

TOMORROW'S FEDERATION: REFORMING AUSTRALIAN GOVERNMENT

Pragmatism and working through existing institutions may be the key to federal reform

Paul Kildea, Andrew Lynch, and George Williams (eds.)

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Tomorrow's *Federation* offers new insight to the well-traversed topic of Australian federalism by bringing together diverse and interdisciplinary perspectives and a practical approach to potential reforms. Its editors acknowledge the 'unhappy state of Australia's federal system' because of the increased centralisation of legislative and financial powers (p. 1). This increased centralisation has resulted in part from the Commonwealth Parliament's increasing attempts to enact legislation that encroaches on traditionally state matters and from the High Court's interpretation of the Constitution, post *Engineers*. As the editors say in the introduction to the book, this centralist approach is entirely contradictory to that envisaged by the framers of the Constitution who saw the states as equal partners in the Australian federation, and in no means reliant on, or inferior to, the Commonwealth.

The contributors to the book are a notable cohort of authors who are academics (in law, politics and economics), PhD candidates, former politicians, legal practitioners, and senior policy advisors. They include Professor Nicholas Aroney from the University of Queensland, Professor A.J. Brown of Griffith University, Professor Alan Fenna

from the John Curtin Institute of Public Policy at Curtin University, former WA Premier Geoff Gallop AC, and Melissa Perry QC. Given that the area of federalism, and indeed constitutional law, has been somewhat male dominated, it is also commendable that 11 of the 22 contributors are women.

The editors of *Tomorrow's Federation* are even more distinguished, with George Williams AO and Andrew Lynch, both from the Faculty of Law at the University of New South Wales, being two of Australia's most prolific and well-respected constitutional law academics. The book's lead editor, Paul Kildea, teaches constitutional and public law at UNSW and is the director of the Federalism Project.

The editors, in compiling *Tomorrow's Federation*, sought to identify how reforms to the Australian federal system have been achieved and propose further reforms through existing institutions, such as the Council of Australian Governments (COAG) and the COAG Reform Council, and intergovernmental grants and

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agreements. Their message is that cooperative federalism can gradually reform the system, and is in fact a more realistic and pragmatic approach than constitutional amendment, which is likely to be effective if implemented but difficult to achieve. However, the authors are not averse to constitutional amendment.

Given that the unhappy state of Australia's federal system has long been recognised, it is no surprise that much has also been written about what needs to be done to repair it. Indeed, discussion of the topic far exceeds what has actually been done to fix the problem. Common prescriptions include a reallocation of roles and responsibilities between the Commonwealth and the states, and restoring revenue-raising powers to the latter so as to reduce vertical fiscal imbalance. Many of these proposals are wise responses to the diagnosed problem and would, if implemented, stand a fair chance of recalibrating the tiered system of government in this country. But their proponents only rarely address the practical means by which such reform might be achieved. This is unfortunate given that, in many respects, the mechanisms of reform are just as important as the substance of the reform itself. As a result, the field suffers not from a lack of good ideas, but from the means of realising them. (pp. 1–2)

The book is divided into five parts, with the first two focusing on intergovernmental relations and intergovernmental grants. The following comments about the book's pragmatic approach are largely based on those parts. Although I wholeheartedly agreed with the book's philosophy that some very effective reforms to federalism can be achieved through existing political institutions and enhancing cooperative federalism, as a Western Australian, I believe such an approach will not do much to redress the federal imbalance.

I acknowledge that a pragmatic and cooperative approach does result in benefits such as the \$1.75 billion National Agreement on Skills, signed in

April 2012, which will create a HECS-style system for vocational training to improve the nation's skills base and employment opportunities.

This, however, contrasts with the ongoing debate over the distribution of GST revenue to the states through horizontal fiscal integration—and highlights the fundamental flaws in Australian fiscal federalism. The GST Distribution Review Panel, comprising The Hon. Nick Greiner, The Hon. John Brumby, and Bruce Carter, will present its final report later in the year.¹ The panel will proceed on the basis that the horizontal fiscal equalisation method of distributing GST revenue between states and territories should still be applied but will focus on making improvements to the system.² The panel's interim report in March 2012 affirmed that horizontal fiscal equalisation will continue but it needs to be more understandable and transparent.³ The report also notes that an increase in a state's share of GST revenue means another state's share will decrease. From the perspective of states such as Western Australia, the ultimate recommendations made by the panel are unlikely to be significant enough to restore the fiscal federal balance to the states.

In addition, although the terms of reference state that the federal treasurer will present the panel's final report to COAG before deciding the distribution of GST revenue,⁴ there is no guarantee that the Commonwealth government will implement its recommendations, although it will be under pressure to do so. In fact, despite the review being underway, the Commonwealth reduced Western Australia's portion of GST revenue for 2012–13 by approximately \$600 million.⁵ In his speech at the opening of the WA Parliament on 21 February 2012, several days prior to this announcement, Premier Colin Barnett highlighted the need for urgent fiscal reforms and the frustration of the state for having to rely heavily on Commonwealth funding.

Unless something changes, the crunch will come on State Government finances. The people of Western Australia know we are being short-changed in the carve up of Goods and Services Tax (GST) revenues.

Last year, we received 72 cents for every dollar paid in GST. The big States of New South Wales, Victoria and Queensland all received over 90 cents in the dollar back. It is a bizarre system that penalises Western Australia for having a successful mining industry, while at the same time rewards other States for their reliance on gambling revenue. The message is all wrong!

Federal reform can be achieved through existing institutions is a proactive and logical approach that the states and territories should be following at every opportunity.

State Treasury forecasts are that our share of GST revenues will fall below 50 cents in the dollar by 2013–14 and could be as low as 36 cents in the dollar by 2014–2015. This will see us lose \$12 billion in revenue to 2014–15, or even more if recent reports that our GST share will fall to 55 cents in the dollar next year are true. The Commonwealth just doesn't care. By anyone's measure this scenario is unfair, unrealistic and unsustainable. It is forcing the State into an over reliance on debt to fund infrastructure and services ...

Western Australia accepts it can make a net contribution to other States and only asks for a floor of 75 cents in the dollar for our share of GST revenues. We're not asking for a special deal, we're only asking for a fair deal. For Western Australia, fixing the GST is the number one issue in Federal-State relations.⁶

This reliance of the states on funding from GST revenue from the Commonwealth and their own inability to raise adequate finance is good reason for more permanent measures, such as a referral of income taxation powers to the states, to help restore the fiscal federal balance.

I am not suggesting that the pragmatic approach suggested by *Tomorrow's Federation* is not valid (once again, I acknowledge that the editors are not opposed to constitutional reform, just realistic about the likelihood of achieving it). In fact, suggesting that, and exploring how, federal reform can be achieved through existing institutions is a proactive and logical approach that the states and territories should be following at every opportunity. Sadly, studies on federalism to date have neglected this logical and sensible approach, which is why *Tomorrow's Federation* is an important contribution to the study of federalism and may indeed result in positive reforms to the Australian federation by raising consciousness, and indeed hope, about the possibility of reform in the absence of constitutional amendment.

Given my penchant for more long-lasting federal reforms, and the difficulty in achieving them through referendums, I read the third part of the book, 'Legal Mechanisms and Federal Reform,' with great interest. In the chapter 'The High Court and Dynamic Federalism,' Melissa Perry writes about the pivotal role of the High Court in altering the federal balance through constitutional interpretation of federal powers, using excise and external affairs powers as case studies. She notes that the importance of the High Court as a guardian of federalism has been greatly enhanced due to the failure of the Senate, which was originally intended to be a 'states house,' to protect state interests in the legislative process. Perry observes that this centralist interpretation of the Constitution has itself led to the need for greater cooperation between the Commonwealth and the states, emphasising the pivotal role of institutions such as COAG. Interestingly, she notes of institutions such as COAG, 'This raises the question as to whether the evolution of these sub-constitutional processes and institutions ought now to be formally recognised as part of the constitutional law landscape in Australia, and whether there are implications to be drawn from the Constitution that might impact upon and regulate them.' (pp. 172, 189) Also of interest was Perry's observation about the future direction of federal 'battles,' which she says are likely to be about the scope of executive power, particularly due to the endorsement of 'the comparative superiority of the position of the Commonwealth

in the federal structure' in *Pape v Federal Commissioner of Taxation* (pp. 172, 191).⁷

Andrew Lynch's chapter, 'The Reference Power: The Rise and Rise of a Placitum,' is particularly interesting and relevant in terms of cooperative federalism. Lynch discusses the use, and limitations of, section 51 in federal reform, a once neglected power whose use has increased in recent times. He warns of the potential impact on cooperative federalism if states are reluctant to make future referrals fearing the Commonwealth Parliament may take advantage of the High Court's likely broad interpretation of the power. Lynch cites the recent attempt to create a 'national scheme' through the National Vocational Education and Training Regulator Bill, which the Commonwealth proceeded with despite strenuous objections from Victoria and Western Australia (pp. 193, 207–208).

Consistent with the book's practical and interdisciplinary approach, 'Part 4: Case Studies in Federal Reform' contains three separate case studies in gender, health policy, and water reform. These case studies offered a refreshing perspective on cooperative federalism, given that these areas are traditionally neglected in studies on federalism.

The book concludes with 'Part 5: The Constitution and Federal Reform.' As a proponent of constitutional reforms to the federal balance, I was most interested to read George Williams' chapter, 'Rewriting the Federation Through Referendum,' in which he addresses the difficulties in achieving a 'yes' vote at referendums and suggests mechanisms to achieve it. Williams co-authored the excellent book, *People Power: The History and Future of the Referendum in Australia*, in which he examined the history of referendums in Australia (pp. 294, 302). In his concluding comments in *Tomorrow's Federation*, Williams suggests that although some federal reforms can be achieved through institutions such as COAG and cooperative federalism, 'any wholistic approach ... must include changes to Australia's Constitution by way of a referendum. The referendum must be part of any viable, long-term strategy for the enhancement of Australian federalism.' (pp. 294, 309)

In his fascinating chapter, 'Measuring the Mysteries of Federal Political Culture in

Australia,' A.J. Brown analyses responses from the public to two surveys on constitutional values (conducted in 2008 and 2010), which indicated Australians' dissatisfaction with their political system and their desire for reform. As an advocate of subsidiarity, I was interested to note the survey results revealed an evenly divided response between those in favour of decentralisation and those in favour of centralisation (pp. 310, 317). Also noteworthy is an excellent chapter by Sarah Murray, 'State Initiation of Section 128 Referenda,' in which she argues in favour of amending section 128 to allow states to initiate referendums.

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Tomorrow's Federation will have a wide and diverse appeal. It will be of interest to students and academics in the areas of economics, law, government and politics, and will no doubt be regarded as a significant resource to those participating in public life in political and policy roles, political commentators, and members of the public interested in Australian politics and government. *Tomorrow's Federation* makes a significant contribution to studies in Australian federalism, and I highly commend it as an outstanding contribution to federal scholarship.

Endnotes

- 1 GST Distribution Review, *The Review* (2011).
- 2 GST Distribution Review, *Issues Paper* (2011), 1.
- 3 GST Distribution Review, *Interim Report* (2012), v.
- 4 GST Distribution Review, *Terms of Reference* (17 November 2011).
- 5 Annabel Hepworth and Paige Taylor, 'Western Australia's fury at plunge in GST share,' *The Australian* (25 February 2012).
- 6 Western Australia, *Premier's Statement*, Legislative Assembly (21 February 2012), 16a–69a (Colin Barnett).
- 7 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 85.