The Pleasant Greyness Of Australian Federalism

Abstract

This article provides an overview of Australian federalism, describing its origins, design, features, evolution, and issues. Its central theme is the way that, in the notable absence of a 'federal society', a system that was decentralised in design and intent has given way to one much more centralised in practice. The issues that plague Australian federalism are the practical ones of fiscal federalism and intergovernmental relations.

Introduction

The Commonwealth of Australia is one of the world's most straightforward federations. It is the purest case of an aggregative federation, having been formed in 1901 by voluntary and democratic union of the same six constituent units as make it up today. It is organised on classic lines, with the States operating under their own constitutions and allocated full legislative and administrative responsibility in their assigned domains. A bicameral national legislature provides for equal representation of the States in the Senate; the Constitution may only be altered with approval of the majority of voters in a majority of States; and a supreme court, the High Court of Australia, provides authoritative adjudication of jurisdictional disputes. Although Australia has had one experience of secessionism, that was short-lived and the country suffers no existential crises.[1]

(Source: Free World Maps Collection (2018)

But being straightforward is not necessarily a good thing, and ticking a number of the institutional boxes of good federalism may not mean a lot. Australia has no existential crises because it has no elements of pluri-nationalism. Indeed, we can go further than that. Although there are of course differences between the States, in "relative terms, Australia's federalism is territorially or spatially homogeneous" (Aroney, Prasser, and Taylor 2012, 273). Without those tensions, those differences, to keep it honest, Australian federalism has substantially eroded over the almost 120 years since it was launched (Fenna 2007). Centralisation has given Australian federalism a distinctly grey shade. It also means that academic debate on the subject in Australia has revolved to an unusual extent around the question of whether Australia should be federal at all

(Fenna 2009).
This ambivalence is not altogether bad, of course, since it could be said that there's only one thing worse than having anæmic federalism, and that's having fraught federalism. The issues today are how to manage the funding relationship between the Commonwealth and the States; how to manage the entangled responsibility for many policy issues; and how to manage the vertical and horizontal fiscal imbalances.

In the Beginning

Federation was a protracted affair, occurring without duress or pressing need, and thus the new union was conceived in quite decentralised terms. The process began in 1890, with delegates from each colony soon reaching agreement on a draft constitution. The process, however, then lapsed; was revived later in the decade; and eventually after approval in referendums was achieved, the proposed Constitution was sent to London to be enacted in 1900. The States retained a plenary power to legislate other than in a handful of matters and the Commonwealth given a limiting list of enumerated powers. State responsibilities were broad and substantial, and, in the largest part, implicitly exclusive. The scheme was one of 'co-ordinate' or 'dual' federalism, where each level of government had its own sphere (Zines 1986). Concurrency was limited to a range of Commonwealth powers where exclusive jurisdiction had not been assigned. With the exception of 'duties of customs and of excise', the States also retained a plenary power to tax.

What Happened?

These features exist in barest outline today. A decisive High Court decision in 1920, the *Engineers* case, marked the turning point, after which centralisation became the order of the day (Aroney 2017; Galligan 1987). [1] In *Engineers,* the Court held that the Constitution was to be interpreted as another statute, not as a federal contract, and thus as providing no implicit sureties to the States. High Court decisions also deprived the States of authority to levy sales tax. Then, the exigencies of war led the Commonwealth to seize exclusive control of the personal and corporate income tax system in 1942, the High Court assenting. [2] Since then, the Commonwealth has enjoyed a position of clear financial superiority and the States have been substantially dependent on intergovernmental transfers (Fenna 2008).
By the mid-1970s, an extensive system of conditional, or 'tied' grants has given the Commonwealth a powerful role in much of what had been exclusive State jurisdiction. In addition, by the end of the 1980s, judicial interpretation had established that the Commonwealth's external affairs power gives it virtual carte blanche to intervene in any areas of State jurisdiction that had become matters of international treaty. By the early years of the new millennium it was clear that other enumerated powers would be accorded broad interpretation. Efforts over the years to centralise through constitutional amendment in the largest part failed to pass the referendum test, although two significant ones were passed — one in 1946 giving the Commonwealth important social policy powers and one in 1967 giving the Commonwealth authority to make laws for the aboriginal people. However, any constraint imposed by the Constitution's resistance to amendment has been more than compensated for by a combination of permissive judicial interpretation and active use of the spending power.

Neither Fish nor Fowl

The result has not been the death of the States or the demise of Australia's federal system. It has, however, been the conversion into a deeply entangled and Commonwealth-dominated system (Fenna and Phillimore 2015). Presiding over the web of intergovernmental arrangements sits COAG, the Council of Australian Governments — on the face of it a paragon of cooperative or even collaborative federalism. However, COAG is a very occasional and brief meeting whose agenda is

controlled by the Commonwealth and in which no decisions are made that are not endorsed by the Commonwealth (Phillimore and Fenna 2017). With the States dependent on the Commonwealth for almost half their revenue, and the Commonwealth holding a number of other trump cards, the system is one of directive intergovernmentalism where the Commonwealth is hegemonic. In the first decade of the twentieth-first century, the States succeeded in establishing a coordinating body of their own, the Council for the Australian Federation (CAF); however, it soon lapsed.

Long gone is Australian federalism's coordinate character. While retaining important elements of its dualist design, these have become overlaid with elements more reminiscent of administrative federalism where the central government exercises broad policy control in important domains and the States implement and administer, with some scope for deviation and non-compliance. In a number of policy areas, such as schooling, this has increasingly become the case as federal education system rapidly gives way to a nationally coordinated one (Hinz 2018; Savage 2016). However, it is an administrative federalism where the States have minimal input into central government policy directions. While Australia has a powerful and lively upper house, the Senate is no Bundesrat: it is a popularly elected chamber, dominated by party, not region, and not a 'house of the States'.

Continuing Issues

Two fiscal reforms ameliorated the situation somewhat. In 1999 the Commonwealth agreed to replace the annual general-purpose grants to the States with the entire net proceeds of the new national VAT, the Goods and Services Tax (GST). In 2009 the Commonwealth replaced a large number of often quite prescriptive tied grants with a handful of block grants (Fenna and Anderson 2012; Treasury 2009). While the latter were still allocated for 'specific purposes' they were far more generally so. The quid pro quo was State cooperation with a regime of performance monitoring (Fenna 2014). However, after a few years of operation, that effort at benchmarking was terminated by the Commonwealth, with no objection from the States.

While liberating the States from their dependence on annual budgetary decisions of the Commonwealth, the dedication of the Commonwealth's GST revenues to the States has not solved any problems and it has contributed to some of its own. First of all, even though the GST revenues are quarantined from Commonwealth budgeting decisions, the pool of tied grant funds remains substantial and entirely at the mercy of the Commonwealth. Second, the GST revenue pool has not grown quite as well as had originally been expected. Third, the formal equalisation system through which those funds are distributed has proven far more contentious than it was when the GST was first introduced.

Under the strict equalisation regime operated by the Commonwealth Grants Commission (CGC 2017; Spasovejic and Nicholas 2013), Western Australia's flood of resource royalties through the period of the mining boom led to its share of the GST plunging commensurately — to the point where it was to receive only 30 per cent of its per capita share. The matter was referred to the Commonwealth government's economics research agency, who recommended a substantial watering down of Australia's thorough-going equalisation system (PC 2018). While this was rejected by the government, it did lay the basis for a compromise reform (Morrison 2018).

Wrestling with Australian federalism's high degree of vertical fiscal imbalance is an ongoing issue, resolution of which is made extremely unlikely by the fact that any reform would require a decision by the Commonwealth to reduce its fiscal power vis-à-vis the States (Fenna 2017). The Commonwealth periodically initiates inquiries into the federal system or floats reform ideas, but these almost invariably come to nought — as most recently with the Reform of the Federation inquiry launched in 2014 and abruptly terminated in 2016 (PMC 2015).

Testing Times: Coping with Covid-19*

When the COVID-19 pandemic struck in early 2020, Australian federalism was put to the test. Discoordination and conflict might have hampered an effective response. Some had certainly argued that the system's 'patchwork' of powers would be inadequate for such an emergency (Howse 2004; cf. Bennett, Carney, and Bailey 2012) and few thought the federal system had distinguished itself during the bushfires emergency that had just occurred. In the aftermath of that event, the prime minister called for enhanced Commonwealth emergency management powers (Prime Minister 2020a), and in keeping with that, this crisis might also have precipitated yet another lurch toward centralisation.

Neither, however, eventuated. The system was lauded for its operation and for the cooperative manner in which that occurred. The COVID-19 response showcased both the continuing importance of the States and the potential for genuinely collaborative intergovernmentalism in Australia. Frictions there were; however, those reflected the unavoidable tension between the necessity and the cost of prophylactic measures and had few adverse consequences for Australia's response.

COAG was set aside in favour of a much more dynamic form of executive federalism, the 'National Cabinet' of PM and premiers that met weekly and by all accounts was characterised by consensus-based decision making. While the Commonwealth is equipped with substantial powers under the *Biosecurity Act 2015*, the States led the way in imposing control measures and four of them closed their borders to the rest of the country. Despite the great centralisation that has occurred in Australian federalism, it is the States that operate the public hospitals, the government school systems, and the police and emergency services agencies. They also have primary jurisdiction over public health, as well as criminal and civil law; they license and regulate the operation of all the thousands of businesses, facilities and services that are potential sites of contagion; and they provide thousands more public amenities of their own that likewise present risks. The States each have their respective public health Acts and emergency management Acts and have always shouldered the main responsibility for emergency management.

The main glitch seemed to be poor coordination at some points between the Australian Border Force and the State government harbour controls dealing with cruise ships. Meanwhile, far from obstructing an effective response, the conflict that occurred reflected the Commonwealth's concern that the States were being too aggressive in their imposition of preventative measures. This was no surprise: while the States were at the front line of the pandemic, the Commonwealth had committed vast sums to keeping the economy on life support during the policy-induced coma. The *Biosecurity Act* equipped the Commonwealth with powers to shut things down, but it could not force the State to open things back up.

As the crisis subsided, the prime minister (2020b) announced dramatically that COAG was finished, superseded by the National Cabinet, which would turn its attention to 'an initial single agenda — to create jobs'. Australian federalism is somehow to be remade. One can only be sceptical, though, that the exceptional unity forged in response to exceptional circumstances will continue once the ideological and intergovernmental differences of normal times return and governments contemplate the fiscal fallout.

Conclusion

In many ways, Australian federalism has been very successful, and the extensive change it has experienced over more than a century of operation is entirely to be expected. In the main, it simply reflects natural adaptation to the needs of society that has always had strong unitary characteristics and which, thanks to modernisation and globalisation, is constantly generating fresh pressures for uniformity and centralisation in regulations and programs. The resulting entanglement provokes demands for reform and even occasionally reformist initiatives; however, these rarely make much headway. Rationalising Australia's intergovernmental arrangements will be an ongoing task and challenge.

*Added in June 2020

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[1] *The Amalgamated Society of Engineers v Adelaide Steamship Co Ltd.* (1920) 28 CLR 129.
[2] *The State of South Australia v the Commonwealth* (1942) 65 CLR 373.
[1] In 1933, voters in Western Australia voted 66 per cent in favour of secession, but there were no legal avenues for pursuing the matter and it quickly faded away, assisted by financial concessions from the Commonwealth (Lecours and Béland 2018, Craven 1986).