

THE FUTURE OF AUSTRALIAN FEDERALISM

At a time when the operation and reform of federal relations within Australia are squarely on the political agenda, this volume brings together eminent lawyers, economists and political scientists who explain, analyse and evaluate the theory and principles underpinning the Australian federal system. Topics covered include the High Court's approach to the interpretation of the Constitution and how this has influenced federal relations in practice; different forms of intergovernmental cooperative arrangements; fiscal relations between the Commonwealth and the states; and emergent ethno-cultural and socioeconomic diversity within the Australian federation. Comparative perspectives from Germany, America, Canada, Switzerland, India and the European Union provide unique prisms through which to view the operation of the Australian system and to contemplate its reform.

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THE FUTURE OF AUSTRALIAN FEDERALISM

Comparative and Interdisciplinary Perspectives

Edited by
GABRIELLE APPLEBY, NICHOLAS ARONEY AND
THOMAS JOHN



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press & Assessment
 978-1-107-00637-9 — The Future of Australian Federalism
 Edited by Gabrielle Appleby, Nicholas Aroney, Thomas John
 Frontmatter
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CAMBRIDGE
UNIVERSITY PRESS

Shaftesbury Road, Cambridge CB2 8EA, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India

103 Penang Road, #05–06/07, Visioncrest Commercial, Singapore 238467

Cambridge University Press is part of Cambridge University Press & Assessment,
 a department of the University of Cambridge.

We share the University's mission to contribute to society through the pursuit of
 education, learning and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9781107006379

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First published 2012

A catalogue record for this publication is available from the British Library

Library of Congress Cataloging-in-Publication data

The future of Australian federalism : comparative and interdisciplinary perspectives /
 Gabrielle Appleby, Nicholas Aroney, and Thomas John (editors).

p. cm.

Includes papers presented at a conference hosted by the Law Council of Australia
 and the Centre for Public, International and Comparative
 Law at the University of Queensland in July 2008.

Includes bibliographical references and index.

ISBN 978-1-107-00637-9 (Hardback)

1. Federal government—Australia—Congresses. 2. Separation of powers—Australia—Congresses.
- I. Appleby, Gabrielle. II. Aroney, Nicholas. III. John, Thomas, 1968– IV. Title.

KU2035.A67F88 2012

342.94'042—dc23

2011035579

ISBN 978-1-107-00637-9 Hardback

ISBN 978-1-107-47105-4 Paperback

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Cambridge University Press & Assessment
978-1-107-00637-9 — The Future of Australian Federalism
Edited by Gabrielle Appleby, Nicholas Aroney, Thomas John
Frontmatter
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FOREWORD

Federations, in their different forms, distribute governmental power among a number of polities having different geographical bases. In some respects, a division of governmental powers makes the functions of government less efficient than in a unitary state, but history, tradition, demographic disparities, or ethnic or religious differences may warrant the vesting of some powers in entities with which local or sectional interests are identified and the vesting of other powers in a central entity which can best exercise those powers in the national interest. Federation may be the constitutional framework of choice to achieve the political and legal unity of a national democracy.

In 2001, this nation celebrated the centenary of our federal Constitution. It is an instrument that has proved obdurately impervious to change by referendum, yet it has sufficed to provide the framework of government in times of war as in times of peace, in times of economic prosperity and depression, in times of cultural and demographic change, in times of transition to complete independence and in times of ecological danger.

A national federation may grow out of the history, culture and contemporary interests of the people who are to be governed by its terms. At the heart of a secure and stable federation, there must be agreement about the form and powers of the central and peripheral governments. If history, culture and contemporary interests are common to all the federating peoples, as they substantially were in Australia, the provisions of their constitution can emerge by their common consent without major disruption to their existing governmental arrangements. In this country, the federal movement was delayed by different contemporary interests of the federating colonies with respect to customs duty and tariffs, and it was only when this 'lion in the path' was slain that the federal movement proceeded. But if different historical or cultural values must be protected, or if the contemporary interests of the federating peoples are diverse, or even conflicting, the creation and

maintenance of a federal constitution may depend, not on the consensus of the people, but wholly or in part on its imposition by a stable and superior political force. Whatever sustains a federation, the distribution of powers between a central and peripheral government can offer efficiency in the administration of matters of national concern and sensitivity to the needs of local communities.

Federations can be flexible, and the tensions which are produced when there are different repositories of power may diminish the risk of sectional or individual oppression, and may even be productive of innovative solutions to common problems.

The political unity of a federation is reflected in and strengthened by a common legal system. In this country, the common law, inherited from England but developed to suit Australian conditions, has been the basis of the entire legal system. It is the matrix in which the Constitution is placed; it affects constitutional interpretation and informs constitutional institutions. Its freedoms and immunities are the benchmark against which political activity is oftentimes judged. And so we have become accustomed to a common legal language, expressing common legal concepts and allowing the courts of both the Commonwealth and the states to speak with the same understandings and preconceptions. Of course, the experience of other federations shows that it is not essential for the same legal system to be in force in all parts of a federation, provided there is an agreed methodology for ascertaining and applying the relevant law to specific situations. Indeed, some agreed methodology is essential also for resolving inconsistencies between the laws and powers of the various governmental elements of a federation. As there is more than one repository of legislative power and more than one repository of executive power in a federation, there has to be some methodology for resolving any inconsistency arising from the concurrent exercise of power by different repositories. Some authority must be created to determine the limits of the powers allocated among the several elements of a federation. The authority to determine those limits will ordinarily be vested in a constitutional court. The federal character of a nation will influence the structure of its courts. At a recent conference, Professor Dr Klaus Tolkdorf, President of the German Federal Court of Justice, explained that: 'The principle of decentralization of the German court structure has evolved due to the federal nature of Germany. The present system represents a compromise between maintaining the independence of the federal states (the *Länder*) in legal and court matters and the desire of legal unity.'

In Australia, the High Court, which is the supreme court of the federation, is not only the ultimate constitutional court but the ultimate appellate court in all justiciable matters. When the legislation for the creation of the High Court of Australia was introduced into the Commonwealth Parliament in 1903, the Attorney-General of the day identified the three fundamental conditions to any federation:

The first is the existence of a supreme Constitution; the next is a distribution of powers under that Constitution; and the third is an authority reposed in a judiciary to interpret that supreme Constitution and to decide as to the precise distribution of powers. . . . [W]hen we say that there are three fundamental conditions involved in federation, we really mean that there is one which is more essential than the others – the competent tribunal which is able to protect the Constitution, and to oversee its agencies. That body is the High Court. It is properly termed the ‘keystone of the federal arch’.¹

The role of a constitutional court is central to the functioning of a federation. The court’s decisions determine the scope and operation of the legislative and executive powers of the respective governments and the competence of the courts created by those governments. In polities where a bill of rights confers justiciable rights and immunities on individuals, the constitutional court may have a major role to play in setting the limits of governmental power and protecting the individual against incursions on his or her human rights. These functions demand the exercise of scholarship and analytical skill, of sensitivity to the nuances of contemporary life, of a sense of history and wisdom in assessing principles and values in reaching the court’s decision. That was foreseen in 1903 when the Attorney-General said:

[T]he nation lives, grows, and expands. Its circumstances change, its needs alter, and its problems present themselves with new faces. The organ of the national life which preserving the union is yet able from time to time to transfuse into it the fresh blood of the living present, is the Judiciary . . . It is as one of the organs of Government which enables the Constitution to grow and to be adapted to the changeable necessities and circumstances of generation after generation that the High Court operates. Amendments achieve direct and sweeping changes, but the court moves by gradual, often indirect, cautious, well

¹ Sir Alfred Deakin, Commonwealth Attorney-General, Judiciary Bill 1902, Second Reading Speech (Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, pp. 10966–7).

considered steps, that enable the past to join the future, without undue collision and strife in the present.²

Several of the chapters in this book are concerned with the distribution and definition of powers. Chief Justice Marshall's famous dictum that it is 'the province and duty of the judicial department to say what the law is', assumes the existence of a competent and impartial tribunal which commands the respect of those affected by its decisions and which is able conclusively to determine any controversy within its jurisdiction. Those whose advocacy and scholarly opinions offer assistance to a constitutional court are as important to the operation of the rule of law as judges and others who have a more formal constitutional role to play.

I do not presume to enter the controversy that has surfaced in the United States about the citation of authority from other jurisdictions, but I do acknowledge the assistance which the High Court of Australia has derived from decisions of courts in other jurisdictions, including supranational tribunals, particularly the European Court of Human Rights and the European Court of Justice. Of course, there must always be an awareness of differences in history, culture or current interests which may distinguish the reasoning in one jurisdiction from the reasoning which might prevail in another. That said, the common aspiration for good government among peoples of similar legal traditions has warranted the courts of this country in drawing on the wisdom of others, and for that we in Australia are grateful.

Of course, the allocation and definition of powers is one thing, the exercise of powers is another. The successful operation of a federation depends on the effective and coordinated exercise of power by the respective elements of government. The chapters in this book written by distinguished scholars who have studied federalism in many forms provide each of us with an opportunity to reflect on our own systems. And it is timely to reflect on the utility of federalism for achieving the coordination of governmental activity in particular regions.

As the European Union has shown, the development of an effective international federation depends on a common consent by nation states to surrender some of their powers. Are nation states willing to do so? If not, regional problems must be addressed, if at all, by international conventions accepted by the relevant nation states. And if a relevant nation state is organised as a federation, are the powers of its central government adequate to allow effective participation in the affairs of

² *Ibid.*

the regional community? It is timely to consider the structures, strengths and weaknesses of federal systems when national issues are increasingly affected by international action.

The chapters in this book record the experiences of different federations and thus provide information needed to fashion or to analyse critically templates of governmental power in our contemporary world.

The Hon. Sir Gerard Brennan AC KBE

PREFACE

This volume, as is the case with large and diverse projects, is the collective effort of many and has undergone a long, and we trust fruitful, gestation period. Many of the chapters were first presented as papers at a conference hosted by the Law Council of Australia and the Centre for Public, International and Comparative Law at the University of Queensland in July 2008. Several others were specially commissioned, to build a volume of work that addresses the current and future state of Australian federalism, understood from a range of disciplines and perspectives. We hope that the breadth of views presented in the book will challenge, motivate and provide stimulation for those concerned about the ongoing vitality of Australia's federal system.

Sadly, we record the passing of one of our contributors, Geoff Anderson, who died while this book was in production. Geoff's passing is a loss to us all and makes us vividly conscious of the value of loved ones.

Gabrielle is ever grateful for the patience, support and love of her partner, Scott.

Nicholas wishes to record his profound debt of appreciation to his parents, Theo and Helen, who taught him the values of faith, hope and love, and to his wife, Lisa, who demonstrates these values on a daily basis.

Thomas: To my darling wife, Alison: *Quos amor verus tenuit, tenebit.*
You hold me every day . . .

*Gabrielle Appleby
Nicholas Aroney
Thomas John*