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Australian federalism: past, present and future tense

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At its inception, the Australian federation was informed by a rich set of ideas about the nature of federalism, and a strong acceptance of both its necessity and its benefits. Today, over one hundred years later, this necessity and those benefits are under question – by Australian politicians, business leaders, professionals, academics and, most importantly, the Australian people. The title of this book suggests that federalism does have a future in Australia, but its chapters explain that it will only have an effective future if it is reformed and the reform is both well-informed and coherently designed.

Past tense

The original design

John Quick and Robert Garran in their seminal text, *The Annotated Constitution of the Australian Commonwealth*, astutely observed that ‘the Federal idea . . . pervades and largely dominates the structure of the newly-created community, its parliamentary, executive and judiciary departments.’¹ This accent on the federal idea, prominent among the framers of the Australian Constitution, has been largely lost sight of today, replaced for the most part by a political pragmatism that we tend to read back into the founding generation. The reality, however, was that the adoption of a federal system of government by the Australian colonies was compelled by *both* practical and philosophical considerations. Practically, the politics of integrating the six colonies, each of which had enjoyed substantial autonomous government under the representative and responsible institutions conceded to them by Britain, meant that a unitary form of government over the entire Australian continent was unthinkable. The geographical size of the proposed

¹ J. Quick and R. R. Garran, *The Annotated Constitution of the Australian Commonwealth* (Sydney: Angus and Robertson, 1901; reprinted Sydney: Legal Books, 1976), p. 332.

Commonwealth, and the differing political and social outlooks that characterised the colonies, also necessitated the adoption of a decentralised system. However, more than just these practical drivers were at work: at the time, federalism was popular philosophically. Distinguished scholars and statesmen across the English-speaking world saw federalism as a highly sophisticated legal and political mechanism for accommodating both unity and diversity within a coherent system of government. And here, the federal constitutions of the United States, Switzerland and Canada provided ready models for the Australians. Each of these constitutions, especially the American, had developed from, and spawned, commentaries and theoretical discussions upon which the Australians relied extensively.²

James Madison in the *Federalist Papers* described the fundamental characteristics of the American federal Constitution by reference to five key factors: ‘the foundation on which it is to be established’, ‘the sources from which its ordinary powers are to be drawn’, ‘the operation of those powers’, ‘the extent of them’, and ‘the authority by which future changes in the government are to be introduced’.³ Madison’s analysis influenced the framers of the Australian Constitution at several pivotal points in their deliberations and can be used today to explain and illuminate the system that they created. As to Madison’s first point, the formative basis or foundation of the system, the preamble to the Commonwealth of Australia Constitution Act 1900 (UK), declares the system to be based upon an agreement between the people of the colonies, and the history of the making of the Constitution confirms this, in that the Constitution was drafted by delegates chosen by the voters in each colony⁴ and approved by them before its final adoption.⁵ Reflecting both ‘national’ and ‘federal’ elements, the Commonwealth Parliament in turn consists of a House of Representatives representing the people of the Commonwealth and a Senate representing the people of the states.⁶ The framers further intended that a system of parliamentarily responsible government would

² N. Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009), chs. 3 and 4.

³ J. Madison, *Federalist* No. 39 [1788], in Clinton Rossiter (ed.), *The Federalist Papers* (New York, NY: New American Library of World Literature, 1961), p. 239.

⁴ At the Federal Convention of 1891, the delegates were nominated by the colonial parliaments; at the Convention of 1897–8, the delegates of all colonies except Western Australia (whose parliament nominated the delegates) and Queensland (which did not participate) were directly elected.

⁵ Ratifying referendums were held in the colonies over the years 1898–1900.

⁶ Australian Constitution, ss. 7 and 24.

operate, with the federal executive being primarily accountable to the House of Representatives, giving the government a distinctly national character, balanced against the affirmation of closely defined powers of the Senate over financial bills.⁷ In addition, the distribution of legislative powers between the federal and state institutions was dominated by three design features: the original and continuing powers of the states, the enumeration of specific heads of federal legislative power, and the provision that federal laws would prevail over inconsistent state laws.⁸ Judicial power was also distributed between federal and state judicial systems, and included the vastly important power of judicial review of legislative action, by deliberate implication vested in the High Court of Australia.⁹ Executive power was likewise vested in both the Commonwealth and the states.¹⁰ Similarly, financial powers to tax and spend were distributed to both levels of government: to the Commonwealth by specific grant, to the states under their continuing Constitutions.¹¹ Finally, the specified amendment procedure required not only a national majority of electors, but the additional hurdle of the majority of electors in a majority of the states – as well as the requirement that any change to the boundaries of a state or its representation in the federal parliament must be specifically approved by the people of the affected state, again reflecting the federal foundations of the system.¹²

At its enactment, the Australian Constitution thus presented a unique combination of both ‘federal’ and ‘national’ features that, despite certain tensions between the powers of the House of Representatives and the Senate, were designed by the framers to operate as parts of an integrated and constitutionally cohesive whole. However, the practical operation of the system since 1901, as shaped by Commonwealth and state action, as well as by interpretations of the High Court, has not always been as coherent or effective as the framers might have hoped. Indeed, there is today a very audible discontent about how Australia’s federal system is operating and serving the community. The last decade has been characterised by expectations within the community that ‘government’ will act quickly, efficiently and effectively to address emergent issues of both

⁷ The Constitution gives the Senate power to refuse to pass annual supply bills, but it reserves the power to initiate and amend money bills to the House (s. 53). It also needs to be noted that although s. 64 of the Constitution requires that Ministers of State must (eventually) hold seats in parliament, it does not require that all Ministers must come from the lower House.

⁸ Australian Constitution, ss. 51–2, 106–7, 109. ⁹ *Ibid.*, ss. 71–7, 106.

¹⁰ *Ibid.*, ss. 61, 106. ¹¹ *Ibid.*, ss. 51(i), 81, 83, 90, 96, 106. ¹² *Ibid.*, s. 128.

national and local focus. These have included the consequences of what has appeared to be a failing Murray-Darling river system, crises in health and hospital care, the plight of Australia's Indigenous peoples, the adequacy of the state education systems, and more recently large-scale emergencies caused by natural disasters such as floods, cyclonic storms and fire. And, as globalisation continues unabated, Australia has also had to respond to emergent international issues, such as the threat of terrorism, climate change, international market competition and challenges to the world financial system.

In each of these cases, Australia's federal structure – like all federal systems – shapes and constrains the responses of governments at all levels. Australia's federal institutions pose unique issues, however, founded in the historic combination of a US-style federal structure with the Westminster tradition of responsible government, as well as the practical evolution of the Australian federal system since 1901. Of particular influence on the practical operation of the federation have been the various approaches of the High Court to constitutional interpretation, which can be traced through several phases.¹³

The High Court's jurisprudence

The first phase was defined by two hallmark but now rejected doctrines, premised on the idea of the federation as a compact between the peoples of the states, namely the reserve powers doctrine and the immunity of government instrumentalities. In combination, these doctrines allowed for the operation of coordinate governments within the Australian federation, qualified only by the sweeping scope of the federal defence power as interpreted during World War I. In 1920 this phase was abruptly brought to an end, however, by the judgment of the Court in the *Engineers' case*.¹⁴ That judgment dictated a more literal and clause-bound approach to constitutional interpretation, which had implications that over time impacted most severely on the legislative powers of the states because it required the Commonwealth's powers to be interpreted in priority and without substantial reference to an appropriate

¹³ For a survey of the cases and literature, and a specific line of criticism of the High Court's federalism jurisprudence, see J. Allan and N. Aroney, 'An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism' (2008) 30 *Sydney Law Review* 245.

¹⁴ *Amalgamated Society of Engineers v. Adelaide Steamship Ltd* ('Engineers' case') (1920) 28 CLR 129.

federal 'balance', let alone any 'reserved' state powers. This approach over time resulted in the High Court's broad reading of the external affairs, corporations and other heads of power, collectively contributing to a gradual but nonetheless fundamental change in the distribution of legislative power in Australia.¹⁵ The approach adopted during this second phase of constitutional interpretation also facilitated the effective transfer of significant financial powers to the Commonwealth. This was achieved through a broad reading of the taxation power,¹⁶ an expansive interpretation of Commonwealth-exclusive 'excise duties',¹⁷ and a virtually unlimited reading of the federal grants power in section 96 of the Constitution.¹⁸

Commonwealth inventiveness, supported by the High Court's interpretation of the Constitution, meant that by the end of World War II the Commonwealth was collecting 88 per cent of taxes, compared with the state and local government share of 8 per cent and 4 per cent respectively.¹⁹ As a consequence, the states have increasingly had to rely upon tied and untied grants from the Commonwealth for much of their policy expenditures. In the 2011–12 federal budget, grants from the Commonwealth to the states were predicted to amount to \$95 billion,²⁰ consisting of \$45.5 billion in tied grants (known as 'Specific Purpose Payments', covering areas such as health, education, skills and workforce development, community services, affordable housing, infrastructure and environment)²¹ and \$49.5 billion in untied grants ('general revenue assistance').²² This represents around half of total state revenue.²³ Australia's intergovernmental fiscal arrangements have as a consequence

¹⁵ See, for example, *Commonwealth v. Tasmania* ('Tasmanian Dam case') (1983) 158 CLR 1; *New South Wales v. Commonwealth* ('Work Choices case') (2006) 229 CLR 1.

¹⁶ *Air Caledonie International v. Commonwealth* (1988) 165 CLR 462, 467 (the Court); and *Australian Tape Manufacturers Association Ltd v. Commonwealth* (1993) 176 CLR 480, 500–1; 504–5 (Mason CJ, Brennan, Deane and Gaudron JJ), cf 529–30 (McHugh J).

¹⁷ *Ha v. Commonwealth* (1997) 189 CLR 465 (Brennan CJ, McHugh, Gummow and Kirby JJ).

¹⁸ *Victoria v. New South Wales* (1926) 38 CLR 399; *Deputy Federal Commissioner of Taxation (NSW) v. WR Moran Pty Ltd* (1939) 61 CLR 735, affirmed in [1940] AC 838; *South Australia v. Commonwealth* ('First Uniform Tax case') (1942) 65 CLR 373; *Victoria v. Commonwealth* ('Second Uniform Tax case') (1957) 65 CLR 373; *Attorney-General (Vic); Ex rel. Black v. Commonwealth* ('DOGS case') (1981) 146 CLR 559.

¹⁹ These statistics are from the 1948–9 fiscal year: R. L. Mathews and W. R. C. Jay, *Australian Fiscal Federalism from Federation to McMahon* (Melbourne: Victoria University, 1972), p. 191.

²⁰ W. Swan and P. Wong, *Australia's Federal Relations: Budget Paper No. 3, 2011–12* (10 May 2011), p. 12.

²¹ *Ibid.*, pp. 12–13 and 20. ²² *Ibid.*, pp. 12–13.

²³ *Ibid.*, p. 124, this percentage is based on the figures from the 2009–10 year.

long been characterised by comparatively very high levels of vertical fiscal imbalance, with the Commonwealth raising considerably more revenue than it spends, and the states heavily reliant on federal grants to deliver services.²⁴

The third phase in Australia's federal jurisprudence, although it emerged later, has operated concurrently with the second phase and is thus perhaps better thought of as a 'mode' of interpretation that exists alongside the mode of interpretation introduced by the *Engineers'* case. This third mode of interpretation, dating from just after World War II, involved the reassertion of federalism as a constitutional interpretive principle, although to a far more limited extent than during the first phase of the High Court's jurisprudence. This third mode has seen the emergence of a modified doctrine of intergovernmental immunities, operating primarily as an implied limitation on both the Commonwealth and states' powers to enact legislation binding upon each other.²⁵ The implication rests upon the predication within the Constitution of the continuing existence of *both* levels of government, meaning that the states, like the Commonwealth, are intended to operate as politically independent governments, democratically accountable to their distinct constituencies. However, this new implied immunities doctrine noticeably does not afford the states the same level of protection as the Commonwealth, the latter being based on the view that the Commonwealth enjoys a relative 'supremacy' compared with the states, and is therefore 'immune' from state interference to an extent that is not equally enjoyed by the states.²⁶

The current High Court, under the leadership of Chief Justice Robert French, has had few opportunities to consider the state of the federal balance. One notable exception to this is *Pape v. Federal Commissioner of Taxation*.²⁷ While it is difficult to assess the wider significance of the case

²⁴ N. Warren, *Benchmarking Australia's Intergovernmental Fiscal Arrangements: Final Report* (Sydney: New South Wales Government, 2006), pp. 49–58.

²⁵ *Melbourne Corporation v. Commonwealth* ('State Banking case') (1947) 74 CLR 31; *Austin v. Commonwealth* (2003) 215 CLR 185; *Commonwealth v. Cigamatic Pty Ltd (In Liquidation)* (1962) 108 CLR 372; *Re Residential Tenancies Tribunal (NSW), Ex parte Defence Housing Authority* ('Henderson's Case') (1997) 190 CLR 410.

²⁶ *Commonwealth v. Cigamatic Pty Ltd (In Liquidation)* (1962) 108 CLR 372; *Henderson's Case* (1997) 190 CLR 410; cf the position of Justice Kirby, who argued that the protection of the Commonwealth from state laws should replicate that of the state from federal laws: *Henderson's Case*, 507–8.

²⁷ ('*Pape*') (2009) 238 CLR 1. At the time of writing, a challenge to direct federal grants to schools to fund the 'National School Chaplaincy Program' has been filed that will require

for the Court's approach to interpreting the federal dimensions of the Constitution, one part of the majority's reasoning requires mention. In *Pape*, the Court considered the constitutionality of stimulus payments made to taxpayers by the federal government in response to the events now commonly known as the global financial crisis. A majority of the Court affirmed that the executive power of the Commonwealth²⁸ was capable of extending to 'enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation'.²⁹ This in itself was not new (and indeed reflected the expansive approach to Commonwealth power associated with the *Engineers'* mode of interpretation), although the scope of this aspect of the executive power has often troubled commentators.³⁰ In a new development, the four majority judges indicated a willingness to interpret this test to take into account the practical exigencies of the contemporary Australian federation, such as the financial resource capacities of the respective governments dictated by historical events and policies.³¹ By contrast, the dissenting three adopted an approach closely tied to the formal configurations of power in the Constitution, finding that the states had adequate jurisdiction to provide the necessary response to the crisis, and that the Commonwealth action was not constitutionally warranted.³²

While the various phases of Australian federalism jurisprudence demonstrate the High Court's willingness to interpret federal legislative and executive power within very broad 'limits', there is still no single tier of government that has the undoubted constitutional jurisdiction, financial resources, political legitimacy, and practical experience to respond unilaterally to all urgent issues of national or regional importance. This has

the High Court to consider again the scope of the federal executive power: *Williams v. Commonwealth*.

²⁸ Potentially supported by the incidental legislative power in s. 51(xxxix) of the Constitution.

²⁹ Adopted from Justice Mason in *Victoria v. Commonwealth and Hayden* ('AAP case') (1975) 134 CLR 338, 396.

³⁰ See, for example, George Winterton's sustained criticism of this aspect of the Court's jurisprudence on s. 61: G. Winterton, *Parliament, the Executive and the Governor-General* (Melbourne University Press, 1983), pp. 29–30, 40–4; G. Winterton, 'The Limits and Use of the Executive Power by Government' (2003) 31 *Federal Law Review* 421, 431.

³¹ Chief Justice French, Justices Gummow, Crennan and Bell.

³² Justices Hayne and Kiefel and Justice Heydon. For further analysis of this aspect of the decision, see G. Appleby and S. McDonald, 'Case Note: The Ramifications of *Pape v Federal Commissioner of Taxation* for the Spending Power and Legislative Powers of the Commonwealth' (2011) *Monash University Law Review* (forthcoming).

meant responses to these issues have had to rest upon mechanisms of putatively ‘cooperative’ federalism, including intergovernmental agreements and the referral of powers by the states to the Commonwealth, as well as so-called ‘coercive’ federalism mechanisms, most prominently the use of tied grants by the fiscally dominant Commonwealth. Frequently, coercive measures of various kinds have tested the constitutional boundaries of known federal power, undoubtedly encouraged by the generally centralist approach of the High Court.³³

Present tense

The federal-state balance

Part I of this book addresses the contemporary state of play in Australian federalism, focusing especially on the current federal-state balance. In the first chapter, Commonwealth Solicitor-General Stephen Gageler begins by showing how the High Court has consistently rejected the idea of a ‘federal balance’ as a canon of constitutional construction in favour of an approach that gives breadth and flexibility to grants of federal legislative power. This approach, he argues, allows the interpretation of the Constitution to develop with changing social, economic and political circumstances. The Court’s focus upon a ‘flexible’ reading of the Constitution, rather than on ensuring the maintenance of any particular ‘federal balance’, has allowed different balances to be struck politically as times have required. For Gageler, the lines of Commonwealth and state legislative competence are best determined from time to time through the interplay of political forces and not by judicial intervention.³⁴ The Solicitor-General’s chapter is thus supportive of an approach to the interpretation of the Constitution that will usually enable the Commonwealth’s views about the ‘necessities of the time’ to prevail over the views of any dissenting states.

In the next chapter the Chief Justice of the High Court, Robert French, asks whether this sort of approach means that Australia is, in practice, on an inexorable path towards a unitary state. In pursuit of this question, his Honour undertakes a detailed analysis of several

³³ For example, *Tasmanian Dam case* (1983) 158 CLR 1 (s. 51(xxix)); *Work Choices case* (2006) 229 CLR 1 (s. 51(xx)), *Thomas v. Mowbray* (2007) 233 CLR 307 (s. 51(vi)), *Pape* (2009) 238 CLR 1 (s. 61).

³⁴ S. Gageler, ‘Foundations of Australian Federalism and the Role of Judicial Review’ (1987) 17 *Federal Law Review* 162.

cooperative schemes that have enabled coordinated policy responses to be implemented *even* in areas of non-exhaustive federal jurisdiction. After surveying the general advantages and disadvantages of cooperative schemes within federal systems, he concludes with a fundamental criticism of the ‘organic’ development of such schemes in Australia, uninformed, he says, ‘by principles for determining what matters are best dealt with by a cooperative or multi-government approach and which are not’ – and not even by a set of principles for ‘selecting the most appropriate cooperative mechanism’ where one is desirable. The result, he says, is a kind of ‘opportunistic federalism’³⁵ characterised by federal intervention in politically salient issues without proper thought for whether particular policy fields are best addressed nationally, locally, or ‘cooperatively’ and, indeed, without any careful thought about how and on what basis we should decide between these different approaches.

Chief Justice Paul de Jersey of the Queensland Supreme Court draws together the central threads of the two foregoing chapters. For him, the High Court’s centralising decisions in the *Engineers*, *Tasmanian Dam* and *Work Choices* cases are best assessed in the light of the federal design of the Australian Constitution and the intentions of its framers. While centralisation has generally been favoured by federal politicians and federal judges alike, his Honour draws attention to the widespread dissatisfaction with the practical operation of the federal system by both the supporters and opponents of that centralisation. In this light, he makes the realist case that the High Court’s jurisprudential path, coupled with the fiscal dominance of the Commonwealth, has left the Australian federation with little option other than to pursue cooperative arrangements to achieve productive outcomes.

Augusto Zimmermann’s chapter in turn draws attention to the discontent felt by opponents of Australia’s ever-creeping centralism by providing a detailed account of the most radical form of that opposition: the Western Australian secessionist movement. Zimmermann’s chapter demonstrates that within a nation that is so often described as politically and culturally homogeneous there exists significant discontent in Australia’s largest and ‘still reluctant’ state. This discontent, traceable ultimately to the way in which fiscal arrangements under the federal compact have in practice been applied by the Commonwealth, surfaced most prominently in the ‘successful’ secession referendum of 1933, the

³⁵ This terminology is taken from the judgment of Justice Kirby in the *Work Choices* case (2006) 229 CLR 1, 225.

hopes of which were dashed by the British Parliament's refusal to receive or consider Western Australia's secession petition in 1934. While conceding that today the likelihood of secession is quite negligible, Zimmermann points out that the political stances taken by Western Australian governments have on occasion restrained some of the more far-reaching assertions of power by the Commonwealth, reminding us that although besieged, the states still have a constitutional identity that makes them significant players in the game of Australian politics.

Closing the first part of the book, Greg Taylor identifies three federalism 'design flaws' in the Australian Constitution to explain the federation's trend towards centralisation. Drawing on comparative experience, Taylor shows how the division of powers, the financial arrangements and the amendment procedures adopted at federation were virtually destined to produce a highly centralised federal system in which the states would decline and the Commonwealth would expand. These defects, he persuasively argues, would best be alleviated by an express list of state powers, a judicially enforceable limit on the Commonwealth's policy-making power to make grants to the states and a constitutionally guaranteed share of taxation revenue for the states. However, Taylor is at the same time highly pessimistic about the prospects of genuinely systemic reforms of this kind, and asks whether in the end we will just have to make do the best that we can.

International comparisons

It is often asserted that the Australian federal system has 'failed'. However, what is usually meant is not so much the progressive centralisation of the political system that the first chapters in this book identify, but rather the idea that 'government' – understood generically, meaning government at either a federal, state or even local level, and including government acting through 'cooperative' arrangements – has failed to respond to emergent issues with the speed, efficiency and effectiveness that is expected by its critics. It is 'policy failures' of this kind, and not failures in the constitutional distribution of power, that have characterised most calls for 'reform' of the Australian federal system.

A prevailing view, particularly in the business sector, has been that the federal system is a relic of our colonial history, is cumbersome and inefficient, and often ineffective. Much attention in this literature is given to dysfunctional policy-making, fiscal inefficiency and bureaucratic duplication, especially as these problems impose unnecessary