

Chapter One

A Federalist Agenda for the Government's White Paper

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This presentation is a bit like the film *Ground Hog Day*, which I have never actually seen, but I grasp the principle of the man who re-lives a single day of his life over and over again.

So, once again, here is Craven pleading for Federalism.

I did the same thing at the first meeting of the Samuel Griffith Society 21 years ago. In preparing for this talk I looked up my paper from 1992 on the web, which, of course, was not invented at that point. I note that about half of the people who were speaking with me at that conference have now died and the other half, including myself, in all decency probably should have died. Julian Leeser at that point would have been about fifteen years old. In terms of Federalism, since that time, generally speaking, things have got progressively worse.

Context and Process around Federalism

In this presentation I am going to make some suggestions around the context and process around Federalism, rather than substance, because any suggestions I have ever made about the substance of Federalism have been spectacularly unsuccessful. We always think about Australian Federalism as a matter of substance – when actually it was the process of Federalism that has been the basis for its success. We so often fail to think about how we ever got six bickering colonies to agree? With the exception of Western Australia, and that is one of those things that goes in front of every sentence about Australia – with the exception of Western Australia – the delegates to the constitutional convention were elected. The Constitution was voted on by the people. The Constitution is, in form, a British Act, but is, in fact, an act of self-determination. As a result, it is changeable only by referendum, passed by the people. Therefore the Australian Constitution had enormous popular ownership and vast democratic authority, unlike, for example, the American Constitution, which has never been voted on by the entire population of the United States. Of course, with the great logic of constitutionalism therefore, our Constitution is largely ignored as a cultural artefact and the American Constitution serves as wall paper on thousands of preparatory school classrooms.

My thesis is that if the greatness of the Australian Constitution lay in that notion of process, then at a time when we are considering Federalism closely in the context of the formulation of the White Paper, perhaps there is some mileage in thinking about influencing the climate in favour of Federalism by process, rather than the usual approach of trying to come up with a series of ultimately unsuccessful substantial changes.

Australian Federalism is not healthy. It has not yet been given the last rites, but the new Chaplain in the hospital probably would be eyeing it hopefully. We know the symptoms of its disease. We know about vertical fiscal imbalance. We know that, historically, we have a High Court deeply biased towards central power, currently a

little more mixed but, no doubt, normal transmission will be resumed at some point. We know, critically, that there was a rather nasty period there, leading up to the *WorkChoices* decision¹ and, indeed, around the *WorkChoices* legislation, where there was a great intensification in the vulnerability of Federalism. It appeared for the first time in our history that neither of the major parties supported Federalism. Both were prepared to make use of any power that was available to them. We also know that we face the “internal moral collapse” of the States. The States have been so repeatedly and regularly bashed that they have not got Stockholm syndrome (where the hostage becomes fond of its captor); it is more that the States stand to attention as they are beaten by the Commonwealth and I think this increases the difficulty for Federalism.

Having said that, it is not entirely without hopeful signs. The collapse of the appalling referendum on the regulation of local government is one such sign and I think there has been a post-Howard, post-*WorkChoices* reflection, especially in conservative circles, but also in Labor circles, about whether the joys of untrammelled central power are quite as high as one might have supposed. One of the lessons of the Rudd-Gillard years has been, in grand-scheme areas like education or water or harmonisation, that the Commonwealth needs to have the States on-side if it is going to get something done. Not because the States are capable of defeating these things but, in a sense, because they can frustrate them by mere passive inertia. I always call it the “Cornwellisation of Federalism”; once you have pushed the Celts to Cornwall and Wales they have not got anywhere else to go and the sheer density of their presence will cause you problems.

The reasons why Federalism has not operated as intended are well known. I have always thought that, although the founding fathers were brilliant, they made certain fundamental design flaws. The fact that the High Court is appointed entirely by the Commonwealth is what is known in the classical legal term as a “mistake”. The fact that we have a one-way amendment process that only the Commonwealth can initiate means you only get one type of proposal. The failure to deal adequately with the question of State finance has been well-documented. I might even mention the regrettable practice of electing Senators, which is currently causing some difficulties in parts of the Federation.

All of those have produced a highly centralised, concentrated Australian Federation and all of that has been exacerbated by events like World Wars and economic crisis. We know that Australian Federalism is in an interesting position. The thing that makes it particularly interesting now is we are probably approaching a key point – and a dangerous point.

Australia now faces a serious economic challenge, and serious economic challenges are not good for Federalism. The reason for that is this; first, there is a naive belief in Australia that the worse the economy is, the more a government should centralise power. That is an exceptionally dangerous mindset for Federalism and for the States. We face the hangover of what I call the “Howardisation of Federalism”. It is a worry that the conservative forces are not as committed to Federalism in times of crisis as we may have supposed. Over the last few years we have seen the emergence of what I call “Stag centralisation”. You all remember Stagflation – where you had inflation and unemployment together. Normal centralisation tends to be a depressing sort of thing, where the Commonwealth gives you some money and you do what the Commonwealth says. Stag-centralism which was practised under the Rudd-Gillard

governments is that you do not give the States any money but you still require them to do what the Commonwealth says. At a time of economic crisis, Stag-centralism is particularly attractive to Canberra.

We have the further factor that the present Prime Minister is something of a Federalism sceptic. He and I have a long-standing friendly disagreement here. But it would be fair to say that Tony Abbott has a very British view of Federalism, that it was merely a 19th century compromise, best discarded. Whereas I tend to believe that it involves a positive belief in United States-style checks and balances in local democracy. Tony Abbott replies that this is simply me retro-fitting a theory of the Constitution to suit my own predilection for the States.

I have to say that there are some signs of re-assessment here. One, in *Battlelines*,² where, in the new edition, the Prime Minister has jettisoned some of his bad ideas about Federalism, but also he has made some very interesting references – made in the context of a charming piece the Prime Minister wrote reflecting on the late Christopher Pearson. He said that one of the things that he thought Christopher Pearson had been right about, and that he, Tony Abbott, could be wrong about, was in his insistence on Federalism.

That brings me to talking about substantive changes such as changing the method of appointing High Court judges; States-initiated referenda fixing federal finance, which are all perfectly technically feasible, absolutely right in principle, but are never going to happen because no Commonwealth government is ever going to put forward a referendum that would trample their power in that way.

Changing the atmosphere

This has led me to ask, if substantial changes are so difficult, are there measures that are contextual and process in nature that we might profitably change with a view to influencing Australian Federalism positively inferentially. In other words, if we cannot change the terrain, could we change the atmosphere in a way that would make Australians more protective of Federalism?

I accept that this is not the natural way for a lawyer to think. It is certainly not the natural way for a former Crown Counsel to the Kennett Government to think. But, with this sort of indirect thing in mind, I would like to present three ideas for the White Paper.

The first idea is that Australia should re-commit formally to Federalism – like the renewal of marriage vows. One of the major political problems federalists face is the argument that Federalism is a historical accident. The consequence is that every time you have discussion about Federalism it is easy to dismiss it as a condition whose time has passed. But what if Australia was, very solemnly, to re-commit in an unequivocal way to the fact that Federalism is a good thing and here to stay?

I would suggest that if the White Paper proceeds on the basis that Federalism will continue, which it will, because, just as there is no way to fix Federalism, there is also no way to destroy it. Then, this argument and approach of transitional Federalism is undermined. There are many ways to achieve this symbolically. There might be joint-resolutions of all Parliaments, State and Commonwealth, an Act, an amendment to the preamble – the preamble seems to be very popular as a receptacle for almost anything! We could actually have a little re-commitment to Federalism in there. It has already got an indissoluble federal Commonwealth. It would then be impossible to de-validate

Federalism as an historical accident. This recommitment is not going to change the view of the High Court on Federalism suddenly, but it is an important and useful point.

Ethics of Federalism

Second is the idea of the ethics of Federalism. We are all aware of different types and applications of ethics. There are health ethics, legal ethics, and business ethics; outside New South Wales there are even political ethics! The remarkable thing is that I have never heard a reference in Australia to the ethics of Federalism.

Having reflected on it, I think my outrage over centralism ultimately is based on an ethical grievance. I know the Constitution was meant to operate one way, but it has been deliberately warped to operate another way and I have never quite managed to get over that. It is a sort of an Irish problem I have. In the context of the High Court, because I am a lawyer, I also know that not only has that warping occurred, but the public reasoning behind it – in cases like the *Engineers' case*³ – is not only wrong but deeply disingenuous; it is as convincing as a work on theology by Eddie Obeid.

My proposal for the White Paper would be that serious consideration be given to enunciating principles of ethical Federalism at both a high and general level as well as a practical and specific level with a view to framing the debate. Such ethical rules would give a moral compass and a reference point to those who wish to argue for Federalism. Let me illustrate this point by describing some broad principles and some specific ones.

Firstly, there should be a formal statement about why Federalism is good. The statement would not only explain that Australia is a Federation but why we are a Federation – because it promotes democracy and competition and diversity and accountability. The purpose of the statement would be to agree that Federalism has these positive features rather than constantly having to re-argue them in the face of absolute cynicism every time a debate begins.

Second, the revenues of constituent elements in the Australian Federation should be commensurate to the proportion of their responsibilities. A general proposition of correlation between revenue and responsibility, and that cooperation between levels of government is to be encouraged. There should be consultation on decisions having implications across federal boundaries. For example, the entry into treaties and the appointment of High Court judges, that type of ethical principle would give some level of moral force to some very weak practices that currently exist. More specifically, inclusion of a general proposition that the external affairs power should be used only as a last resort in the exercise of Commonwealth power and only on matters of genuine international concern.

A final “large” general ethical proposition – truly outrageous – that Senators have particular responsibilities to the representation of the interests of their State. Presently all of these things have to be advanced as contentious propositions but they should become universally accepted truths.

In relation to “specific things”, the Commonwealth should not invade traditional areas of the State without due consideration and public articulation of the reasons why. Perhaps there should be some definition of those areas and the requirement for a Federalism Impact Statement which would outline why the Commonwealth is engaging in this action, what it is going to do, and why it should happen. In addition,

the Commonwealth should not impose program responsibilities on States without adequate funding and the States (and these things should be mutual) should rigorously apply Commonwealth funding to required purposes, where there is a required purpose.

There should be a series of principles around COAG – that the States should be able to put things on the agenda that do not go to the bottom and are actually discussed; that the COAG Secretariat should be independent of the States and the Commonwealth; that notice of proposals by the Commonwealth should be commensurate with the size of the proposal; and that at least one COAG meeting should be within a certain period and should discuss the general state of the Federation and what you might call strategic federalism; that grants not be excessively tied with conditions; that programs funded by the Commonwealth through the States should be standard-driven, not by micro stipulation; and that Cooperative Schemes should have real targets, data and accountability attached to it. And I note that a number of those ideas have been put forward to the COAG Reform Council by its Chairman, John Brumby, a former Premier of Victoria.⁴

None of these things is going to change the substance of Australian Federalism, but if there was a genuine public agreement to that, it would certainly fundamentally change the public debate around Australian Federalism.

White Paper and convention

This brings me to my last idea, which is also a process idea. It is crucial that the White Paper goes into the issues in sufficient depth. After it is done, there needs to be a conversation in the real world of Australian Federalism involving participation of the Commonwealth, the States, business people, government experts, economists and even academics. I propose that after the White Paper, a mini Convention be appointed to consider the ideas and comment upon them, elaborate on them, and improve them. The Convention would then report to the Government. I would hope that both the Convention and the White Paper would also consider the other ideas I have talked about: the re-commitment to Federalism, and the notion of State and Federal ethics.

I appreciate that this is not the usual cavalry charge in defence of Federalism that I favour, but it is perhaps the time to move to a more realistic approach.

Endnotes

1. *New South Wales v The Commonwealth* (2006) 229 CLR 1.
2. Tony Abbott, *Battlelines*, 2013, 2nd Ed.
3. *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.
4. John Brumby, “Reform or Perish: A Report Card on Five Years of National Reform”, Speech to the National Press Club, Canberra, 6 November 2013, at <http://mill.cha.org.au/site.php?id=1980>.