Dinner Address
The Constitution: 100 Years On

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In the public celebrations of the Centenary of Federation, little attention has been paid to the question whether the Constitution works satisfactorily. That is understandable. The focus of the celebration is on the establishment of the Commonwealth, and the interest and enthusiasm of the public is not likely to be increased by a discussion of constitutional principles and the nature of federalism.

The Constitution can not be understood by looking at its text alone; its meaning has been expounded by many decisions throughout 200 volumes of the Commonwealth Law Reports. What Edward Gibbon said in the 18th Century with regard to the law seems applicable to constitutional law today:

> "Few men without the spur of necessity, have resolution to force their way through the thorns and thickets of that gloomy labyrinth".

"Gloomy" may be too strong a word to apply to the constitutional decisions, but no one could deny them the epithet "labyrinthine". I find it necessary tonight to take only a few short steps into the labyrinth.

Even if, on examination, we were to find that the Constitution is less than perfect, we should still honour those men (the founding fathers) whose efforts succeeded in gaining the acceptance of the Constitution by the public in Australia and by the Imperial authorities in London. It seems to us now so natural that Australia should be one nation that we tend to forget that it was only by effort and sacrifice that those who strove for Federation were able to overcome the local jealousies, and reconcile the local interests, of the six Australian Colonies and to secure the agreement of the Imperial authorities to the form of Constitution on which the people of Australia had agreed.

The founding fathers – they were all men, of course – had the high purpose that, in Edmund Barton's words, there would be, for the first time in human history, a nation for a continent, and a continent for a nation. There were other arguments in favour of Federation – for example, the need for a unified defence force and the abolition of internal customs barriers – but they were subsidiary to the ideal that Australia should be one nation. The ideal has endured; it has withstood attempts at secession in the past, and one hopes that in the future, it will withstand misguided attempts to divide the nation by such things as the claim for Aboriginal sovereignty.

The founding fathers of our Constitution are not known to every school child in the way that the founders of the American Constitution are known in the United States. It is not unusual for distinguished Australians, other than sportsmen and bushrangers, to be consigned to oblivion, from which they are rescued only for the purpose of attempting to show that they had feet of clay.

A former Prime Minister described those who were responsible for the form which the Constitution took as "forelock tuggers". I assume that he meant that they were submissive to the English establishment. He seems to have resented the fact that they rejected the idea that Australia should have a republican Constitution – which would have been quite impossible to achieve at the time, and was in any case wanted only by a small minority – and that they provided for the Senate – without which the colonists would never have agreed to federate. The description does little justice to the Australian delegates who went to London to attempt to secure the passage of the *Constitution Act* and strongly resisted the attempts of the Colonial Office to amend the Constitution that had been drafted in Australia by Australians. They succeeded in all significant respects except one – they were forced to compromise on the question of the right to appeal to the Privy Council. One of the most influential of those delegates, Alfred Deakin, showed how little deferential he was by refusing not only a knighthood but also an honorary doctorate offered by Oxford. He had previously shown that he was not in awe of high-ranking English authority when he replied to a speech by the Prime Minister of Great Britain, Lord Salisbury, by "challenging [his] arguments one by one and mercilessly analysing the inconsistencies of his speech". He was certainly no "forelock tugger".

The preamble to the *Constitution Act* states that the people had agreed to unite in one indissoluble Federal Commonwealth under the Crown. It did not recite that the Constitution should be a democratic one, or that Australia should be governed by the rule of law. No doubt it was taken for granted that the Constitution would recognise those principles, and it did.

The Constitution is firmly democratic. Both Houses of Parliament must be directly elected by the people; the Senate is not, as has been suggested, unrepresentative, although the people of each State vote for Senators as one electorate. The democratic principle was extended to the amendment of the Constitution, which requires the agreement of a majority of all voters and a majority of voters in a majority of States. This requirement prevents a government which has secured even a large majority from using its temporary power to effect a permanent change to the Constitution. Whether this valuable safeguard has been eroded by the *Australia Act* is a question to which I shall later return.

The possible excesses to which democracy may degenerate are to some extent prevented by the checks and balances of the Constitution. The power of the Executive, which mainly dominates the House of Representatives, is checked by the Senate, which is not necessarily so dominated. The power of the Commonwealth is balanced against that of the States. The Constitution secures the rule of law, by entrenching the position of the High Court and the Federal Courts, and thus securing the independence of the Judiciary. A reader of the Constitution might be surprised to learn that it also may protect the Judiciary of the States, for implications have been found in the Constitution that might not be obvious to the uninitiated.

Under the Constitution, Australia has enjoyed stable and democratic government for a century during which many other nations, much older than Australia, have descended to despotism or anarchy. It is difficult to say how much this stability is owed to the Constitution, and how much to other factors, such as the comparative homogeneity of society in the past, the cultural traditions which we have inherited from Great Britain, and the protection of powerful allies. At least it can be said that the Constitution contributed to our stability and is probably an essential condition of it. A comparison with other countries shows the value of constitutional checks and balances in restraining extreme fluctuations of governmental policy.

Stable government is not always good government. It is hardly necessary to say that those who govern must take some of the blame for inefficiencies in government, but an unbalanced federation may largely contribute to inefficiency. When the framers of the Constitution declared that they intended to create a Federal Commonwealth, they meant, as Sir Robert Garran said, "a form of government in which sovereignty or political power is divided between the central and the local governments, so that each of them within its own sphere is independent of the other". In other words, it was intended that the States should not be subordinate to the Commonwealth but coordinate with it. It follows, as Alexander Hamilton said in the *Federalist Papers*, that the State governments must be able to supply the finance necessary to perform their functions, just as the Commonwealth must have the same ability in respect of Commonwealth functions.

The framers of the Constitution endeavoured to give effect to these principles. They strictly defined the legislative powers of the Commonwealth, and where they thought that those powers might infringe on the powers of the States, they limited them, for example, in relation to banking, insurance, fisheries and industrial conciliation and arbitration. They restricted the application of the provisions regarding trial by jury, and freedom of religion, to Commonwealth laws. They prohibited the Commonwealth from taxing State property.

There was, however, one difficulty concerning financial relations which they could not surmount. It was regarded as essential that duties of customs should be uniform throughout Australia, and the Commonwealth was accordingly given exclusive power to impose duties of customs, and also, for no good reason, duties of excise as well. But in those days the States relied on duties of customs for revenue. Accordingly, temporary provision was made for the payment of the surplus revenue of the Commonwealth to the States, and a further provision, also apparently intended to be temporary, enabled the Commonwealth to grant financial assistance to any State on such terms and conditions as the Parliament thought fit.

In spite of this flaw in the pattern, a distinguished English economist was able to say that the Australian Constitution "conformed in a manner not reached anywhere else to the classic image of a federation with each level of government supreme and independent within its own sphere". That was what was intended by the majority of the delegates to the Constitutional Conventions. Sir Samuel Griffith dominated the Convention of 1891, and Edmund Barton was the leader of that of 1897, and no one who reads what they said at the Conventions, and in their judgments when they sat on the High Court, could have any doubt that they thought that the Constitution, which Griffith had played such a large part in drafting, provided for a classic federation of the kind described in the words of Sir Robert Garran to which I have referred.

As Robert Burns has told us:

"The best laid schemes o' mice and men
Gang aft agley,
An' lea'e us nought but grief an' pain,
For promis'd joy".

Federation in Australia is no longer what Griffith and Barton intended. As a result of decisions of the High Court, action by the Commonwealth, and to a lesser extent inaction by the States, the supremacy and independence of the States within their own sphere has suffered a double whammy, or, if you prefer a more Miltonic expression, has been struck by a two-handed engine.

In the first place, the powers of the Commonwealth have been given a wide effect which ignores the context which the Constitution itself provides. In particular, the external affairs power enables the Parliament to legislate not only to implement any treaty obligations, but also to carry out the recommendations and draft international conventions resolved upon by international bodies, even though the legislation operates entirely within Australia. It is now possible, given the necessary international foothold, which is all too readily available, for the Parliament to legislate with regard to anything. The power of the Parliament to intrude on the sphere of State activity is increased by its ability to impose conditions on its financial grants, since it has been held that there is virtually no limit to the kind of condition that can be imposed. The States are no longer supreme and independent within their own spheres.

Secondly, the wide meaning given to the expression "duties of excise", and the withdrawal of the States from the field of income tax, has meant that the States cannot raise the revenue necessary for their own purposes, but must rely on Commonwealth grants to enable them to perform their functions. Thus the States are responsible for spending monies which they do not raise and the Commonwealth raises monies which the States are responsible for spending.

The Goods and Services Tax may increase the total revenue payable to the States, but it does not remove this imbalance between the power to raise revenue and the responsibility for expenditure. Although the total amount of the Goods and Services Tax is notionally allocated to the States, no individual State has a guaranteed share in the revenue, since the distribution among the States will be made according to fiscal equalisation principles determined by the Commonwealth Grants Commission. Also the Commonwealth still has the power to affect the amounts payable to the States by determining the amounts of the conditional grants that will continue to be made.

Federations may take many forms, and those who favour the growth of central power may view with equanimity the way in which our Federation has developed with the resulting erosion of the independence of the States. However, the result is much inefficiency. There is a duplication of effort and control in many aspects of government. For example, both Commonwealth and States determine policy, and exercise powers of administration, with regard to health, education, transport and the environment, and each blames the other when things go wrong. The States are forced to resort to undesirable forms of taxation because their taxing powers are so limited. The need of the States to secure increased revenue from gambling has led to a considerable growth of facilities for gambling in Australia, with great harm to society, and particularly to its less affluent members.

It seems obvious enough that it would be desirable for the relations between Commonwealth and States to be put on a rational basis. There should be a redefinition of functions, so that, so far as possible, the States should have the sole power and responsibility in respect of such matters as are assigned to them. The taxing powers of the States should be increased to remove, or at least reduce, their reliance on the Commonwealth for financial assistance.

There would be little point in convening a Constitutional Convention to consider these matters, since recommendations made in the past have not been acted on, because of lack of bipartisan political support. The only hope of reshaping our Federation (judicial activism apart) would be if politicians of all major parties could put aside political differences for the purpose of working out anew which powers should be given to the Commonwealth and which to the States, and of deciding which powers to raise revenue should be possessed by the Commonwealth and which by the States. Some issues should be easy to decide – for example, to increase the power of the Commonwealth with regard to corporations, and to reduce it with regard to external affairs, and to reduce the scope of the excise power. Others, health and education for instance, would be more difficult and might require compromise. Financial relations might again be the lion in the path.

One suggestion, that the States might impose an income tax surcharge, would, together with a more restricted definition of excise, reduce the fiscal imbalance that I have mentioned. However, that suggestion would not necessarily appeal to the States, and if adopted it would mean that instead of having competitive income tax systems, the States would have to apply the Commonwealth taxation laws which, unfortunately, under governments of both political parties, and no doubt because of bureaucratic influence, have become so complex and voluminous that even experts have difficulty in understanding them. To achieve the desirable reform of the Constitution, it would be necessary for politicians of all major parties to have the vision and the will to undertake this task, and to reach an agreement that would make it possible that a referendum would be carried. Is this an impossible dream?

The assumption that I have made, that the Constitution can be altered only by referendum, may not be correct. The *Statute of Westminster* gave Australia power to repeal or amend Acts of Parliament of the United Kingdom in so far as they were part of the law of Australia, but s.8 of the Statute went on to provide that this power did not extend to the repeal or amendment of the Constitution or the *Constitution Act*. That provision limits the power given to the Commonwealth by s.51 (xxxviii) of the Constitution to exercise, at the request or with the concurrence of the Parliaments of the States, any power which could be exercised by the Parliament of the United Kingdom. It would seem to follow that if s.8 of the *Statute of Westminster* were repealed, the Commonwealth Parliament, acting at the request or with the consent of the Parliaments of all States, could amend the *Constitution Act*, and therefore the Constitution.

The *Australia Act* now provides that the *Statute of Westminster* may be amended by an Act of the Commonwealth Parliament passed at the request or with the concurrence of the Parliaments of all the States. Does this mean that if the Commonwealth obtained the concurrence of all States and amended the *Statute of Westminster*, it would be free to amend the Constitution by an Act of Parliament with which all States concurred? That is an alarming prospect; it would mean that if one political party secured government in the Commonwealth and all States, it could transform the Constitution in ways to which the people of Australia would never agree.

The explanatory Memorandum to the *Australia Bill* did not deal with this question. In introducing the Bill, the Attorney-General, Mr Lionel Bowen said: “Nothing can happen to the Constitution of Australia unless the people of Australia agree that it should happen”. Perhaps the High Court would concur, and would hold that the provisions of the Constitution itself now provide the only manner in which the Constitution could be amended. Who knows?

The reform of the Federal system does not seem to rank high on the agenda of any political party at present. The main interest in constitutional amendment seems to be to attempt to convert Australia into a republic. No one now seriously argues that the Constitution is in any way defective in its working so far as the Monarch and the Governor-General are concerned. A change to a republic would not increase the efficiency of the Constitution; it would have no more than a symbolic significance.

A change to a republic would be an illusion of constitutional reform. On the other hand, it is clearly in the national interest to remove the duplication of effort and the divided responsibilities that have resulted from the distortion of the federal system. Our Constitution has served Australia well during the century of its existence, but the correction of the imbalance and overlapping between State and Commonwealth powers would be a substantial benefit to Australia.