

AUSTRALIAN FEDERALISM: THE BUSINESS PERSPECTIVE

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I INTRODUCTION

The interaction of the Australian business community with the functioning of federalism is largely unexplored terrain. Whilst there is considerable material published on business–government relations per se, it relates mainly to the business community’s interaction with each level of government, rather than the dynamic of intergovernmental relations. This paper endeavours to capture the changing nature of business perspectives on Australian federalism through analysis of key landmarks and developments in Australia’s political, legal and commercial history.

Such an exercise produces the distinct impression that while business played a largely reactive or passive role for roughly the first 80 years following Federation in 1901, it has become more proactive in recent times. Moreover, whereas the main concerns of business in this domain have traditionally been focused on those aspects which impact directly on business profitability, there is considerable evidence that, in the late 20th and early 21st centuries, business has also been giving serious thought to the reform of federalism for the benefit of the nation as a whole.

The profound centralisation of power which has occurred since Federation has made it easier for business to lobby, and be consulted by, government (the Commonwealth government, that is) which now has the power to press the majority of the levers which produce policy impacts on business. The changing public–private mix in ownership and service delivery in recent decades, with stronger economic and even social roles for the private sector, has also drawn business more closely into the politics of the federal divide and produced more proactive pleas for reform of federal arrangements.

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To be sure, the fundamental specific issues for business regarding federalism have remained fairly constant, including taxation, regulation, infrastructure provision (especially transport, communications and energy), industrial relations, education and training, and occupational health and safety. However, the business community, typified by the research and active advocacy of its major peak body, the Business Council of Australia ('BCA'), has now cast these concerns in a more systemic context, arguing for the creation of truly national markets, greater uniformity in policies, greater certainty in policy regimes, reduction of regulatory and service delivery overlap and duplication, harmonisation of laws, and removal of other impediments to global competition for Australian business. This has led business to think more deeply about, and suggest fundamental reforms to, the institutions and dynamics of the federal system itself, including the once taboo topic of constitutional change.

These aspects can only be canvassed briefly in this article. However, it is hoped that they may provide signposts for further research in a neglected arena of debate on Australian federalism, which is currently undergoing a significant resurgence.

II IN THE BEGINNING

Some of Australia's founding fathers were businessmen – others had an appreciation of the impact of governance on commerce and industry. The original constitutional design in 1891 reflected this, especially the taxation arrangements and the provisions to create a common market – two aspects of federalism that have dogged Australian business ever since.

Henry Parkes had already appealed to Australia's new sense of national identity with the memorable phrase, 'the crimson thread of kinship runs through us all'. His genius at the National Australasian Convention, 1891 was to seek agreement first on a set of principles before any detailed consideration of the *Constitution* could begin. The principles that Parkes proposed (which were readily accepted) were:

- Powers of colonies to remain intact subject to whatever surrender of power is necessary and incidental to the power of the federal government.
- Trade between the colonies to be absolutely free.
- The federal body to have exclusive power to levy customs duties, subject to agreement on their disposal.
- Defence to be entrusted to the federal force under one command.
- A system of responsible government comprising the Senate (a States' House with no power to originate or amend money bills), the House of

Representatives, State Supreme Courts, and the Executive (led by the Governor-General with advisers drawn from Parliament).¹

At Federation in 1901 there were no income taxes – the main colonial revenue measures had been customs and excise duties, and to a lesser extent land taxes. Since customs and excise would have to be national taxes the Founders realised that this would leave the States with a revenue deficit; arrangements were therefore made in the constitutional design for transfers of this revenue (originally three-quarters of it) to occur from the national government to the State governments – the beginning of Vertical Fiscal Imbalance (‘VFI’) in the federation.² Also, recognising that particular States might experience difficulties from time to time through differing capacities to raise revenue and deliver services – Horizontal Fiscal Imbalance (‘HFI’) – the Founders included section 96 to allow national grants to pass to States ‘on such terms and conditions as the Parliament thinks fit’. This of course involves conditional funding, although the Founders considered that it would only be used for emergency or isolated circumstances.³

Perhaps of greater significance was the provision to address the ‘Lion in the Path’ of Federation; that is, the need to ensure freedom of interstate trade. Section 92 said that ‘[o]n the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free’. This was such an important issue because Victoria had built an industrial base behind an inter-colonial tariff wall consisting of customs duties on goods imported from all other colonies, whereas other eastern colonies had no such barriers.⁴ Little wonder then that, after 1901, the section 92 guarantee of free interstate trade would become the most litigated section of the *Australian Constitution*, particularly as States tried all manner of tricks to lure investment and industry, many of which breached the concept of ‘free’ trade as interpreted by the High Court.⁵ Section 92 also became known as the bedrock of private enterprise as it frustrated successive attempts by both national and State Labor governments to nationalise various industries or sectors of commerce and industry. Section 92, like the bulk of the federal sections of the *Australian Constitution*, had been modeled on similar provisions in the *United States Constitution*; so too was the creation of an Interstate Commission, in sections 101 and 102, to police freedom of interstate trade.⁶ This body has since been abolished and re-created twice in Australian

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- 1 The full account of the Convention Debates of the 1890s is contained in John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (1901, 1976 reprint).
 - 2 The formula was contained in the *Constitution* s 87 – the Braddon Clause – which stipulated that the arrangements had to be reviewed after 10 years. It was then replaced by a system of per capita grants from the Commonwealth to the States.
 - 3 Quick and Garran, above n 1, 871.
 - 4 To this day the industrial structure of Melbourne is qualitatively different from that of Sydney, particularly in relation to the manufacturing sector, reflecting in part these historical circumstances.
 - 5 See Michael Coper, *Freedom of Interstate Trade under the Australian Constitution* (1983).
 - 6 Quick and Garran, above n 1, 871.

history (despite being mandated in the *Constitution*), giving testimony to the controversial nature of the free trade provision in the face of competitive federalism.⁷

Section 92 was ostensibly oriented towards the creation of a customs union or common market, for that is what a true federation should be, with common external boundaries on trade, finance, and immigration, but no internal barriers. The historic Customs Houses still standing along the banks of the Murray River, the border between the two most populous Australian states of New South Wales ('NSW') and Victoria, are reminders of the persistent difficulty of enforcing a customs union or national free market.

Other clauses in the *Constitution* were included as part of the attempt to create a common market. They protected the smaller States from predatory behaviour by the larger States, something they had demanded as the price of joining the federation, along with the creation of the Senate as a States' House with all States having equal representation.⁸ These clauses were mainly those which required the national government to ensure uniformity in customs duties (section 88), taxation (section 51(ii)), and bounties (section 51(iii)). Section 99, which prevented the Commonwealth from giving preference to certain States or parts of States regarding trade, commerce, or general revenue laws, was also inserted. In addition, the States were prohibited, by the inclusion of section 90, from levying customs and excise duties or bounties on production and export.

It is significant that the arrival of Federation in 1901 also fell in the middle of Australia's original era of major economic infrastructure construction, including railways, tramways, electricity generation, postal and telecommunications services, roads and bridges, harbours, and dams. The provision of this infrastructure fell almost entirely to the public sector, unlike the situation in other federations, because Australia's small population, scattered across such a vast continent, made it unprofitable for private enterprise to undertake these tasks. The States had primary responsibility for infrastructure. There also emerged a philosophy that all Australian citizens were entitled to the same standard of government services no matter where they lived.

III THE CONCEPT OF FEDERALISM

It was not long after Federation that the different priorities of the States in taxation, as well as capital and recurrent spending, began to show. This was only

7 Although the Interstate Commission was disbanded on the technical ground that it could not possess both judicial and administrative powers, the reality was that it ran into political opposition, primarily after it acted to prevent the States from using tapered rail freights to lure produce from other States to their retail outlets and ports.

8 The smaller States were more concerned about exploitation by the larger States than the new Commonwealth government and insisted on protective clauses being inserted in the *Constitution* along with equal representation in the Senate. This occurred primarily at the Adelaide sitting of the National Australasian Convention, 1897.

natural, given the States' differing geography and topography, population dispersal, industrial structure, and socio-cultural diversity.

Indeed, the theory of federalism posits that one of its great advantages is the provision it makes for differences in public policy arrangements to suit particular regions, while at the same time encouraging local innovation and experimentation. In this respect it also encourages competitive federalism with the potential for lower taxation, greater efficiency and effectiveness in service delivery, and client responsiveness owing to the closer proximity of decision-makers to key areas.⁹ The fundamental defining feature of federalism, which distinguishes it from other forms of government, is that States are *sovereign entities* each with their own constitution.¹⁰ This is reflected in Wheare's classic definition of 'layer cake' federalism, which has been the foundation of many of the world's modern federal systems and which the Australian Founders took to heart in pursuing their goal of 'Unity in Diversity':

By the federal principle I mean the method of dividing powers so that the general and regional governments are each, within a sphere, coordinate and independent.¹¹

This context applied to government–business relations in Australia from the time of Federation. It was intended that business would look predominantly to State governments rather than the new Commonwealth Government since, according to the Convention Debates and the new *Constitution*, the national government held only a narrow list of exclusive powers (defined in sections 51 and 52). Significant powers over business and the facilitation of business operations, including taxation powers and infrastructure provision, would rest with State governments. It was also envisaged that the Commonwealth would be kept in check by the States through the Senate, which was granted relatively strong powers by the standards of comparative federal systems.¹² Technically, the *Constitution* created a wide scope for concurrent powers; nevertheless, the Founders clung to the belief that it would be the States that would drive the nation, as appeared to them to be the case in other modern federations such as the United States, Switzerland and Germany.

By and large, in 1901 Australia was seen as six separate economies and polities. It was envisaged that any interconnections between them could be handled by the few national economic powers the Commonwealth had been given (for example, powers over trade, immigration and banking), through joint exercises of power in areas of constitutional concurrency, through State referrals of power pursuant to section 51(xxxvii), or through bail-outs of troubled States

9 See Kenneth Clinton Wheare, *Federal Government* (1947); Geoffrey Sawer, *Modern Federalism* (1976); A V Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed, 1914).

10 See Richard Darrell Lumb, *The Constitutions of the Australian States* (2nd ed, 1965). Sub-national constitutions such as those of the Australian States are often ordinary pieces of legislation no superior to other Acts, as opposed to national constitutions.

11 Wheare, above n 9, 10.

12 Since the Senate can force the House of Representatives to an election without itself having to face an election, it is considered one of the most powerful upper houses of any federation. In most other federations deadlocks have to be resolved by political compromise.

through the Commonwealth's use of the section 96 grants power. Possibly the best example of the perception of a fragmented economy is to be found in the industrial relations power in the *Constitution* (section 51(xxxv)), which grants to the Commonwealth power in respect of *interstate* industrial disputes, something which was considered to be an unlikely occurrence. Menzies was later to comment that the Founders must have seen industrial action as something akin to a bushfire which would only occasionally cross State borders. The fact that the Commonwealth was given no specific constitutional powers over prices and incomes is also indicative of a turn of the century perception of six separate economies.

IV CENTRALISATION BEGINS

The history of Australian federalism throughout the 20th century is one of a gradual centralisation of power in favour of the Commonwealth. For the first three-quarters of the century business and industry were largely passive observers and occasionally victims or beneficiaries of this trend, rather than active protagonists. It was only in the latter part of the century that business became an active lobbyist and was occasionally considered a stakeholder or partner in policy changes which affected the shift of power to the national government.

The remainder of this Part considers the primary means through which the federal balance in Australia has shifted in favour of the Commonwealth.

A Referendums

The emergence of 'people power' in the 1890s ensured the inclusion of section 128 in the *Constitution*. There have been only eight successful referendums since Federation and only three of them have resulted in profound changes to the Commonwealth–State balance: the establishment, in 1927, of coordinated government borrowing and the creation of the Australian Loan Council; the introduction of significant social welfare powers for the national government in 1946; and the formal power given to the national government with respect to Indigenous affairs in 1967 (the largest 'Yes' vote ever recorded at almost 91 per cent). None of these changes had a direct impact on business. Although it might have been thought that the arrival of the Loan Council would engender a greater involvement of the private sector in infrastructure provision, this was not to be. Interestingly, the Loan Council never became a national infrastructure planning body, although it had that potential, because the States retained their sovereignty in its governance and operations. Loans for infrastructure were parceled out according to State priorities rather than national ones. (The Commonwealth had a strong position in the voting structure but rarely used it to override State bids in the national interest.¹³)

13 The voting structure of the Australian Loan Council was such that the Commonwealth could have its way if it had the support of two States, but few votes were ever taken. See Ronald Sunter Gilbert, *The Australian Loan Council in federal fiscal adjustments, 1890–1965* (1973).

B Judicial Review

The oscillation of the High Court in different periods of its history between favouring State and national governments has also been well documented.¹⁴ However, following the seminal decision in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*,¹⁵ and particularly in the period since World War II,¹⁶ the trend has been unmistakably towards the national government with often profound consequences for business. This trend has had a particular impact on business in relation to taxation and regulation, and especially as successive Court decisions squeezed the States out of wholesale taxes (for example, over petrol and tobacco), forcing them to resort to retail or ‘nuisance’ taxes or seek Commonwealth compensation or a referral of taxation power, as in the case of payroll tax, now the States’ largest ‘own source’ of direct revenue. While it used to be fashionable to blame the ideological disposition of High Court Justices and the governments that appointed them for this centralising trend, it is now evident that many High Court decisions involved the bench basically recognising Australia’s increasingly national economy and its operation in a globalised, treaty-saturated, environment.¹⁷ However, the willingness of the Court to rule that some sections of the *Constitution*, for instance the external affairs and corporation powers, could be used by the Commonwealth to intervene in areas previously thought to be domain of the States, is less easy to explain. This pattern is rare in other federations. Indeed, it has created a *mélange* which the business community finds singularly frustrating and creates much uncertainty for investment decision-making. For example, the mining sector has faced considerable confusion regarding the Commonwealth’s powers over the environment and Indigenous affairs.

C Fiscal Federalism

Australia has progressively become the most fiscally centralised federation in the democratic world. This is mainly due to the dominance of the Commonwealth government in the field of income tax, surrendered by the States during World War II and, somewhat uncourageously, never reclaimed. The States could at any time re-enter the field of income tax, although they would have to do so

14 See Brian Galligan, *Politics of the High Court* (1987); Geoffrey Sawer, *Australian Federalism in the Courts* (1967).

15 (1920) 28 CLR 129 (‘Engineers’ Case’).

16 See, eg, *South Australia v Commonwealth* (1942) 65 CLR 373 (‘First Uniform Tax Case’); *Victoria v Commonwealth* (1957) 99 CLR 575 (‘Second Uniform Tax Case’); *Commonwealth v Tasmania* (1983) 158 CLR 1 (‘Tasmanian Dam Case’).

17 Australia is a signatory to over 350 active international treaties and has been associated with many more, a number of which have impacted on federal–State relations. See Kenneth Wiltshire, ‘The Federal Dimension’ in Philip Alston and Madelaine Chiam (eds), *Treaty-Making and Australia: globalisation versus sovereignty?* (1995) 74.

unanimously.¹⁸ The situation is also exacerbated by the fact that the main indirect taxes are also national ones, thanks to High Court interpretations – for example, the former sales tax, excise duties, and the GST (which is a Commonwealth tax despite being hypothecated to the States).

Measures of VFI have generally seen the national government collecting over three-quarters of all public revenue but responsible for only about half of all public expenditure. The States have, on average, received about half of all their income from transfers from the national government and half of that again has had conditions attached.¹⁹ The smaller the State or Territory the greater the dependence on national transfers. The situation is far worse for local governments which have become increasingly dependent on transfers, particularly from State governments. This creates significant issues for local governments because State governments routinely attach their own conditions to the bulk of their transfers. The situation is further complicated by the continual creation and amalgamation of local councils and the devolution of powers without accompanying fiscal compensation. Local government has also been the victim of cost-shifting by the States and, as a consequence, has become ever more reliant on property taxes, to the annoyance of business.

Australia's VFI has seriously distorted accountability in the federation, with each level of government often blaming the others for poor service delivery or fiscal mismanagement. When the government that spends is not the same as the government that taxes, a significant break occurs in sound public policy-making and accountability. A further consequence has been the proliferation of taxes; a 2007 study identified 56 taxes across the three levels of government, a figure which is now a target of lobbying by peak business groups.²⁰

D Executive Federalism

Since the first conference in 1920 of interstate police ministers to plan a Royal Visit, and the first specific purpose grant for roads from the Commonwealth government to the States in 1923, the intermingling of the levels of government has proliferated. It received a significant boost during and after the Great Depression when the so-called era of 'Co-operative Federalism' saw the establishment of many Ministerial Councils ('Mincos') based on the Australian Agricultural Council prototype.²¹ Each Minco comprised ministers with the same

18 This is because all Commonwealth taxes must be uniform – a requirement laid down in, inter alia, ss 51(ii) and 99 of the *Constitution*.

19 See Geoffrey Brennan, Bhajan Grewal and Russell Lloyd Mathews (eds), *The Economics of Federalism* (1980); Wilfred Prest and Russell Lloyd Mathews, *The Development of Australian Fiscal Federalism* (1980); Russell Lloyd Mathews *Federal Finance: Australian Fiscal Federalism from Federation to McMahan* (1997).

20 The results of the study, conducted by PricewaterhouseCoopers, are available in Business Council of Australia, *Tax Nation: Business Taxes and the Federal–State Divide* (2007) <<http://www.bca.com.au/Content/101017.aspx>> at 11 August 2008.

21 See Kenneth Wiltshire, *Administrative Federalism* (1977).

portfolios from the Commonwealth and all State and Territory governments, and occasionally New Zealand for good measure.

By the 1980s there were 43 such Mincos, presiding over approximately 350 intergovernmental agreements, and comprising about one-third of all Australian public expenditure. Many of these agreements had conditional grants attached, of which there came to be some 110 in total, though by 2008 this was reduced somewhat to 98. At the pinnacle of this pyramid stood the annual Premiers Conference (not mentioned in the *Constitution*) which later morphed into the Council of Australian Governments ('COAG'). The pattern was much the same in all these bodies – an annual charade was played out with the Commonwealth pretending to engage in consultation but at the end of the conference laying down its law because it controlled the purse strings. The Commonwealth could enforce its will because of the High Court's liberal interpretation of section 96 of the *Constitution*, no matter that this was never the use of the clause envisioned by the Founders. The most significant example is the Court's upholding of uniform taxation arrangements after World War II²² on the grounds that the Commonwealth could continue to give Taxation Reimbursement Grants (later termed Financial Assistance Grants) to the States on condition that they refrained from levying income taxes.

This was centralisation by stealth as the deliberations of all Mincos were usually secret. Indeed, for a very long period there was no central repository of all the Australian intergovernmental agreements kept by any government – national, State or Territory. Once again accountability was severely distorted; indeed, it is still unclear whether the Commonwealth Auditor-General and Ombudsman can investigate the policy-making decisions and behaviour of State government public servants, who are also not obliged to appear before committees of the Commonwealth Parliament. Many business organisations with strong links to State governments were amazed to discover that their protagonists were constantly trumped by Canberra. It mattered not which political parties were in power. This produced a mess of unaccountability, known in the literature as 'marble cake federalism',²³ but nobody could tell who had baked the cake or where the recipe was kept.

Interestingly, some studies²⁴ of executive federalism (sometimes called 'administrative federalism' given its 40 year evolution) have revealed the main purposes of these intergovernmental agreements, including:

- the achievement of national approaches to attain national priorities;
- the desire for uniformity;

22 *First Uniform Tax Case* (1942) 65 CLR 373; *Second Uniform Tax Case* (1957) 99 CLR 575.

23 A term coined by Morton Grodzins, *The American System: A New View of Government in the United States* (Daniel J Elazar, ed) (1966). See also Sawyer, *Modern Federalism*, above n 9.

Unlike the layer cake model with separate levels, the marble cake or organic federalism model sees the levels of government swirled throughout the texture of the federation.

24 Wiltshire, *Administrative Federalism*, above n 21.

- avoidance of overlapping and duplication in service provision;
- catering for mobility and portability;
- ensuring access to and equitable treatment by government programs;
- standardisation and complementarity;
- dissemination of information;
- promotion of research;
- pooling of resources especially to cope with national emergencies and disasters; and
- addressing the implications of globalisation.

The irony was that these agreements took the nation in the direction of uniformity and homogeneity when, as we have seen, the main advantage of having a federal system of government is its purported diversity.

V KEY HISTORICAL LANDMARKS

This Part of the paper is directed towards examining other important landmarks for business in the historical pageant of 20th century federalism.

A *White Paper on Full Employment*

The *White Paper on Full Employment*, issued in 1945 as a blueprint for post-War reconstruction, was the closest Australia has come to having a National Plan, especially for economic and social infrastructure. The Commonwealth had sought in vain to have the States refer some powers for the purposes of the War and post-War effort. The States, however, refused and a referendum on the issue went against the Commonwealth. Nevertheless, the Commonwealth still managed through legislation and funding to produce a fairly comprehensive national program which facilitated the regeneration of business and manufacturing.²⁵

B State Economic Strategies

In line with international trends, the late 1950s and 1960s saw all States establish deliberate strategies to encourage industrialisation and occasionally accompanying decentralisation to pursue the associated investment and employment multiplier effects. Development economists²⁶ had conveniently classified industry into three categories: resource-based, market-based, and footloose. The States pursued all three, but particularly the latter. If this meant

25 See, eg, Paul Hasluck, *The Government and the People, 1942–1945* (1970); D H Merry and G R Bruns, 'Full Employment: The British, Canadian and Australian White Papers' (1945) 21(2) *The Economic Record* 223; H C Coombs, 'The Economic Aftermath of War' in David A S Campbell (ed), *Postwar Reconstruction in Australia* (1944).

26 See, eg, Albert O Hirschman, *The Strategy of Economic Development* (1958).

poaching industries from other States then so be it. The range of State-based incentives included cheap Crown land, subsidised housing, payroll tax concessions, concessional rail freights, training deals, and State government preferential purchasing arrangements for local manufacturers. This also entailed States becoming aggressive players abroad through offices in many countries, thereby generating tension with the Commonwealth government's trade and immigration powers. (The States really have no constitutional powers in the domain of trade while immigration is at best a concurrent power.) Industry quickly learned this game, especially in the resources and commodities sectors, and so became economically and politically tied to State governments.

C Whitlam and Centralisation

The economic developments adverted to above partly explained the alignment of business with the States against many of the 1972–75 Whitlam Government's centralist incursions into arenas formerly considered the preserve of the States, including urban and regional policies, housing, transport and communications, sewage, environment, Indigenous affairs, education and health, and resources. Significant national funding in this period involved a sizeable infrastructure component from a Labor Government ideologically somewhat hostile to the private sector. Being very sympathetic to international treaties, the Whitlam Government posed a threat to the States on this score as well, and thus threatened to disturb relationships between State governments and business. Many of the Whitlam Government's national policy objectives were achieved through an escalation in the use of conditional funding to the States; this quickly came to represent half of all transfers, compared with approximately one-third in earlier periods.²⁷ The Government also engaged in direct funding to local government by circumventing the *Constitution* (hitherto unknown) and imposed a requirement that the allocation of certain funding provided to State governments had to be decided upon with the involvement of regional bodies and local governments.²⁸

Of course none of this was done in a clandestine manner. Whitlam had always been quite open about his disdain for the States and their so-called 'States' House', that is, the Senate. Indeed, it had been Labor Party policy for many decades to abolish the States and the Senate, and create a regional form of government (and a republic to boot). Ironically, in 1975, the year of Australia's greatest constitutional crisis, it was the Senate, effectively acting as a States'

27 See, eg. Russell Lloyd Mathews (ed), *Making Federalism Work* (1976); William Ronald Lane, 'Financial Relationships and Section 96' (1975) 34(1) *Australian Journal of Public Administration* 45.

28 This was largely accomplished by having each local government register as an entity under the Commonwealth legislation enabling the program.

House, that triggered the actions which saw the dismissal of the Whitlam Government.²⁹

The period between World War II and Malcolm Fraser's ascension to the role of Prime Minister is largely characterised, at least for present purposes, by the progressive shift in taxation powers from the States to the Commonwealth and the concomitant growth of conditional funding to the States. Business, therefore, rapidly became beholden to national rather than State politics, particularly prior to Prime Minister Gorton's bail-out of the States in 1970 through a \$1 billion debt write-off. This, in a sense, marks the beginning of the real frustration of Australian business with the federal system, as it was either caught in a tug of war between the levels of government, or increasingly subject to a policy mix where real responsibility was impossible to pin down. Business had become one key juicy ingredient in the omelette that Australian federalism had become, and did not know which chef to blame or lobby.

D New Federalism

Malcolm Fraser's New Federalism (1975–83) produced, for a while, greater certainty and comfort for the business sector, as it rolled back many of the aforementioned Whitlam Government initiatives, introduced a mild form of tax-sharing between the three levels of government, consulted the States on High Court appointments, involved local government more in intergovernmental forums, and, through its Advisory Council on Intergovernment Relations, produced certain useful criteria for the roles and responsibilities of the three levels of government.³⁰ Fraser was also hostile to multilateral international treaties meaning that State powers were not threatened from this direction – this also allowed business to rest somewhat more easily.

E The Hawke Era

Undoubtedly, the reform of federalism that has had the greatest impact on business in the nation's history was that of the Hawke Government. Elected in 1983 on a platform of consensus building, Bob Hawke is arguably the only Australian Prime Minister who has been equally comfortable in the boardrooms of big business as he was in those of the trade unions from whence he came. Moreover, a large proportion of his frontbench had considerable business experience, a first for a Labor government. Consequently, this period also marks the end of Australian business' ideological alignment with the Liberal–National Coalition, previously considered to be the only parties of free enterprise and de-

29 The Queensland Governor acting on the advice of the Premier issued writs for the Senate election in that State, as provided for in the *Constitution*, in a manner which created sufficient vacancies to prevent the Whitlam Government from obtaining a Senate majority at the ensuing election. This gave the Opposition control of the Senate which led to the dismissal of the Whitlam Government by the Governor-General.

30 Australian Advisory Council for Intergovernment Relations, *Towards Adaptive Federalism* (Information Paper No 9, 1987).

concentration of power. From Hawke's time on, Labor has gained increased credibility with the private sector and business community, albeit with lingering suspicion of Labor's continued links with the trade unions and continuous spats with Labor governments over industrial relations and workplace policies.

In the early period of the Hawke Government, the emphasis was on macroeconomic reform and achieving international competitiveness for the Australian economy, with accompanying reform of the Commonwealth. However, before long the reform drive led to microeconomic reform. This in turn logically led to federal-State relations because it was the States that controlled a significant proportion of infrastructure provision, and because their service delivery in many of the sectors impacting on business was uneven and incompatible across the nation. Australian businesses could not become more export-oriented and internationally competitive while their input cost structures were inflated by the operation of inefficient State government activities, for example, in the areas of energy, transport, education and training.

With no national or State elections in sight for an 18 month period, and all governments bar that of NSW being Labor (and NSW Premier Nick Greiner being very sympathetic to rationalist reforms), a window of opportunity was presented to achieve radical change. A series of Special Premiers' Conferences (present-day COAG) took place. Hailed by all governments as cooperative federalism, the rubric was now that when a policy was deemed to be 'national' this no longer simply meant 'Commonwealth government'; rather, it meant 'partnership with the States'. COAG worked to reform federal arrangements based on four principles:

- The Australian Nation principle: All governments in Australia recognize the social, political, and economic imperatives of nationhood and will work cooperatively to ensure that national issues are resolved in the interests of Australia as a whole.
- The Subsidiarity principle: Responsibilities for regulation and for allocation of public goods and services should be devolved to the maximum extent possible consistent with the national interest, so that government is accessible and accountable to those affected by its decisions.
- The Structural Efficiency principle: Increased competitiveness and flexibility of the Australian economy require structural reform in the public sector to complement private sector reform; inefficient commonwealth-state divisions of functions can no longer be tolerated.
- The Accountability principle: The structure of intergovernmental arrangements should promote democratic accountability and the transparency of government to the electorate.³¹

Possibly the single most important conceptual contribution of the new approach was to refocus the debate concerning allocation of powers in the federation from functions to roles. This was identified as a key element for reform in a paper prepared by the Economic Planning Advisory Council, itself a

31 Kenneth Wiltshire, 'Australia's New Federalism: Recipes for Marble Cakes' (1992) 22(3) *Publius: The Journal of Federalism* 165, 174. This paper provides a useful account of Hawke's New Federalism.

creation of this era.³² Drawing on successful experiences in modern federations like that of Germany, it was argued that the old style coordinate or layer cake federalism could no longer apply, because in so many functions of government there was now not one, but two, and often three, levels of government involved. Therefore, the challenge was to accept this milieu. Rather than trying to unravel the *discrete* functions, it was necessary to identify more clearly the roles and responsibilities which each level would play in the *shared* functions. From this time on there was a discernible increase in the use of the term ‘roles and responsibilities’ in debate about federalism reform.

The era is probably best remembered for the *National Competition Policy* report (‘Hilmer Report’), which demonstrated that significant financial benefits lay in the introduction of open competition into the Australian economy.³³ This led directly to the subsequent National Competition Policy (‘NCP’), which transformed the economic landscape across the nation. It created an almost level playing field between public and private sectors and saw State government business undertakings, usually conducted through government-owned corporations, subject to private sector style efficiency performance benchmarks. It also shifted the focus of regulation and deregulation markedly from State to national level. Some subsequent commentary on NCP has portrayed it as a policy initiative foisted on the State and local governments whereupon they were forced to meet benchmarks set by the national government or lose their share of the productivity dividend being attained. However, it is important to remember that the Hilmer Report had been commissioned by COAG, and NCP had also had the full endorsement of COAG, which comprised all States and Territories, and representatives from local government.

Other outcomes from Hawke’s New Federalism which had significant effects for business include the achievement of mutual recognition of professional and trade qualifications (based on the European Union model); the establishment of the eastern seaboard electricity grid; national standards in food labelling; a national rail freight corporation; uniform road regulations and user pays principles for charging; national performance monitoring of government trading enterprises accompanied by national accounting standards including standards for asset valuation as well as other issues such as borrowing arrangements, taxation and competition policy; a uniform State-based system of prudential supervision for non-bank financial institutions; an intergovernmental agreement setting out roles and responsibilities of all governments across a range of environmental management issues; and ongoing review of duplication of services in many government functions with an emphasis on health, welfare and vocational education and training. Subsequently, the Australian National Training Authority (‘ANTA’) was established as a cooperative federalism body through

32 Economic Planning Advisory Council, *Towards a More Cooperative Federalism* (Discussion Paper No 90/04, 1990).

33 Independent Committee of Inquiry into National Competition Policy in Australia, *National Competition Policy* (1993).

complementary Commonwealth and State legislation (it was subsequently abolished by the Howard Government).³⁴

Following these successful reforms in areas of expenditure, Hawke was willing to consider some form of tax-sharing arrangement with the States. This became part of the cause of his downfall at the hands of Paul Keating, who was never enthusiastic about most of the New Federalism agenda and no lover of the States.³⁵ Hence, the opportunity to continue the federalism reform process so as to embrace intergovernmental revenue sharing, which would have addressed VFI and restored a degree of sovereignty to the States, was lost.

F The Howard Era

The Howard Government (1996–2007) will probably be best remembered for its tax reforms, including the introduction of a 10 per cent GST. After considerable difficulty getting the reforms through the Senate the final package of reforms ushering in the GST also included a reduction in personal income tax, a reduction in company tax (largely in line with the recommendations of the 1999 *Review of Business Taxation* ('Ralph Report')), and abolition of the sales tax. In a complete surprise the Government decided to give the proceeds of the GST to the States and Territories in lieu of their former Financial Assistance Grants, though this was subject to the condition that the States abolish, over a five year period, nine of their minor 'nuisance' taxes, primarily those concerning property transactions and licenses. The revenue from the GST would be distributed amongst the States and Territories according to the recommendations of the Commonwealth Grants Commission, but a guarantee was given that no State would receive less than would have been the case under the old system. Most interestingly, the rate and base of the GST could not be changed without the unanimous agreement of the Commonwealth and all States and Territories (a measure designed to assuage concerns over the potential for the tax rate to increase, as had occurred with value added taxes in other nations).³⁶

The Howard Government's approach to federalism surprised many observers because of its profoundly centralist nature, given that the Coalition, especially the Liberal Party, had been born and bred on a diet of State's rights. It is tempting to explain this by the fact that all of the States and Territories were governed by Labor for almost all of the period from 1996–2007, but this is only part of the explanation. Howard and his long-serving Treasurer, Peter Costello, pursued a

34 ANTA had a Ministerial Council made up of all training ministers from all jurisdictions and a working group of CEOs of all training departments of the Commonwealth and States. The Commonwealth provided only one-third of all training funding but used this leverage to achieve its aims in subsequent renewals of the intergovernmental training agreements.

35 Paul Keating accused Bob Hawke of selling out the Labor movement by weakening the national government's capacity to redistribute income and wealth along traditional Labor principles.

36 *A New Tax System (Goods and Services Tax) Act 1999* (Cth) s 1.3; *A New Tax System (Commonwealth–State Financial Arrangements) Act 1999* (Cth). Value added taxes are shared between levels of government in some federations but in no other federation is the tax completely hypothecated to the sub-national level.

different kind of economic reform agenda, one in which it was held to be essential for the Commonwealth Government to be dominant, with the States predominantly as service deliverers rather than full policy partners. Consequently, COAG lost its punch and much of its relevance in this period.

Under Prime Minister Howard the Coalition pursued a centralising approach through a number of avenues, including:

- use of the s 51(xx) corporations power to override State powers, most famously in the area of industrial relations;³⁷
- (increasingly) conditional funding to the States;
- simple overriding of States and Territories in a number of policy initiatives, the clearest example being the 2007 intervention into Indigenous affairs in the Northern Territory;
- by-passing States and Territories, for example, through the establishment of Australian Technical Colleges as Commonwealth government entities receiving direct Commonwealth funding;
- contracting out of Commonwealth services on a competitive basis whereby State and Territory governments would not have preferential bidding rights; and
- direct appeals to citizens and parents to embrace national performance standards and reporting/accountability measures, which would then be forced upon the States and Territories, for example, in school education.

The public and media generally applauded the Howard Government's moves because they promised uniformity, portability, accessibility, rising standards of government services, more choice, and better reporting leading to greater accountability. School education was the prime example. Howard often stated words to the effect that the person on the Bondi bus did not care which level of government was theoretically responsible for a service, as long as it was effectively and appropriately delivered.

By and large, business and industry also welcomed the Howard Government's measures in the field of intergovernmental relations, partly because of the national approach to issues of ongoing concern to the business community, but also because of the general feeling that the States and Territories had been incompetent with respect to the delivery of basic infrastructure and the provision of utilities. The business community had long expressed concern over clogged ports, dysfunctional infrastructure, lax regulation of non-bank financial institutions, regressive and burdensome State taxation regimes (despite the bonanza for the States from the GST), long hospital waiting lists, sub-standard

37 See the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) and the High Court's subsequent validation of the legislation in *New South Wales v Commonwealth* (2006) 229 CLR 1 ('*Work Choices*'). It is notable that the dissentients in *Work Choices*, Kirby and Callinan JJ, relied strongly on considerations of the federal balance and States' rights in rejecting the validity of the impugned laws.

literacy and numeracy in schools, and politically correct school-based curricula. Consequently, when Treasurer Costello flagged that the Commonwealth was considering taking over ports and other major aspects of infrastructure-delivery from the States, together with the dimensions of financial regulation residing with the States, he received warm support from the business sector.

VI CHANGING THE PUBLIC–PRIVATE MIX

The modern international era of privatisation began with the Thatcher Government in the United Kingdom in 1979, but was slow to take hold in Australia predominantly because, for most of the 1980s and early 1990s, Australia had Labor governments at the national and State level and Labor was, for the most part, ideologically opposed to selling public sector assets. NSW, under the Coalition Greiner Government, did engage in some selected sales, and a considerable degree of corporatisation. The Hawke Cabinet and many in the right wing of the Labor Party had wanted to privatise nationally but successive national Labor Party conferences saw a combination of unions, left-wing politicians, and other delegates with sufficient numbers to block such moves doing so. While a couple of exceptions did slip through, for example, the privatisation of the Commonwealth Bank of Australia,³⁸ by and large, the most that the Hawke Government could do was to corporatise the 12 major Commonwealth Government Business Enterprises³⁹ which, of course, made them ripe for privatisation when the Howard-led Liberal–National Coalition won the 1996 federal election.

At the State level, both privatisation and corporatisation were hindered by federalism because to sell or even corporatise a State asset was to make it subject to Commonwealth taxation. This was due to the fact that any such asset becomes, upon attaining corporate form, subject to company taxes, which are collected by the Commonwealth. Hence, the State government would lose its internal dividend stream from the enterprise and also see the national government reap the benefit. This could be overcome to some extent if the Commonwealth compensated the State in question for the revenue foregone – there was, however, no guarantee of this happening. Moreover, it would prevent the familiar clandestine political interference with State government enterprises in terms of their politicisation and the raiding of their dividends to prop up State government budgets, a familiar practice in Australian history despite the well-established principle that such enterprises are supposed to be run at ‘arm’s length’ from the government. The latter part of the 20th century saw, and the early part of the 21st century has seen, a considerable amount of privatisation, particularly at the

38 The Labor Party only agreed to sell the Commonwealth Bank so that it would have the capital to rescue the State Bank of Victoria and so try to save the Victorian Labor Government from an election loss. The privatisation and merger of the banks went ahead but Labor lost the Victorian election.

39 These enterprises were in crucial sectors including airports, shipping railways, post and telecommunications.

national level, but also in some States. This has been particularly apparent in the energy and transport infrastructure sectors and in relation to utilities such as water. Corporatisation also proceeded apace with former public enterprises run under separate legislation; previously tight government ownership was also converted to arrangements whereby corporations operated under company law, making them subject to all of the transparency and economic imperatives which that entails.

This period also saw the gradual introduction amongst the larger States of public–private partnerships ('PPPs') for the purpose of economic and social infrastructure provision. The smaller States and Territories found it hard to get started in this domain because private sector bidders demanded a minimum critical mass of worth of projects to make the exercise viable.⁴⁰ Following the United Kingdom's adoption of the Private Finance Initiative ('PFI') there followed in Australia a wave of other forms of alliances and partnerships between the public and private sectors, for example, build–own–operate ('BOO') and build–own–operate–transfer ('BOOT') schemes. However, some Labor-governed States remained suspicious of the new relationships with the private sector – unions have never been in favour. Meanwhile, straight outsourcing or contracting-out of government services also gathered momentum, with mixed results, since many departments lost their corporate memory and ability to manage such contracts as enterprising public servants left to take up the new opportunities on the other side of the contract divide. This was also the period of 'Reinventing Government' or New Public Management ('NPM'),⁴¹ in which the Commonwealth and most State and Territory public services adopted many private sector concepts and approaches regarding risk-taking and entrepreneurialism, client services, steering rather than rowing, and injecting competition into their service delivery through splits between funder, purchaser and provider. For the Commonwealth this was a logical continuation of its highly successful Financial Management Improvement Program ('FMIP'), introduced in the Hawke years and copied by several States. Under this scheme private sector approaches such as program budgeting, accrual accounting, output and outcome performance management, and efficiency auditing were introduced. Thus, to a limited extent, public servants discovered market-based concepts and practices. At any event, this period saw a fundamental shift in the mix between the public and private sectors in Australian infrastructure provision. The classical distinction between a public and private good began to be watered down. Something similar happened in recurrent expenditure too, particularly in health and school education where growth in private health and schooling grew significantly, largely because of intense citizen dissatisfaction with sub-standard

40 The only way a small State or Territory could overcome this problem was to bundle a number of projects together for one tender. To this day, though, they are disadvantaged in this arena which has become crucial for infrastructure development.

41 See David Osborne and Ted Gaebler, *Reinventing Government* (1993); Ewan Ferlie et al, *The New Public Management in Action* (1996).

State government public hospitals and schools. The States blamed poor Commonwealth government funding for this malaise but public opinion, as expressed by successive opinion polls and certain election debates, suggested the contrary.

This period saw the State governments come under severe pressure from the electorate, particularly the business community, for their poor planning and management of infrastructure and basic services. Somewhat desperately, those State governments which had formerly been hostile to the market-based concepts involved in engagement with the private sector, took them on board if only to relieve pressure on their budgets which were often under strain during this period. This budget strain was often of their own making as they eschewed borrowing, fearing that this would jeopardise their credit ratings, objects of almost religious worship since the 1980s – it was, one might say, ‘Government by Moody’s’.⁴²

Thus, to the pleasure of the business community, Australia began a fundamental shift away from its heavy reliance on the public sector for the provision of capital and recurrent services. This occurred even in remote areas where the use of the Community Service Obligation⁴³ could now see the private sector handling much of this activity, even though this would give rise to much debate and controversy as to standards of service. In Australia’s remote areas, such as much of the Northern Territory, the delivery of vital functions depends more on the visible hand of the public service than the invisible hand of the market. Such delivery was supposedly watched over more vigilantly by regulators. Indeed, this was also the era in which regulators, both national and State, supplemented their increased prominence under NCP, albeit with mixed results and performances across the nation.⁴⁴ It was the States who were largely being blamed during the 20th century for clogged and inefficient infrastructure, for example in relation to ports, roads, energy, and water, because of a lack of foresight and under-funding, and often because of the inadequacy and economic insensitivity of their regulatory regimes. Business and citizens looked to the Commonwealth to step in and address these crises, whether by carrot or stick.

This gradual overall shift from the public to the private sector, and the adoption by most Australian governments of an increasing array of private sector management concepts and approaches, produced a concomitant demand for clearer government performance measures. This was especially so in the areas of service delivery and taxation. Since the measurement of public sector performance is a fraught exercise at the best of times, and not conducive to the application of absolute yardsticks, attention turned to available sources of

42 The credit rating of a State government, apart from determining the interest it will pay on borrowings, has taken over from unemployment or inflation as an indicator of political performance. This has made the States frightened to borrow because of the possibility that their indebtedness may affect their credit rating.

43 Community Service Obligations in Australia are predominantly for subsidisation of service delivery to remote and regional areas.

44 Task Force on Reducing Regulatory Burden on Business, *Rethinking Regulation* (2006) (‘Banks Report’).

comparative data by which to compare the performance of the State jurisdictions. It was in this context that three Australian institutions came increasingly into the spotlight.

VII THE ROLE OF THE THREE SENTINELS

There are three major national bodies in Australia which provide periodic snapshots of the comparative performance of all governments, particularly State and Territory governments. They are the Australian Bureau of Statistics ('ABS'), the Commonwealth Grants Commission ('CGC'), and the Productivity Commission.

The role of the ABS has become progressively weaker in the intergovernmental domain, partly because successive national governments have cut its budget, but also because of its unwillingness to confront the States in the necessary manner to ensure that its public finance collection remains at a detailed and high standard in conformity with international specifications. The result is that the ABS' public finance collections are a pale imitation of its former proud record, and singularly inadequate for proper analysis. (This outcome is somewhat ironic given that the ABS was the creation of one of Australia's intergovernmental agreements in the 1950's.⁴⁵)

The CGC, so often the target of misplaced criticism from those who do not properly understand its objectives and methodology, is only concerned with equalisation of inputs to governments, not outputs – it is completely policy neutral and non-judgmental. The standards it constructs are internal, not external; that is, they average State performance. They are not any kind of imposed external performance measures, as claimed by some commentators. The CGC is only concerned with capacity equalisation not performance equalisation, based on what States actually do, not what they 'should' do.

The CGC operates on principles which are poorly understood by most of the business community, much of whom are misled and inflamed by persistent State government complaints over their respective shares of the GST, mainly emanating from NSW and Victoria. Misguided and ill-informed reports from academic consultants to these governments are also not helpful. The *Review of Commonwealth–State Funding* prepared by economists Ross Garnaut and Vince Fitzgerald for the governments of NSW, Victoria and Western Australia was a particular example of a perceptive analysis of the issue of VFI in the federation, but demonstrated a lack of understanding of the true operations of the Australian HFE process.⁴⁶ The CGC is partly responsible for this reaction because it adopts such a low profile that it is almost invisible, secludes its staff in monastic conditions detached from the public sector fraternity, and makes almost no public effort to explain its rationale and methodology which, it has to be admitted, are complex and could be simplified. There has never been even a slim brochure

45 See *Statistics (Arrangements with States) Act 1956* (Cth).

46 Ross Garnaut and Vince Fitzgerald, *Review of Commonwealth–State Funding: Final Report* (2002).

from the CGC explaining the system, which is regarded as the most sophisticated, though most complex, HFE approach of any federation, and is the subject of constant international attention from a parade of officials from other countries coming to learn about the concept and its application.

Thus it has fallen to the Productivity Commission to be the key beacon of light on performance of the federal–State arrangements. Objective and rationalist in its approach, it does this primarily through its periodic comparison of the outputs and outcomes of State and Territory governments in their key functions. It also has provided very insightful analysis of public trading undertakings, which are often not a pretty sight in terms of their economic performance. Its other work has also been extremely useful for assessing State and Territory performance and the need for reform – for example, the insightful work in the Banks Report.⁴⁷ The Productivity Commission Chairman, Gary Banks, has also criticised the wastefulness of competitive federalism, which was largely responsible for State governments, with the exception of Queensland, signing non-poaching of industry agreements.⁴⁸

In 2005 the Productivity Commission convened a major symposium on ‘Productive Reform in a Federal System’,⁴⁹ which involved industry input and generated a number of examples of how the federal system was adversely impacting business. The key topics canvassed at that symposium included the institutional frameworks of federalism, health, the labour market, freight, transport, and productivity. The recurring themes throughout the presentations included the advantages and disadvantages of competitive federalism, with participants agreeing that the wasteful disadvantages outweighed the theoretical advantages. The Secretary of the Commonwealth Treasury, Ken Henry, went so far as to suggest that Australian federalism had been characterised by both cooperative federalism and competitive federalism but that it was the latter that had been dominant, to the detriment of the national economy.⁵⁰ Regulation was a theme recurring in many presentations dealing with various sectors but, although the desirability of uniform regulations seemed generally accepted, there were disagreements as to whether regulation could ever be as ‘simple’ as that desired by business.

Another concern of most participants at the symposium was the lack of a true common market in Australia which, it was said, poses a serious economic hindrance because of the need for industry to meet differing standards of regulation and conform to differing legislative frameworks throughout various State jurisdictions. Again, it was Henry who put this most forcefully, stating that Australia did not have a national common labour market, nor national markets in electricity, water, and land transport, thus creating significant obstacles to the

47 Banks Report, above n 44.

48 Gary Banks, ‘Competition and the Public Interest’ (Speech delivered at the National Competition Council Workshop, *The Public Interest Test Under National Competition Policy*, Melbourne, 12 July 2001).

49 See Productivity Commission, *Productive Reform in a Federal System: Roundtable Proceedings* (2006).

50 Ken Henry, ‘Time to “Get Real” on National Productivity Reform’ in Productivity Commission, *Productive Reform in a Federal System: Roundtable Proceedings* (2006).

achievement of greater productivity and hindering the economy in an era of globalisation. He observed that the sections in the *Constitution* (in particular section 92 and the powers concerning uniformity of policy in section 51) which the Founders included in an attempt to ensure a common uniform market, had not been sufficient. Moreover, the courts and legislatures had not taken positive action to interpret these sections proactively or realise that, in themselves, they were not adequate and had indeed been interpreted differently in different jurisdictions:

These various constitutional prohibitions fall well short of ensuring nationally uniform laws affecting economic activity – except in narrowly defined areas.

More generally, none of the *Constitution*'s so-called 'common market' provisions compels the States to do anything at all to facilitate the development of national markets in anything – no good, no service, whether a business input or a household purchase.⁵¹

The basic causes of this malaise, he believed, could be found in geography, competitive federalism, and the way politicians at all levels refused to truly engage markets: 'The two biggest threats to economic reform in Australia are an aversion to the logic of markets and stubborn parochialism. Neither of these threats is new.'⁵²

Business has been well served by the Productivity Commission and has often made good use of its findings in arguing for reform of federal–State arrangements. The same cannot be said of State and Territory Parliaments. Since all three of these bodies – the ABS, CGC and Productivity Commission – can only analyse and recommend, it falls to the political system to take up their findings and turn them into good public policy. However, the venues where one would most expect to find this happening, State Parliaments, are moribund on this score. Provided with a wealth of condemnatory comparative data on their State or Territory's performance, the Parliaments (and particularly opposition parties) too often do nothing, to the frustration of the business community, especially those enterprises that are mainly or solely located in a jurisdiction that is performing comparatively poorly. This is a major defect in the functioning of the Australian democratic process and it weakens the very sinews of Australian federalism. It also augments the arguments of those who argue for the abolition of the States.

VIII ENTER THE RUDD GOVERNMENT

Labor's platform for the 2007 national election was largely a mix of promises that copied those of the Coalition, along with a series of dot points in other fields which could not really be called policies. The latter was certainly true of the platform on federalism, despite the appointment before the campaign began of a

51 Ibid 340.

52 Ibid 341.

panel of experts for advice, reporting to the Shadow Minister for Federal–State Relations, Bob McMullan.

Once in government no federalism principles were espoused, not even the Hawke Government's four pillars policy, which Rudd had helped to draft in an earlier bureaucratic life. The States were described as 'service providers' by Rudd and his Minister for Finance and Deregulation who, in his maiden speech to Parliament, had called for the abolition of the States. The key rhetoric of the campaign was to end the so-called 'blame game' between the levels of government; this was based on the dubious assumption that this could easily be achieved because all of Australia's governments would be Labor. (Australian history certainly proves that having the same party in power at different levels can never guarantee cooperation and harmony in intergovernmental relations.) Moreover, Rudd's stance was contradictory, on the one hand promising to reduce the number of conditions on Commonwealth funding, but in the same breath threatening to take over functions from the States and Territories if they did not perform, particularly in relation to hospitals. As was becoming customary in Australian politics, business hedged its bets in the election campaign but welcomed the prospect of any greater harmony in intergovernmental relations.

It was not long after the election that COAG was summoned and a plethora of working parties, comprising national and State ministers and officials, were established to review federal arrangements, ostensibly with a view to reducing overlap and duplication and achieving nationally cohesive approaches. Astoundingly, two more Mincos were eventually created in the areas of Ageing and Trade. Significant confusion reigned when it was stated by COAG that the achievement of such national approaches might occur in different ways in different areas, including template legislation, cooperative pledges of some kind, complementary legislation with some opting out allowed, and occasionally transfers of power to the national government. This applied in such fields as industrial relations, occupational health and safety, workers compensation, uranium mining, and the diffuse and confusing methods which were outlined for achieving a national school curriculum.

The matter of conditional funding was reasonably quickly addressed by an agreement to broadband the more than 90 specific purpose payments ('SPPs') into a smaller bundle and reduce the onerous burdens contained therein, but no further detail has emerged.⁵³

The comprehensive Human Capital Reform agenda, previously proposed to the Howard Government by the States and Territories at the behest of Victoria, (and seen as a natural flow-on from the capital expenditure emphasis of NCP) was revived. It covered such fields as health, education, skills, and workplace safety. However, its modalities were flawed from a federalism perspective because they would sacrifice the sovereignty of the States and Territories and

53 Council of Australian Governments, *Communiqué*, 26 March 2008
<http://www.coag.gov.au/coag_meeting_outcomes/2008-03-26/docs/communique20080326.pdf> at 12 August 2008.

subject them to performance benchmarks which would be set and policed by the Commonwealth; this would also involve an ambiguous role for a new Federalism Reform Council. This would also discriminate against the smaller States and Territories who do not have the capacity to launch the same bids as larger and richer States. This was yet another example of the way in which NSW and Victoria have persistently refused to accept that HFE is part of the price of nationhood. Nor have they recognised that the smaller States often prop up Sydney and Melbourne through export earnings, tariff policy, and the fact that many company headquarters are taxed in Sydney and Melbourne in spite of the fact that the income involved is earned in other jurisdictions. It is also the case that monetary policy (applied uniformly across Australia) is primarily based on economic conditions in Sydney and Melbourne which do not always apply elsewhere.

Whether Rudd's process-ridden federalism was an antbed or a beehive of activity depends on the perception of the commentator; however, it appears that little has changed in terms of who is calling the shots. Prime Minister Rudd made it plain that the main role he saw for the States is to implement his election platform. Over subsequent COAG meetings in 2008 the 'blame game' was only resolved by very significant grants of money to those States and Territories who complained or threatened to scupper any national approach – examples include water funding for the Murray–Darling, hospitals funding, and funding for computers in schools.⁵⁴ A number of side-deals were also done with particular States on specific programs. Some States, whilst agreeing to participate in particular areas, reserved the right to opt-out of aspects of the arrangements, as with occupational health and safety and industrial relations. Ironically, COAG did deliver on former Treasurer Costello's dream of a national takeover of the remaining financial services regulation. When Rudd announced a review of Australia's tax system, to be chaired by the Commonwealth Secretary of the Treasury Ken Henry, but then excluded the GST from the review, most business commentators and the business media saw this as opportunism and irrational policy-making designed to mollify the States and bolster the rhetoric of cooperative federalism.

The current Labor Government's new federalism saw divided opinion amongst the business world and the business media. Some were skeptical, others hopeful. To the skeptics the continuous COAG meetings seemed like a series of opportunities for 'spinfests', even by mid-2008 when the States finally agreed to abolish the remaining State and Territory nuisance taxes, to cede powers over financial regulation to the Commonwealth, and to make uniform a raft of other business regulations. The business sector applauded these moves and hoped they were a portent of things to come. By mid-2008 the Government had begun to set up its new body, Infrastructure Australia,⁵⁵ with a sizeable cache of funding, although it was not clear whether it would take a truly national approach to

54 Ibid.

55 See *Infrastructure Australia Act 2008* (Cth).

project funding as business had called for, or whether the old parochialism would prevail. When various States started immediately putting in bids the signs were not hopeful – it seemed like the Loan Council revisited because, according to the mandated State bidding process, funding would be allocated on a regional or spatial basis rather than according to national economic priorities.

The largest challenge facing the Commonwealth Government in 2008 has been climate change and its associated policy ramifications. Following the release of the Garnaut Climate Change Review *Draft Report* in mid-2008, which outlined a draft model for a national emissions trading scheme, many States and Territories, particularly NSW (which launched a scathing attack on the *Draft Report*), joined a lineup of business groups arguing for exemptions, special consideration, or compensation for particular industries, regions, consumers, or sectors.

In 2008 the Rudd Government also convened the Australia 2020 Summit, with some 1000 handpicked persons in attendance. There was significant criticism of the logistics of the Summit from observers and also attendees; these criticisms related to perceived bias in the selection of delegates and alleged engineering of the Summit's findings, which did not always match the actual discussions.⁵⁶ Some of the topics covered related directly to federalism and some of the ideas suggested by business representatives and others had ramifications for business as with taxation, regulation, innovation, and education and training.

IX THE SPECIAL CASE OF THE BCA

In the twilight of the 20th century and the sunrise of the 21st century, several Australian peak business organisations and think tanks have given considerable thought to the reform of the federation, producing substantial research reports on the topic. Prominent among these have been the BCA, the Australian Industry Group ('AIG'), the Australian Chamber of Commerce and Industry ('ACCI'), and the Committee for Economic Development of Australia ('CEDA').

The main sustained effort has come from the BCA, which represents the top 100 business organisations in Australia. It could, of course, be validly argued that the BCA is not necessarily representative of all business opinion in Australia, especially small/medium enterprises ('SMEs') and rural business; it is, however, a useful indicator of business attitudes to federalism and has conducted considerable research on the subject and produced a number of influential reports. It has also been engaged by governments in consultations over reforms to public policy, even if its advice has not always been heeded.

There can be no doubt about what the main preoccupations of the BCA have been with respect to the federal system. The themes which it has persistently revisited, with especial vigor of late, include industrial relations, regulation, business taxation, infrastructure, and reform of the institutions of federalism.

56 See Commonwealth, *Australia 2020 Summit Final Report* (2008) 350
<http://www.australia2020.gov.au/final_report/index.cfm> at 3 August 2008.

The BCA view on industrial relations has the federal dimension as a part of its more general policy thrust – flexibility and balance. However, it has been a strong advocate of a national approach rather than State-by-State fragmentation, which it argues is a major (and costly) impediment to national efficiency. The BCA welcomed the High Court’s validation of the Howard Government’s *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) largely because it would transfer power to the national government and hence remove inconsistencies between State laws. It did not go unnoticed that successive Labor governments in Victoria had not chosen to reverse the referral of industrial relations effected by the former Kennett Government.

On regulation (or perhaps more aptly, *deregulation*), the BCA, along with partner business groups, embraced the findings of the Banks Report in 2006,⁵⁷ especially its checklist that governments ought to follow before introducing regulatory regimes. The BCA also applauded COAG’s initial agenda to harmonise regulations and make them nationally consistent, but has since castigated the States for failing to honour these commitments. Indeed, the BCA runs a progressive scorecard assessing every State and Territory on its regulatory reform performance; in 2007 it identified a ‘red-tape blowout’, with the growth of regulation increasing at three times the rate of Australia’s economic growth. The goals which are constantly espoused by the BCA in this domain are ‘a seamless economy’, ‘one set of rules for business’, ‘national consistency’, and ‘reduction of overlap and duplication’. In a major paper on the topic in March 2008 the BCA called on COAG to:

- Complete the implementation of a seamless economy for business regulation by 2010.
- As an immediate priority, complete harmonisation of the already identified ten COAG hotspots by the end of 2009, with remaining business regulations to be harmonised by 2010.
- Implement processes to maintain a seamless economy in the future.⁵⁸

On business taxation the BCA and the Corporate Tax Association (‘CTA’) launched, in April 2007, a scathing report entitled *Tax Nation: Business Taxes and the Federal–State Divide* (‘Tax Report’)⁵⁹ which identified problems with the current system of business taxation arising from the division between the federal and State tax systems. The primary impact of the Tax Report derived from the fact that it included a comprehensive survey by PricewaterhouseCoopers of the number, type, and total amount of taxes paid by nearly 100 of Australia’s largest companies. The survey located 56 taxes on business which applied across the three levels of government in Australia, a previously unknown statistic which stunned business, government, the media and

57 Banks Report, above n 44.

58 Business Council of Australia, *Towards a Seamless Economy: Modernising the Regulation of Australian Business* (2008) 4 <<http://www.bca.com.au/Content/101371.aspx>> at 12 August 2008.

59 Business Council of Australia, *Tax Nation: Business Taxes and the Federal–State Divide* (2007) <<http://www.bca.com.au/Content/101017.aspx>> at 12 August 2008.

academics alike. These comprised 21 federal taxes, 33 State and Territory taxes, and two local government taxes.

The Tax Report stated quite firmly that the States had not honoured their pledge to reduce taxes following the Ralph Report and the introduction of the GST. Indeed, the number of taxes had grown. According to the BCA and CTA, the 'results confirm business concerns about weaknesses and limitations in current tax arrangements'⁶⁰ and confirm that conflicting roles between tiers of government act as a significant drag on business and the economy.⁶¹ The Tax Report called for a comprehensive review of the tax system by the Productivity Commission to shake up federal–State relations and harmonise and eliminate inconsistencies between tax regimes.⁶²

In 2007 the BCA released *Infrastructure: Road Map for Reform* ('Sims Report')⁶³ in which it was said that

Australia's infrastructure, including ports, road and rail transport systems, water, energy and accessible fast broadband, are the building blocks for future growth. But our economy has expanded beyond the capacity of key infrastructure. As a result Australia continues to be at the crossroads in terms of addressing current infrastructure need and developing sufficient infrastructure capacity to meet future growth.⁶⁴

The problems and barriers which had resulted in Australia's infrastructure-constrained economy were said to be poor governance and planning arrangements, along with poor policy choices. The previously piecemeal approach required urgent attention in the following ways:

- The development of fully operational national markets for transport (freight and passenger), water and electricity.
- The elimination of regulatory impediments to investment in, and efficiency of, the provision of electricity, urban and freight transport including ports, and water.
- The establishment of a cross-jurisdictional framework for appropriate, timely, and coordinated investment in infrastructure to meet future growth (this should include prioritised road and rail investment in line with freight and population growth projections).
- A focus on the development of a quality broadband system with comprehensive access for business and households.
- Regular and transparent audits of the state of current infrastructure and risks.
- The development of a national approach to policies related to climate change.⁶⁵

The Sims Report outlined some particularly useful 'Foundation Strategies for Australia's Infrastructure' which had provided the basis for the BCA position.

60 Ibid ii.

61 Ibid 1–3.

62 Ibid 20.

63 Business Council of Australia, *Infrastructure: Road Map for Reform* (2007) <<http://www.bca.com.au/Content/101167.aspx>> at 12 August 2008.

64 Ibid ii.

65 Ibid.

They encompassed national, not State-based, infrastructure markets with market-based price signals; forward-looking public investment processes integrated across governments and prioritised on benefit/cost ratios; effective competition in all contestable (non-network) market segments; private ownership as the preferred model in all contestable market segments; and regulation of infrastructure that does not discourage investment seeking to meet expected demand. The Sims Report saw COAG as the main enabler of this strategy and the Productivity Commission as providing its review mechanism through two year audits.

Amongst Australia's main interest groups, the BCA has also played a prominent role in suggesting reform of the very institutions of the federation. This began in 2006 with *Modernising the Australian Federation: A Discussion Paper* ('Federation Paper').⁶⁶ It canvassed some of the main classic advantages of federalism, but quickly concluded:

Just because there are theoretical advantages with the federal system however does not mean these potential benefits are actually captured. More important, even where these benefits do exist, they must outweigh any costs arising from weaknesses or flaws in the federal system, if that system is to be a net benefit to the people it serves.⁶⁷

Australia's federal system was exacerbating the costs, the Federation Paper claimed, because of the high degree of shared functions, the strong centralising trend in Australian political and economic history, and the high degree of VFI in Australian economics. The other major problem was the political and legal difficulty of changing the *Constitution*. The Federation Paper suggested three steps towards modernising the federation: first, the establishment of an effective vehicle for better collaboration between the Commonwealth and the States; using this collaborative machinery to allocate responsibilities and functions appropriately; and using this redefined framework to rationalise government policy development and service delivery to ensure the federation operates effectively and efficiently. More specifically, the Federation Paper called for COAG to meet for a full day twice a year, the creation of a COAG Secretariat comprised of both national and State officials, and a new Federal Commission be established as an oversight and monitoring body reporting to all governments through COAG. It also called for clarification of governmental roles and responsibilities, rationalisation through the removal of duplication, inconsistencies and other inefficiencies arising from shared responsibilities, revenue and expenditure correlation, and an entrenchment of intergovernmental cooperation in the *Constitution*.

Towards the end of 2006 came the most substantial of the BCA's interventions in this arena: *Reshaping Australia's Federation: A New Contract for Federal-*

66 Business Council of Australia, *Modernising the Australian Federation: A Discussion Paper* (2006) <<http://www.bca.com.au/Content/101346.aspx>> at 12 August 2008.

67 Ibid 4.

State Relations ('Federal–State Relations Report').⁶⁸ The Federal–State Relations Report claimed that the federal system of government had become a major barrier to realising the nation's potential:

The issue of relations between the Commonwealth and the states has been debated for many years, with intermittent calls for major reform of Australia's system of federalism. However in recent times, it has become clear that the system of federal–state relations as it currently operates is increasingly dysfunctional and not geared to meet the increasing economic and social challenges Australia faces.⁶⁹

The major concerns expressed in the Federal–State Relations Report were the lack of consensus on national goals and consistent forward planning; the chronically blurred lines of responsibility between the Commonwealth and the States; and, because of the growing lack of transparency and accountability, the quantity of government had taken precedence over quality. This was why it was time for a new contract between the Commonwealth and the States, especially as this study had revealed the cost to Australians of dysfunctional federalism was up to (and potentially in excess of) \$9 billion per annum. These costs were attributed to a combination of overlap and duplication, cost shifting between governments, unnecessary taxes imposed by the States, and overspending on programs because of lack of oversight or accountability:

The current arrangements governing federal–state relations were born in horse and buggy times. The Commonwealth and the states need to agree on a modern contract for modern times that can guide us into the future.⁷⁰

The Federal–State Relations Report, which was prepared with wide consultation with many key players in intergovernmental relations, was accompanied by a detailed study of the costs of federalism, and also a (slightly inaccurate) analysis of other federations. The crux of all of this analysis, discussion and advocacy was a 12 point plan based around three key principles:

1. Clarify roles and responsibilities.
2. Institutionalise cooperation.
3. Fix fiscal arrangements.

The plan outlined a number of useful reforms and approaches to addressing the dilemmas and problems it had identified. Space precludes a full description of them all, however, some of the more pertinent points made include principles for allocating functions between levels of government and the urgent need to establish a truly national common market in fields where business faces multiple and inconsistent regulatory regimes, including: occupational health and safety laws; workers' compensation; State tax calculations (particularly payroll tax and stamp duty); product standards; equal opportunity and anti-discrimination laws; trade and professional licensing; personal securities; and environmental laws.

68 Business Council of Australia *Reshaping Australia's Federalism: A New Contract for Federal–State Relations* (2006) <<http://www.bca.com.au/Content/101346.aspx>> at 12 August 2008.

69 Ibid iv.

70 Ibid vii.

The Federal–State Relations Report observed that over time these inconsistencies had grown and from a business perspective Australia was moving further away from a common market rather than closer to one. At a time when globalisation is reducing the trade barriers and differences between countries, the differences across Australian States were growing. The BCA also called for the Commonwealth to have permanent power over corporations law, rather than the existing referral of powers from the States, to achieve a national scheme for the regulation of corporations to complement a common market.

To complete the task of creating an Australian common market the BCA proposed that a time limit be placed on COAG to harmonise the 10 priority cross-jurisdictional ‘hot spots’ where overlap and inconsistent regulatory regimes were impeding economic activity. Those areas include: rail safety regulation; occupational health and safety; national trade measurements; chemicals and plastics; development assessment arrangements; building regulations; environmental assessment and approvals processes; business names, Australian Business Numbers and related business registration processes; personal property securities; and product safety.

Since COAG relied on voluntary action by States to achieve such harmonisation, the Federal–State Relations Report proposed an alternative approach to enforcement if the States did not act. Lamenting the fact that Australia had national markets only in financial capital, postal services, telecommunications and aviation, and no national markets in rail or road transport, water, labour or electricity, the Federal–State Relations Report suggested that the issue of whether the Commonwealth should take over the management and regulation of national markets ought to be referred to a proposed Federal Convention, though no details were provided. Indeed, the creation of a Federal Convention comprising community, business and government was, along with the creation of national markets, at the centre of the reform processes proposed by the BCA. Other institutional aspects recommended included strengthening COAG, making ministerial councils more accountable, and creating a new Federal Commission to oversee the reform process.

The recommendations in the Federal–State Relations Report provided the essence of the BCA’s *Charter for New Federalism*,⁷¹ issued in 2007, and also for its submission to the 2008 Australia 2020 Summit. All in all, it represents the most comprehensive analysis of the Australian federation ever undertaken by the business sector.

X IN RETROSPECT: BUSINESS AND THE AUSTRALIAN FEDERATION

The 107 years since Federation have brought significant changes that have impacted on the interaction between intergovernmental relations and the Australian business community. Australia now has a truly national economy with

71 Business Council of Australia, *A Charter for New Federalism* (2007).

significant mobility of capital, labour, and goods and services. It also has a sophisticated pattern of communications by land, sea, air, post and particularly telecommunications – a far cry from the 1890s when the Premiers would communicate in Morse Code. Remoteness has to a large extent been overcome by the revolution in communications, although this is not always a complete or adequate substitute for face-to-face service delivery by governments. The media remains largely regional and parochial, with just two truly national newspapers and no major national television networked news.

The Australian economy is substantially locked to globalisation with all of its challenges and opportunities regarding capital, migration, treaties, and international agreements. This process has also meant that the economy has been impacted on by forces and trends once considered external to the pure realm of economics, such as social capital, environmental linkages, and sustainable development.

The mix of public and private has changed significantly, with considerable increases in the private share of most aspects of economic activity, including investment, employment, ownership, and service-delivery. Partnerships between the two sectors are on the rise and the public sector has taken on board many private sector practices, whilst the private sector has gained an increased understanding of the role of governments in public policy-making and establishing governance frameworks. Australia now has a large measure of ‘joined-up’ government as the interdependence of various government functions has become apparent, particularly in the areas of health, education, welfare, employment and tax.

Australia is no longer a true federation because the States have lost their de facto sovereignty. Instead, we now have a national polity with a virtually unitary system of governance. Politics has been transformed and power has clearly shifted to the national arena. Each of the major political parties are now centralists. The economic trends canvassed in this paper have been part cause of this as they have created centrifugal forces propelling power towards the centre. Australia’s constitutional design has not been able to accommodate this phenomenon, and so extra-constitutional structures and processes have evolved, spurred on by curious interpretations from the High Court that have given the Commonwealth substantially increased control over the nation by virtue of its taxation, corporations, and external affairs powers. Political structures have been introduced to compensate for this constitutionally permissible process of centralisation, in an attempt to make Australia’s federal system work. For example, executive federalism, in the form of the Premiers Conference and its morphed cousin COAG, might be seen as a substitute for the decline of the Senate as a States’ House.

In essence, the institutions of federalism are not working as designed and intended by the Founders, and governments at all levels are no longer properly accountable to voters, particularly in the realm of intergovernmental relations. The *Constitution* has proved itself to be a distinctly rigid document, largely because many citizens have become alienated from politics and politicians, and distrusting their proposals to change its provisions.

In the context of all this business has changed too. Whilst business was once reactive to trends in federal–State power rivalry, it has become much more proactive and has begun engaging meaningfully in the reform process. This has primarily been done through its peak organisations, which have become increasingly sophisticated in their lobbying and understanding of the dynamics of intergovernmental relations, as the work of the BCA makes clear.

Needless to say, business has always wanted to reform federalism in ways that would benefit business. Throughout the period since 1901, and especially in the past two decades, business has pressed for changes to federal arrangements that would make its operations more certain, more subject to free market influences rather than government intervention, more national and uniform, more adaptive to globalisation, less subject to contradictory or overlapping government rules and signals, and less costly overall. The major targets have been the tax and regulatory systems and the impediments to the operation of national markets.

Business has, however, proven itself capable of more altruistic interests in the federalism debate. It has embraced, to some extent at least, concepts such as triple bottom line reporting and corporate social responsibility; it has also engaged more with not-for-profit organisations and formed alliances with governments. In so doing, business has come to appreciate human capital and the sustainable development agenda. Its concerns for the federal system have also embraced areas including education, health, Indigenous affairs, and the environment. Its submissions on the federal system have reflected this more inclusive approach and, in turn, business has been consulted far more by governments in reform discussion than used to be the case. In discussions about federalism, business has been prepared in recent times to work with governments of all persuasions.

Nevertheless, business still does not have any natural affinity with a federal form of government. Deep down, most businesses would probably prefer to have a unitary system of government and abolish the States. This has been the main underlying sentiment in the business sector for most of Australia’s federal history. When attempts are made to relate and integrate one interface (government–business relations) with the two interfaces of federalism (national–state–local), the systemic complexities are compounded exponentially – business, however, ultimately craves simplicity.

XI THE OPTIONS FOR REFORM

Australia is trying to operate a 21st century economy with a 19th century constitution and system of government. There are three fundamental options for reform.

1. Continue the process of centralisation, abolish the States, and create a two-tier system with one national government and numerous regional governments. This model has been the favourite of business in its honest moments. The amount of discretion for the new regions is an uncertainty but business would essentially like to see them performing mainly service delivery functions for

the national government. Of course, this would spell the end of federalism, but it is an option which opinion polls tell us enjoys significant support among citizens.

2. Restore State sovereignty and return to a truly federal system of government. Since federalism is essentially a contractual partnership and the only true partnership is one in which the partners are equal, this must involve the States taking back their income tax powers so that they are no longer dependent on largesse from Canberra and can bargain from a strong independent financial position. Business groups have reacted very coolly to this option because they fear a two-tier tax system and a proliferation of taxes. However, there need only be one tax office, the ATO, which can do all the collecting on behalf of all levels, as is the case in Canada. It also raises the prospect of tax sharing, as occurs in many modern federations, Germany being the obvious example.
3. Continue muddling through with incremental changes at the margins, leaving the centralisation of power intact, but shifting with the roles and responsibilities of the three levels of government. This can be approached by tinkering at the margins (as has been going on for the last 20 years) or by a more fundamental attempt to change the constitutional alignment of powers. It is disappointing that business, even the BCA, has been sucked in to the tinkering option until very recently, when it began to advocate the stronger route of constitutional change.

It would, for instance, be in the interests of business to argue for constitutional amendments to achieve the following: four year terms of Parliament; rectification of VFI by mandated tax sharing between levels of government; inserting new functions relating to the environment and sustainable development into the *Constitution*; eliminating anachronistic passages such as section 51(xxxv) dealing with industrial relations; more clearly defining powers concerning national markets; the removal of past ambiguities in constitutional wording, particularly in respect of the 'free trade' provisions, thereby casting aside restrictive High Court interpretations; and fostering a new alignment of functions between levels of government as well as defining their respective roles, responsibilities and shared functions, as occurs in the Joint Tasks provisions in the *Basic Law for the Federal Republic of Germany*.⁷² A more inspiring and relevant preamble would also not go astray.

72 In the *Basic Law for the Federal Republic of Germany*, drawn up after World War II, the common practice in most federations for intergovernmental action in many sectors was noted and provisions enabling this were included in Pt VIIIa 'Joint Tasks'. This stresses clear definition of roles and responsibilities of each level of government. Of course, the functioning of this concept is aided by the fact that the German national Upper House, the *Bundesrat*, is a true states' house because the members are appointed and instructed by the State (*Länder*) governments.

Achieving this requires a Constitutional Convention, bi-partisan agreement, a constructive debate in both national Houses of Parliament, and a clearly defined set of referendum proposals to be put to the Australian people accompanied by a positive education and information campaign. Business could be a key facilitator of this journey.

However, this option can only have meaning if the preliminary step, clarifying just what sovereignty the States possess and whether they are genuine policy partners or mere service deliverers, is taken. There also needs to be the establishment of foundational principles. The principles put forth by Parkes in 1891 and Hawke in the New Federalism era could contribute since each remain relevant today. The challenge then becomes one of building a new federation. Constructing lasting and functional structures on foundations is something every successful business leader understands only too well. Business ought to be a willing partner in this endeavour for its own sake and that of the nation.