

Chapter 7

The Rocky Road of Federal-State Relationships

J. C. Bannon

In June 2015, the 800th Anniversary of the Magna Carta was commemorated in many parts of the world, including Australia. Its power as an historical event and its symbolic significance has endured. It is seen as marking a profound change in power relationships and sources of authority, and the first real charter of liberty. A realistic historical analysis of its various manifestations forces the conclusion that it was lucky to survive. King John got the Pope to rule that it was made under duress and declare it invalid very quickly. But it was periodically revived. It lived on, to influence not only feudal relationships, but the Enlightenment, the American and French revolutions, and constitution-makers such as the Australians in the 1890s.

This power resides in the ideas and mythology created around it, which are untouched by historical de-bunking. This is the fate of all great founding documents including the Constitution of the Commonwealth of Australia. More than one hundred years on, it is valued and very resistant to change, for many reasons, not least that it is ultimately only the citizens of Australia who can change it and they will not do so lightly. It has merged with the mythology of a nation finally reaching maturity at Anzac Cove in 1915. This is the background against which the current fundamental look at our federal arrangements is being held.

Since 1901 there have been constantly changing relationships between the former self-governing colonies of Australia and the federation they created which produced a central government and States. Envisaged as “minimalist,” the Constitution defined the role of the Commonwealth Government and spelt out the heads of power the colonies would surrender to it, leaving all residual power under State authority. Its interpretation and intergovernmental disputes over the exercise of power were to be resolved by the High Court which could make a final determination, and not the imperial Privy Council as some wished. And, further, where a matter lay within the power of both the Commonwealth and State governments, then the Commonwealth law would prevail.

Changes in this minimalist version were hastened by rulings of the High Court, by judges appointed solely by the Commonwealth Government and not the States or the Parliament, and by the need to manage great national events like the First and Second World Wars and the Depression. This almost invariably increased Commonwealth power. Such crises saw the Commonwealth take more of the revenue-raising powers into its hand – and after the crisis was over they were not returned. The Commonwealth power to make special grants to the States was increasingly used, until Special Purpose Payments (SPPs) became a substantial source of revenue to fund State programs but under terms and conditions laid down by the Commonwealth.

The increasing vertical fiscal imbalance (VFI) put more constraints on State autonomy and, with the SPPs and the reliance on the Commonwealth Grants Commission to distribute the general allocation from the Commonwealth fairly created more tension and difficulty. On a personal note, I became involved with Commonwealth/State relations at the time of the Whitlam

Government, when the Commonwealth Government seized the whole agenda and attempted to by-pass the recalcitrant States, with very mixed results.

Later, as Premier of a State, I was involved under Fraser, Hawke and Keating with numerous Premiers' Conferences, Loan Councils, ministerial meetings, national summits (think "wage/price freeze," price/income, tax, employment) and group initiatives such as the Economic Planning Advisory Council.

By the late 1980s, the inadequacies of the post-Second World War system of annual Premiers' Conferences and Loan Council meetings became very apparent. A routine pattern developed where the premiers would give exit press conferences outlining their demands of the Commonwealth (most of which were not debated at the conference for the want of time); the financial offer of the Commonwealth, on a take it or leave it basis, was slipped under the hotel door and nervous Treasury officials made a rapid analysis. The respective premiers then phoned the Prime Minister to complain and arrange a meeting prior to the conference convening to make bi-lateral deals at the expense of their colleagues. Angry words were exchanged for the benefit of the media, and the conference retreated behind closed doors to hammer out the final deal. This chaotic procedure eventually could no longer be "worked" and finally broke down in 1990.

The result was the Special Premiers' Conferences initiated by the Hawke Government which started a new process leading to creation of the Council of Australian Governments (COAG) in 1992 and new procedures which are still with us today. (Ironically, the process helped bring Prime Minister Hawke down in 1991, when Paul Keating effectively used the allegation in the Labor Caucus that Bob Hawke was surrendering control of the economy to the States.)

Sometimes successful, sometimes neglected, and then revived, it is fair to say a lot of improvements have taken place post-COAG, but there remains a basic dysfunction. Overlaps, duplication, buck-passing of responsibility and general political competition between levels of government became more pronounced. States found that they carried responsibility to deliver services, but did not have the means to do so. Lack of respect and trust between the three tiers of government did not help.

In August 2014 the then Prime Minister, Tony Abbott, announced the start of a process of reform of the federation which would again attempt to overcome the problems. The Government would initiate a process of reform that would attempt to reduce or, if appropriate, eliminate overlap between State and Commonwealth responsibility. A Reform of Federation white paper would be produced using a collaborative process. It would be prepared in conjunction with a paper on taxation and financial reform. The terms of reference specified that clear lines of responsibility should be drawn where possible. The emphasis was on making the federation more understandable and accountable to citizens, and not just an obscure and tiresome wrangle between levels of government. It would focus on the outcomes for clients of government and not on the bureaucratic processes.

There were a number of refreshing elements in this. Firstly, the Prime Minister, Tony Abbott, indicated an openness to re-allocation of functions. As he said in the terms of reference, "the Commonwealth has become for various reasons, increasingly involved in matters that have been traditionally functions of the States. The States have become increasingly reliant on revenue collected by the Commonwealth to deliver services in the areas they are responsible for . . ." The

question of whether it was for the Commonwealth to relinquish its direct involvement in some programs or to take them over fully and any other options would all be on the table.

Secondly, he acknowledged that consensus was necessary for any major reforms to be implemented. COAG would be central to the process. A Steering Committee was established comprising heads of Premiers' and Chief Ministers' departments and the Chief Executive Officer of the Australian Local Government Association (ALGA) to oversee development of the white paper. COAG would be actively involved at all stages.

Thirdly, financial issues would be treated separately which has allowed a more uncluttered and "in principle" exercise to take place with federation reform proposals, freeing it from the familiar "where's the money coming from?" question that usually stops policy discussion in its tracks. This vital question is, however, being vigorously pursued through the taxation and finance study, and the two exercises will be brought together as an active plan at the end of the process.

The Prime Minister also established an Expert Advisory Panel to monitor the process, provide an independent assessment of papers produced by the Secretariat, provide ideas and input to the issues papers and the Green Paper and act as an advocate for change within the community and organisations. I am a member, together with Professor Greg Craven, Professor Doug McTaggart, Jennifer Westacott, Cheryl Edwardes and Alan Stockdale. All of us have been long involved in Commonwealth/State issues, as practitioners and commentators, some as Cabinet ministers, some as senior public servants, as consultants and senior academics and administrators, in the private sector as well as the public.

Since then a number of community round table discussions have taken place in all States and territories and their outcomes incorporated into the drafting of the policy documents. Five issues papers were released between September 2014 and February 2015. The key topics examined in depth cover health; education and training from pre-school to universities; vocational employment training; and housing and homelessness. Other topics may be added – this will be driven mainly by COAG and its priorities. The Green Paper draft was ready for the Leaders Retreat in July. Its publication and community discussion will follow shortly.

Will the effort be worthwhile?

Strong arguments can be put for and against this process succeeding in producing real change, but on balance it could be argued that the next year provides a window of opportunity that has not been open for some time – and a major effort should be made.

I have to confess to finding a depressing level of cynicism about the whole exercise, with low expectations that anything can be achieved. "Here we go again" is a common refrain. The negativity of academics in particular, and the continuing failure of the media to grasp the concepts and realistically look at what has been done so far is very disappointing.

It is easy to argue negatively. A few of the arguments against include:

1. The difficulty of making fundamental changes, and the resistance to constitutional change by the electorate.
2. The different requirements and priorities of the stakeholders.
3. The lack of respect and trust which has existed between governments, leading to suspicion

of any proposals; and within government departments, with vested interest in survival.

4. Political volatility leading to uncertainty of tenure of leaders and/or governments which undermines commitments. This particularly affects the durability of agreements. A lot of harm has been done by the introduction or announcement of “reform” or even “revolutionary” programs that are aborted or terminated.
5. A lack of bi-partisanship.

There are strong counters to these arguments.

1. From the beginning the process of reform was on the basis of doing things under the current Constitution. No changes or referendums are necessary to give effect to the quite radical re-ordering of powers and responsibilities.
2. The issues are common to all jurisdictions and, while one size cannot fit all, the white paper will be able to take account of some specifics within the national context. Bi-lateral pilot programs can be undertaken in some areas.
3. The close involvement of premiers and chief ministers and their offices and departments has already dispelled a lot of suspicion. Everyone has a vested interest in reforms both functional and fiscal.
4. We are currently in a comparatively “election-free” zone where most governments can focus on the issues well into next year without distraction. The Commonwealth and Western Australian governments go to the polls in 2016, but South Australia and Tasmania are less than halfway through their terms, the NSW Government has just been re-elected, and Victoria and Queensland are at the start of their terms. (This proved critical to major progress made in the early 1990s.) The leaders sitting round the Prime Minister’s table should become very familiar with each other over this period. They have already developed a sense of collegiality on the process as demonstrated by the ready acceptance of the Prime Minister’s proposal for a Premiers’ Retreat and its subsequent success. It was a surprisingly constructive and dynamic meeting, positive, with no political point scoring. But problems can strike anywhere, anytime in politics so the occasion must be grasped as quickly as possible.
5. Another factor favouring a sustainable consensus is that State and Territory governments are now evenly divided between the two major parties. The attitude and response of the Federal Opposition is most important, and has not yet been tested. They will reasonably wait until they have more detailed information. It is hoped that the Labor Government leaders in Victoria, Queensland, South Australia and the ACT will be able to provide assurances of the integrity of the process.

The key considerations

1. **Political Feasibility.** There needs to be a consensus of Commonwealth and States on revenue and, including local government, a willingness to act and provide resources.
2. **A Results Focus:** for citizens. Not just a bureaucratic fix-up.
3. **A Leadership Role for the Commonwealth,** even in those areas where it is not directly or only marginally involved.

4. **Greater autonomy for States.** The Commonwealth, States, territories and local government must not be played off against each other. Very secure relationships with the States are needed. The watchwords are “durable” and “sustainable.”
5. **The “National Interest”.**This is shared by all levels of government, and is not the prerogative of the Commonwealth.
6. **Coordination, planning, local planning.** “[I]deally, co-design and service planning in a number of programs should take place at the local or regional levels involving local government, the community and private sectors.” A single point of reference is desirable.
7. **Reliable data for accountability.** Timely collection of information and like for like comparison.
8. **Align incentives to outcomes** (not delivery) for improvement.