Australia’s Federal Future

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Introduction

The Australian colonies ‘agreed to unite in one indissoluble Federal Commonwealth’ in 1901 after considerable thought about what system of government would best suit the new nation. A federal system was adopted because it offered many advantages. It provided a means by which the colonies could unite to achieve national goals, while also enabling them, as States in the nation, to pass laws and develop policy for local needs.

The choice of a federal design for Australia has since been vindicated by the adoption of this model of governance by many other nations. Some 25 countries now have federal systems of government, including Brazil, Canada, Germany, India, South Africa, Switzerland and the United States. Australia’s system follows the United States model. Indeed, Australia now has one of the oldest federal systems of government in the world.

The age of Australia’s federal system speaks of its success. It has underpinned a stable form of government, and yet has still enabled significant economic and social change. Moreover, the federal system itself has adapted over time. The early decades of the federation, and in particular, the events of World War I, established the need for stronger central organisation within the nation. This was fostered by the High Court of Australia in its famous decision in the Engineers case in 1920. In that decision, to use the language of Justice Windeyer in the Payroll Tax case, ‘the Constitution was read in a new light, a light reflected from events that had, over twenty years, led to a growing realization that Australians were now one people and Australia one country and that national laws might meet national needs’.

Australia’s federal system is the product of many minds, including especially those people who assembled at the constitutional conventions of the 1890s. Sir Samuel Griffith played a particularly important role both before and after federation. He was a central figure at the 1891 convention, and lead the drafting committee that produced the draft constitution approved by the convention. After 1901, he was appointed as the first Chief Justice of the High Court, and so bore responsibility with the other members of the bench for interpreting and applying the federal design written into the Constitution.

The Constitution reflects Griffith’s vision for Australia’s federal arrangements. He saw a prime motivation for federation as being the creation of an economic union. Indeed, he said at the 1890 Australasian Federation Conference: ‘I admit freely their federation without fiscal union would be unsatisfactory’ and that ‘[i]t has been said that there can be no federation without absolute freedom of interchange of products’.

Federation may have required tearing down the economic barriers between the colonies, but it did not require the colonies to give up their independence. Hence, he said at the 1891 convention that ‘we must not lose sight of the essential condition that this is to be a federation of states, and not a single government for Australia’. He thus adhered to the ‘fundamental principle … that we are only surrendering to the central government what is absolutely necessary for the benefit of the whole of Australia, leaving to the several states their autonomy’. Underlying all of this was his view: ‘I do not want unification. I strongly object to it. I am perfectly satisfied that under this constitution there will be no unification, because state rights will be perfectly preserved.’

Within this framework, Griffith recognised the need for adaption over time, and so supported the idea of a constitutional system responsive to change. At the 1891 convention, he pointed out that the framers were ‘launching upon an unknown sea’, and so envisaged ‘a constitution so elastic as to allow of any necessary development that may take place’.

Griffith’s vision for the Australian federation has been realised in some key respects. He succeeded in creating a nation characterised by free trade between the States. He also succeeded in creating a system of government responsive to the times. However, this last feature has come to compromise his strong adherence to the idea that the Constitution should promote and preserve state autonomy, and that the Commonwealth should only have such powers as are ‘absolutely necessary for the benefit of the whole of Australia’.

As Chief Justice of the High Court, Griffith developed interpretive approaches to the Constitution that were consistent with State rights, most notably the idea of reserved State powers. However, after his retirement, the High Court in the Engineers case discarded this approach. The Court instead developed a method of constitutional interpretation that facilitated a broad reading of Commonwealth power, and so over time a corresponding diminution in the spheres of State influence. The result has been a federation in which state rights have been far from ‘perfectly preserved’.

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Not surprisingly, after more than a century, the Australian federation has departed in important ways from the vision of its framers including Griffith. In itself, this is not a problem. Constitutional systems cannot survive unless they are sufficiently flexible to meet the needs of the time. The changes are so large though that they are giving rise to important questions about the future of Australia’s federal system. Has Australia’s system of government become so lopsided in producing a dominant Commonwealth that the benefits of federalism are being compromised? What should be the next stage in the evolution of Australian federalism? What is the long-term position of the States in Australia, and what should be their role and what functions should they have in, for example, 2030?

Underpinning each of these questions is an ongoing need for federal reform. It is not always obvious that Australia has the capacity to achieve this. Bringing about federal reform depends upon the extent to which our political leaders are willing to use their political capital to bring about change. This in turn is affected by public awareness of the opportunities and problems posed by the federation.

The State of the Debate

One thing that is striking about Australian federalism is how public debate is overlaid with ignorance and defeatism. These can loom larger than the policy challenges themselves. Such challenges may never be addressed if the public is unaware of them, or if solutions are believed to be impossible to achieve.

When it comes to Australia’s system of government, the general community is, by and large, woefully ignorant. One survey found that only one in two Australians was unaware that we even have a written Constitution, let alone aware of which level of government is responsible for what (something that may elude even a constitutional lawyer or political scientist).

It is clear that the community knows little and understands less about Australia’s federal system. This extends well beyond the community. Media reporting of federal issues can often be shallow, and my experience is that few politicians have a sound grasp of the fundamentals.

It should be no surprise then that public debate about federal reform is often driven by simplistic slogans and superficial thinking. One aspect of this is how debate about federalism in Australia so often centres on the concept of ‘national interest’. This is often played as a trump card in federal debates. With some exceptions, notably Western Australia, Griffith’s idea of States’ rights is only a faint echo of what it once was.

A good example of the use of the ‘national interest’ was in Prime Minister John Howard’s response to the High Court’s 2006 decision in the Work Choices case. Along the Tasmanian Dams case of 1983, it is a landmark in Australia’s federal history. As a result of these cases, it is rare to find a legal impediment to the Commonwealth being able to impose its policy objectives over those of the States. It is now more often a question of whether the federal government has the requisite political will to do so.

The Work Choices case gave Prime Minister Howard a powerful new tool with which to expand the reach of the federal government. It means that the Commonwealth can regulate hereto unreachable aspects of the Australian community by casting obligations upon corporations. The Commonwealth quickly recognised the potential of the decision, but Howard said:

We will not interpret this decision as being any kind of constitutional green light to legislate to the hilt. We have no desire to extend Commonwealth power, except in the national interest.

The question before and since has thus come down to whether new federal policy initiatives, including, for example, a new regulatory regime for the higher education sector, is in the national interest.

The problem here is not that we debate things like the national interest, but that the concept is almost completely uninformed by questions of good governance and federal design. It is more often deployed as a slogan than as a considered justification.

I am certainly in favour of national control of many areas that lay within the domain of the States in 1901. Globalisation, enormous changes in the Australian economy and society and leaps in technology all mean that the constitutional settlement of 1901 provides an inadequate model for today.

The problem is not that we have seen a change in the settlement of 1901, but that it has occurred in an ad hoc, reactive way. Australia has become a much more centralised nation, perhaps in tax terms the most centralised of any democracy, but it is an unthinking, unconsidered centralism. It is a centralism born out of political opportunity, rather than any coherent development of the sort of federation that Australia ought to have.

As a result, we have a federation that for more than a century has developed more often in response to political imperatives than gaols such as efficiency and maximising the return of the taxpayers’ dollar. Where such goals have been realised, this has too often been coincidental rather than the product planning and good design.

In this context, the concept of the national interest is usually seen as synonymous with uniformity. Uniformity can be desirable. But on other occasions, the national interest will be better served by diversity between jurisdictions and robust competition between States and regulatory regimes.

Yet, these concepts are rarely reflected in the Australian debate. We value competition highly elsewhere, but in the area of federalism, multiple centres of power and regulation are often equated with inefficiency and the waste of public money.
It is no surprise that the poor state of the Australian debate is reflected in Professor AJ Brown’s regular Australian Constitutional Values Surveys. Each survey taken since 2008 has shown a steady increase in the number of Australians who agree that: ‘The current system of government, with three main levels, does not work well.’ In 2012, nearly 40% of respondents took this view, while 66% indicated that they did not believe that: ‘The federal and state governments are working well together’. The confidence of Australians in federal-state cooperation is lower than in either of the United States or Canada.

When the national interest rules and people perceive that the federal system is not working, it is only a short step to supporting the simple proposition that the States should be abolished. Hence, in 2010, the Australian Constitutional Values Survey returned the remarkable figure that four out of ten Australians support this view.

Such views are a product of our education system and the media, but also of a lack of vision and leadership by our politicians. Australia has few political defenders of federalism. It is rare to find a politician willing to explain why having a federal system is in the best interests of the community as a whole. At best, there have been occasional attempts by State and federal politicians to engage in debate about the future of the federation, but little follow-up and nothing like the emergence of a reform agenda for the future.

A year or so ago, with the support of ANZSOG and the COAG Reform Council, UNSW and Griffith University sought to establish an annual State of the federation event. The idea was to provide a public forum to examine ongoing questions about the performance of the federation, and areas for reform. The event could not be held because our political leaders were unwilling to speak at it. In dealing with their advisors, I was repeatedly told that it was not a subject upon which the leaders had anything meaningful to contribute. I have organised many events, and this is the first time I have encountered this problem.

We are unfortunately at a point where our leaders are more than willing to acknowledge that Australia’s federal system is broken, with Tony Abbott for example describing it as ‘Australia’s biggest political problem’, but are not in a position to offer ideas or solutions. It can only be hoped that the new federal coalition government’s White Paper on federalism will provide welcome leadership in this regard.

The former head of the COAG Reform Council, Paul McClintock, got it right in a speech at the end of his term. He spoke of Australia going backwards when it came to creating a mature federation, and said the ‘silence of COAG members’ is ‘telling’. As McClintock says, ‘we are neglecting the unavoidable avenue to success of any Australian vision – our federal system of government’.

The Reform Agenda

The willingness to tackle federal reform ebbs and flows in Australia. It is currently at a low ebb. Even where there has been a focus on federalism, such as during Kevin Rudd’s first tenure as Prime Minister, when he promised to ‘end the blame game’, little effort was expended at any form of fundamental or holistic reform. Indeed, a reform high point of that era, the Intergovernmental Agreement on Federal Financial Relations, may yet achieve little in terms of fundamental change over the longer term.

In the absence of any overarching plan narrative, the debate tends to be dominated by sporadic Commonwealth policy initiatives in areas of State concern, such as education and health. Such initiatives may be welcome, but they are weaker for not being informed by a broader sense of Australia’s federal future.

Proceeding in this way steadily erodes the position of the States. In the absence of any clear sense of what independent role the States should have in Australia today, it is understandable that many people question their relevance, and argue for their abolition.

It is hard though to be too critical of our political leaders on this front when the work has not been done to flesh out a broader reform agenda. Here, Australia is exposed by its lack of institutional support for federal reform. How can there be effective federal reform unless people are developing the policies and ideas that will drive it?

Australia is well served by a range of expert bodies that on an ongoing and ad hoc basis are charged with developing credible, evidence-based policies for reform. Yet no such body has existed in Australia for decades when it comes to the federal system.

Such bodies have existed in the past. Major reviews of the federal system had been undertaken through the Royal Commission on the Constitution of 1929, the Federal Parliaments’ 1959 Joint Committee on Constitutional Review and the Constitutional Commission of 1980s. There has not been anything of the same kind since.

Within our universities, there has not had a dedicated research centre in the field for nearly two decades since the Federalism Research Centre at the Australian National University was disestablished in the mid-1990s.

There are of course important bodies that work in and around the system, such as the Productivity Commission and the COAG Reform Council. Each of these bodies though has a limited mandate, and none is able to undertake the broad scope of the work required.

It was with this in mind that I with a number of collaborators in the fields of economics, public policy, political science and law sought to secure funding from the Australian Research Council for a Centre of Excellence for the Australian Federation. That bid was unsuccessful, but the rationale underlying it remains.
The starting point for that initiative was to recognise that Australia is a federation for good reason. The people of the colonies voted to become a federation in 1901, and even though the rationale may have shifted and developed over time, it remains the case that a federal model of governance is in Australia’s long-term interests. If nothing else, a federal model represents the only viable model of governance for Australia given our history and political arrangements.

The question then is not whether we should be a federation, but how can the federation be best made to work. A starting point could involve assessing federal reform initiatives to date. It is striking for example that major initiatives such as those of the first Rudd era remain largely unstudied, and certainly under analysed. This gives rise to questions such as whether the Intergovernmental Agreement on Federal Financial Relations has met its goals, and whether initiatives such as the new hospital funding model represent a template that should be copied elsewhere. Answering these questions should also be informed by comparative experience.

With some understanding of our own successes and failures, we will be better equipped to assess and inform future policy. Such policy ought to address the core problems that beset Australia’s federal system, including:

- The degree of administrative duplication, overspending blame-shifting and policy distortion between governments. In one indication, the Business Council of Australia estimated in 2006 that these inefficiencies cost at least $9 billion a year in wasted taxes alone and that the total impact of suboptimal federal arrangements upon businesses and the community may be up to $20 billion a year, or 3% of GDP. Such figures are of course contestable, but there is no doubt that very significant costs are involved.

- How current federal fiscal arrangements, especially the growing liabilities on State budgets, are widely appreciated as unsustainable. To remain competitive in the international environment, significant investment in education, infrastructure and workforce skills training is needed, requiring critical changes to the collection and distribution of tax revenue within the federation, and a renewed focus on improving productivity through federal reform.

With such problems in mind, the plan for the Centre of Excellence for the Australian Federation suggested that the reform agenda ought to focus in on the following five areas as a means of realising the opportunities that federalism offers to Australia, and of alleviating the costs and burdens imposed by deficiencies with the current system:

1. What ideas, values and goals should drive the development of the federation?
2. How can the federation be more efficient and stimulate productivity and innovation?
3. What should be the roles and responsibilities of each level of the federation?
4. How can collaboration and coordination between levels of government be improved?
5. How can awareness of and democratic engagement in the federation be promoted?

All of these areas are important, but if asked to nominate only one, I think that the most urgent and necessary is the third in dealing with the roles and responsibilities of the different levels of government. Without this, we can have no clear conception of what role the States are to play within a modern Australian federation. Without a better understanding of this question, we will also continue to have long-running, unproductive battles over major areas of policy responsibility.

In Australia, we have not only lost a sense of what tier of government ought to be responsible for what, but even what criteria that should be used for determining this. Without this, we are in no position to formulate a sustainable position for the States, or to have a realistic sense of what their role should be in the future.

The Strategy

Improving the performance of Australia’s federal system is not a short-term goal. It will require long-term institutional support that extends beyond any one political cycle. It will also require the careful framing of goals that attract ongoing support from the community and their elected representatives.

These goals should not be something as esoteric as fixing the federation, but simple, easy to communicate, objectives such as:

- a federation in which the taxpayers’ dollar goes further;
- a federation that strives for the lowest levels of red tape for the community and business; and
- a federation that delivers higher quality community services at all levels of government.

Put simply, people need to understand that, if they care about how much tax they pay or how they will be treated in hospital or their children educated, they also need to care about the state of Australia’s federal system.

In the short term, the focus should emphasise achievable goals that will build confidence and capacity in the longer term reform agenda. Within my own field of constitutional law, for example, I do not think that the focus should be on any broader constitutional realignment of federal-State responsibilities, but upon fixing practical, impediments to federal-State cooperation.
High Court decisions have undermined the effectiveness and capacity for such co-operation, and there has been support across federal and State lines, and across all political parties, to fix this. Yet, nothing has been done even though it has been seen for many years as an obvious place to start.

There is of course a strong non-partisan element to this agenda. It is in the interests of every government and every political party to have a system that enables co-operation and the efficient and effective expenditure of public money.

That said, these agendas need to be clearly connected to the changing political objectives of our governments. When it comes to the goals of the prior federal government and the new coalition government, for example, it is easy to see how relevant the federal agenda is.

The federal coalition has a number of policies relating to deregulation. This necessarily raises questions as to what should be regulated at the federal and State levels. It is hard to see how any effective scheme of deregulation could proceed without a sense of the appropriate roles and responsibilities of the Commonwealth and the States.

Similarly, the former Labor Prime Minister and Treasurer had indicated that they saw boosting productivity and competitiveness as the ‘key economic challenge’ facing the nation over the next three years. It is equally difficult to see how either of these could have been addressed in a meaningful or effective way without dealing also with aspects of Australia’s federal system.

Conclusion

Australia has a remarkable record in general terms of policy development and achievement. We are the envy of the world in many respects, such as for our economic reforms of the 1980s onwards, and for our willingness to be innovative and bold, such as recently in regard to the plain packaging of tobacco products.

Yet we have failed to achieve at the same level when it comes to federal reform, despite Australians demanding this for many years. The most recent Constitutional Values Survey, for example, shows that two thirds of the community wants to see federal reform. As a result of inaction, the community has a long record of putting up with second best outcomes when it comes to Australia’s federal system. We have become the masters of the ‘work around’.

Australia ought to remain a federation, but we should also recognise that the system can deliver more than it currently does. A key part of realising this is having a debate about what Australia’s federal future should be. We need to plan for a federal system that performs better than the one we are heading to, which is one in which the States continue to drift into irrelevance and unsustainability. This is a path that will miss out on many of the benefits that our federal system could offer.

There are many things that are needed to bring about a better federal future for Australia. As in other areas, an important starting point will be well-crafted ideas backed by credible, well-informed research that offer real benefits to the community. The absence of such policies and goals remains a major hindrance to Australia realising its federal potential.