Commonwealth–state relations

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Key terms/names

block grants, co-operative federalism, collaborative federalism, competitive federalism, concurrent powers, conditional grants, division of powers, exclusive powers, executive federalism, judicial review, fiscal equalisation, laboratory federalism, vertical fiscal imbalance

One of the defining features of Australian government and an important factor in Australian politics is the country's federal system. Like other federations such as the USA, Canada, Switzerland, Germany and India, Australia has two constitutionally defined levels of government: the Commonwealth and the states. Each is accountable to the citizens and empowered to make and implement policy. This distinguishes Australia from unitary countries such as the UK, New Zealand, France, Sweden and Indonesia, where all sovereign power is held by one national government.[1]

Federations also differ greatly from one another, with some, such as Canada, preserving a quite decentralised character while others, such as Australia, have experienced considerable centralisation over time.[2] The Commonwealth govern-

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1 Hueglin and Fenna 2015. Such unitary states may have significant regional governments – as the UK has had since 'devolution' created parliaments in Scotland and Wales – however, those only exercise authority delegated to them by the national parliament.

2 Fenna 2019; Lecours 2019.

ment plays a far broader role in Australian governance than it did a century ago or than was envisaged when the Constitution was written. This means that Australian federalism functions not only in a more centralised way, but also in a way that is messier and more opaque to the public. With both levels of government operating in many policy fields, who does what and who should be held accountable is often not at all clear.

Understanding the day-to-day functioning of Australian federalism and the periodic issues and conflicts that arise means understanding the constitutional framework; the way that framework has been interpreted over the years by the High Court; the way financial resources are shared between the Commonwealth and the states; the attitude of the political parties to the federal system; and the network of intergovernmental relations that has evolved in response to growing overlap and entanglement between the Commonwealth and the states.

Today, Australia struggles with how the two levels of government should fund themselves and co-ordinate their respective roles and responsibilities. Those challenges, in turn, lead to a set of underlying questions about the costs and benefits of federalism: what advantages does a system of divided jurisdiction provide Australia and do those outweigh any disadvantages?

Origins and design

Australia is a classic example of an aggregative or 'joining together' federation, where a group of independent territories decide that they would be better off in some kind of union. Delegates from Britain's Australian colonies met in a series of constitutional conventions during the 1890s to design a federal system that would create a new overarching government – the Commonwealth – but leave the states with the bulk of the responsibilities they had exercised as self-governing colonies. A draft Constitution was eventually produced, put to the voters in colony-by-colony referendums and, once approved, sent to London to be passed into law by the British parliament.[3] Australia's federal system is still composed of the six original states, though there are now also two territories. While the Australian Capital Territory and the Northern Territory (NT) sometimes participate in the day-to-day operation of the federation like states, both remain under the authority of the Commonwealth and have no independent constitutional status.[4]

Federation

By 1890, all of the Australian colonies except Western Australia (WA) had enjoyed self-government under their own constitutions and through their own parliaments

3 Hirst 2000; Hudson and Sharp 1988; Irving 1997; La Nauze 1972.

4 Statehood for the NT is mooted from time to time; see Harwood, Phillimore and Fenna 2010.

for more than a generation. They could have continued in that fashion, eventually achieving full independence from Britain, but they decided to pursue a federal union instead. There was no pressing need to do so, but a combination of growing national sentiment, a sense of economic advantage and a desire for greater strategic clout provided sufficient motivation. A Constitution was soon drafted, but enthusiasm waned, and it was not until the end of the decade that a final text was agreed upon. After passage by the British parliament as the Commonwealth of Australia Constitution Act, it came into effect on 1 January 1901.

This created a system in which two levels of government, the Commonwealth and the states, have constitutionally guaranteed status. A provision was made for the territories (section 122). Local government was not mentioned at all; thus, as explained below, local governments were left entirely as subordinate entities of their respective state governments. Periodic attempts are made to give local government constitutional status; however, so far these have come to nought.[5]

The division of powers

Key to the federal system that the framers envisaged was the division of powers. Which tasks would be assigned to the Commonwealth and which left to the states? The general consensus was that almost all functions internal to the operation of each state should remain the responsibility of the states. The Commonwealth was assigned primarily those powers necessary for cementing the union and managing relations with the outside world.

Following the American example, which they drew on extensively, the framers decided to accomplish this by creating, in section 51, a single list of areas in which the Commonwealth was permitted to legislate and simply leaving the states with an open-ended grant of unspecified powers (section 107). Thus, section 51 was a limited list of powers intended to confine the Commonwealth to a set range of tasks.[6] Moreover, section 51 deliberately did not make the powers of the Commonwealth exclusive. Unless otherwise indicated, the Commonwealth's powers are held *concurrently* with the states. However, another clause, section 109, was inserted to give the Commonwealth paramountcy in regard to those concurrent powers. And elsewhere in the Constitution a handful of powers were made exclusive to the Commonwealth. Among those was the authority to 'raise or maintain any naval or military force' (section 114) and to 'coin money' (section 115).

The framers intended that any power not mentioned in section 51 would be entirely the responsibility of the states. These included a wide range of important government functions, such as: land management; environmental protection; education, social services and health care; transport and infrastructure; law enforcement; and local government.

5 Expert Panel on Constitutional Recognition of Local Government 2011; Grant and Drew 2017.
6 Aroney 2009, 276.

In summary, then, there was a handful of exclusive Commonwealth powers; a larger list of concurrent powers, with the Commonwealth enjoying paramountcy; and an open-ended set of implicitly exclusive state powers. The idea was that the two levels of government would operate, for the most part, in their own spheres, with minimal overlap and thus minimal need for co-ordination. It was envisaged as a relationship between what pioneering federalism scholar K.C. Wheare characterised as 'distinct and co-ordinate' governments.[7]

Safeguards

A division of powers is not, in itself, a guarantee that the two levels of government will respect each other's jurisdiction. The framers included other components to assist in that task – three most importantly. One was a powerful upper house (inspired by the US example), the Senate, where the states would have equal representation. A second was an 'umpire' of sorts: the High Court of Australia. The High Court is empowered to strike down legislation by either level of government that transgresses the division of powers, and its decisions are 'final and conclusive'. A third was a procedure for altering the Constitution that prevents the Commonwealth from changing the rules unilaterally. Although only the Commonwealth parliament, and not the states, may initiate an amendment, section 128 requires that any such proposal be approved by a majority of voters in a majority of states in a referendum.

That demanding amendment procedure has proven a very effective safeguard, with 36 of 44 attempts at amendment being rejected at referendum. Not all of those were proposals to alter the federal balance, but many were. Australians have only endorsed a clear transfer of authority to the Commonwealth on two occasions: in 1946 voters supported the proposal to give the Commonwealth authority to provide a wide range of social service benefits (section 51[xxiiiA]) and in 1967 voters agreed to strike out the prohibition on the Commonwealth makings laws for 'the aboriginal race in any State' (section 51[xxvi]).

The other two safeguards have, by contrast, proven feeble. By virtue of being popularly elected, the Senate has always functioned as a second chamber for contest between the political parties, rather than as a 'house of the states', and has played little or no role in safeguarding the federal system. Meanwhile, the High Court has been anything but a safeguard. Rather, judicial review has provided a 'great corrective' to the rigidity of the Constitution represented by section 128.[8] We turn to that now.

7 Wheare 1963, 2; Zines 1986, 79.
8 Menzies 1967, 152. See also Allan and Aroney 2008.

The courts and the Constitution: judicial review

Under the Constitution, criminal and civil law are both matters of state jurisdiction; no authority in respect of either was assigned to the Commonwealth. Thus, the states have their own criminal codes and their own court systems. However, the Constitution also provides in Chapter III for 'a Federal Supreme Court to be called the High Court of Australia' and whatever federal judiciary the Commonwealth parliament decides to create. Under section 73, the High Court is empowered to hear appeals from state Supreme Courts, thus creating a unified legal system. And under section 74, the High Court is implicitly given jurisdiction to settle constitutional conflicts between the Commonwealth and the states.

Although the High Court is tasked with being the 'umpire' of Australia's federal system, it was not made entirely neutral. Under section 72, the justices of the High Court are 'appointed by the Governor-General in Council' – which effectively means the prime minister. In other words, appointment is controlled not just by one side to possible disputes, the Commonwealth, but by the executive branch of that side alone. Here, the framers departed from the American example, where Supreme Court appointments have to be approved by the Senate.

How to interpret a constitution?

Constitutions are but words on paper; quite what those words mean, and how they apply in varying situations, is open to interpretation. Interpretation is particularly tricky in the case of constitutions because such 'founding documents' have a special status, often seen as providing guarantees of lasting application to preserve the terms of the original agreement. One approach to their interpretation, then, is to go beyond what a constitution says on face value and take into account what was *originally intended* (originalism). A quite different approach is to reject attempts at reconstructing original intent and assume that it was up to the framers to articulate their vision through words that will speak for themselves, as *literally* read. And even further from the approach of originalism is the view that constitutions must be fit for purpose and that their clauses should be interpreted in whatever reasonable way best suits current needs.

Judicial reasoning

Even presuming that there is consensus on which approach to take, abundant scope remains for differing views about how any particular clause should apply in any given situation. Legal reasoning relies heavily on *stare decisis*, or 'precedent': the rules established in previous judgements.

The appellate structure of the judiciary has long been fundamental to the provision of consistent and wise justice in our system. Cases typically begin in lower courts and can be appealed to higher ones, perhaps to the very highest one. In

the process, a uniform or 'common' law is produced, since anomalies in any one judgement will be overturned at the next level. The High Court occupies a privileged position in this hierarchy since its judgements cannot be appealed; its decisions are final. This gives the High Court a unique ability to defy – and thus change – precedent, should the judges so decide. This happened very dramatically in Australia when the High Court decided in the 1992 *Mabo* case that the legal doctrine of terra nullius should no longer be accepted as valid.[9] As a consequence, Australia had to start recognising some form of land rights for Aboriginal and Torres Strait Islander people.[10] This, in turn, had a direct impact on Commonwealth–state relations since it meant that the states had to defer to the Commonwealth over land-rights claims.

The absence of further appeal means that the High Court carries a heavy burden, being expected to 'get it right'. Under existing legislation, the High Court is made up of seven judges and operates on a 'majority rules' basis. Cases may be decided 7 to 0, 6 to 1, 5 to 2, or 4 to 3. There is a chief justice, but he or she holds only an ordinary vote, like any of the others. Dissenting opinions – that is, those in the minority in any given decision – may well have a significance of their own if they express views that are ahead of their time and that later provide the intellectual basis for a switch in the court's stand.

Centralisation and judicial review

The High Court has been resolving disputes about the division of powers since it commenced operation in 1903. For the first decade or more, the court was made up of leading figures from among those who had drafted the Constitution. Not surprisingly, an originalist mode of interpretation prevailed, emphasising what the framers had *intended*. Most importantly, this meant defending the states' jurisdiction against Commonwealth encroachment and maintaining the 'federal' character of the Constitution, as the judges knew was intended. In the process, the court developed doctrines such as those of 'implied immunities' and 'reserved powers', asserting that even if the Constitution did not explicitly protect the states, its federal nature required and *implied* such protection.[11]

All of this changed in 1920, with the watershed decision in the *Engineers* case.[12] In this case, the court declared that interpretation had to rely on the words of the Constitution alone, read like any other statute. Implications were out. Because the Constitution was not fortified with explicit statements about its federal character, this new approach opened the door to an expansive interpretation of Commonwealth powers that has prevailed ever since.[13]

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9 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (*Mabo*); Russell 2006.

10 Brennan et al. 2015; *Native Title Act 1993* (Cth).

11 Aroney 2017, 53.

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

13 Aroney 2017, 54.

Key cases

Soon after *Engineers*, the Commonwealth discovered that it could intervene in areas of state jurisdiction by offering the states cash grants with conditions attached (see below). This was challenged by the states in the *Roads* case, but the High Court decided that the Commonwealth's power to impose conditions on the states when making grants was incontestable under section 96 of the Constitution.[14] Section 96's enormous centralising potential was made evident in the *Uniform Tax* case of 1942, when the court decided that the Commonwealth could use that power to take personal and corporate income tax from the states.[15] A condition of receiving further grants was that the states entirely cease from levying income tax on their residents, and the court ruled that this was constitutional under section 96's sweeping terms. As discussed below, this gave the Commonwealth a tremendous financial lever in its relations with the states.

In the *Racial Discrimination Act* case of 1982 and *Tasmanian Dams* case of 1983, the court decided that the Commonwealth's power to legislate for 'external affairs' (section 51[xxix]) meant that it could override the states on any domestic matter that had become subject to international treaty.[16] This allowed the Commonwealth's *Racial Discrimination Act 1975* (Cth) and its natural heritage protection initiatives to trump state laws in respect of land use. In the *WorkChoices* case of 2006, the court decided that the 'corporations' power (section 51[xx]) allowed the Commonwealth to enact wide-ranging laws in respect of industrial relations.[17]

Fiscal federalism

Much – though not all – of what government does requires money, sometimes large amounts of it. Having constitutional licence or even responsibility to do something is not the same as having the *capability* to do that thing. Governments need financial resources to fulfil their responsibilities and to enjoy an autonomous existence. One of the principles of federalism is that the different governments have a degree of financial independence that allows them to make their own decisions and be accountable for those decisions to their own voters. This operates vertically and horizontally. In the vertical plane, does each level of government have access to resources commensurate with its responsibilities? In the horizontal plane, are there measures in place to ensure a common standard of capability in all the different

14 *The State of Victoria and Others v Commonwealth* (1926) 38 CLR 399 (*Roads*), where the issue was interference in state decisions about new roads. Section 96 declares that 'the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit'.

15 *The State of South Australia v Commonwealth* (1942) 65 CLR 373 (*Uniform Tax*).

16 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 (*Racial Discrimination Act*); *The Commonwealth of Australia v Tasmania* (1983) 158 CLR 1 (*Tasmanian Dams*).

17 *New South Wales v Commonwealth of Australia* (2006) 229 CLR 1 (*WorkChoices*).

states? As it turns out, in Australia the answer to the first question is 'no' and the answer to the second question is 'yes, but there can be conflict'.

Controlling the revenue

The Constitution gives both levels of government full access to all revenue sources except 'duties of customs and of excise' (section 90). Customs and excise were made exclusive to the Commonwealth to ensure that Australia enjoyed the economic benefits of internal free trade.[18]

However, things turned out a bit differently. First, the High Court started interpreting the prohibition on state 'excise' taxes in a way that covered any sales tax, depriving the states of a major and quite economically efficient revenue base.[19] Then, in 1942, the High Court endorsed the Commonwealth's takeover of personal and corporate income tax in the *Uniform Tax* case. Since then, the Commonwealth has enjoyed a stranglehold over revenue in the federation. This is why, in contrast with the situation in Canada or the USA, Australians pay no state income tax and no state sales tax. It is also why the states impose socially and economically inefficient taxes, such as stamp duty, and it helps explain why they are generally so willing to condone gambling.

The result is a high degree of *vertical fiscal imbalance* (VFI), where the Commonwealth collects far more in tax than it requires for its own purposes and the states have expenditure needs far in excess of their tax revenue. This lead to the states being dependent on annual transfers from the Commonwealth for roughly half of their revenue. Occasionally, proposals are made to restore some financial balance to the federation, but so far none have generated any momentum.[20] In 1999, the Commonwealth and the states did agree that the proceeds from the Goods and Service Tax (GST) that the Commonwealth was introducing would go to the states.[21] However, this merely replaced one set of Commonwealth transfers with another.

Commonwealth grants

The Commonwealth could simply hand back to the states the surplus revenue it collects, and, indeed, a substantial amount is transferred in that way (GST revenues). However, it was not long before Commonwealth governments realised that by making grants to the states for certain defined purposes, or with certain conditions attached, they could start to influence or even control what the states did

18 For an overview of the dilemmas faced by the founders, see Saunders 1986.
19 Culminating in the decision in *Ha and Another v The State of New South Wales and Others* (1997) 189 CLR 465, which prompted the Commonwealth to compensate the states by hypothecating the total net revenue of the proposed GST to them. Saunders 1997.
20 Fenna 2017.
21 *A New Tax System (Commonwealth–State Financial Arrangements) Act 1999* (Cth).

in their own areas of jurisdiction. By such means, they would be able to circumvent the limitations imposed by the federal division of powers. Since the early 1970s, these *specific purpose payments*, or 'tied grants', have proliferated and made possible the expansion of Commonwealth power across a wide range of policy fields, the largest being health and education. Today, just over 50 per cent of Commonwealth transfers to the states come in the form of unconditional revenue from the GST and just under half come in the form of grants for specified purposes. Reforms have occurred, but it is not clear how profound they have been.

Reform and regression in the grants system

Recognising the distortions this tangle of conditional grants imposed on Australian federalism, the newly elected Rudd Labor government introduced a suite of reforms in 2009. These collapsed almost a hundred conditional grants, some of them highly prescriptive, into a handful of *block grants*, each allocated to a broad policy domain. The idea was that instead of answering to the Commonwealth for various requirements attached to each grant, the focus would shift to expectations about how much the states would accomplish in those fields.[22]

But for this to work, there had to be a way of measuring how much the states were accomplishing and how much their performance was improving over time. The states and the Commonwealth agreed to assign this task to a joint body that would benchmark the performance of each state across the wide range of policy fields covered by the new system of block grants.[23] The Council of Australian Governments (COAG) Reform Council made a brave effort, but it was an ambitious undertaking, requiring methodical work, and progress was slow. In 2014, after only a few years of operation, the council was abruptly and unilaterally terminated by the incoming Abbott Coalition government. It had also become clear that although the existing tangle of conditional grants had been pruned back, there was nothing to stop new ones appearing.

The equalisation system

All federations are torn between the principle that each of their constituent units has some responsibility for its own economic and financial success and the principle that citizens should receive a comparable quality of public services regardless of where in the country they live. In Australia, the latter principle has dominated. A highly developed system of *horizontal fiscal equalisation* (HFE) allocates GST revenues to each state according to their respective needs and capabilities.[24]

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22 Department of the Treasury 2009; Fenna and Anderson 2012; *Federal Financial Relations Act 2009* (Cth).

23 Fenna 2012.

24 Commonwealth Grants Commission 2017.

The Commonwealth Grants Commission uses a complex formula to make recommendations to the federal treasurer for GST distribution each year. That formula takes into account the particular spending needs of each state and territory – a jurisdiction with proportionally larger disadvantaged populations, for instance, will have greater spending needs. And on the other side, the formula takes into account each jurisdiction's revenue-raising capacity. As long as the differences are not great, the system works reasonably well. However, when, as in the last decade, they have widened and shifted, conflicts arise.

Conflict and compromise in the equalisation system

Historically, the two big states, home to most of Australia's population and manufacturing industry, have been the 'donor' jurisdictions. New South Wales and Victoria have long received slightly less than their per capita share of the unconditional transfers so that the smaller and less advantaged states and territories could be subsidised. It was generally a small price to pay. When the mining boom began in the early 2000s, WA's huge increase in royalty earnings caused it to join the ranks of the donor states. Because its population was so much smaller, however, the reduction in WA's GST allocation was proportionally much greater. By the time the mining boom had ended, the Grants Commission's calculations left WA eligible for only 30 per cent of its *per capita* share.

Inquiries into GST distribution have been launched twice in recent times, but finding a compromise acceptable to the Commonwealth, the donor states and the beneficiary states and territories is inherently difficult.[25] Eventually, the Commonwealth agreed to ameliorate the situation by establishing a 'floor' under which a state's per capita GST share would not be allowed to fall and promising an injection of Commonwealth funds, with legislation being passed in mid-2018.[26]

Who stands up for federalism?

These centralising developments remind us that, to stay intact, any set of institutional arrangements needs powerful friends. For a long time, Australian federalism could count to a reasonable extent on the Liberal Party. In part, this was because of the affinity between the Liberal Party's ideology and federalism. Federalism's division of powers and constitutional constraint went hand-in-hand with liberalism's belief in the rule of law, individual rights and limited government. More importantly, though, Australia's federal system provided a bulwark against the Labor Party's ambitions for activist or interventionist government. At key moments in the 20th

25 GST Distribution Review 2012; Productivity Commission 2018.

26 *Treasury Laws Amendment (Making Sure Every State and Territory Gets Their Fair Share of GST) Act 2018* (Cth).

century, Labor was prevented from pursuing its policies by the limits on Commonwealth government jurisdiction.[27]

However, this was never going to translate into a consistent, principled, defence of states' rights and the federal system. When in government in Canberra, the Liberal Party itself inevitably has national policies it wants to introduce, policies that will often involve an expansion of Commonwealth influence.[28] Labor's hostility to federalism eventually diminished as their interventionist ambitions declined and tied grants increasingly proved themselves an effective work-around.[29] The Liberal Party's support for federalism accordingly also declined – to the point where two successive Liberal prime ministers (John Howard and Tony Abbott) were openly critical and decidedly centralising.[30] This disdain was consistent with the growing impatience big business was showing towards the inconveniences of federalism as more firms came to operate across states and the Australian economy became increasingly integrated. Their call was for a 'seamless economy'.[31]

Intergovernmental relations (IGR)

Almost a century now of centralisation since the *Engineers* case has left Australia with a federal system where, instead of operating in their own spheres, the two levels of government are deeply entangled. The states have retained most of their original responsibilities, but the Commonwealth now plays a role in almost all of those areas. There are now education, health, local government and social service departments, as well as environmental protection agencies, at both levels of government although each of those was originally state jurisdiction. As we have seen, this high degree of overlap has resulted, most importantly, from the Commonwelath's financial superiority and the ability that gives the Commonwealth to provide conditional grants to the states. In such a deeply entangled system, mechanisms for co-ordination and collaboration between the two levels of government are essential. The general term for this is *co-operative federalism* – meaning that ongoing co-operation is required, but not meaning that it is achieved without conflict.

Australia's IGR system

Since 1991, in particular, Australia has developed a sophisticated network of co-operative mechanisms. At the apex is COAG, the Council of Australian Governments. COAG is a periodic meeting of the Commonwealth and the state and

27 Galligan 1987.
28 Sharman 2001, 287.
29 Galligan and Mardiste 1992; cf. Parkin and Marshall 1994.
30 Hollander 2008.
31 For example, Business Council of Australia 2008.

territory heads of government (along with the president of the Australian Local Government Association) where major intergovernmental issues are considered. Answering to COAG are a clutch of ministerial councils bringing together all the responsible ministers in the main portfolio areas from across the country. In addition, a number of statutory agencies have been established to administer joint programs or oversee joint policies. Many of the new and complex relationships between the two levels of government in different policy fields are regularly formalised in intergovernmental agreements. While legalistic in style, these are not legally binding or enforceable.

COAG, it must be remembered, is only a brief and occasional meeting held when the prime minister decides, and the Commonwealth dominates. For a few years, there was an organisation through which the states tried to co-ordinate joint action and positions on national issues: CAF, the Council for the Australian Federation.[32] Joint action by the states would have provided some counterweight to that Commonwealth dominance. However, such joint action has proved very difficult to maintain.

Co-operative federalism

The formalisation of Australia's longstanding practice of summit meetings between the prime minister and the premiers as COAG in 1991 was the beginning of a new and much more active period in Australian intergovernmental relations. Since then, co-operative federalism has waxed and waned. Through the 1990s, Australian governments worked more closely and sometimes collaboratively in an effort to make Australian federalism operate more effectively and efficiently.[33] Enthusiasm for co-operative federalism faded somewhat under the Coalition government of 1996–2007, in part because of partisan differences with Labor governments at the state level. However, it surged to a new highpoint with the election in 2007 of the Rudd government, when, for a brief time, it was 'wall-to-wall' Labor governments across the country. COAG met frequently and the two levels of government worked energetically to improve the functioning of Australia's federal system.

Generally, a well-functioning system of *executive federalism* is seen as a good thing. However, questions are sometimes raised about the extent to which it removes political decision making from the purview of the people's representatives in parliament.

32 Phillimore and Fenna 2017; Tiernan 2008.
33 Painter 1998.

The future of Australian federalism

Despite the enormous change that has taken place in Australian federalism over the past century, the states still play a large role, particularly in delivering public services. State governments manage their respective hospital and government school systems, plan and construct transport infrastructure, manage their state's energy utilities, and control most of the policing and criminal law. However, they are dependent on Commonwealth funds for a good part of that and carry out those tasks in ways greatly influenced by Commonwealth policy decisions. The result is a system that is anything but 'distinct and co-ordinate'. The entanglement of the two levels of government regularly elicits criticisms and complaints of overlap and duplication, blame- and cost-shifting, blurred lines of accountability and inefficiency. It raises the question of whether Australia should rehabilitate, re-engineer or retire its federal system.

What's the use of federalism?

Federalism came into being in Australia and elsewhere not because it was seen as conferring any special benefits, but simply because it allowed pre-existing regional communities to retain a degree of autonomy while gaining the advantages of being part of a larger entity. Since then, the case has often been made that federalism is desirable in itself and should be preserved as much as possible. This is particularly relevant in the Australian case since the Australian states are not distinct cultural or linguistic communities that require the autonomy federalism provides – as is often the case overseas.

One argument is that by creating multiple governments, federalism multiplies the opportunities for democratic participation and engagement.[34] Another is that by imposing limits on actions of the respective levels of government, federalism provides enhanced protection for individual rights.[35] A third is that federalism allows for variation in public policy across the country instead of a 'one-size-fits-all' approach. Another concerns *competitive federalism*: state governments are subject to pressure to perform since their citizens can compare across jurisdictions and even move out of state if they are sufficiently unhappy. And another is that federalism allows for experimentation and learning in public policy, with opportunities for new ways of doing things to be tried in any of several jurisdictions. In effect, policies can thus be 'tested' before being adopted more widely, hence the term *laboratory federalism*. All these possible benefits of federalism require that the states retain a substantial degree of autonomy and policy independence.

All of them are also, however, merely propositions, and the extent to which federalism actually does deliver these benefits is an open question. In addition, critics often emphasise disadvantages to federalism. These include the tendency for overlap

34 Galligan 1995, 38–53.
35 Galligan 1995, 142–7.

and duplication between the levels of government and for 'blame-shifting' and 'cost-shifting'. With the Commonwealth having extended its role, activity and influence into so many areas of state jurisdiction, overlap and duplication are unavoidable. Sometimes it might be wasteful and inefficient; sometimes, though, it may provide a double protection that citizens appreciate.[36] Similarly, the extent to which blame- and cost-shifting are serious problems is also very much an open question.

Another limitation of federalism is that, although it allows for subnational autonomy in political systems, it only does so for territorially defined communities. Federalism offers little for groups in society that are dispersed rather than territorially concentrated. With the occasional exception such as Nunavut in northern Canada, indigenous people are thus rarely in a position to achieve the kind of autonomy and degree of self-determination that federalism offers.[37]

Where to now?

Numerous inquiries and commentaries have suggested that Australian federalism be 'reformed' by rationalising the roles and responsibilities of the two levels of government. Ideally, overlap and duplication would be minimised and each level of government would take responsibility for the tasks to which it is best suited. There has even been suggestion that Australia should return to a simpler age of a more co-ordinate style where clearer lines of division between the two levels of governments are re-established.[38] In 2014, incoming Coalition Prime Minister Tony Abbott announced a high-level and comprehensive inquiry into the matter.[39] That inquiry got as far as releasing a preliminary report but was terminated by Abbott's replacement before the process could finish.[40] This typified the start–stop experience with federalism reform in Australia, a process that is heavily constrained by the dominant position of the Commonwealth.[41]

Conclusions

The union of Britain's six Australian colonies in 1901 created a federal system where a constitutional division of powers allocated much of the work of government to the states while assigning certain specific functions to the Commonwealth. That system exists to this day, but has changed significantly in its operation. The Commonwealth has taken on new responsibilities and extended its influence into a wide range of areas that were originally exclusive to the states. As a consequence,

36 Hollander 2010.
37 Hence the growing interest in potential modes of 'non-territorial autonomy'; see Coakley 2016.
38 For example, NCA 2014; NCA 1996.
39 Prime Minister 2014.
40 Department of the Prime Minister and Cabinet 2015.
41 Fenna 2017; Tiernan 2015.

Australian federalism has been transformed from the original model, in which the two levels of government operated independently of each other, to one where there is endemic concurrency.

The Constitution lays out the legal architecture of Australia's federal system. This is most notable in section 51, enumerating the Commonwealth's powers; section 90, prohibiting the states from levying duties of customs or excise; section 96, allowing the Commonwealth to make conditional grants; sections 107 and 108, guaranteeing the states their continued existence and authority; section 109, establishing the superiority of Commonwealth law within its assigned jurisdiction; section 74, making the High Court the umpire of the federal system; and section 128, requiring support in a majority of states for constitutional change.

Although Australian federalism has changed greatly over the last century, with a couple of notable exceptions, it is not because these key provisions have been changed. Indeed, section 128's strict requirements have helped ensure that very little has been altered in the Constitution itself. Rather, change has occurred as a consequence of the way some of those provisions have been used and the way they have been interpreted by the High Court. Since the *Engineers* decision of 1920, the High Court has followed an interpretive approach supporting an expansive reading of Commonwealth powers. This has facilitated assumption of fiscal dominance by the Commonwealth, which, in turn, has given it enormous financial leverage over the states.

Whether it be in education, housing, health care, environmental protection, infrastructure or a range of other areas of governance that were originally state matters, the two levels of government are now inextricably intertwined. In tandem with that development has come the rise of co-operative federalism, where the Commonwealth and the states work to negotiate over policy and co-ordinate their actions. At the apex of that system of intergovernmental relations is COAG.

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