



## The politics of the Australian federal system

The Australian federal system, which came into existence in 1901, has generally worked satisfactorily, even though its dynamics have been altered substantially in the years since. Today there is much debate about its future, recently highlighted by the High Court’s 2006 WorkChoices judgment. There is a general consensus that the Australian federal system does not work as well as it might, and the question for Commonwealth and state governments is what should be done to enhance its performance and reputation. This paper gives an overview of Australian federalism, noting its strengths and weaknesses, and asks: where does the system go from here?

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## Executive summary

The Australian Constitution established a federal nation, where powers were to be shared by the national (Commonwealth) government and the six member states. The constitution-writers were generally pleased with their efforts in creating a federal system in which the states were to be significant players.

Optimistic words about the division of power in the Australian federation have not been borne out. Many factors have worked to weaken the federal structure:

- government perspectives have often worked to boost national government power
- the national government has increasingly controlled the national purse-strings
- states have become increasingly dependent on grants from the Commonwealth
- international events have tended to give more power to the national government
- the Australian community has tended to look increasingly to the national government for assistance in many matters formerly the sole preserve of the states
- High Court decisions have tended to increase Commonwealth power, and
- Commonwealth governments have tended to focus on their own needs, policies and preferences before those of the states or territories, with an implicit assumption that the national view is the one that should be preferred in times of debate and argument.

Changes in society have also had an impact on the federal system:

- Australians have raised their expectations of what they can gain from government
- the Commonwealth is increasingly seen as most likely to see that people's needs are met
- internal migration has created a frustration with different laws and regulations in each state
- the development of large national businesses has been affected by the lack of a true common market, and
- the great increase in the size of cities has shown weaknesses in the system.

Such factors have all increased the level of criticism directed at the federal system.

There is a great deal of valuable cooperation between governments, as well as a large amount of local decision-making. Despite this, many criticise Australia's governmental arrangements as no longer relevant for effective government:

- they help create and maintain inequality among citizens
- they create difficulties for people living on state borders
- they are heavily encrusted with bureaucracy
- they hinder infrastructure development
- they maintain a disappointing weakness in local government, and
- they produce a large cost associated with duplication and overlap of services.

What might be done to remedy these problems? Some call for the abolition of the federal system, others speak of re-allocating government powers, while another view is that the Commonwealth should take over all policy-making, with the states as service-deliverers.

There is a general consensus, therefore, that the Australian federal system does not work as well as it might, though it is also clear that the system has generally worked satisfactorily in handling changed needs in Australian society. In the aftermath of the High Court's Workchoices judgment, the question for government is what, if anything, should be done to enhance its performance and its reputation?

## Introduction—federalism’s structural difficulties

Federalism is a 100 year old structure. It’s like a 100 year old house where the wiring hasn’t been redone, with a copper, not a Fisher & Paykel, in the laundry, and an earth closet out the back. The fabric’s sound – but, boy, could the place be made more liveable. More efficient. That’s our federation.<sup>1</sup>

.....

The key achievement of the American Founding Fathers was their success in creating a political system which met the political needs of the American colonies. The American federal constitution created in 1787 succeeded in achieving a balance between the need for a united nation, combined with a significant degree of sub-national diversity. Governmental power was divided in three ways: some powers were the responsibility of the national legislature, some remained the responsibility of the state legislatures, and some were shared (‘concurrent’).

In particular, the American Founders sought to ensure that the state governments had meaningful powers and were not governmentally subordinate to the national government. This remains an important consideration in the evaluation of whether a political system is correctly defined as ‘federal’ or not:

In laying down that the autonomy of the parts of a federal state must be considerable in extent, I mean that we should hardly call a state federal merely because the independence of local governments in certain minor matters was guaranteed by the constitution.<sup>2</sup>

Such is the typical arrangement achieved by the writers of all successful federal constitutions. As in the Australian case, this division of governmental power can be crucial to the perceived success of the constitution-writing process.

A problem, though, is that constitutional powers can be affected by time and changing circumstances. A power of apparent significance at the time of constitution-writing—the Australian states’ power to make money from the sale of land, for instance—can wane over time. Another ‘power’ that is not on the discussion table when a constitution is written—the need to protect the natural environment, for example—can become very significant, and may consequently be fought over by the two levels of government. Constitution-writers can also err in what they choose to include or exclude—the omission of local government from any direct reference in the Australian Constitution is considered by many to be a major failing in the Australian Founders’ design. Fifty years ago, Professor Rufus Davis of the University of Queensland summed up the difficulties of federal constitutional design when he pointed out that:

... it is no more possible to predicate the precise motives, postulates, and understandings, or predict the life which will ensue from the choice of this form of union than one can predicate the motives which lead to marriage or to predict the relationship which will ensue from the former in which the union is legally consummated. It is scarcely conceivable that

all parties to the federal bargain at all times and in all places seek the same things, in the same proportions, for the same reasons; or that the intensity of the preferences among those who seek just that much more strength for the national government, or for the regions, should be the same ... At best the federal compact can only be a formalised transaction of a moment in the history of a particular community.<sup>3</sup>

All of which means that the boundaries drawn around powers are not immutable, for they can be pulled, stretched, jumped across, or ignored, by governments responding to changing circumstances. Such circumstances can include times of national danger, the discovery of unanticipated flaws in constitutional design, changing policy priorities, or changes in the political arena. It is probably impossible to write a federal constitution in such a way as to anticipate all eventualities. To this extent, therefore, federal constitution-writers will inevitably fail in their task, for their constitution will be unable to maintain the same balance between central and territorial governments that was achieved when the new constitution came into force.

In their attempt to divide powers, constitution-writers also weaken the structure of what they have created by their probably-inevitable failure to allocate the powers into separate, air-tight, jurisdictional compartments. Quite often, indeed, there will be the provision of concurrent powers, referred to earlier, which ensures constitutional overlap—40 in the Australian case, for instance, and 47 in the Indian Constitution.

The overlapping of powers can also arise if there is any sort of textual ambiguity in the words of a constitution. In the Australian case, s. 51 refers to the Parliament having power ‘to make laws for the peace, order and good government of the Commonwealth with respect to’ the various specified areas of government administration. Professor Cheryl Saunders of University of Melbourne has noted that the High Court’s treatment of the words, ‘with respect to’ has broadened each of the powers fractionally, ‘by attaching an “incidental” power to them to do anything that is necessary to make the main power fully effective’.<sup>4</sup> In all federal systems the political result is:

... an assertive federal center [sic] which typically enlarges its circumscribed powers yet manages to stay within the constitutional framework.<sup>5</sup>

The consequence is that the constitutional core that is s. 51 is being continually expanded to gradually increase central government power. The High Court’s 2006 *WorkChoices* case is simply the latest in such an expansion (see below p. 15).

The supposed equality of the components in a federal state also is undermined by the existence of ‘supremacy’ provisions favouring the centre, such as Article VI in the US Constitution, or s. 109 in the Australian Constitution:

When a law of a state is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

There is irony in the fact that the writers of federal constitutions—who are typically very much aware of regional fears—are likely to include words in their constitution that have ‘a unitary and centralizing potential’ in what they are planning will be a decentralised governmental structure.<sup>6</sup> Over time, as our understanding of federal nations has grown, we have seen an increasing frequency and range of central intervention in the supposedly separate and protected powers of territorial governments, irrespective of how the constitution was constructed.

This Parliamentary Library Research Brief illustrates how this analysis of federal systems fits the Australian case. Within ten years of the creation of the Australian nation the financial aspects of the federal system had been undermined, something that has continued to the present day. With the Constitution now over 100 years old, the paper asks: where does it retain value and where does it fall short of providing Australia with governmental outcomes suitable to our times? The paper also asks what, (if anything) does the Australian nation now need to do to improve our constitutional structure and hence, the quality of governmental outcomes?

It must be noted that all that can be done here is to give a brief overview of what is a vast literature on Australian federalism. Parliamentary Library studies on particular aspects of the federal system are referred to on pp. 29–30. Members and Senators interested in other federal issues can seek more analysis from the Parliamentary Library.

## **The Australian model**

The Australian Constitution established a federal nation, where powers were to be shared by the national (Commonwealth) government and six member states—the former British colonies. Colonial parliaments and laws were protected, though certain powers were lost to the national government. The Australian Founders sought to protect as many state powers as possible, for they believed that this was the only type of government that had a chance of being accepted by voters. In all colonies there was concern over the possible loss of colonial identity in a large, anonymous union.

The Founders’ desire to preserve a significant state presence can be seen in a number of places, including:

- the establishment of the Senate, seen by the Constitution-writers as the house where the states’ existence was recognised in the national parliament—many of the Founders preferred the name ‘states’ Assembly’ or ‘states’ House’, to make the place of the national upper house in the federal system perfectly clear<sup>7</sup>
- equal numbers for each ‘Original State’ in the Senate
- the fact that the national Parliament’s powers are specified in the Constitution, with the residue belonging to the states

- the fact that this residue is considerable, indicating that the Founders wished to have important and powerful regional governments within the new political system
- the considerable work put into Chapter IV of the Constitution (Finance and Trade) in an effort to guarantee the continued good financial health of the states after the achievement of nationhood
- the insertion of sections 106 (state constitutions), 107 (state parliaments) and 108 (state laws) designed to guarantee the continued existence of each part of the state structure—and hence, of the states themselves, and
- the requirement that amendments to the Constitution affecting a state's representation, Parliament, the geographical size of a state or 'in any manner affecting provisions of the Constitution in relation thereto', cannot become law without the support of a majority of voters in the state being so affected.

Overall, the constitution-writers were pleased with their efforts to create a federal system in which there was a strong element of concurrent power. As a South Australian delegate put it:

We have created an instrument of partnership between us which, I believe, while it secures the independence of the several states, will provide for the joint control of certain matters, at the same time as it also leaves free and complete self-government on all matters not committed to the central authority. And this, it seems to me, is what we should have done—to provide that national questions should be federalized, and the local questions should be left to local self-government.<sup>8</sup>

## The undermining of the Founders' design

The hopes of the Founders were quickly shown to be constitutionally naïve, for, whether by design or force of circumstance, the national government soon began to undermine and distort the new constitutional arrangements. The states also played their part in this. Such undermining and distortion have continued to the present day.

### Party politics

The Founders probably had no idea of how much party politics would colour the attitude of government and politicians to federalism. In particular, the Australian Labor Party has always had difficulties with the federal system. At the time of Federation many in the labour movement opposed the Commonwealth Bill due to their concern that a federal system would weaken the struggle for social welfare. There was also opposition to the 'undemocratic' provision of equal Senate representation for states, and a belief that the Senate was too powerful—in fact, some opposed the creation of a national upper house at all.<sup>9</sup> Since then, Labor Prime Ministers have worked to lessen the power of the states, as in the case of John Curtin and Ben Chifley's activity in excluding the states from the income taxation field (see



below, p. 12). Such attitudes have tended to be sharpened when state governments have been led by party opponents.

The story has been similar for the major non-Labor parties. Despite being generally more sympathetic to the federal system than their major opponents, party politics has always seemed likely to influence non-Labor attitudes to Commonwealth-state relations. A famous example occurred at the 1970 Premiers' Conference chaired by Liberal Prime Minister John Gorton, where South Australia's Don Dunstan was the sole Labor government leader. When South Australia received markedly lower Commonwealth grants than the other states, Dunstan claimed that the 'inescapable conclusion' was that party politics had 'influenced the treatment of a particular state'.<sup>10</sup> In October 1974, National Premier Joh Bjelke-Petersen, announced an early Queensland election so that voters could 'register their views on the grave problems facing the state' due to 'the whittling away of state rights and the denigration of our constitutional system' by the Whitlam Government.<sup>11</sup> Currently, observers have speculated that the relationship between the Howard Government and the state and territory leaders has been influenced by the fact that the regional governments currently are all Labor governments—described by a Howard Government minister as acting as 'de facto members of the Federal Opposition'.<sup>12</sup> According to John Summers of Flinders University, the current Commonwealth Government's willingness to 'take on' the other governments can be explained by partisan factors.<sup>13</sup>

## Perspective

Although the constitution-writers saw each level of government as having a role to fill, hopefully for all time, their optimistic words about the division of power in a federal state have not been borne out. An important, if not always appreciated, point is the part that perspective has played in shaping the different levels of government in the years since 1901. Commonwealth governments have tended to focus on their own needs, policies and preferences before those of the states or territories, with an implicit assumption that the national view is the one that should be preferred in times of debate and argument. State concerns have often been pushed aside. Similarly, state and territory governments have seen policy through the prism of their regional needs, often seemingly unable to see that there might be a need greater than the satisfaction of their own community.

Such attitudes, whether central or regional, can override political party policies and prejudices. A party may well have long-standing policies on the future of Australian federalism, but very often the views of the federal system held by some of the party's members tend to be affected by where the particular division or branch of the party sits in the system. For example, state Labor governments and oppositions tend to be more protective of the federal system than Commonwealth Labor governments. Commonwealth Liberal governments have tended to distort the federal arrangements rather more than their pro-federalism rhetoric has suggested would be the case. Former South Australian Liberal Premier, and later member of both houses of the Commonwealth Parliament, Steele Hall, has illustrated the impact of perspective upon one political player's view of the political system:

... sitting in a Federal House it's clear that Australia has to work as a country, not as a group of separate units. You tend to get a lower opinion of state administrations when you see Canberra at work.<sup>14</sup>

As an Opposition backbencher in the House of Representatives, Tony Abbott (NSW, Lib) once described the Australian federal system as 'perfectly good', provided each tier took care of 'its own business'.<sup>15</sup> However, after nearly a decade in office as a Howard Government minister, he proposed that the Commonwealth directly fund schools, hospitals and service providers, traditionally state responsibilities, 'rather than use the states as intermediaries'.<sup>16</sup> Hall's and Abbott's comments are also a reminder that some key politicians can shape the 'tenor and structure' of the federal system depending on their views of it. Prime Minister Hawke and Premiers Bannon (SA, ALP) and Greiner (NSW, Lib) were more committed to inter-governmental cooperation than were Prime Ministers Whitlam (ALP) and Keating (ALP) and Premier Kennett (Vic, Lib), all of whom were critical of Australia's federal structure.<sup>17</sup>

The impact of experience upon a politician's perspective can be seen in the case of Prime Minister Robert Menzies, Liberal defender of decentralised power, but also a politician who could see merits in the financial dominance of the Commonwealth. Although he acknowledged that it suited him politically at times to protect the federal system from the Labor Party,<sup>18</sup> he worried that the federal system was being manipulated without due regard to the basic need of creating a nation. Menzies believed that it was important:

... to abandon, not the principles of federalism, but that excessive emphasis on purely local rights which is proving such an impediment to the creation of a truly national sentiment and pride.<sup>19</sup>

Despite the optimism of the Constitution's writers, the claims of the Commonwealth government and the claims of state governments have often clashed since 1901. Invariably, such clashes have been about which government, regional or national, best expressed the people's will, seemingly with little reference to the quality or relevance of particular policies. Quite often issues can be resolved co-operatively (see below pp. 20–22). Far more typically, 'resolution' is a matter of the Commonwealth prevailing in the argument, irrespective of the views of any particular states: 'the federal government often seems more interested in getting its own way than in making federalism work better'.<sup>20</sup> National perspectives held by Commonwealth governments are inherently likely to undermine governmental arrangements that restrict national power. Arguments between the Commonwealth and the states not only involve policy issues, but they are also about which values will prevail in the marketplace of political ideas. It has been said that there will never be final answers to these national-regional questions and that the tension inherent in federalism will never disappear, but that assumes that the federal system will remain intact.

## Commonwealth financial dominance—Section 96

A great many of the changes in Australian federalism have flowed from the failure of the Finance clauses (Chapter IV) of the Constitution to avoid the increasing centralisation of financial power. Within a few years of Federation, the Commonwealth was finding the financial arrangements irksome, due to the need to make unexpectedly large expenditures of its own in such areas as defence, public works and social services.<sup>21</sup> It was therefore soon working to undermine the government finance guarantees. The states were powerless to resist. As early as 1902 the Commonwealth Attorney-General, Alfred Deakin, had made his oft-quoted claim that the states were 'legally free, but financially bound to the chariot wheels of Central Government'.<sup>22</sup> By the end of the first decade, when sections 87 (payment of customs and excise takings to the states) and 94 (distribution of surplus Commonwealth funds to the states) had been allowed to fall into disuse, the pattern of Commonwealth financial dominance and relative state penury had been established. This has remained at the centre of Commonwealth-state relations ever since. As noted by Menzies, it was one of:

... the centralizing, or centripetal, developments in our ... federal Constitution. But I ... confess that I can see no way by which it could have been avoided ...<sup>23</sup>

Commonwealth and state governments soon came to see there was a need to deal with the collapse of the constitutional financial arrangements. A constitutional means was at hand in the form of s. 96:

... the Parliament may grant financial assistance to any state on such terms and conditions as the Parliament thinks fit.

A last-minute addition to the Constitution, the section was believed to have been inserted only for use in times of financial emergency.<sup>24</sup>

A major step in 1910 was for the Commonwealth to begin using s. 96 to make annual 'topping up' payments to each state to help them deliver services to their populations. Despite this, Western Australia and Tasmania were still unable to cope, and within two years extra payments were being made to these states.<sup>25</sup> Not surprisingly, all states were soon depending upon s. 96 grants to help them meet their financial needs, a dependency that has, in fact, increased in the years since. By 1928 the Commonwealth had also forced the states to accept the newly-created Loan Council, which henceforth controlled all government borrowings, both Commonwealth and state. Each of these two developments further undermined the constitutional provisions.

S. 96 was used in various other ways that continued to cement Commonwealth dominance and state dependence.

## Grants Commission

All of these early grants were ‘general purpose’ grants, which meant that the states could spend the money as they chose. Giving such grants to the states does not, of itself, ensure the establishment and maintenance of adequate state-run services. Quite early in our federal history, the view emerged that there was a need to distribute Commonwealth funds to ensure ‘that each state has the capacity to provide services at national average levels of efficiency’, or what has become known as ‘horizontal fiscal equalisation’.<sup>26</sup> Eventually this became a factor in Commonwealth grant allocations, after the establishment of the Commonwealth Grants Commission in 1933. The Grants Commission has been required to recommend how the Commonwealth’s general purpose grants should be allocated among the states (and later, the territories). The Commission’s work soon became ‘integral to the stability of the Australian Federal system’;<sup>27</sup> it also gave the Commonwealth a clear view of state government finances.

## Income tax

Section 96 also featured in relation to the issue of the Commonwealth ‘takeover’ of the income taxation power. Between 1915 and 1942 Australians paid income tax to both the Commonwealth and state governments. Because the level of state taxes varied, and the Commonwealth was constitutionally required to treat the citizens of all states equally, it meant that there were different rates of income tax around the nation. Needing to raise as much money as it could to meet its Great War responsibilities, the Commonwealth asked the states to temporarily refrain from levying income tax, but was rejected. The Commonwealth was rejected again in the early years of World War II, until the Curtin Labor Government legislated to introduce a uniform national income tax. Section 96 grants were used to recompense the states, though receipt of these grants was dependent on a state vacating the income tax field. The arrangement was to last until one year after the cessation of the war. To the states’ dismay, their High Court challenge to this new arrangement was lost,<sup>28</sup> and soon after the war Labor Prime Minister Chifley refused to allow the states to resume the income tax power, a decision that was supported by a second High Court case in 1957.<sup>29</sup> Gaining sole access to this major growth tax ensured that the Commonwealth’s coffers have always been healthy; the states’ never have.

The states also were weakened by an increasing difficulty in raising funds by other means. Apart from the loss of an income tax stream, they have lost former sources of money such as estate duties, or found others of much less importance and a series of High Court judgments has steadily deprived them of revenue deemed to be excise taxes.

Over time, therefore, the effect of the changing government financial arrangements has been that the Commonwealth has collected more funds than it has needed for its own expenditure, whereas the states (and local government councils) have been unable to raise sufficient funds to finance their governmental responsibilities. The term commonly used to describe such a situation in a federal state is ‘vertical fiscal imbalance’. This can be seen in all federations, though Australia has the most extreme imbalance of all.<sup>30</sup> Today, the Commonwealth raises

approximately 75 per cent of total general government revenue but is responsible for only around 60 per cent of total expenditure on government programs. As the Parliamentary Library's Richard Webb notes, the difference is made up by the use of s. 96 grants.<sup>31</sup>

### Goods and Services Tax

In 1999, the Howard Coalition Government legislated for the source of the general-purpose transferred funds to be the Goods and Services Tax (GST). Since then there has been a legislative requirement that Commonwealth Grants Commission monies must be distributed according to the principles of horizontal fiscal equalisation.<sup>32</sup> The Grants Commission has summarised its horizontal fiscal equalisation guidelines in this way:

- (i) GST revenue distribution being a method through which the Commonwealth equalises states' fiscal capacities, taking account of their individual expenditure requirements and revenue capacities; and
- (ii) each state government having the capacity to provide the same standard of services, presuming each:
  - makes the same effort to raise revenue from its own sources, and
  - operates at the same level of efficiency, as determined by the Grants Commission.<sup>33</sup>

A study of Australian, German, Canadian, Swiss and United States of American federations has shown Australia to be the only nation that attempts to deal with vertical fiscal imbalance through such a means. By contrast, the USA makes no effort to effect horizontal fiscal equalisation.<sup>34</sup> Here, again, s. 96 is the constitutional instrument used by the Commonwealth.

### Tied grants

As well as 'general purpose' grants, s. 96 grants can also be made 'to any state on such terms and conditions as the Parliament thinks fit'. The first of what came to be called 'specific purpose payments' were made in 1923, when the Commonwealth Parliament passed legislation granting the states money that could only be used on the development of main roads. Sensing the danger of accepting grants for a purpose chosen by the Commonwealth, the states supported Victoria in a High Court challenge, only to lose their bid to have the legislation declared invalid.<sup>35</sup>

For many years specific purpose payments were a relatively small proportion of s. 96 money granted the states, but since the deliberate increase in their use by the Whitlam Government (1972–75), successive Commonwealth governments have maintained a high proportion of such grants. Today, four out of every ten dollars paid to the states have conditions attached,<sup>36</sup> in a wide range of policy areas, including hospitals, schools, roads, housing and natural heritage, none of which is included in the powers granted the Commonwealth. Taking one state as an illustration, specific purpose payments to Tasmania in 2004–05 included money for such disparate purposes as the Gun Buyback Scheme, indigenous education, essential

vaccines, the Skilling Farmers for the Future scheme, crisis accommodation assistance, and housing assistance for indigenous people. Some specific purpose payments are provided with few conditions imposed, but many of the grants are subject to detailed instructions from the Commonwealth as to exactly how the money should be used.

Were it not for the existence of s. 96 it is difficult to imagine that the Commonwealth could have gained the level of financial and governmental dominance it has achieved. As Menzies noted, s. 96:

... has become a major, and flexible, instrument for enlarging the boundaries of Commonwealth action; or, to use realistic terms, Commonwealth power.<sup>37</sup>

Howard Government Minister, Tony Abbott, has described the states as ‘institutionalised beggars’.<sup>38</sup> If that is the case, it has largely been the actions of Commonwealth governments, as well as High Court judgements, that has made them so.<sup>39</sup>

## The High Court

The net impact of the High Court’s role in interpreting the power relationship between Commonwealth and states has been to facilitate Commonwealth encroachment on state areas of responsibility.

The basis of a federal system is that governmental power is divided between different levels of government. What happens, though, when one level of government appears to be encroaching upon the powers of another? At such times, constitutional courts are likely to be called in to adjudicate. The High Court’s first years saw an effort by a majority of the Court to protect the ‘balance’ between Commonwealth and state governmental power the Founders believed they were setting in place. The first Chief Justice, Sir Samuel Griffith, is said to have had a ‘vested interest’ in this particular ‘ideology of federation’ and under his lead the Court established what has been called ‘a doctrine of mutual non-interference between Commonwealth and states’.<sup>40</sup>

By contrast, Justices Higgins and Isaacs, appointed to the High Court in 1906, shared what has been called ‘a political passion’ for pushing views which emphasised Commonwealth powers and Commonwealth supremacy.<sup>41</sup> Isaacs implicitly criticised the Griffith view, when he stated that constitutional interpretation was simply a matter of interpreting a constitution’s words alone, rather than imposing a particular ideological view:

...it is not permissible to wander at large upon a sea of speculation searching for a suitable intent by the misty and uncertain light of what is sometimes called the spirit of the document...<sup>42</sup>

By 1920, the High Court membership had altered to the point where the Isaacs-Higgins view could prevail. In the *Engineers* case of 1920 the Court expressed the view that the key question in matters relating to the extent of government powers, was just how far

Commonwealth power extended. The impact of any judgment on a so-called ‘balance’ of Commonwealth and state powers was irrelevant.<sup>43</sup>

Professor Brian Galligan of the University of Melbourne has noted that although the High Court has wavered at times since the *Engineers* decision, the long-term effect of this interpretative approach has been to produce ‘a centralisation of constitutional power’ in the hands of the Commonwealth Parliament.<sup>44</sup> This centralisation has occurred in relation to many areas of governmental responsibility. For example, since the *Concrete Pipes* case (1971) the Commonwealth has been able to play a more hands-on role in the area of corporate activity,<sup>45</sup> while the *Ha* case (1997) is simply the most recent of a long line of cases that have steadily closed off the states’ options in regard to establishing taxes designed to give them significant revenue sources of their own.<sup>46</sup>

The 2006 WorkChoices judgment, which endorsed a broad interpretation or application of the corporations power, is the most recent of the cases that have impacted upon the federal balance, leaving the states ‘more vulnerable to federal intervention’.<sup>47</sup> Prime Minister John Howard has said that:

It’s not the intention of the Government to interpret this decision as some kind of *carte blanche* for some massive expansion of Commonwealth power.<sup>48</sup>

That may be so as far as the present Government is concerned, but the decision does add to the armoury available to the Commonwealth. The earlier comment in this paper about perspective would suggest that it is only a matter of time before a Commonwealth government—whether Coalition or Labor—makes use of the judgment to its own advantage.

### **Some governments have pushed harder than others**

All Commonwealth governments have tended to regard their own interests as paramount when interacting with state governments. Some, however, have made a more deliberate push to expand their powers at the expense of the states than others, with two governments, one Labor and the other Liberal-National, notable for their efforts to strengthen the place of the Commonwealth.

#### **The Whitlam Government**

Gough Whitlam had no love for what he damned as the ‘archaic’ Australian Constitution,<sup>49</sup> and fifteen years before coming to power he was lamenting the ‘very serious obstacles our Constitution places in the way of efficient and responsible government’. He claimed it was ‘generally recognised’ that national governments should be responsible for the state of a nation’s economy, yet in Australia, a country effectively now a single unit due to improvements in communications, the national government could not properly assume its proper economic responsibilities.<sup>50</sup> The solution was obvious:

There are few functions which the state Parliaments now perform which would not be better performed by the Australian Parliament or by regional councils. The states are too large to deal with local matters and too small and weak to deal with national ones.<sup>51</sup>

The Whitlam Government was only briefly in power, but its impact on the federal system was substantial and a matter of political controversy. It took over some state functions such as railways, it threatened state power by its move to give funds to local government, it moved into unknown territory by its establishment of a department concerned with urban and rural development, and as noted earlier, it put pressure on state policy-making through a deliberate increase in specific purpose payments. In 1972–73, specific purpose payments of \$931.5 million represented 25.8 per cent of total Commonwealth payments to the states; in 1975–76, specific purpose payments of \$4.15 billion represented 48.5 per cent of the total payments.<sup>52</sup> The Whitlam Government's tough approach to Commonwealth-state relations played an important part in its downfall.<sup>53</sup>

### The Howard Government

Throughout the first ninety-odd years of federation, Labor's opponents often described themselves as the protectors of the federal system, claiming that the division of government powers among various levels of government was preferable to 'complete centralisation of power' in Canberra.<sup>54</sup> In John Howard, however, the Liberal Party has had a leader who has always seemed less than enamoured with the federal structure. Whether as Minister for Business and Consumer Affairs in 1977, forcing the reluctant states to accept a national corporations and securities commission,<sup>55</sup> or as Prime Minister encouraging his ministers to seek uniform practices in many areas of government services, Howard has described himself as a 'nationalist', having little time for what he has called 'state parochialism or state rights'. He also has expressed the belief that had Australia's system of government been established at the start of the 21st century, it is unlikely a federal structure would have been the outcome.<sup>56</sup>

Various Howard Government ministers have similarly expressed their doubts about the federal arrangements. Former Minister for Employment, Workplace Relations and Small Business, Peter Reith, was critical of industrial relations arrangements,<sup>57</sup> Attorney-General Philip Ruddock has spoken of the need for the 'efficiency' that would come were the Commonwealth to take on more policy areas hitherto the reserve of the states,<sup>58</sup> Minister for Education, Julie Bishop, has attacked the 'dysfunctional' nature of federal policy-making,<sup>59</sup> while Treasurer Peter Costello has spoken of the states 'moving towards the role of service delivery more on the model of divisional officers than sovereign independent governments'.<sup>60</sup> In line with Costello's view, Minister for Ageing Santo Santoro has referred to the need for Commonwealth oversight of state service delivery, to enhance governmental accountability.<sup>61</sup>

The most radical views have been those of Minister for Health, Tony Abbott. Observing that 'conservatives believe in small government rather than many governments', he has rejected the standard conservative view of the work of the Constitution-writers.<sup>62</sup> While



acknowledging their achievement in creating a new nation, Abbott has claimed that it was through ‘accident as much as design’ that Australia was established as a federal state and that contrary to accepted wisdom, the Founders actually sought to give ‘as much power as possible’ to the new national government. Criticising what he has labelled modern day ‘feral federalism’, Abbott has said that in any dispute between state and national interests, ‘Australia’—by which he means the Commonwealth Government—‘must come first’.<sup>63</sup>

All of which has seen the Howard Government making decisions well outside the range of powers granted by the Constitution and much in excess of previous Commonwealth governments of all types. There have been two main avenues by which the Government has attempted to achieve its ends.

On the one hand, the Howard Government has mirrored aspects of the Whitlam years by linking funding proposals to the imposition of particular policy aims. Queensland and Western Australia accepting three-year funding agreements for their Technical and Further Education (TAFE) systems with the proviso that TAFE staff would be offered Australian Workplace Agreements, is just such an example.<sup>64</sup> Another was former Minister for Education Brendan Nelson’s linking of education funding to his desire to see a national school testing program put in place.<sup>65</sup>

The second means has been a consequence of the size of the Commonwealth surplus during its period of office. This has enabled the Commonwealth to make financial grants that effectively bypass the state and territory governments. Payments made directly to local governments for programmes such as the Roads to Recovery are typical. Examples referred to in the 2004 Commonwealth election included the provision of tool boxes for apprentices and the establishment of technical secondary colleges; rather more narrowly focused cases included the building of a bridge in the Queensland electorate of Petrie, or the dredging of Tumbi Creek in New South Wales.

Despite the fact that by 2006 we have the unusual situation of Labor spokespeople speaking out on behalf of the states against a Prime Minister whose government appears to be weakening the federal system,<sup>66</sup> the views of major party members in the Commonwealth Parliament regarding the importance of Commonwealth power tend to be similar. Nearly thirty years after his loss of office, former Prime Minister Whitlam applauded the Howard Government’s industrial law changes:

Liberal Prime Minister John Howard correctly wishes our national parliament to have jurisdiction to make laws with respect to the terms and conditions of industrial employment.<sup>67</sup>

## Societal change

When constitutions are written, they are seen by their writers as written for all time. What the writers cannot foresee are the pressures placed on all constitutional documents by the inevitable changes that occur in every society. As circumstances have altered, so

governments have been taken in directions that Australia's constitution-writers could not have envisaged.

### **Australians expect government to do more—and in more areas**

One simple explanation for the growth of Commonwealth power is that all governments have gradually accumulated more responsibilities. At the state level, governments do much more than once was the case and at Commonwealth level the story is the same. This is due largely to the steady increase in the use of tied grants to enable the Commonwealth Government to introduce and refine policy in areas long regarded as a responsibility of the states. For example, in 1972 the Commonwealth first became involved with funding child care in a substantial fashion, providing funding for capital grants, recurrent grants and research grants relating to child care. Since then, Commonwealth participation in child care has increased to the extent that it now outlays almost \$1.7 billion annually.<sup>68</sup> As government has done more, so have Australians pushed their governments to maintain standards, to introduce new facilities and generally to increase their commitment to such policy areas. A consequence of the expansion of the Commonwealth into areas traditionally state preserves, is that the Commonwealth is increasingly seen as the government most likely to ensure that people's needs are met. Analysis of polling in the 2006 Queensland election indicated that a significant number of voters blamed the Commonwealth for problems in the state's hospitals, 'believing there are enough funds at a federal level to fix everything'.<sup>69</sup>

### **Internal migration**

The movement of people around the country is much greater than at the time of Federation. As people move residence from one state to another, or within a particular state, it is natural that they should expect that government services they receive should be of equal standard wherever they happen to live. The impact of a mobile population has long been seen in education. For example, a Queensland academic has noted that curriculum discontinuity has been identified by mobile families as a major obstacle for educational success, a problem that is emphasised:

... when children crossed state borders and entered different educational systems, where neither the school entry age nor the year levels match those of the Queensland system.<sup>70</sup>

This has long been a problem for children of defence force families forced to move as parents regularly take up different postings around the country and has been cited by Brendan Nelson as a reason for moving to remedy 'the crippling impact of 8 different educational systems within one nation'.<sup>71</sup> The age that Australian children start school varies around the country: four years and five months in New South Wales and South Australia, four years and six months in Queensland, Western Australia and the Northern Territory, four years and eight months in Victoria and the ACT and five years in Tasmania. Does this matter? It certainly creates difficulties for parents planning to move from one state to another. In addition, the Commonwealth Government has argued that lowering the school starting age to a standard

age would boost economic productivity and increase the number of students completing year 12.<sup>72</sup>

### **The growth of cities**

As Australian cities have grown rapidly, so have the problems for government. There is growing pressure to develop rail services especially to outer urban areas, the great mass of cars on the roads is creating enormous problems, water services are increasingly stretched to near-breaking point, renewable energy and reduction in energy usage are important and gentrification and rising house prices are forcing people to locate to the outer urban areas or into higher-density housing. The cities themselves are increasingly unable to pay for all of this change and with transportation gridlock threatening in some areas, there is a need to build arrangements into the governmental system that will be able to cope with the increasing pressures. As a House of Representatives committee noted in 2005: ‘our cities risk becoming more unsustainable across environmental, economic and social indicators’.<sup>73</sup>

The problem is that the organisation, management and government of cities was not something that Australian politicians of the late 19th century saw as necessary to include in our national Constitution. As a consequence, cities must cope with the impact of uncoordinated policies from all three levels of government, that do little to promote harmonised and sustainable development. The cities, in fact, have outgrown our federal arrangements, developing as ‘chaotic responses to discrete programmes and policies’.<sup>74</sup> Most local planning takes place at the local government level, yet constitutional responsibility lies elsewhere—the Australian federal system is not necessarily the most effective means of achieving sustainability.

### **The changing needs of business**

A major reason for Australian colonies federating was the desire to eradicate internal customs barriers—to create a common market within the new nation. Internal customs duties soon disappeared, but Australia has never achieved a perfect common market. In recent years, this has restricted the development of businesses operating across state boundaries. There is the frustration, for example, of businesses having to deal with eight sets of environmental approvals or businesses finding that they must deal with different employment classifications, which act as barriers to the mobility of skilled workers. Such problems add to costs. A survey has estimated that the cost impact of different state and territory building laws to be between one and five per cent of company turnover. Although corporations form the major part of nationally operating businesses, the Commonwealth in fact does not have sufficient powers to establish a national corporation-regulation scheme.<sup>75</sup>

### **International events**

From an early stage, Australian governments have had to respond to international events in a way that has tended to impact upon the federal system. From the time of the First World War, when the Commonwealth involved itself in the fixing of prices of everyday products, the

national government has increasingly felt the need to act in ways that have affected state powers.

An increasingly important example has been the way in which Commonwealth power has been used to implement international treaties or conventions.<sup>76</sup> In 1936 the High Court established that the Commonwealth could use its power in relation to external affairs to implement international treaties or conventions, even in areas where it lacked formal power.<sup>77</sup> An example of the consequences of this judgment was the Tasmanian Dam case of 1983, wherein the High Court said that the Commonwealth's power over external affairs enabled it to force Tasmania to halt the building of a hydro-electric dam, on the grounds that the area to be flooded was World Heritage Convention-listed. The fact that the Commonwealth did not have direct power over dam building was constitutionally irrelevant.<sup>78</sup> As Mr Justice Dawson of the High Court noted:

... even with existing treaties to which Australia is a party, the Commonwealth presently has the capacity to cut a swathe through the areas hitherto thought to be within the residual powers of states.<sup>79</sup>

Overall, use of the 'external affairs' power by the Commonwealth is an important political weapon which enables the national government to involve itself in policy matters once considered the sole responsibility of the states, such as the preservation of the environment. This is emphasised by the pressures of globalisation, which often require speedy decision-making at the highest level of government. In effect, all governments are answerable to the international community.

## Where the system retains value

The federal system has thus altered markedly and inevitably since Federation, particularly in respect to the accumulation of power by the Commonwealth government. To acknowledge this, however, is not to say—as some do (see below, pp. 29–30)—that the federal system is without merit.

### Co-operation

Since the early years of the Australian nation, three important structural factors have meant that cooperative relations between the Commonwealth and the states have often been valuable in enabling the Australian federation to function relatively smoothly:

- This has partly been for constitutional reasons, for the Australian Constitution created a concurrent federal structure, where the two levels of government have powers in different policy areas. As noted by the Federal-state Relations Committee of the Victorian Parliament:

In a federation as concurrent in structure as Australia's, effective intergovernmental relations are essential to the successful management of the inevitable overlap between the activities of governments.<sup>80</sup>

- In addition, the need for intergovernmental cooperation was increased by the emerging financial dependence of the states on the Commonwealth, which soon involved the Commonwealth in many areas of policy where the states retained the necessary administrative machinery to implement policies.
- Finally, it was soon realised that in any federal system there must be co-operation between governments if they are to deal successfully with policy matters not covered in the national constitution.

An example of the latter occurred in 1939 when the Commonwealth gave £1000 for the purpose of bushfire relief in Tasmania. From that time the Commonwealth, while regarding the handling of most disasters as a state matter, came to recognise the need for a level of financial assistance that a state would not be able to afford.<sup>81</sup> Today, Natural Disaster Relief Arrangements are administered by the Commonwealth Department of Transport and Regional Services on behalf of the Australian Government. These arrangements, which apply to natural disasters caused by bushfire, earthquake, flood or storm, are a significant example of the intergovernmental cooperation that helps give continuing life to the Australian federation.<sup>82</sup>

Over the years there have been many other examples of cooperation between the governments, indicating that the federal system often allows governments to respond appropriately to deal with perceived needs. For example, much has been done through Premiers' Conferences (today, the Council of Australian Governments), councils of ministers such as Attorneys-General and a large number of ad hoc or standing administrative groups. Such bodies remain in constant communication, exchange information and sometimes work together on joint operations. Co-operation can also take the place of joint programmes, formal agreements, intergovernmental administrative arrangements and occasionally the passage of uniform legislation. Current (November 2006) Intergovernmental Agreements include those dealing with natural gas pipelines (1997), food regulation agreements (2000 and 2002), foot and mouth disease (2002), research involving human embryos (2004) and surface transport security (2005).

An example of ministerial co-operation is the area of justice administration. The Australasian Police Ministers' Council (APMC) was established in 1980 to promote a 'co-ordinated national response to law enforcement issues and to maximise the efficient use of police resources'. Its initial role was the development of a co-ordinated approach to police policy and operations, and in May 1986 this was broadened to include 'the co-ordination of the national attack on organised crime and the co-operative efforts needed to achieve that goal'. More recently its agenda was extended to include a wide range of national law enforcement policy development and implementation activities including DNA legislation, a national sex offenders registry and gun control. Since 1993, the APMC has been part of Ministerial

Council on the Administration of Justice, along with the Australasian Police Ministers' Council, the Inter-Governmental Committee of the Australian Crime Commission and the Corrective Services Ministers' Conference.<sup>83</sup>

The less politically controversial an issue, the easier it is to achieve intergovernmental cooperation—it is easier to achieve co-operation in matters to do with food regulation than with the uniformity of school curricula. To a major degree, cooperation is easier to achieve in areas where there is no political stimulus for the Commonwealth to achieve national uniformity. Joint action therefore emerges primarily for reasons of 'political and administrative convenience'.<sup>84</sup>

But politics is never far from the surface. The desire to collaborate with other governments is invariably a tactical decision and can soon be cast aside by conflict between politicians who often reject cooperation for short-term political reasons. There is also the impact of perspective. The Commonwealth view of cooperation between governments is often driven by a desire for uniformity, whereas state and territory attitudes are very much influenced by a perception of local needs and attitudes. A common consequence is frustration on all sides. For all the political difficulties expressed, intergovernmental cooperation plays an important part in maintaining the usefulness of the Australian federal system.

### Local decision-making

In any nation, local communities have particular needs, some of which may well be beyond the purview of national policy. The Australian federal system provides two main ways in which such communities can make their own rules. Local government councils—the creations of state governments—can achieve objectives in many policy areas, while state or territory governments facilitate decision-making within the borders of the relevant state or territory. Federalism therefore provides an institutional means of recognizing the need for communities to govern themselves in some policy areas in accordance with their own perceived interests:

Federalism institutionalises a system of government predisposed to a more participatory and accessible mode of operation. It is potentially more participatory because the multiple levels or arenas of governance multiply the opportunities for meaningful citizen involvement in the political process. It is potentially more accessible because of the multiple access points opened up for citizen access to the governmental sphere.<sup>85</sup>

Policies can thus be closely tailored to the local needs. For example, Western Australian industrial regulation, introduced in response to the needs of its remote mining industry, allowed more intensive working hours, long before they were allowed for in federal awards. The existence of such local needs is in fact likely to be a major factor in ensuring that federal government remains the basic Australian structure. As Professor Greg Craven puts it, 'real differences of place interact with equally real political and social differences'.<sup>86</sup>

## Experimentation

Advocates of federalism see an advantage in different jurisdictions having power over similar important areas of administration because it enables experimentation by one government before all take up a particular policy. Among the better known examples have been South Australia's leadership of social reform in the 1970s, Victoria's introduction of compulsory seat belts in 1970, and the Northern Territory's development of flexible teaching strategies during the 1980s. Because of the poor outlook for the Victorian economy in the early 1990s, the Kennett coalition government was able to push the policy frontiers, and experiment with a raft of governmental reforms that were not politically possible elsewhere at the time. Most of the experiments, such as the massive re-creation of the local government system, were successful and were subsequently adopted to some degree by other states.

The other side of experimentation is that mistakes—and there are always likely to be some—can be isolated in a particular state or states that have tried a new policy approach. For example, it has been claimed that the education policy of the Carr Government in New South Wales had been shaped by Labor's acknowledgment of weaknesses in the Victorian Certificate of Education introduced by the Cain Labor Government during the 1980s. In turn, Victoria under Premier Kennett, built on the experience of the Carr Government's successes in this area.<sup>87</sup> Some would say that this is also a warning about seeking national uniformity in policies, for there is no guarantee that some mistakes will not be made by the Commonwealth Government as well as by the states: 'a federation, ... is not a model of efficiency'.<sup>88</sup>

## Where the system falls short

### Inequality

Despite the long-term attempt by the Commonwealth Grants Commission to ensure that there is an equality of services across the nation, critics claim that while states retain important policy-making powers the uniform delivery of equal services remains impossible. A basic problem is that while the Grants Commission has delivered equal capacities, there is no obligation on the states to use these. At the time of writing, Queensland is the only Australian state in which Auslan, the language of the Australian deaf community is not widely offered. In order that she receive an education where this language was used, eight-year-old Queenslander Tiahna Hurst recently moved with her family to a state where Auslan was more widely used. In July 2006 the Federal Court ruled that Tiahna had been discriminated against by the Queensland Government.<sup>89</sup> This case is an indication of how the very existence of the federal system can have the unintended consequence of introducing and maintaining inequalities across the nation. Two policy areas where this can be seen are those of indigenous affairs and policies of relevance to Australian women.

One major difficulty for indigenous people has been that it has not always been clear where governmental responsibility for particular services actually lies. Apart from areas of Commonwealth responsibility, many of the day-to-day living needs of communities are provided by such agencies as local governments or state departments dealing with social

welfare matters. The constitutional inexactitude so typical of federal systems has created administrative grey areas that protect governments and frustrate their clients. In such a situation, indigenous recipients of services can be left guessing which government is relevant to their needs.<sup>90</sup>

Professor Kim Rubenstein of the Australian National University has noted the difficulties the division of power in the area of family relationships has caused women and their families. An example is the Commonwealth possessing the power to legislate with regard to de facto couples' disputes over children, but not in regard to their disputes over property. Rubenstein also notes the Commonwealth's relative lack of power in regard to child welfare matters and in particular, issues relating to child protection. Essentially, the difficulty lies in the fact that the Commonwealth has limited and piecemeal powers in regard to family relationships, which have made the lives of women 'more difficult and time consuming' than they need have been.<sup>91</sup>

### Living on a border

Administrative differences can create difficulties for residents of particular communities. In a federal system the obvious way in which regional governments are organised is within the borders of each. With different states having different policies and administrative arrangements, however, local residents have found that 'dealing with different rules and regulations between the states ...[can become] an irksome way of life'.<sup>92</sup> The range of problems has become large, including such matters as taxi licensing, mental health services, fishing and boating licences, operating rules for local police, fire and ambulance services, trading hours, taxation, daylight saving and the use of 1300 and 1800 telephone services. In many cases it has been the creation of different administrative arrangements that annoys and frustrates local residents, but in many other cases the difficulties can be far more serious. This was pointed out in a submission from a resident of the near-border Victorian town of Beechworth to the 2005–06 Senate select committee on mental health:

The continuing problems of state cross border anomalies is an on-going source of frustration that needs to be addressed with some urgency if effective and timely care is to be provided to clients.<sup>93</sup>

Governments have been alert to such frustrations—at different times New South Wales has had the Border Anomalies Committee (established 1979), the Regional Communities Consultative Council (operating under the aegis of the Premier's Department), and the One City Plan designed to create a seamless administrative structure for Albury-Wodonga (2001). All achieved some improvement for local residents, but not enough to dissuade various MPs from border electorates from supporting a private member's Bill seeking to establish a Cross-Border Commission in 2004–05.<sup>94</sup> The Bill failed to pass the New South Wales Parliament.



## Too much bureaucracy?

The Business Council of Australia (BCA) is critical of the current state of the Australian federal system. In particular, the BCA notes that the existence of multiple governments, each having a finger in particular policy pies, produces a marked ‘duplication of effort and inconsistencies in programs and regulations’. The outcome is not only a bureaucratisation leading to an unnecessary increase in the costs of public administration, but also a heavy financial burden for firms attempting to do business across Australia. This is probably an inevitable consequence of having different law-making areas within a nation, but critics believe that in the modern, globalised economy it is a burden that should be addressed with the aim of eliminating it.<sup>95</sup>

This bureaucratisation can be seen particularly clearly in regard to government regulation. The Commonwealth Government’s Taskforce on Reducing Regulatory Burdens on Business has drawn attention to the size of what it sees as major problems for Australian government:

- there are more than 1500 Commonwealth Acts of Parliament, plus approximately 1000 statutory rules in force, plus an unknown amount of other Commonwealth ‘subordinate’ legislation
- each state and territory administers a large body of its own legislation and regulation—in Victoria 69 regulators of business administer 26,000 pages of legislation and regulation
- there are ‘literally millions’ of pages of rulings, explanatory memoranda, and advisory notes
- one indicator of the extent and complexity of regulation that affects business is that the three levels of government administer over 24,000 different types of licences for businesses and occupations.<sup>96</sup>

To all of this could be added the major example of inconsistent policy that is the different workers’ compensation regimes across the nation. In a BCA-commissioned report (October 2006), Access Economics estimated that such problems cost the nation an many millions per year.<sup>97</sup>

## Infrastructure development

Australia’s infrastructure—electric power generation facilities, roads, railways, telecommunications, airports, potable water, irrigation, waste-water management and so on—is ageing and in many cases is in urgent need of replacement or upgrading. State governments have traditionally been the main providers of such infrastructure and therein lies a major problem, for the development and maintenance of infrastructure suffers in Australia from:

... a lack of integration and co-ordination ... with the three tiers [of government] each having separate and sometimes overlapping roles and responsibilities.<sup>98</sup>

The Australian federal system imposes particular complexities and constraints that are not experienced in many other federations, for Commonwealth-state financial relations have ‘a pivotal role in shaping infrastructure investment’.<sup>99</sup> In such a setting, with many infrastructure issues crossing state borders, it is often argued that national leadership can produce large benefits. As former Liberal Party national leader, John Hewson, has put it:

I think infrastructure as a national responsibility makes sense, because competition between states ... really mean[s] uneven and unwanted development of infrastructure in some parts of Australia versus others and so on, it just bedevils the whole country. We really have to act in economic terms and in business terms, as an integrated nation.<sup>100</sup>

An increased need for infrastructure development will be a pressing issue in the coming decades. It is uncertain whether the federal system will be able to cope with this.

### The weakness of local government

Local government exists in Australia as the creation of the states—most controversially, not only can the state parliaments establish local government councils, but state governments can dismiss them, quite arbitrarily. None of the colonial politicians who drew up the Australian Constitution apparently believed that local government should be given specific constitutional status and therefore, constitutional protection. Despite this, local government has been affected by the ongoing story of Commonwealth-state financial relations, as well as by the increased power of the Commonwealth Government to influence such local responsibilities as road-building, housing and the provision of social welfare arrangements. There is an argument suggesting that as the Commonwealth becomes stronger, so the right of people to govern themselves in local matters should be given constitutional recognition—as it is in the state constitutions.

Twenty years ago, the Commonwealth Department of Local Government and Administrative Services supported constitutional recognition of local government on two grounds: because local government was elected and publicly accountable and because local government participates in the federal system of public administration.<sup>101</sup> The Constitutional Commission (1985–88) agreed, expressing its belief that any constitutional recognition should require:

- (a) that the people of each state are represented by an elected Local Government body
- (b) that Local Government bodies shall not be dismissed arbitrarily, and
- (c) that, if the Local Government body in any area is lawfully suspended pursuant to a state law, it will be restored within a reasonable period by elections.

Accordingly, the Commission recommended that a new section 119A be added to the Constitution:

Each state shall provide for the establishment and continuance of local government bodies elected in accordance with its laws and empowered to administer, and to make by-laws for, their respective areas in accordance with the laws of the state.<sup>102</sup>

An attempt to amend the Constitution in this way failed in 1988. This seems to have been due to opponents choosing to link this with the Commonwealth Government's three other amendment proposals—for four-year terms for the Commonwealth Parliament, democratic elections and certain civil rights—describing them all as giving 'more power to the Federal Government at the expense of the states'.<sup>103</sup> Perhaps unfortunately, the constitutional entrenchment of local government fell by the wayside, but the issue is still relevant. In 1997, the Australian Local Government Association stated that:

Local governments are elected to represent their local communities; to be a responsible and accountable sphere of democratic governance; to be a focus for community identity and civic spirit; to provide appropriate services to meet community needs in an efficient and effective manner; and to facilitate and coordinate local efforts and resources in pursuit of community goals.

To these ends, the principle of elected Local government must be enshrined in the Australian Constitution and the constitutions of each state and the Northern Territory.<sup>104</sup>

On 6 September 2006, a resolution was introduced in the House of Representatives, which said *inter alia* that each house:

... recognises that Local Government is a part of the governance of Australia, serving communities through locally elected councils ...

... acknowledges the role of Local Government in governance, advocacy, the provision of infrastructure, service delivery, planning, community development and regulation.

Despite its passage through the Parliament, the resolution still fell short of what many local government advocates would prefer.

### **The avoidance of responsibility**

Commonwealth and state governments, of all parties, have long used constitutional grey areas to deny responsibility for weaknesses in their performance. Criticism of the Commonwealth over administrative failures in particular areas will see the Commonwealth blame the states which, we are often reminded, have the constitutional responsibility of the particular policy area.

With the emergence of specific purpose payments, the later establishment of Grants Commission, and the creation of the GST, the avoidance of responsibility has often been seen in claims by the states that the reason they cannot perform better has been the niggardliness of the Commonwealth Government. Minister for Health, Tony Abbott, has spoken of the problem of public hospitals, part-funded by the Commonwealth, but wholly run by the states. Abbott has said that the consequences of this has been 'the states blaming the Commonwealth

when anything goes badly wrong’—as in the case of the Labor government in Queensland in the 2006 state election.<sup>105</sup>

A more recent example is of the increasing practice of state (and occasionally the Commonwealth) governments to shift costs to local government. According to the Commonwealth Grants Commission, local government has been taking on extra functions due to governments devolving responsibilities for new functions, or where the complexity or standard of a service is increased, with local government picking up the increase in cost. Cost-shifting can also involve a government withdrawing from a service, with local government forced to step in to maintain the service, or withdrawal of Commonwealth or State funds forcing local government to continue a service due to public demand.<sup>106</sup> An example is library funding, which has increasingly been reduced by state governments, forcing local government to assume an extra funding responsibility rather than abandon the service altogether.<sup>107</sup> All of which gives more ammunition for the federal system’s critics.

## Where to from here?

Where is the Australian federal system heading? It is ironic that at a time when many are expressing doubts about the value of Australian federalism, the federal idea is being extended throughout the contemporary world. Various countries—the United Kingdom and Spain, for example—are attempting to accommodate internal diversity by devolving power to regional governmental bodies. In Australia, by contrast, many believe the original federal model has had its day.

### A rigid written Constitution

The Constitution is a federal document, drawn up by regional politicians determined to protect the long-term position of the states. Voters in the Federation referenda were spoken to incessantly about the need to protect the place of their colony in the future union, and in the years since voters have often been asked to show support for their state, most notably in regard to constitutional amendments proposing to increase central government power. Voter response has been spectacular—all 17 constitutional amendment proposals to increase Commonwealth economic power have been rejected, as have four others dealing with non-economic powers. Two referenda suggesting Commonwealth involvement with local government have also failed. Constitutional amendment can thus be difficult if it strays outside the federal parameters that can seem to apply as much today as they did in the late 1890s. Whatever the merits of a proposal to alter aspects of the Australian federal arrangements, the difficulty of constitutional change in Australia makes it hard to see such changes being made formally to the Constitution:

Australians will not alter aspects of the federal system of government if they perceive its basic structure to be under threat.<sup>108</sup>

The problem is that occasional changes to the Constitution so as to bring the document closer to the current realities of government, are not made. The Constitution thus can appear less and less relevant to the real world of Australian government.

### Abolition of the states?

Can a constitution written in the late-19th century cope with the pressures—both known and predicted—of the 21st century? This question is illustrated in a writer's wondering if the continuance of the 'sovereign' state of Tasmania can be justified:

Tasmania continuing to be a sovereign state is increasingly hard to sustain as a serious proposition.

It's a state which cannot hope to adequately meet the challenges and expectations of the 21st century without being part of greater and more sophisticated governmental and community structure like that which exists in a state such as Victoria.

It is pure folly to think the political, legal and social infrastructure of this island of fewer than half a million people can ever attain a consistently high standard.<sup>109</sup>

The Abolish the States Collective (ASC) is a private organisation whose members believe that the only way Australian government can be made relevant and effective in the early years of the 21st century is for state governments to be abolished 'at the earliest possible opportunity'.<sup>110</sup> In justification of this position they claim:

- that state governments are divisive
- that the states are wasteful in their duplication of government services
- that the states place an enormous cost burden upon the nation, putting Australia at a competitive disadvantage in an increasingly competitive world.

The ASC maintains that state government functions could be performed effectively at either the national government level or at a level closer to the people than the states:

We believe that Australia needs a single, effective national government which would assume most of the powers and responsibilities held by the present state and federal governments. We also believe our national government should administer uniform national laws, but we endorse flexibility in the local application of such laws.

Were the states to be abolished, how might the replacement structure be organised?

One idea, which has a long pedigree, would be for a two-tier system to be created, made up of the national and 'regional' governments. As early as 1920, the Nationalist MHR, Charles Marr, was claiming that:

One Parliament for Australia, with some bodies—say, county councils—would provide a far better administrative system than exists today with the state and Federal Parliaments.<sup>111</sup>

Former Prime Minister Whitlam pointed to the governmental imbalance contained in the national Constitution:

Ideally, one continent should have neither so few state governments nor so many local government units. We should not have a federal system of overlapping parliaments and a delegated but supervised system of local government. We should have a House of Representatives for international matters and nationwide national matters, an assembly for the affairs of each of our dozen largest cities and regional assemblies for the few score areas of rural production and resource development outside those cities.<sup>112</sup>

More recently a combination of national government and regions has been advocated by many observers including former independent MHR, Ted Mack, New South Wales Independent MLA Clover Moore, Lindsay Tanner MHR (ALP), and former Liberal Minister for Regional Services, Territories and Local Government, Senator Ian Macdonald.<sup>113</sup>

### A re-allocation of powers?

Not all believe the states should be abolished, preferring to push for a modernising and a re-allocation of powers between the Commonwealth and states. Professor George Williams of the University of New South Wales, for instance, claims that the Constitution-writers' granting of power over international trade and commerce to the Commonwealth, but not power over trade within state borders, might have made some sense at the end of the 19th century, but not at the beginning of the 21st century:

Our economy does not now consist of discrete sectors of commerce within each state or even within Australia, but exists within a world global markets in which there is competition and interdependence with the economies of other nations.

Williams believes that in such a setting it makes little sense for businesses to have to deal with nine different Australian jurisdictions. In addition, he points to the constitutional barriers to the creation of an integrated national judicial system and the fact that the Commonwealth lacks a general commerce power.<sup>114</sup> Williams also believes that although urgent problems relating to controversial policy areas such as health and education can be resolved by political compromise, such arrangements are unlikely to be satisfactory over the long term. The system can be reformed and the advantages of federalism retained, but it is important to analyse 'whether the division of powers agreed to in 1901 is the best model for today'.<sup>115</sup>

### The states as 'service deliverers'?

Despite the enthusiasm with which abolitionists approach the task of eradicating the states, it is quite likely that the three tiers of government will be retained. This is partly because of the political difficulties in removing them—the states run large governmental apparatuses. They are responsible for three-quarters of all public sector employment. There is also the

possibility that the states might be used more efficiently within the governmental system. Professor Pat Weller of Griffith University has suggested the likelihood of there being a rationalisation of funding by the Commonwealth government. With the states increasingly unable to raise most of the money they need for their administration, the Commonwealth will be more and more tempted to direct s. 96 specific purpose payments in a way that aims to reduce the differences between state programmes. Weller speaks of the states delivering the services 'within a framework of Federal funding and program design'.<sup>116</sup> Former Labor Queensland Premier, Wayne Goss, has suggested that such a change would see a significant alteration in the relationship between the centre and regions in Australia:

... it is most likely that regional governments will not be a significant force but rather providers of services determined, not entirely but to a significant degree, by the national agenda.<sup>117</sup>

More recently, a similar arrangement has been suggested by a number of prominent Liberals, including Peter Costello and Santo Santoro. They have suggested that service policy-making become the sole responsibility of the Commonwealth, with the states and Territories acting as the deliverers of the services, such as education and health. Senator Santoro, for example, has proposed that:

... in most fields, the states should have responsibility for service delivery, and the Commonwealth a central role in the development of national benchmarks to guide and assess the states.<sup>118</sup>

Such an arrangement would, at least on paper, see the maintenance of the federal structure, even if the realities of power and administration were rather different from the outline put in place at the time of Federation. It is not clear where local government, which is controlled by state legislation and state governments, would fit into such an arrangement.

Such a change would mean the retention of the federal system, but in a different form.

## **Last words**

Where to for the Australian federal model? There is still much support for a political system that has worked quite well since its beginnings in 1901. However, supporters, as well as those who disparage the system, believe there are problems. Even the Premiers see serious problems that need repair.<sup>119</sup> There is a general consensus, therefore, that the Australian federal system does not work as well as it might. The question for the nine governments is: what should be done to enhance its performance and its reputation? The way forward is far from clear, particularly as any move to wholesale change will inevitably become enmeshed in party politics. It has been forever thus.

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