

## Dinner Address

### What should we say about our Federation?

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The coming together of the six Australian colonies in 1901 had a touch of the miraculous. Alfred Deakin, who was to be three times Prime Minister, was convinced that the new Commonwealth had only been achieved by a miracle. Most people probably rejoiced in that miracle. Curiously, at this time there was little sign of what would later be seen, in many quarters, as a breakdown in the spirit and the functions of the federal system. The breakdown came from the dominance of the Commonwealth over the States.

Eventually, Australia, in financial terms, became the most centralised federation in the world. In fact, half of the States' revenue in 2001 came from the Commonwealth.<sup>1</sup> Such dominance was not predicted. The States and their financial powers had seemed to be adequately protected by the Constitution that came into effect in 1901. What, then, were the forces and influences that weakened the power of the States?

It is commonly argued, especially by scholars possessing a deep knowledge of legal history, that the politicians who framed the Constitution were not careful enough, not far-seeing enough. As a result, several sections of the Constitution proved to be vulnerable to capture or overthrow. They included the specific financial provisions originally called the Braddon initiative, and the absence of any provision giving the States a voice in the appointing of High Court judges—the very people who would sometimes have a crucial say in determining the relative power of State and Commonwealth governments. After the *Engineers' Case* of 1920 the tendency was for the High Court, when called upon, to sympathise with the Commonwealth and to augment its powers at the expense of the States.

In the end, the financial arrangements in the Constitution probably favoured the Commonwealth more than was envisaged. The financial key was s. 87, the Braddon initiative. It stipulated that three-quarters of the vital customs revenues collected by the Commonwealth should, until 1911, be handed over to the States. This would give to the States a ten-year financial reprieve. But Tasmanians particularly feared that, after 1911, the lesser States might, in a financial emergency, need federal grants. As a result, the making of conditional grants to the States was incorporated in the federal Constitution as s. 96.<sup>2</sup> This section was shaped with little debate and ended with slightly ambiguous wording—if the Constitution is to be viewed as a whole. To present ambiguity to the Justices of the High Court is, at times, like presenting them not only with their legitimate serve of bread and butter but also with a welcome crate of Scotch. They get merry on it.

Various sections of the Constitution were clarified or reinterpreted, as the decades passed by, and as the world became more complex. Thus the conditional or special-purpose grant, originally designed to give a walking stick to limping States, eventually gave the Commonwealth a legitimate way of tapping the States on the head and telling them to stand aside in what they always assumed was their own domain.<sup>3</sup>

The strenuous promoter of s. 96 had been John Henry, a Scot who became a grocer on the Victorian gold diggings around Castlemaine, and then crossed the strait to north-west Tasmania, where he set up a little chain of general stores, over which hung the sign, Universal Provider. The slogan could well have become the slogan of the expanding Commonwealth.

John Henry died in 1912, and was buried in the Devonport cemetery. If he had chanced to belong to a later generation and to have fallen ill in Devonport this year, he himself might have been a beneficiary, in the Mersey hospital, of the latest Commonwealth intervention into State affairs.

I should just add a thought about the High Court. So vital to the new Commonwealth and its relations with the six States, its creation was deferred. When at last the attempt was made by the Barton Government to create the High Court, a loud shout of opposition arose. After it was explained that the High Court would be the keystone of the federal arch, many politicians said they did not want a keystone. Alfred Deakin almost had to threaten to resign until finally some of his Victorian colleagues came into line. So the Bill butted its difficult way through both Houses, and the High Court was finally established.

For its opening years the High Court was largely in the hands of foundation federalists, men of the mainstream such as Sir Edmund Barton and Sir Samuel Griffith. Before long the federalists from the anabranches, those founding fathers who paddled their own canoes, became more influential on the High Court. One was Sir Isaac Isaacs, who was prominent in the *Engineers' Case*. And then came a generation of lawyers who had had no part in creating the original Constitution. Sometimes they found it easier, by their interpretation, to alter the meaning of the Constitution while sitting in the High Court, than had the individual federal fathers when they stood and debated one another, week after week, in the federal conventions that actually drafted and revised the Constitution in the 1890s.

Another reason is widely put forward to help explain the unexpected dominance of the federal government. This is the failure of the Senate in practice to act primarily as a States' House. There is a good deal of validity in such an explanation, but maybe not a great deal. I doubt whether the Senate was widely expected by experienced politicians to play primarily this role. No doubt this role was widely emphasised in the pre-1901 rhetoric. It was an aspirin offered to the less populous States, which felt reassured that they would each elect as many Senators as would the big pair of New South Wales and Victoria.

Even in 1901, however, it was probably clear to experienced politicians that few issues in the new Parliament would be debated largely along State lines. To the best of my knowledge, it was never widely expected that the Senate would vote almost unanimously on some topics, and stand united against the demands of an ambitious federal government. The Colonies or States in their interests were already divided, with one cleavage dividing the populous from the less populous. One sign of the cleavage had been the last-minute and successful demand of New South Wales, as a populous State, that the Braddon section, which was the citadel of the small States, become inoperative after ten years.

In the new federal Parliament the party system was soon in force: loyalty to the party usually came before loyalty to one's home State. Above all, the big unifying national topics such as defence and immigration were moving to the centre of the stage. Even the potentially divisive topic of protection versus free trade was eased, because the argument for tariff protection and self sufficiency, and the emergence of heavily-protected industries such as iron and steel, was subtly linked to the need for national security.

My own view, and I offer it tentatively rather than emphatically, is that the increasing role and power of the Commonwealth government was not primarily the fault of the founding fathers. Even if they had tightened up the Constitution in the interests of the States, the trend of power would have run the other way. Of the four similar federal systems that were functioning by 1914—namely the United States, Switzerland, Canada and Australia—ours was, to an unusual degree, shaped by powerful forces that strengthened soon after the Constitution was accepted and the federation was created.

One influence was the tense international situation: the military victory of Japan over Russia in 1905, the intermittent European crises, and then the outbreak of the First World War. Even before the war the new Commonwealth government was spending massively on defence. Thus in 1913, Australia's defence expenditure *per capita* was far higher, for example, than that of Italy, the United States, Russia and Japan. Indeed Australia was spending, on defence, three times as much *per capita* as Austria-Hungary with its huge army and small Adriatic navy.<sup>4</sup> High spending before, and especially during, the war of 1914-18 increased the role of the Commonwealth. The Second World War accentuated the pattern: it was in 1942 that the Commonwealth became the sole tax collector, and even took over the taxation offices and staff of State governments. Incidentally, the defence power was also used in 1949, four years after the war, to justify the Commonwealth in setting up the Snowy hydro-electric and irrigation scheme.

Another factor that increased the Commonwealth's role was the rapid rise of the Australian Labor Party. Labor had exercised little influence in the shaping of the Constitution in the 1890s. By 1904, however, it was strong enough to take office, federally, for the first time. In the first 16 years of the new Commonwealth it was probably the most successful party. It operated through a caucus, and exercised discipline on its parliamentary members, and those practices possibly tended to have the indirect effect of diminishing the role of the Senate as the States' House. Labor was, as we shall see, not so sympathetic to federalism as were the other major political parties. It also believed deeply in using the Commonwealth to expand and widen social security. That activity, like the demands of war, called for more money, and so the financial demands of the Commonwealth were multiplied. To these two factors we should add the growing nationalism, which initially gave an ideological boost to the national rather than the separate State governments.

So, through these powerful influences, the Commonwealth government slowly gained a dominance which almost no federal founder had envisaged in 1901. This dominance, however, could not have taken place

if it had been opposed by the main political parties.

The Labor Party even began to lose faith in federalism. Its long-term dream was unification, though the desire for unification was stronger in the Labor branches in the south-east corner than in Western Australia and Tasmania. Labor believed it could promote unification by skipping past one of the glories of the Constitution, the section stipulating that the people voting in a referendum must approve of any change to the Constitution. The Scullin Government (1929-32) passed in the House of Representatives a Bill—now largely forgotten—to allow the High Court, rather than a referendum of the people, to make changes to the Constitution. This was accompanied by the decision—made while Scullin was overseas, and made against his will—to add the Labor politicians, Dr Evatt and Mr E A McTiernan, to the small bench of the High Court. The scheme did not succeed. In the Senate in May, 1931 the controversial plan of eliminating or by-passing a referendum of the people was defeated.<sup>5</sup>

Support for unification rather than federalism rose and fell. John Curtin, who became leader of the Labor Party in 1935 and Prime Minister from 1941 to 1945, did not support unification. Coming from Western Australia, he believed in the States: he had to. He certainly did not support secession. For him the States were an essential inconvenience. But it was Curtin who in wartime helped to manufacture those manacles for the States: the policy of a uniform income tax, and thereby the abolition of the States' main prospective source of revenue.

Whitlam was the last of the important Labor leaders who wanted to get rid of the States or to squeeze them into jelly. That was one of the reasons why he supported local government: he really wanted two spheres or tiers of government, not three. His favourite phrase was “the Australian government”, not the Commonwealth or federal government.

At present there is some surprise amongst Liberals that Mr Howard at times has intervened in the States' domain, or what were traditionally their domains. But across the decades, the Liberals or their Coalition partner have been at times the promoter of Commonwealth power in various fields. I offer three instances—there are more.

The Bruce-Page Government, a Coalition ruling from 1923 to 1929, initially seemed willing to return the control of the income tax to the States: it was all a matter of how it was to be done. The opposite happened. In the longer term Earle Page, the federal Treasurer and leader of the Country Party, did much to strengthen the Commonwealth's control of finances. He cut out the general grants to the States and initiated the special purpose grants, especially for roads. Likewise it was S M Bruce who, as Prime Minister, tried to give the Commonwealth more control over industrial relations, especially over disruptive strikes. He tried—and failed—to secure such control at a referendum.<sup>6</sup>

In 1946 the Chifley Labor government sought, by referendum, a vital change to the Constitution, giving the Commonwealth government an undisputed right to dispense all kinds of social services. R G Menzies and all but three of the parliamentary members of his new Liberal Party endorsed the proposal. The referendum won a majority of votes in all six States. Menzies, however, did not support the unsuccessful referendum to transfer industrial powers to the Commonwealth. On the other hand, the Country Party supported the unsuccessful referendum to enable the Commonwealth government to set up marketing schemes.<sup>7</sup>

A decade later, the Liberals under Menzies extended the Commonwealth government's intervention in education. Universities had been entirely the realm of the States until 1943, when the Curtin Labor government set up the Commonwealth Reconstruction Training Scheme, called CRTS, to offer a tertiary education and living allowances to ex-service people and to provide grants for certain university buildings. Two years later the Commonwealth Office of Education was set up with the distinguished economist, Professor R C Mills, in charge. This smallish Commonwealth role in tertiary education was formalised at the start of a ten-year period in which university enrolments were to be doubled. Then in 1956 the Menzies Government, worried by the plight of universities, commissioned the Murray Report, which recommended a massive increase in the Commonwealth's role. Mr Menzies promptly accepted, to Murray's astonishment, all the main recommendations. Fadden, the federal Treasurer and leader of the Country Party, was not too happy. Interestingly, Menzies sought no Commonwealth representation on State-supervised university councils, though they were increasingly to spend Commonwealth funds.

On the eve of the 1963 federal election, Menzies promised that the Commonwealth would lend a hand in secondary education. His first step was to award 10,000 scholarships in secondary schools, both public and private. The Catholic Church was delighted. In the federal election, the preferences of the Democratic Labor Party continued to flow strongly to the Coalition parties, and Menzies won easily an election which, in the

view of some commentators, he was in danger of losing.

It was a Liberal government which made a bold attempt to return some way towards the old federalism in which the States accepted more financial responsibility. Mr Malcolm Fraser made the attempt. Perhaps he was especially sympathetic to the States because they had several strong Premiers who, in the tense days of 1975, had given him vital support in fortifying the Opposition numbers in the Senate and so challenging the Whitlam Government. Fraser made effective moves, in the late 1970s, to give more financial backbone to the States. He even made his bold offer, inviting them to set up their own system of income tax. On hearing of the offer, several Premiers closed their ears, or were ashen-faced. They had no wish to endanger their own terms of office by fixing their own tax rates. Only Sir Charles Court of Western Australia expressed keen interest.<sup>8</sup>

The episode was a mirror of how the States, mentally, were contributing to their own financial demise. So the Canberra steamroller rumbled on its way, after most of the Premiers had nervously skipped to the side of the road.

### **Six States—no more and no less**

For my part I regret the astonishing rigidity in the number of States. There were six States in 1901: there are still six. No new colony or State has been created since the birth of Queensland in 1859. I concede that two Territories—the Northern Territory and the Australian Capital Territory—have been created since 1901, but they were carved from existing States. In contrast, in the United States since 1859 about a score of new States has been created, and in Canada since 1867 various new Provinces have come to life.

The essence of the federal system is that, in a big country with wide variations in climate and natural resources, a State government should preside over the special interests of each major region, and that a central government should preside over defence and other matters of common concern. The case for a new State in North Queensland, with its large population, is overwhelming: there the case is far stronger than for the Northern Territory. Critics will argue, of course, that Australia already has too many Parliaments and too many politicians. This appears to be a persuasive argument to the average Australian, at a time when the popularity of politicians as a species is not as high as it could be.

In my view the large number of politicians, and the three spheres of government, are a trifling price to pay for a system of government where the electors have far more say in national affairs than is available to them in nearly all other democracies. The big cost in Australia is not parliamentary salaries: it is the costly overlap whereby particular activities are supervised by three separate spheres of government.

It is possible that during the next century, New Zealand will join the Australian federation. It refused to join in the 1890s: it was then more prosperous than Australia and so could see no pronounced advantage in joining a common market. While, today, the typical New Zealanders would not dream of formally voting away their national independence, they are quietly losing it, to some degree. New Zealand, by virtue of what is called the Closer Economic Relationship or CER, virtually belongs to the Australian common market, the very market which originally it had refused to join. There is virtually a free flow of goods and people across the Tasman. Nothing in the last quarter century has done so much as this free flow to keep buoyant the sometimes-struggling New Zealand economy. Most Australian voters are content with this arrangement, largely because they don't know about it. It is beyond doubt that New Zealand has one foot inside our back door.

The federation has remained surprisingly stable. Only one attempt—by Western Australia—has been made to secede from the Commonwealth. It should be emphasised that secession is the treason of the federal system of government. The US civil war (1861-65) was a war about secession, about the right to secede, as much as a war about the abolition of slavery. Abraham Lincoln was not an abolitionist until the war was far advanced.

Western Australia had a valid case for secession. It had been pushed into the federation at the last moment largely by the votes and agitations of the Victorians who dominated its goldfields. It had entered the federation, however, without adequately negotiating to protect its special interests. Admittedly, it was promised a transcontinental railway, but the first train did not arrive until 1917. The gain from the railway was far less than the loss suffered from the soaring shipping rates and the dear manufactured goods, both of which were the results of the early protectionist policies of the Commonwealth government. The grievances festered. In April, 1933, near the trough of the world depression, Western Australians at a State-wide referendum voted to secede by a massive majority. Of the 50 electorates, only six voted against secession. They were six electorates on the goldfields.<sup>9</sup>

The secession movement, opposed firmly in Canberra, ran out of steam as the nation's economy recovered during the mid-1930s. Moreover, some of Western Australia's grievances were eased by the new Commonwealth Grants Commission, which was really a stepchild of John Henry of Devonport. If Western Australia had been allowed to secede, it surely would have quickly applied to rejoin the Commonwealth early in 1942, soon after the Japanese bombed Darwin, Broome and other tropical ports.

Will a secession movement arise again in WA? Someday it possibly will. Meanwhile, Western Australia is no longer a reluctant recruit but one of the federal stars.

### **The muddying effect**

A federal system is the best for Australia, in my view. It is highly democratic. It is a guardian of civil liberties, because it offers a balance of powers rather than one supreme power. It is close to the people but also Olympian at times. It enables specialisation, and it respects the regional differences in a big continent. But it is not a neat package of powers. Tidiness is not amongst the visible strengths of a federal system. There will always be ragged edges and compromises, there will always be tensions in a federal system. There will periodically be formal or guerrilla raids across the federal-State boundaries, usually led by national leaders. The raids now and then are led by Justices of the High Court.

It is fair to suggest that it is not an easy system for politicians to operate in. Their standing in Australia would, probably, be higher if we had a unitary system. Therefore, some aspects of the present criticism of Australian politicians seems unfair: it is more a criticism of the untidiness of a vigorous federal system. And yet the untidiness, compared to the rigid neatness of (say) a dictatorship, is in the long term a decided virtue.

Federalism, as practised here, is highly democratic. In a ten year period we can each vote on more issues than if we lived in a unitary system. But if a federal system is too unsystematic, too difficult for the half-curious citizen to understand, it can weaken a belief in democracy, especially amongst newcomers to a democratic country.

If three spheres or levels of government carry out the same activity, say in health or social services or education, then the bureaucratic and administrative expenses may well be too high. And if things go wrong, whom do we blame? Praise and blame form the gearbox of democracy. It is vital that a government responsible for creating chaos, or letting chaos reign, should be pinned down. The leaders should be identifiable, should be answerable. But it is not easy to pin down the ministerial culprit, in (say) health or education, when the State or federal governments both shape the policy and provide the funds.

I am reasonably well informed, but I do not even know what proportion of the funds for health come from the Commonwealth government, and how much from my own State government. Without that knowledge, it is hard even to make the first step towards allocating blame and praise, and thereby deciding how to vote, if health is a crucial topic in a State or federal election.

I have another concern about overlapping governments. Our system of taxation is not widely understood, at the grand level or even at the personal level. Most of us can no longer do our own tax returns. The GST quarterly return had me puzzled for months, partly because of the nouns it employs. Most of us do not fully understand the overall taxation system, of which we are the crucial part. And yet taxation is at the core of the political process, and especially of a federal system.

Many of the momentous events in democratic history have hinged on taxation, and the justice and injustice perceived to be embedded in certain taxes. George Washington and King George III knew that. So did Peter Lalor, the leader at Eureka. And yet it is hard to reshape a nation's taxation system. John Hewson lost the 1993 election, partly because he tried to improve the tax system. Many voters were perturbed or even bamboozled: they did not understand the system he was trying to reform.

### **Will the federal system survive?**

The States, still important, are under pressure. The original fortresses intended to protect them have partly been pulled down or infiltrated. The proportion of the Australian voters who instinctively are centralists rather than federalists is probably high, maybe running at 50 per cent. Many well-informed people do not appreciate the strengths of a federal system. The strengths have never been explained to them.

Western Australia and Queensland, and probably Tasmania, retain a deeper belief in the rights of States and in the value of federalism. To me the biggest single guarantee of federalism, as we know it, is the fact that WA and Queensland have been growing for the last third of a century at a faster pace than those States huddled in the south-east corner. These two huge outer States seem likely to exert an increasing influence in national politics.

There is an important rough-and-ready rule in the geography of Australian politics. There are marked exceptions to the rule, but the rule makes sense. The further away you are from the Hume Highway and from Canberra, the less likely you are to worship there regularly.

#### **Endnotes:**

1. Brian Galligan, *Commonwealth-State relations*, in Graeme Davison *et al.*, ed., *The Oxford Companion to Australian History*, Melbourne, 1998, p. 141.
2. J A La Nauze, *The Making of the Australian Constitution*, Melbourne, 1972, esp. pp. 213-215, 246.
3. Section 96 was first turned into a stick rather than a walking stick by the High Court in 1926. See David Chessell, *Financial Centralisation*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 1 (1992), p. 96.
4. G Blainey, *The Tyranny of Distance*, Melbourne, 1966, p. 322.
5. Gavin Souter, *Acts of Parliament*, Melbourne, 1988, pp. 272-4.
6. *Bruce-Page and federalism*: J R Nethercote, in Nethercote (ed.), *Liberalism and the Australian Federation*, Sydney, 2001, pp. 130-1.
7. *The 1946 referenda*, Geoffrey Sawer, *Australian Federal Politics and Law 1929-1949*, Melbourne, 1963, p. 173.
8. Philip Ayres, *Malcolm Fraser: A Biography*, Richmond, 1987, pp. 323-5.
9. G Blainey, *A Shorter History of Australia*, Melbourne, 1994, p. 175.