with little if any recourse to historical context. The High Court has dismissed this line of argument with minimal engagement of its merits by concluding that s115 does not apply to the Federal government and that it only applies as a limitation upon the States.⁴⁷ That reasoning may hold with respect to the States issuing their own paper money and deeming that currency legal tender, yet the reasoning of the High Court does not explain how the States can make or permit the federally issued paper to be legal tender in the payment of State debts (such as payroll tax, stamp duty and other debts/fines imposed by State bodies).

III. WHAT IS SO BAD ABOUT A FIAT CURRENCY ANYWAY?

Many of the leading scholars associated with the Austrian School of economics consider fiat money arrangements dangerous to the prosperity of a society and personal liberty.⁴⁸ The main arguments offered in support of these beliefs emerge from an understanding of the government dynamic explained above. When the government can arbitrarily control the value of wealth and the purchasing power of a currency unit, that wealth can be taken away (stolen, taxed or whatever you

47 See *Skyring, Ex parte; Re Attorney-General of the Commonwealth B111/1996* [1996] HCATrans 376 (20 September 1996); *Re Attorney-General (Cth); Ex Parte Skyring* (1996) 135 ALR 29.

48 See primarily, Friedrich A. Hayek, *Denationalisation of Money: The Argument Refined* (1990); Murray N. Rothbard, *What has the Government done to our Money?* (1980); See also Andrew Dickson White, *Fiat Money Inflation in France* (1993); *Guido Jorg Hulsmann, The Ethics of Money Production* (2008).

want to call it) at whim. At the macro level, values remain steady when arbitrary manipulation is removed from the system. A steady economic environment favours planning and investment whereas a system that embodies unpredictable deviations in monetary value discourages those important phenomena.

Using the money supply to stimulate the economy may meet with some short term success. In the long term, however, artificial value bubbles (stocks, technology/internet companies, property) inevitably burst wreaking havoc with people's lives, livelihoods and families. The flow-on effects of economic instability and the consequent damage this causes to the fabric of society is catastrophic. Economic decline in concentrated sectors have severely damaging effects on associated communities. For example the decline in the US automotive sector has seen Detroit now exist in post-apocalyptic circumstances where streets are empty, businesses are boarded up and crime is rampant. When politicians feel that they have the power to change things and the tools to make their personal ideals a reality, to build the proverbial tower of Babel, their economic meddling inevitably results in unforeseen consequences as incentives and dis-incentives are perverted in a mass of fiscal confusion.⁴⁹

Whether it was the English Monarchy seeking military funding to expand its wealth and impose its personal morals on other peoples, lands and civilizations; or Alexander Hamilton seeking to create the American utopia; or even King O'Malley seeking to stand on their shoulders — fiat currencies skew the real bounds and limitations imposed by calculations of value based in the physical world. For those that do not accept the fiat currency and its falsely proscribed value, there is always the iron fist of the State ready to proselytize non-believers.

What are the prospects that a monetary system will emerge that embodies the principles of liberty, property and non-coercion? Given the technological advances of the internet age fuelled by the growth in online commerce, the emergence of a cashless monetary system is very likely. Will this cashless society, however, still be subject to the same state-sanctioned monetary manipulation and control to which the current fiat currency system is susceptible? These problems, along with several other monetary insights identified by the Austrian school, represent the obstacles that any tech-based monetary system must address. Creative solutions to these problems, although perhaps unimaginable at the moment, will inevitably arise so long as the autonomy of the internet is maintained and the cyber realm remains a place where people can freely share ideas.

49 This assessment makes the naïve assumption that politicians are following their internal ideals rather than making decisions based on political convenience - or even worse - that they are the tools of external special interests attracted to the concentrated power that exists in the hands of politicians.

IV. CONCLUSION

In a congressional confirmation hearing Reagan Supreme Court nominee Robert Bork was asked by then Senator Joe Biden (now US Vice President) if he could identify any precedents that should be reconsidered in light of their original meaning. Bork pragmatically replied:

I cite to you the legal tender cases. These are extreme examples admittedly. Scholarship suggests that the Framers intended to prohibit paper money. Any Judge who today thought he would go back to original intent really ought to be accompanied by a guardian rather than sitting on the bench.⁵⁰

The American position on the constitutionality of paper money has developed a schizophrenic outlook. Scholars agree that the Constitution was meant to prohibit State or federally issued paper money. Nevertheless there is a mainstream chorus that still maintains and tows the line that it is constitutional for the federal government to issue a fiat paper currency 'on pragmatic grounds'. A similar sentiment can be seen in the debates surrounding the English financial crisis of the 1790s where William Pitt the Younger (who was the youngest ever English Prime minister at 24 in 1783) expressed the sentiment 'on some occasions the urgency of particular instances must outweigh general principles'. Rocking the boat, it would appear, is deemed too controversial and the consequences too extreme or unpalatable to be seriously contemplated at the highest levels of government today. Even the dictates of basic constitutionalism are seemingly superseded by the interests of those invested in the prevailing State system of financial corporate-and-public patrimony.

Although the issue of fiat money is not as widely acknowledged and discussed in Australia as it is in the US, this article argues that the same fundamental conclusions are shared in both jurisdictions. The intellectual classes in Australia either do not know about this particular perspective or deem it a curious anomaly without appreciating the historical and political significance of this constitutional sleight of hand.

The accepted approach to constitutional reasoning in Australia holds that the text of the Constitution takes primacy. If the text is indeterminate only then can an examination of other factors be entertained. One of the approaches which the High Court has in the last 25 years adopted in this context is the use of history in constitutional reasoning. Yet even if the unwarranted concession is made that the text of the Australian Constitution is unclear on the point of whether a federally issued fiat currency is constitutional as a national currency, the historical

50 'The Supreme Court Nominee's Record Examined: Bork Faces Tough Questions on Privacy and Equal Rights', 45 *Cong. Q Weekly Rep.* 2258-59 (September 19, 1987).

record provides a similar perspective on the unconstitutionality of paper money. History illuminates the relationship between the concept of executive fiscal accountability and paper money. Seen through this prism the framework that emerges is one where fiat currency is positively correlated with a reduced executive accountability.

In order to sustain an argument that the text permits a fiat currency you must subscribe to a constitutional philosophy whereby the document can be bent and stretched to mean something that it obviously does not mean. Under this philosophy the Constitution thus becomes a tool box through which scholars and politicians rummage to find justifications for the expansion of government power rather than representing a genuine limit on government power.

Even if the strong economic arguments against fiat currency are put to one side, and you examine this issue from a strictly constitutional perspective, any way you slice it, the system of fiat paper money in Australia must be closely examined and questioned. Any honest inquiry will inevitably conclude that the Australian Constitution does not support a system of fiat currency that can apply nationally across federal and State jurisdictions. Whether it is the text of the Constitution, or looking at the historical record, or even examining broad constitutional principles such as executive accountability, the fiat currency arrangements in Australia are premised on shaky constitutional grounds.