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The revival of Australian federalism? Trends and developments in Commonwealth–state relations

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Abstract

This chapter reviews developments in Australian federalism since the start of the new millennium, situating them in the context of longer-term trends and tendencies. After rehearsing the chief characteristics of the Australian federal system, it considers the way different issues have shaped the continuing evolution of that system in recent years. Two of those issues—climate change politics and the COVID-19 pandemic—stand out for the way they seem to have given Australian federalism a new lease on life when centralising forces have otherwise prevailed. The chapter examines the way those challenges have brought the states to the fore and ventures some evaluation of their significance.

Keywords: federalism; fiscal federalism; intergovernmental relations; pandemic; climate change.

Introduction

The COVID-19 pandemic provided convincing demonstration that there is not just life, but real vigour, left in Australian federalism. Long-term trends as well as developments over the opening decades of the federation's second century suggested otherwise. Persistent centralisation had in many ways reduced the states to subordinate partners, leading one scholar to ask 'why Australia remains federal at all' (Saunders 2013:399) and another to describe Australia as a 'degenerated federal state' (Wanna 2021:147). This chapter considers the state of Australian federalism by reviewing the shifting character of Commonwealth–state relations over the past two decades, relations that have exhibited a seemingly chaotic, but ultimately telling, range of competing tendencies. Centralisation has continued, but climate change politics and the pandemic have brought the states to the fore. Does this represent a new direction, a short-term deviation or a simply an often-overlooked reality?

Fluctuating fortunes

The fluctuating fortunes of the states can often be sheeted home to the states themselves: reflecting their level of political development, and their degree of policy capacity and initiative at any given time. Central governments, for instance, have assumed a more active role in federal systems when inertia or policy failure prevails among the constituent units (Parkin 2003:104–05; see also Teaford 2002). The obverse may also be true, as discussed below. Here, the focus is on the impact of exogenous and often entirely adventitious factors—the way issues of the day and their associated ideological tensions give federalism its protean quality.

As has been frequently observed, federalism has a mixture of virtues and vices (e.g. Hueglin and Fenna 2015:41–46). Chief among its putative virtues is the tailoring of policy to local conditions, needs and preferences; the ability to provide alternative venues for policy initiation; and the potential for policy experimentation and interjurisdictional learning. At the same time, federalism can foster detrimental externalities and inhibit economies of scale; protect local injustices; impose inefficiencies; and create overlap and duplication. This inherently amphibolous character means that the federal balance shifts depending on the challenges being faced; some play to federalism's strengths, some to its weaknesses. The system is eroded when the dominant issues demand a uniform response; it is strengthened when they lend themselves to

local solutions. For much of the past century, it was the former that prevailed. To contextualise the way these tendencies have played out, the following section outlines the defining characteristics of the Australian system.

The Australian federal system

The essentials of Australian federalism can be summarised in 10 points: voluntary union; dualist design; decentralised conception; limited safeguards; centralising evolution; the absence of an underlying federal society; a high degree of fiscal equalisation; partisan complexion; a network of intergovernmental relations with a low degree of institutionalisation; and continuing importance of the states.

1. Voluntary union

Australia is a prime example of an aggregative federation, where democratically self-governing political communities (the settler colonies) agreed to unite under a constitution they had designed through a series of constitutional conventions in the 1890s and endorsed in referendums. In doing so, they were motivated by an emerging national sentiment and a desire to resolve trade issues (La Nauze 1972; Hudson and Sharp 1988; McMinn 1994; Hirst 2000). Although passed as an Act of the British parliament, the resulting Constitution was entirely Australian in origin, and, thanks in particular to the section 128 amendment clause, from its very inception Australian in operation and control. This was not the case, by contrast, for the Canadian federation.[1]

2. Dualist design

The system the framers opted for was an American-style 'dualist' one, where the two orders of government are assigned full responsibility for policymaking, implementation and administration in their respective spheres and expected to function autonomously—or in what KC Wheare (1963:2) described as a 'distinct and co-ordinate' fashion. Conceived as 'independent entities', there was thus only the most minimal provision made in the Constitution for cooperation between the Commonwealth and

1 Where the absence of an amending procedure left the *British North America Act 1867* in the hands of the UK parliament. This was only rectified with the 'patriation' of the Constitution by the Canadian federal government in 1982.

the states (Zines 1986:81). The fact that a number of the Commonwealth's powers were not made exclusive meant a degree of concurrency in certain areas, but only in those areas. Such dualism was the norm, and contrasts with the functional division of powers characteristic of Germany's administrative federalism (Hueglin and Fenna 2015:135–65). That distinction remains evident, though rather eroded, today (Mueller and Fenna 2022).

3. Decentralised conception

The Commonwealth was assigned, in section 51, a limited list of powers concerned in the main with the internal union and external relations. It was a decentralised vision, with s. 107 assuring the states a broad residual power and hence exclusive jurisdiction over most domestic responsibilities (Zines 1986; Aroney 2009). These were extensive, and included criminal and civil law; policing; emergency management; local government; land management and environmental protection; health, education and welfare; infrastructure; business regulation and industrial relations within their respective boundaries. To finance these not-insubstantial responsibilities, the states were granted a plenary power to tax with the sole exception of 'duties of customs and of excise' (s. 90), seen as incompatible with interstate free trade.

4. Limited safeguards

While the Constitution included certain provisions to preserve the original terms of union, these were by no means robust. As laid down in section 128, formal constitutional change requires approval not just of voters, but of voters in a majority of states; however, it grants the Commonwealth exclusive power to initiate proposals. Meanwhile, constitutional interpretation and thus adaptation rest with the High Court as judicial umpire, but the executive branch of the Commonwealth was assigned exclusive power over High Court appointments. Moreover, the Constitution included no requirement that its clauses be interpreted in a fashion consistent with federalism. Finally, bicameralism ostensibly provided for a federal upper house, the Senate, but given its elective nature this was never going to be a house of the states. In the admittedly rather jaundiced view of one commentator, 'the almost total failure of the key mechanisms inserted by the founding fathers into the Constitution for protecting the States' has contributed enormously to the pronounced centralisation that has characterised much of Australian federalism's history (Craven 1992:50).

5. Centralising evolution

Centralisation has been the normal fate of pre-twentieth century federations subject to the pressures of great economic and social changes in the shift to modern industrial society (Dardanelli et al. 2019). Australia has exemplified this process, with the Commonwealth having greatly expanded its role in the federal system over the past century (Fenna 2019a). The section 128 safeguard ensured that this was not through formal constitutional change, and only two amendments, one in 1946 and one in 1967, have made a significant alteration to the division of powers.[2] Key to the process has been constitutional interpretation rather than alteration, a process launched by the High Court's decision in the *Engineers* case of 1920 opening the door to broad interpretation of the Commonwealth's enumerated powers (Booker and Glass 2003; Fenna 2012; Aroney 2017). Turning points included the 1926 judgement that section 96 gives the Commonwealth carte blanche to impose 'such terms and conditions' on grants to the states as it 'thinks fit'; the commandeering of the personal and corporate income tax in 1942; and the dramatic expansion in the scope of the external affairs power in the 1980s (Fenna 2019a).[3]

Since taking over the personal and corporate income taxes from the states in 1942, the Commonwealth has enjoyed a stranglehold over the main revenue sources. A high degree of vertical fiscal imbalance (VFI) has thus prevailed, with the states carrying service provision responsibilities far in excess of their own-source revenues, and the Commonwealth enjoying revenue far in excess of its spending needs. This has provided the basis for extensive use of the spending power to impose policies and programs in areas of state jurisdiction through conditional or 'tied' grants (Fenna 2008). Periodic initiatives to address VFI have produced little result (Fenna 2017). The turning point in the use of the spending power was the early 1970s, when the ambitiously reformist Whitlam Labor Government utilised tied grants as the cornerstone of 'the most vigorous strategy of intervention into areas of state jurisdiction ever attempted' (Parkin 2003:106). Since then, transfers to the states have tended to be split reasonably equally between specific- and general-purpose grants. The latter were put on a stronger footing when the Commonwealth agreed in 1999 to direct the total net

2 The Social Services amendment, section 51(xxiiiA); and deletion of the clause exempting 'people of the aboriginal race' from the race power, section 51(xxvi).

3 See the High Court decisions in *The State of Victoria and Others v The Commonwealth* (1926) 38 CLR 399, *South Australia v The Commonwealth* (1942) 65 CLR 373, and *The Commonwealth of Australia v Tasmania* (1983) 158 CLR 1, respectively.

revenues of the Goods and Services Tax (GST) it was legislating to the states in lieu of the annual financial assistance grants—although that did not in any fundamental way address the imbalance.[4]

In general, decades of centralisation have substantially eroded the original coordinate scheme, engendering a de facto but extensive and rather lopsided concurrency as well as a certain degree of administrative federalism with policy being made centrally and service provision executed by the states.[5] Contrary to some characterisations (e.g. Saunders 2013), though, this does not mean Australia functions as an 'integrated' federation since there is no co-determination of those centrally made decisions (see Fenna 2020).

6. Federalism without a federal society

Canada, Belgium, India, Nigeria, Spain—these are all countries where federalism is an essential mechanism for enabling regionally diverse peoples to live under one roof. Australia not only lacks a 'federal society' to underpin its federal system, but, along with Germany (Bendel and Sturm 2010), is the least regionally diverse of any federation; it is 'territorially or spatially homogeneous' (Aroney et al. 2012:273). This helps explain the extent of centralisation and the widespread ambivalence towards federalism (Tiernan 2015; Fenna 2019a). It was this homogeneity that led US federalism scholar William Riker (1964:113) to ask 'why they bother with federalism in Australia' at all.

7. Sharing the wealth

That territorial homogeneity also helps explain why Australia has a comprehensive system of horizontal fiscal equalisation, ensuring that all jurisdictions have similar fiscal capacity and can offer a roughly equal standard of public service across the country. This has been in operation since 1981, but with the introduction of the GST in 2000, has been affected by adjustments to the shares of the GST revenue distributed to each jurisdiction according to the calculations of the Commonwealth Grants Commission.[6]

4 As formalised in the *Intergovernmental Agreement on the Reform of Commonwealth–State Financial Relations* and legislated in *A New Tax System (Commonwealth–State Financial Arrangements) Act 1999*.

5 Though not as much as is sometimes mooted—as for instance by the Coalition in their proposal for 'outsourcing' to the states; see Tingle (2012).

6 In Schedule 2, sections 7 and 8, the 1999 *New Tax System* legislation not only specifies that the states are to receive the GST revenues, but they are to do so 'in accordance with horizontal fiscal equalisation (HFE) principles'.

Although this system had always attracted some criticism (e.g. Garnaut and FitzGerald 2002), it only became a vexed issue with the mining boom that transformed Western Australia from being a modest beneficiary to being a proportionally massive donor. This prompted the commissioning of two successive inquiries in the period covered here and, eventually, concessions on the part of the Commonwealth watering down the degree of equalisation such that Western Australia could keep a substantial share of its windfall resources gains (Fenna 2011; GSTDR 2012; Frydenberg 2018; PC 2018; CGC 2021).[7] The perversity of those concessions to Western Australia became evident in 2020–21 when, as other states were battling with the severe budgetary effects of the pandemic, Western Australia recorded the largest budget surplus in its history and the second largest in the history of any state, then repeated this in 2021–22.[8]

8. Partisan complexion

For much of the country's history, Australian federalism has had a strongly partisan aspect, with, on the left, the Labor Party bridling at the constraints divided jurisdiction imposed on central government policymaking and, on the right, the Coalition parties (and typically business) favouring federalism for precisely that reason. The combination of declining obstacles to central government action and declining enthusiasm for statism led to the Labor Party's 'reconciliation with federalism' (Galligan and Mardiste 1992; cf. Parkin and Marshall 1994) and thereby helped bring to an end the long-running 'love affair' between the conservative parties and 'federal constitutionalism' (Craven 2006). Liberal Party leader John Howard (2007a) coined the term 'aspirational nationalism' to justify his government's reconciliation with centralism, while subsequent Liberal leader and prime minister Tony Abbott (2004:185) was quick to criticise the states for being engaged in what he termed 'feral federalism' (Parkin and Anderson 2007; Twomey 2007; Hollander 2008).

Those tendencies have been reinforced by the growing impatience with regulatory variation between the states in business circles, which has help propel the country away from economic federalism and toward full

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

8 The 2021–22 budget surplus of AUD5.7 billion was only kept from looking even more obscene than the previous year's record surplus of AUD5.8 billion by declining over AUD1 billion worth of dividends from state government utilities. A substantial part of those surpluses resulted from the 2018 changes privileging Western Australia's share of the GST (Treasury 2022:32, 82).

economic union (e.g. BCA 2006, 2008; also Fenna 2007; Gleeson 2018). Both sides of politics are now happy to advance their respective priorities through Commonwealth action. Partisanship remains important, but chiefly in the way it drives conflicting policy priorities between the two levels of government when they are in different hands.

9. Executive federalism

Centralisation and the resulting overlap between the Commonwealth and the states, along with the expanding scope of many social and economic concerns, spawned a comprehensive network of intergovernmental relations (Phillimore and Fenna 2017). At the peak level, those intergovernmental relations have taken the form of first ministers' meetings, formalised as COAG, the Council of Australian Governments, in 1992. COAG was particularly active in the early 1990s, when 'collaborative federalism' became the order of the day and the two levels of government worked together to pursue National Competition Policy (Painter 1998; Fenna 2019b). Underpinning the operation of COAG, ministerial councils and other aspects of the intergovernmental relations system have been senior officers' meetings and, in general, a wide range of preparatory work and negotiation within public service departments and agencies.

Periodic calls for peak-level intergovernmental relations to be institutionalised fall on deaf ears since the Commonwealth has no interest in tying its hands through more formal procedures (e.g. Kildea and Lynch 2011; SCRAF 2011). COAG remained an occasional and brief summit meeting, held at the behest of the prime minister, with its secretariat in the Department of the Prime Minister and Cabinet. What has been characteristic of the system, though, has been the pervasive use of formal intergovernmental agreements giving expression to arrangements for cooperation, coordination or collaboration between the Commonwealth and the states and territories. Though not justiciable or legally binding, those agreements carry considerable political and administrative weight.

When the pandemic necessitated quicker and more collegial decision-making, COAG was shelved in favour of a less-structured first ministers' meeting dubbed 'National Cabinet', discussed below.

10. Continuing importance of the states

Despite the extensive centralisation that has taken place since 1920, the states remain the primary agents of service delivery and thus retain both the potential to protect their autonomy in various ways and an ongoing importance in many policy spheres and thus the lives of their citizens. As noted above, the degree to which the Commonwealth provides guidance from above has led some commentators to wonder if Australia is shifting, or has shifted, from a dualist division of powers to an administrative one, where the central government sets the policy framework while implementation and administration is delegated to the constituent units (e.g. Keating and Wanna 2000:148; Saunders 2013). There is some truth in this (Mueller and Fenna 2022). However, it must not be forgotten that the states retain an important number of policymaking powers in their own right and in many of those policy domains the classic Left–Right contest of policy priorities and orientations is clearly evident (Phillimore and Fenna 2020).

The federalism roller-coaster

The first two decades of the twenty-first century have been tumultuous ones for Australian federalism, fluctuating between conflict and cooperation, centralisation and state assertion. This was driven by the intersection between partisan changes and alignments on the one hand, and external forces and events on the other. Prominent among the latter were terrorism; global competitiveness pressures; the global financial crisis; climate change; and the COVID-19 pandemic.

Continuing centralisation

The twentieth century ended well for the states with the introduction of the GST on 1 July 2000, that process having taken a very collaborative form and the new tax ensuring them a reliable flow of general-purpose revenues.[9] The twenty-first century began, however, with the terrorist attacks of 11 September 2001 in the United States ('9/11') engendering a fresh expansion of Commonwealth powers. The states cooperated via 'referral' of

9 Collaborative to the point that the *A New Tax System (Commonwealth–State Financial Arrangements) Act 1999* (Part 3) stipulates that 'The rate of the GST, and the GST base, are not to be changed unless each State agrees to the change'.

power—provision for which is made in s. 51(xxxvii) of the Constitution—giving the Commonwealth an enhanced role in combatting terrorism and cross-jurisdictional crime (Australia and States and Territories 2002; Lynch 2012).[10] This was followed by various other centralising initiatives and developments, driven much more by ideological and partisan motives. In 2006, the High Court gave its imprimatur to the Commonwealth's use of the 'corporations power' to take over industrial relations so that it could remould them in accordance with the Coalition Government's ideological preferences.[11] In 2007, a swag of enumerated powers were used to take control of the central river system of the mainland eastern states and create the Murray–Darling Basin Authority (Gardner 2012; Connell 2013).[12] Meanwhile, coercive use of the spending power enabled partisan intervention and longer-term centralisation in schooling while opportunistic unilateralism occurred in vocational education and hospitals. The Commonwealth passed the *Australian Technical Colleges (Flexibility in Achieving Australia's Skills Needs) Act* in 2005 that brought it into direct competition with the states' longstanding vocational education and training systems and intervened in 2007 to take over a Tasmanian hospital that was slated for closure (Howard 2007b).

COAG, which had been such an important element of Australian federalism in the early 1990s, was convened only occasionally. In 2005, the decade-long program of National Competition Policy reforms that had been the high point of cooperation between the Commonwealth and the states concluded and nothing was taking its place (Fenna 2019b).

Compensatory federalism: Labor in the states

This was not the whole story, though. A counterweight existed to these strongly centralising developments and declining intergovernmentalism in the form of state initiatives and collective action—'compensatory federalism', as such a tendency has been called (Derthick 2010). In response to one area in which the Commonwealth was deliberately taking very little action, the states led the way on early emissions-reduction policies to address climate change. Individually they initiated their own programs, and collectively

10 *Criminal Code Amendment (Terrorism) Act 2003* (Cth).

11 In the 'Work Choices' case, *New South Wales v Commonwealth of Australia; Western Australia v. Commonwealth of Australia* [2006] 231 ALR 1.

12 The *Water Act 2007* (Cth). The Murray–Darling Basin Authority then set about implementing the Murray–Darling Basin Plan.

they planned a national emissions-trading scheme. This was one policy challenge that played to federalism's strengths: policy development could readily shift to the state level to circumvent a reluctant central government; initiatives could develop and unfold in a way best suited to local needs and preferences; and actions could be incremental and additive. South Australia, the mainland state least wedded to hydrocarbons and whose circumstances were most conducive to renewables, surged ahead (McGreevy et al. 2021), with other jurisdictions following as per their individual circumstances.

Other forms of compensatory policy activism were also occurring at the state and territory level, with the introduction by the ACT of its *Human Rights Act* in 2004 and Victoria with its *Charter of Human Rights and Responsibilities* in 2006 (Evans and Evans 2008). This, again, reflected ideological and partisan divisions, but provided some indication that federalism could serve as a 'democratic laboratory' with the states being able to 'try experiments in legislation and administration' from which others can learn (Bryce 1893:353). A 'bill of rights' may or may not be a good thing and may be implemented in different ways, so such an incremental, experimental approach has much to recommend it, as with other possible institutional modifications (Fenna 2010a).

With 'wall to wall' Labor governments, the states and territories also took the first real initiative to establish a collective action body, the Council for the Australian Federation (CAF). Surprising as it seems, the Australian states had never clubbed together in an act of horizontal intergovernmentalism before. Solidarity of that nature potentially protects state interests in two ways: providing a means to obviate central government intervention by addressing common issues themselves; and increasing their bargaining clout (Schnabel 2020). It seems that CAF was only possible, though, because and for as long as the jurisdictions were all governed by the same side of politics, facing partisan opposition from the Commonwealth (Tiernan 2008; Menzies 2012; Chordia and Lynch 2015).

Meanwhile, the states were also pursuing a set of proposals dubbed the National Reform Agenda developed by the Victorian Government (DPC and DTF 2005). This was envisaged as picking up the baton where the conclusion of the National Competition Policy left off, expanding the focus to include 'human capital' formation—though exactly what this would involve was always rather vague (e.g. Silver 2008:67–68). COAG (2006)

agreed in principle to this, and established a new body, the COAG Reform Council, to supersede the National Competition Council that had assessed progress on National Competition Policy.

Pulling together: Labor hegemony

Things changed radically with the election in late 2007 of a Labor Government in Canberra pledged to 'end the blame game' and repair Australian federalism after a decade of Coalition rule (Rudd 2005). The Rudd Government set about that task energetically, perhaps even frenetically, turning COAG from a virtually moribund entity into what the new prime minister liked to call the 'workhorse of the nation' (Rudd 2007). Issues were tackled across a range of policy areas, but the centrepiece was sweeping reform to the system of conditional grants that provided the states with a quarter of their revenue and laid down rules across a range of policy areas.[13] These were condensed down to a handful of block grants, with much of the conditionality removed (Treasury 2009; Fenna and Anderson 2012).[14] The quid pro quo for a much lighter Commonwealth touch was cooperation from the states in an ambitious new arrangement for performance benchmarking. This would shift the focus from input and output requirements to outcomes assessment (Fenna 2014), and be carried out by the recently-created COAG Reform Council, a genuinely collaborative intergovernmental body (CRC 2010; Gallop 2012; O'Loughlin 2012).

At the same time as restoring some of the character of federalism by winding back conditionality, the reform program also sought to tackle what was perceived to be one of the detrimental consequences of divided jurisdiction: a balkanised economy. Creating internal free trade had been a central purpose of federation, and eliminating remaining and accumulated obstacles as demanded by big business was seen as completing that project. The *National Partnership Agreement to Deliver a Seamless National Economy* was signed in 2008, outlining a program of reform and providing for 'facilitation payments' as had first been instituted to compensate the states for loss of revenue resulting from National Competition Policy.

At the same time as this ambitious program of federal reform was getting underway, Australia was hit by the global financial crisis, to which the Rudd Government also responded with alacrity (Fenna 2010b). It was a busy

13 *Intergovernmental Agreement on Federal Financial Relations*, 2009.
14 *Federal Financial Relations Act 2009* (Cth).

time. An economic disruption of that magnitude may well have had a derailing and centralising effect on that reform program and the system generally; instead, though, it proved something of an elixir. Much of the Commonwealth's counter-cyclical spending program was implemented through the states—providing the kind of fiscal emollient that under normal conditions the states could only dream about (Anderson and Fenna 2010). At the same time, the occasional forays by the Commonwealth into implementation only served to reinforce the perception that these things were best left to those closer to the action, the states (Kortt and Dollery 2012).

Reversion to type

From such heights, there was really no way but down for intergovernmental relations, and signs of that occurring emerged soon enough. Centralisation was evident in the move to a national curriculum and testing regime for the state-run school system under the 'Education Revolution' rhetorical banner (Harris-Hart 2010; Kayrooz and Parker 2010; Savage 2021). More overt was the prime minister's determination to force sweeping health system changes on the states, changes moreover that included a plundering of the GST pool to help cover the Commonwealth's contribution.[15] The prime minister's determination was evidenced in the threat to hold a constitutional referendum on healthcare powers if necessary (Rudd 2010).

> If the states and territories do not sign up to fundamental reform, then my message is equally simple: we will take this reform plan to the people at the next election—along with a referendum by or at that same election to give the Australian Government all the power it needs to reform the health system.

Western Australia held out and the prime minister was shortly thereafter removed from office by his own party (for a host of other reasons). A 'watered down' version of the health reforms, leaving the GST pool intact, was eventually implemented under Rudd's successor Julia Gillard (Duckett 2015:136; also Australia and States and Territories 2011; Anderson 2012).

On top of this, the Rudd Government decided to impose a new tax on the mining industry, the Resource Super Profits Tax, inspired by a major Treasury report on tax reform (AusGov 2010; Henry 2010; Sanyal and

15 *National Health and Hospitals Network Agreement,* 2010.

Darby 2010). On the face of it, this was a rational attempt to ensure that a greater share of the windfall profits from the mining boom were captured for Australians, correcting deficiencies of the existing state government royalties approach. However, it was an ill-conceived and ill-fated move that invited conflict with both the industry and the mining states (SSCSNT 2011; Kellow 2016). A more conciliatory version, the Minerals Resource Rent Tax, was legislated in 2012 by the Gillard Government, only to be repealed once Labor lost office.[16] All this was occurring while federalism was coming under strain from the pressure the mining boom was putting on Australia's system of fiscal equalisation. By 2010, the heady days of Rudd's cooperative federalism were already a thing of the past. Much more consensual and much more successful an exercise in centralisation was the launching of the National Disability Insurance Scheme (NDIS) on 1 July 2013 under Julia Gillard.[17]

With the Coalition returned to office under Tony Abbott in 2013, the end of that experiment in cooperative and collaborative federalism was confirmed. The new government's first budget announced swingeing cuts to Labor's schools and hospitals funding, instigating a fresh round of intergovernmental conflict (SSCH 2016). At the same time, the COAG Reform Council, whose role had been so central to the Labor Government's reform of the intergovernmental grant system, was abruptly and unilaterally terminated. The states made no protest—unsurprising given that the CRC's mandate was to assess their performance. In general, the demise of Australia's short-lived experiment in federal benchmarking was unsurprising too—predictable and predicted (e.g. Fenna 2012).

Start/stop: Coalition ambivalence

Following conservative tradition, the incoming Coalition Government appointed a 'Commission of Audit' to help frame its agenda—one set of recommendations from which was that Australia return to a more coordinate style of federalism with a clearer division of roles and responsibilities and greater financial autonomy for the states (NCA 2014). Following this, the Abbott Government launched a comprehensive review of the system, its *Reform of the Federation White Paper* (RFWP 2014). This was one of the periodic instances when moves are made to address dysfunctionalities

16 *Minerals Resource Rent Tax Act 2012* (Cth).

17 *Intergovernmental Agreement for the National Disability Insurance Scheme (NDIS) Launch; National Disability Insurance Scheme Act 2013* (Cth).

arising out of the way the system has evolved and adapted to changing needs and conditions (Fenna 2012). That inquiry produced several research papers and a Green Paper (DPMC 2015) just before a change of Liberal Party leader and hence of prime minister led to its abrupt termination. The roller-coaster continued with Malcolm Turnbull, the new prime minister, suddenly floating the idea of returning taxation powers to the states—a notion that was as unexpected as it was unrealistic and unsuccessful—and just as suddenly abandoning it (Turnbull 2016; Fenna 2017).

States to the fore: Climate change

As its predecessor had a decade earlier, the federal Coalition governments in office from 2013 to 2022 under a succession of prime ministers, resisted pressure to take action on climate change and, indeed, turned back the clock on measures recently introduced. The Rudd–Gillard Labor governments had taken over from the states the proposal for a carbon tax of some form, eventually introduced with passage of the *Clean Energy Act 2011* (Cth), coming into effect the following year. Its removal had been one of the Coalition's main policies and first actions—'axe the tax', as their rhetoric put it. Then-Treasurer Scott Morrison's appearance in parliament proudly brandishing a lump of coal in 2018 epitomised the Coalition's position on climate change, a position that in no small measure helped it lose the election of 2022.

In turn, just as they had done a decade earlier, the states took the initiative and sought to compensate with programs of their own. Despite the great extension of Commonwealth powers since 1920, the states retain an almost-full panoply of tools and responsibilities with which to reduce emissions. This is particularly the case given that they are in charge of their respective electricity systems—the leading source of greenhouse gas emissions. Federalism was again demonstrating its possibilities as an opportunity structure (Fenna 2023). By 2021, it was clear that those programs were having a substantial impact, with the share of electricity generated from renewable sources continuing to surge and coal-fired generators clearly on the way out. As had been the case when the Coalition last governed federally, this occurred because of the number of Labor governments at the state level. By 2020, even the Coalition Government in New South Wales had followed suit. When, at the United Nations Climate Change Conference in late 2021, the prime minister announced that Australia would commit to net-zero emissions by 2050, he was merely following the lead of the states and territories, all of whom had already committed to targets equal or greater ambition.

States to the fore: COVID-19

It was the COVID-19 pandemic, though, that revealed most dramatically the continuing importance of the states and the advantages of divided jurisdiction; and it was the pandemic that revived a degree of cooperative federalism not seen since 2008–09 (Fenna 2021). That the gravest health threat since the Spanish Flu of a century earlier would reveal the strengths rather than the weaknesses of Australian federalism was not necessarily to be expected. This was particularly so given that it came immediately on the heels of catastrophic bushfires that had prompted the prime minister to advocate enhanced Commonwealth emergency powers and establish a royal commission to that end (Morrison 2020a; RCNNDA 2020). It would not have been the first time a crisis had ratcheted-up the degree of centralisation in Australian federalism.

The Commonwealth's *Biosecurity Act 2015* claims extensive powers over an emergency such as this (Lee et al. 2018:171). However, it is the states that not only hold responsibility for emergency services but also for the schools, hospitals, policing, business regulation, transport and other frontline aspects of pandemic management. They responded forcefully, adopting measures appropriate to their own varying circumstances and, more controversially, closing their borders to reduce transmission. A reasonably clear division of responsibilities operated, with the Commonwealth controlling the external border, providing material support of various kinds and dealing with the economic fallout, and the states exercising responsibility for control measures within their own territories as well as management of their respective hospital systems.

In taking charge to such an extent, the states were regularly at odds with the Commonwealth, particularly about the appropriate severity of control measures, and that tension persisted well into 2021 as new outbreaks continued. Whether it was lockdowns, school closures or border closures, the Commonwealth frequently expressed its frustration and its desire to see the economy—for which it bears primary responsibility—opened back up. Its draconian powers in the *Biosecurity Act* were of little assistance in that regard. Resolute action by state governments, though, was strongly supported by public opinion and they prevailed throughout. There was no action more expressive of Australian federalism's revival than state border closures. On the face of it, these were flagrantly at odds with the unambiguous language of the Constitution's section 92 and were challenged in the High Court as such. The Commonwealth repeatedly deplored the closures and

joined the challenge, only withdrawing when the savage second wave hit Victoria. The High Court upheld the closures as a legitimate exception to the requirements of section 92.[18]

There were also challenges at the operational boundary between the Commonwealth and the states. The most significant concerned quarantine, a major component of the control strategy through into early 2022. Quarantine is an enumerated Commonwealth power under section 51; however, its implementation involves access to, and administration of, significant accommodation resources and this put it into state hands. Mismanagement of quarantine gave rise to the deadly second wave in Victoria 2020 and questions continued to arise about its handling (CHQI 2020).

At the peak level, the states worked closely with the Commonwealth in an arrangement best described as 'loose coordination'. This was helped by development over more than a decade of coordination protocols under the auspices of COAG expressed in a succession of planning documents and intergovernmental agreements. By far the most visible manifestation of this coordination was the immediate transformation of COAG into 'National Cabinet', with weekly meetings having a much more collegial character than COAG's summit-style events and providing a reasonable consistency of message and policy (Morrison 2020b). The states, and several commentators, were effusive about this new arrangement—because of its consensus-based decision-making and the way it 'established national principles that recognise the sovereignty of states and territories to implement policies according to local circumstances' (Victorian Government 2020). Others were impatient with the fact that its decisions were not binding, even suggesting National Cabinet outcomes were often 'a "decision" in name only', presenting a mere 'fig-leaf of unity' (Duckett et al. 2020:22–23). However, this deviation from rule by Commonwealth fiat should surely be seen as highly functional and consistent with the federal principle.

'National Cabinet' was more a case of operational change and rebranding than of institutional change, since a cabinet is only such by virtue of the combination of party discipline and collective ministerial responsibility to parliament, neither of which pertain to what was little more than a rejigging of peak-level executive federalism. This reality was confirmed by the Administrative Appeals Tribunal when an unsuccessful attempt was made to

18 *Palmer & Anor v The State of Western Australia & Anor* HCA 5 (6 December 2020).

shelter National Cabinet records from freedom-of-information requests.[19] The government's response was to make an attempt at endowing National Cabinet with privileged status via legislation, but the Bill did not proceed beyond second reading before federal parliament was dissolved in 2022.[20]

National Cabinet had not been operating long before the prime minister announced with great fanfare that it would supersede COAG permanently, with the promise that the new arrangement 'will change the way the Commonwealth and states and territories effectively and productively work together' (Morrison 2020c). For the prime minister, it was to be a 'congestion busting process' that would put an end to 'endless meetings that do not result in action'. Others endorsed this view, urging leaders to seize the moment and not squander 'a once-in-a-generation opportunity' to reform intergovernmental relations (Smith 2020). This, though, was either political puffery or political naïveté. National Cabinet emerged in response to extraordinary circumstances and will inevitably lapse or revert to standard negotiations mode once conditions normalise. Among the reasons it worked so well were: the fact that states so heavily occupied the emergency management field and were thus equal partners; a federal as distinct from a unitary approach worked well and was recognised by public opinion as doing so; this issue eclipsed the perennially divisive issues in Australian federalism; and the pandemic was much less a zone of ideological conflict than most public policy questions. Once the conflict, messiness, complexity and difficulty of Australia's shared governance issues return, so, unavoidably, will the difficulties of executive federalism.

Conclusion

Thinking back to the attempt at the beginning of this chapter to encapsulate the essence of Australian federalism in a handful of key points, there are a number of observations we can make in the light of recent developments. First, centralisation is the underlying reality and continued into the new millennium. Recent milestones in that process include the extension of Commonwealth policing commitment and powers; the High Court's expansive interpretation of the corporations power; the national curriculum

19 *Patrick and Secretary, Department of Prime Minister and Cabinet (Freedom of Information)*, AATA 2719 [2021].

20 *COAG Legislation Amendment Bill 2021*. See, also, Senate Finance and Public Administration Legislation Committee report on the Bill, October 2021.

and associated bodies; and the NDIS. The bushfires did not result in another ratcheting up, but there was certainly indication they might. Meanwhile, leaders from both sides of politics have not hesitated to call the very notion of federalism into question.

Second, the original decentralised conception finds its expression in the continuing importance of the states in a wide range of service delivery and regulatory functions. This was particularly evident during the pandemic but also in climate change policy. Third, although shades of administrative federalism have certainly crept into the system as a consequence of centralisation, the essentially dualist nature of the division of powers found its expression in both the compensatory action of the states in the field of climate change mitigation and their strongly autonomous role during the pandemic. For several decades, Australian federalism has been battered by issues that do not lend themselves to a fragmented federal solution. Environmental protection, economic efficiency and regulation, human rights, international competitiveness, globalisation, interjurisdictional crime and terrorism have been among these challenges that have provoked centralising responses. Climate change, by contrast, is one domain where a state-level response can be effective and the pandemic has been particularly well-suited to the kind of localised response federalism invites.

Fourth, although the partisan divide over federalism has dissipated, partisanship contributes significantly to the dynamics of Commonwealth–state relations in the way it drives competing policy agendas between governments. That was particularly clear with a highly ideological issue such as climate change, less so with a much less ideological issue such as the pandemic. Finally, executive federalism fluctuates according to both the nature of the issues confronting governments and the partisan composition of those governments. The two highpoints were the early years of the Rudd Labor Government when COAG was harnessed to serve as the workhorse of the nation, and during the pandemic when the first ministers' meeting was remodelled and repackaged as National Cabinet. Given the very low level of institutionalisation, it is not surprising that peak level intergovernmental relations fluctuate so much from one period to the next in Australian federalism—and will continue to do so.

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