

AUSTRALIAN FEDERALISM: A REPLY TO THE THEMATIC ISSUE

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A little more than 50 years ago, when I started at the law school at the University of Queensland, contemporaneity in legal scholarship tended to be disparaged in some quarters. In the courts, there was close adherence to the extraordinary, and by then, already outdated convention, that the works of a still living author should not generally be cited. I well recall a case in which Mr Bruce McPherson, later to become Justice McPherson, was appearing before a judge of some age and standing. Without reference to his excellent treatise on the winding up of companies, McPherson stated a proposition carefully distilled from a long line of cases. Not surprisingly, he used a very similar formulation to the way in which he had expressed it in his book. The judge, quite unfairly, then launched an attack upon him for impliedly referring to his own work as an authority. Essays in university law journals fared no better! Of course in those days there were fewer law schools, and those that published did so infrequently, and without the rigour practised in university law journals today.

For my own part, I do not doubt that legal scholarship is much more widely judicially appreciated and utilised nowadays. I happily acknowledge that I found academic writings very helpful to me when I was a judge. Even if I did not agree with the reasoning and conclusions of an author, I often found it helpful to read the counterweight to my own opinion. Wordsworth referred to his poetry as, I think, ‘recollections in tranquillity’. I would not wish to be taken as suggesting that academic writing is done in any leisurely way, but its practitioners do have the advantage of not having to give a conclusive judgment within a limited period. That they do not have to do that does provide an opportunity to present a more rounded, reflective view of the law than judges committed to the resolution of a particular dispute – sometimes a very narrow one. Academic writers also have the luxury of speculating about and strongly pressing desirable future trends in the law rarely available to sitting judges.

For these reasons, I would commend the publishers of university law journals. They serve the legal and the wider community very well. This Law Journal,

* Justice of the High Court of Australia, 1998–2007. Text of an address delivered at the launch of Volume 31 Issue 2 of the University of New South Wales Law Journal on Australian Federalism, 8 September 2008.

which I am to launch tonight, is no exception. It contains a thoughtful and diverse collection of essays both practical and academic.

I must say that when I was asked to launch it, and, on learning its topic, I wondered whether the invitation was intended as a provocation, or a second chance for me to achieve what I had failed to do, when I was on the Court – revive true federalism. I was, I confess, rather lonely there on occasions, as a federalist.

When I was a law student, I was a committed centralist. I think we all were. My parents had suffered a great deal in the Depression. The various governments that had been elected during it had been placed under the necessity of seeking national solutions for what was both a local and an international economic catastrophe. That need for a national response had been heightened by the Second World War, and the direct threat that it presented to Australia itself. As a schoolboy in 1951 I had even participated in an event to celebrate the jubilee of Federation. I thought, not in terms of the State in which I lived, but in terms of Australia. I still think in terms primarily of being an Australian (except when Queensland is in an interstate sporting contest), but have come to learn that not all of the best, or indeed the only acceptable measures are national ones, a matter to which I will, if I may, briefly return soon.

I read each of the essays in the Journal with great interest. Let me assure you that I do not wish to turn this occasion into a defence of what some of you may think indefensible, my judgment in the *Work Choices* case,¹ but I hope I may be forgiven for taking issue with one aspect of Andrew Lynch's and George Williams' otherwise admirable piece, where they suggest that I provide no answer to the question posed by the majority question 'when it is said that there is a point at which the legislative power of the Federal Parliament and the legislative powers of the State are to be divided lest the federal balance be disturbed, how is the point to be identified?'²

The answer is a multifaceted one. Absolute precision of legal doctrine and principle is, in every area of the law, an elusive Holy Grail. On those rare occasions when it is almost within grasp, a new situation, a fresh case arises, and the principle in its apparently cast iron form turns out to be, by necessity, malleable. The decision of the majority in the *Engineers' Case*³ itself establishes that constitutional doctrine is no exception. Secondly, it is rarely strictly necessary to identify precise tipping points or dividing lines in advance, in the law. It will be recalled that a majority in *Patterson's Case*⁴ were confident, that by a process of evolution, the United Kingdom had become a foreign power, even though, as I complained in my, again I admit, dissenting judgment, they did not identify which of the many possible dates and events was the one that

1 *New South Wales v Commonwealth* (2006) 229 CLR 1. ('*Work Choices*')

2 Andrew Lynch and George Williams, 'Beyond a Federal Structure: Is a Constitutional Commitment to a Federal Relationship Possible?' (2008) 31(2) *University of New South Wales Law Journal* 395, 411 citing *Work Choices* (2006) 229 CLR 1, 120 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

3 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

4 *Re Patterson* (2001) 207 CLR 391.

effected the momentous change, a date of some continuing importance to thousands of British assisted passage migrants who would have been astonished to learn that they were now foreigners. The third response that I would make, if I have not already made it in my judgment, is that it is all a question of degree: some instances will be clearer than others. Look at history. What did the colonies commonly do? Here *Melbourne Corporation*⁵ comes into play and informs the evaluation. What did the Founders actually say? And to what did they aspire? How necessary, on the evidence, and the constitutional facts properly defined and weighed, is a broad, effectively completely, uncontained implication of power in favour of the Commonwealth? The fourth answer I would offer is that there has to be, under the *Constitution*, some division of power. The States are more than mere forms. They have legal life and substance. The whole purpose of a federation is to divide power. Power corrupts; undivided power may not corrupt absolutely, but can very easily do so. Somebody has to say where the dividing line is, and in this country that body is the High Court. The term ‘federal balance’ does not mean, or need to mean, a perfect equilibrium at any or all times. The defence power is a classic example of a power that can wane as circumstances change. What it conveys is the need for a process of weighing and measuring, without stacking one side of the scales in advance. These considerations in my view do give content to a concept, a not absolute or inflexible concept, of a federal balance.

I do note however, that Professors Lynch and Williams are not entirely comfortable with the majority’s reasoning in *Work Choices*, and do helpfully discuss ways and means of improving the democratic governance of this country.

A J Brown hopes, in his essay,⁶ for reform by constitutional recognition of, and the bestowal of real power upon, local authorities. It will not surprise any of you present to hear that I welcomed his recourse, in considering this topic, to the Convention Debates and failed referenda, legitimate constitutional interpretative aids in my opinion. I remain wary however of polling. It depends very much on the time, place and form of the question. We all remember well the republic referendum. I asked an unreconstructed Irish migrant resident in this country, a natural republican you might think, how he would be voting. He made this response: ‘I was for it until I saw who was in favour of it. Now I’m “agin” it.’

Anne Twomey’s contribution⁷ is, as always eloquent, forceful and persuasive. She is, in my view, right to say that the people of Australia do not consider themselves people of defined regions. She too has voiced a strong suspicion of centralised government and suggests and that the true costs and benefits of regional bodies have yet to be calculated. Her view, that much regional funding is aimed at imminent elections rather than at providing important public services, is not an exercise in cynicism, but rather a shrewd observation.

5 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

6 A J Brown, ‘In Pursuit of the “Genuine Partnership”: Local Government and Federal Constitutional Reform in Australia’ (2008) 31(2) *University of New South Wales Law Journal* 435.

7 Anne Twomey, ‘Regionalism - A Cure for Federal Ills?’ (2008) 31(2) *University of New South Wales Law Journal* 467.

I do not suggest that Geoff Anderson's case for a reinvigorated and genuinely co-operative Council of Australian Governments is not well argued in his paper.⁸ It clearly is but I cannot help wondering whether the solutions truly lie there.

That question leads naturally to the topic of the next essay in the Journal, 'Commonwealth Fiscal Power and Australian Federalism' by Professor Fenna.⁹ I was struck by his turn of phrase in pointing out that the pattern of intervention and entanglement by the Commonwealth in State affairs by Specific Purpose Payments can be seen as one of the pathologies of federalism. I was also pleased to notice that he thought that it would seem a necessary implication of the form that section 51 of the *Constitution* takes, 'that the power of the States were left plenary and untouched unless expressly indicated to the contrary'.¹⁰ The problems which concern him may be, of course, reduced in various ways, but in a federation will always be present so long as the central power exercises the greatest taxing power. The states are often accused, not unfairly I acknowledge, of disingenuousness in crying poverty whilst rejecting proffered offers to allow them re-entry into productive areas of taxation. The truth is, nonetheless, that the Commonwealth is equally disingenuous about this. The Commonwealth government, and in this I refer to both the non-elected and the elected executive, would never lightly relinquish a field of taxation, and the power that goes with it, something that the Commonwealth could do easily by simply deciding to reduce tax by the amount spent by it on, for example, education and roads, progressively over three years, with a corresponding reduction in its taxes and payments to the States, thereby forcing them to tax, to raise the shortfall themselves. Power may come out of the barrel of a gun in some societies: in democracies it comes out of a monopolisation of taxation.

Professor Warren's essay on the Commonwealth Grants Commission¹¹ was a timely one for me, as only a week or so ago, I delivered a paper questioning its utility. That tied in with an earlier paper that I had written urging that the practice of the elected executive of devolving – outsourcing decision making to other bodies – might need checking because of its capacity to damage responsible government: that the Grants Commission, even though it was not a final decision maker, could usefully perhaps be replaced by a body that looked to the proper application of funds, rather than debating about the targets for them, which is fundamentally a political matter. It is impossible rationally to disagree with Professor Warren's conclusion that if Australia wishes to have a dynamic and vibrant federation, a fundamental review of its intergovernmental fiscal arrangements must take place.

8 Geoff Anderson, 'The Council of Australian Governments: A New Institution of Governance for Australia's Conditional Federalism' (2008) 31(2) *University of New South Wales Law Journal* 493.

9 Alan Fenna, 'Commonwealth Fiscal Power and Australian Federalism' (2008) 31(2) *University of New South Wales Law Journal* 509.

10 *Ibid* 510.

11 Neil Warren, 'Reform of the Commonwealth Grants Commission: It's All in the Detail' (2008) 31(2) *University of New South Wales Law Journal* 530.

There are many valuable insights in all of the essays in the journal. They neatly blend the intellectual and the pragmatic. As Professor Walsh states in his 'The Economics of Federalism and Federal Reform': 'it is simply a reality of federal systems that they will not result in, or sustain, a neat and tidy (unambiguous) allocation of roles and responsibilities.'¹² I cannot resist adding to that statement, that I would have preferred that the High Court not so often resolve the ambiguity by allocation to the Commonwealth. But Professor Walsh states a fundamental truth about democracies. They are, like humanity itself not always tidy, and can be on occasions inefficient. If you want tidiness, perhaps you should look at totalitarian countries, where beneath the tidiness, there is oppression, often corruption, and ultimately therefore economic inefficiency.

Professor Wiltshire has turned his mind to business' perspectives on federalism, arguing that business has, altruistically it may be inferred, been giving serious thought to the reform of federalism for the benefit of the nation as a whole.¹³ That is not an object you will see in the constitution of any corporation for profit of which I am aware. The business of business is to make profits not unethically and lawfully. It is highly improbable that people will invest in companies, the directors of which regard it as their right and duty to spend the profits in pursuit of public purposes. A case can be made in some circumstances, for a coincidence of enlightened self interest with the public interest, but these occasions are, I suspect, rare. Most shareholders take the view that it is for them to use their money, if they wish it to be used philanthropically, personally, and not by the directors for them on their unexpressed behalf. Another problem lies in defining business. The interests of a sole trader, or a small partnership are far removed from those of major national corporations. Multinationals with head offices in London, New York and Delhi can hardly be expected to have Australia's best interest at heart when they do business. Professor Wiltshire's essay does not of course overlook those difficulties. He is right, I think, in saying that business does not have any national affinity with a federal form of government. He finds it inconvenient, but I must say that I am somewhat sceptical about the reliability of the calculations made from time to time by business of the costs doing business across jurisdictions.

Professor Galligan has, as usual, thoughtful things to say about federalism.¹⁴ He is, I am inclined to think, the ultimate realist about it and its politics. He gets my vote when he says that judicial review based upon the extreme *Engineers' Case* methodology is not, in principle, a credible process for reforming the *Australian Constitution*, and in practice has proved to be increasingly distorting.

How to conclude? Professor Cheryl Saunders, in her Foreword, takes the stance that the disadvantages of federalism tend to be overstated, and the benefits

12 Cliff Walsh, 'The Economics of Federalism and Federal Reform' (2008) 31(2) *University of New South Wales Law Journal* 553.

13 Kenneth Wiltshire AO, 'Australian Federalism: The Business Perspective' (2008) 31(2) *University of New South Wales Law Journal* 583.

14 Brian Galligan, 'Processes for Reforming Australian Federalism' (2008) 31(2) *University of New South Wales Law Journal* 617.

underestimated.¹⁵ I agree with that. Local conditions often require different regulations. In my own experience, before I went on the Bench, I formed the view that often the differences were more illusory than real. Certainly as much as can be standardised beneficially, should be. But the European Union is an example of how standardisation can be carried, in some areas to extremes. A search for perfection is commendable even if must turn out to be futile. People and institutions are all fallible. Let us by all means try to improve them, both by change and adaptation. While on the one hand, perhaps the advantage of interstate competition may be overvalued, large centralised unitary governments, running both free and command economies, mainly the latter in totalitarian countries it must be conceded, demonstrably, don't seem to have performed significantly better than ours. As important a question as the economic one is how to maintain democracy, which, my inclination, is to answer, by saying, by diffusing power.

The topic of competition stirs me to raise a further issue about federalism, that is, of the truncation of the State insurance power in 2007 in *Attorney-General (Vic) v Andrews*,¹⁶ in which Kirby J and I were again in dissent. That is a case that I think would repay some close study and analysis. I suppose it has escaped academic attention to some extent, because it has been obscured by the constitutional mushroom cloud of *Work Choices*. It is to me, more than a mere curiosity that a competition between statutory schemes, the whole purpose of which is to benefit a particular class – workers – might be resolved on one of several bases, admittedly among others, that insuring employers have the liberty to choose one scheme over another – a choice, denied entirely to the objects of the schemes, the workers.

I wish to congratulate the student editorial body responsible for producing this Journal. It is at least the equal of any, and better than some that I have seen that are not produced in this way. Those students are justified in being proud of it.

I do take it as an honour to be invited to launch the Journal. I hope you do not think that I have exploited the occasion to propound too many of my own opinions. I ask your forgiveness if you do. Retired judges' opinions are not asked very often, and aren't worth much when they're given, so just ignore them. I am sure however that this Journal will not be ignored. Its timing is opportune. The *Work Choices* case and the issues in the last federal election have reignited the debate on federalism. That debate will be enriched and further stimulated by the learned and perceptive collection of essays in this Journal which I now formally launch.

15 Cheryl Saunders, 'Foreword' (2008) 31(2) *University of New South Wales Law Journal* 395.

16 (2007) 233 ALR 389.