FOREWORD

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Given the tenor of much of the public debate, one could be forgiven for thinking that the issues confronting the Australian federation are confined to increasing the uniformity of law and administration in areas of State constitutional authority and perfecting intergovernmental machinery to that end. In his article in this symposium, Geoff Anderson notes that at least three of the 10 streams at the 2020 Summit made recommendations about federalism in which 'harmonisation and the standardisation of regulation were seen as urgent'. He identifies the driving force as 'a fully national economy' underpinning 'economic prosperity'. He reports a tendency to equate 'a modern form of the federation' with one that 'meets the conditions necessary for an efficient national economy' and which is 'regulated by "conditions" imposed by the central government'. As Ken Wiltshire shows, the influence of this view in its present form owes much to the work of the Australian business community, pursuing what it perceives to be an effective response to the pressures of globalisation.

One of the strengths of this symposium is that it identifies a wider range of challenges for Australian federalism, not all of which necessarily pull in the same direction. Concerns about the breadth and depth of the national market are well covered. So also, however, are other key questions, many of which have beset Australia for some time. A J Brown and Anne Twomey tackle two aspects of the central issue of the composition of the federation: recognition of local government in the *Commonwealth Constitution* and the possibility of regionalising Australia, either in addition to, or in replacement of, the current State structure. Alan Fenna and Neil Warren deal with several dimensions of the long-running problem of fiscal federalism in Australia, which also may have wider implications for the efficiency and responsiveness of governments: the vertical fiscal imbalance; conditional grants; and the procedures and goals of fiscal equalisation. Andrew Lynch and George Williams challenge aspects of the interpretative method of the High Court, too often taken for granted where federalism is concerned, but an important dimension of the present malaise. Cliff Walsh and Brian Galligan explore a series of broader questions about the principles that should guide the Australian approach to the roles of the respective spheres of government and the ways in which change should be pursued.

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As this catalogue suggests, this collection is of interest also because it brings together disciplinary perspectives from political science, economics and law. The differences between these disciplinary approaches emerge tellingly from the various contributions to the symposium. Each nevertheless contributes to a rounded understanding of Australian federalism in a way that deserves to be taken seriously by the others and by those interested in federal reform. Thus, for example, the reliance placed by political scientists on the evolution of complex institutions through the pushmi-pullyu of political forces as the solution to the challenges currently confronting the federation provides a useful corrective to the emphasis that lawyers typically give to the substance and interpretation of the *Constitution* and other legal rules, although these are important as well. Similarly, as the paper by Cliff Walsh demonstrates in particular, economic theories about the rational bases for the distribution of powers in a federation can throw light not only on areas in which particular powers are presently contested but on the value of federalism itself and in that way can underpin consideration of the direction that change might take.

The articles in this symposium obliquely demonstrate two limitations of the current debate on federalism in Australia, which also have characterised Australian attitudes to federalism over time. They inhibit Australia's capacity to take advantage of its federal arrangements and confine Australian imagination about the direction that change might take.

The first is that the debate attaches no value to federalism itself as an attribute of a system of government, against which the adequacy of current arrangements might be measured. Rather, the effectiveness of federalism is viewed only through the lens of the extent to which it secures a national market through policy uniformity. Contrary to some recent rhetoric, this focus on the national market is not new, as Ken Wiltshire's article shows. On the contrary, development of a national market was one of the driving forces for Federation at the end of the 19th century and explains much of the present *Constitution*: the predominance of commercial powers amongst the powers allocated to the Commonwealth in section 51; the exclusive power of the Commonwealth over customs and excise duties in section 90, since augmented by its monopoly over all other major forms of taxation; and the various devices used to secure internal free trade, ranging from section 92 to provision for an Inter-State Commission in section 101. Most, although not all, of these provisions have played a significant role in developing a national market that is much deeper than that likely to have been envisaged by the Framers. The relative failure of the interstate trade and commerce power (section 51(i)) to develop as a broad-based Commonwealth power for the regulation of national commercial activities is a notable exception, attributable to its historical entanglement with section 92 and the interpretative method of the High Court. There is no perfect national market, however; and certainly not in a federal system. Australian history over the past 100 years has been witness to successive attempts to adapt the Australian national market to contemporary conditions, of which the present range of initiatives is only the most recent.

To the extent that Australian federalism does not meet the needs and expectations of Australians in economic, commercial, social or political matters it should, of course, be changed. Whether the solution always lies in regulatory uniformity and nationally consistent policy, however, is another question. The relative homogeneity of the Australian people, at least in terms of territorial distribution, appears to have contributed to a political culture in which the advantages of difference are underestimated and too readily dismissed. Even in an homogeneous society, innovation, policy experimentation on a sub-national scale and the productive competition that stems from differences in approaches to complex problems by governments that are directly accountable to a section of the people are advantages. Drawn on appropriately, these have the capacity to augment, rather than detracting from global competitiveness. Such advantages can be realised only in a federation that is working well, however; a theme to which it will be necessary to return.

Almost every serious discussion of Australian federalism is liable to be sidetracked by arguments about the abolition of the States and their replacement by regions in a two-tiered system of government that, it is assumed, would simultaneously be more efficient and more responsive. The present phase of deliberation on federalism is no exception. The regional model is never adequately developed but as long as it is assumed to be a viable alternative it weakens efforts to achieve a genuine solution. For this reason, Anne Twomey's contribution to this symposium is particularly welcome. She argues convincingly that it is highly improbable that any form of regionalism would result in a two-tier system of government in a country with Australia's geographical size and population distribution. On any view of the number and functions of regions, moreover, her article suggests that the formal regionalisation of Australia would be both more costly and productive of greater policy fragmentation than maintenance of the current, relatively lean, State system. Twomey's work should serve finally to establish that the idea of a two-tier system of government is a chimera, and that solutions to problems of Australian federalism must be found within the system itself.

A second limitation of the current debate is the tendency to examine federalism in isolation from the rest of the system of government. To do so is misleading; any system of government forms an integrated whole, particularly after it has been in operation for a period of time. Alteration of one part has implications for others, which need to be taken into account. The significance of this rather obvious fact might be explored in a range of ways for present purposes. Most obviously, abolition of the States would have implications for the checks and balances in the Australian constitutional system that would necessitate restructuring of the system as a whole. For the same reasons, allowing federalism simply to deteriorate, hollowing it out from within to avoid the hurdle of constitutional change, should be a cause for concern rather than complacency, from the standpoint of the health of Australian constitutionalism. In this collection, opinions are divided over whether the critical point has already been reached.

One dimension of the relationship between federalism and the rest of the system of government deserves further attention, in the face of the reliance of present reform proposals on co-operative federalism. Co-operation can achieve uniformity, national consistency and co-ordination in areas where Commonwealth institutions are unable to act unilaterally. In the absence of constitutional change, it is thus an essential tool for deepening the national market and enabling a national approach in other areas where a national approach is sought. The cost of many forms of co-operation, however, is the 'democratic deficit' to which several of the articles in this symposium refer: blurred lines of political and legal accountability, complexity and lack of transparency, which raise questions of principle from the standpoint of democracy and the rule of law. It an interesting reflection on the extent to which pursuit of co-operation has become all-consuming goal that no objection has been raised to what Geoff Anderson describes as 'co-operative centralism' by reference to these well-known by-products of co-operation and that no serious steps have been taken to ameliorate their effects.

The omission deserves attention for several reasons. The first is that the already considerable accountability problems are likely to be exacerbated as co-operation broadens and deepens. By way of an example of the latter: the new practice reported by Geoff Anderson whereby Commonwealth ministers chair meetings of State officials, under the auspices of COAG, may enhance the outcomes of co-operation but plays havoc with the principles of responsible government. Secondly, attention to accountability and transparency is not necessarily inconsistent with more effective co-operation. On the contrary: better public and media understanding of issues under consideration in intergovernmental forums could play a positive role, by enabling responsibility to be sheeted home to participants causing obstruction or delay without good reason. Thirdly, to the extent that executive federalism as practised in Australia is responsible for what Ken Wiltshire describes as the 'moribund' state of State Parliaments, urgent remedial action is required. If poor performance of the State sphere of government is fuelling pressure for national action in areas where national action would not otherwise be required, one answer is to tackle the problem at its source. More generally, the failure of representative institutions at one level of government has the potential to bring the others into disrepute as well and to erode the public support and public understanding on which a healthy democratic system depends.

One further dimension of co-operation deserves attention in the light of the article by Andrew Lynch and George Williams in this issue. They argue that the characteristics of Australian federalism should be taken into account by the High Court in the course of constitutional interpretation; that the Court should recognise not only that the character of the federal relationship depends on the structural integrity of each sphere of government but also that it is co-operative in kind; and that, in consequence, the Court should not lightly invalidate legislation constituting part of a co-operative scheme. In this last respect, they have in mind

in particular the legislation invalidated in *Re Wakim; Ex parte McNally*[1] and threatened in *R v Hughes*.[2] These decisions have inhibited the conferral of State jurisdiction and State executive power on Commonwealth institutions, in order to deepen uniformity by co-operative means.

The time may well be right for the High Court to develop a more contemporary approach to the interpretation and application of the federal provisions of the *Constitution*.[3] Whether such an approach should confer special status on co-operative arrangements is another question. All else being equal, it is arguable that a constitutional court should favour legislative validity, even where only one government is involved. The argument is correspondingly stronger where the legislation has, at least ostensibly, the support of all governments. On the other hand, all is not necessarily equal. All federations are by definition co-operative to a degree, through the combination of shared rule with self rule.[4] In constitutional design as opposed to political practice, Australia is not obviously more co-operative than others, with the possible exception of the United States, and it is significantly less co-operative than many. As Lynch and Williams note, Australian federalism cannot be understood through the prism of structure alone. Structure nevertheless is important, because it is the point at which representative democracy and federalism intersect. If we want to alter the structure to provide for joint institutions on which public duties can be conferred it would be preferable to do so formally, in a way that preserves as much as possible of the ethos of accountability and transparency that, in other contexts, is both a hallmark and strength of Australian governance.

There is in any event a question about exactly what is wanted in this regard. Even federations that centralise most legislative power tend to leave much administration and the initial stages of adjudication to the constituent units.[5] If a problem calls for the centralisation of legislative, executive and judicial power in Commonwealth institutions, this may be an indication that it should be the subject of Commonwealth legislation alone, thus automatically attracting Commonwealth executive power and federal jurisdiction. As luck would have it, Australia has a mechanism to enable the exercise of Commonwealth power in situations of this kind, in the form of the reference power (section 51(xxxvii)), which also permits some continuing involvement of referring States, through the agreements on which references are based. The reference power has come into greater favour since the decision in *Hughes*. It raises some questions of accountability of its own, about the respective roles of State Parliaments and State governments in relation to a reference, which have begun to emerge in the

1 (1999) 198 CLR 511.

2 (2002) 202 CLR 535 ('*Hughes*').

3 Cheryl Saunders, 'Can Federalism have Jurisprudential Weight?' in Thomas Courchene (ed), *Festschrift for Ronald Watts* (forthcoming).

4 Daniel J Elazar, 'Federalism and Pluralism in a Free Society' in *Federalism and the Way to Peace* (1994) 17, 21.

5 Cheryl Saunders, 'Legislative, Executive, and Judicial Institutions: A Synthesis' in Katy Le Roy and Cheryl Saunders (eds), *Legislative, Executive and Judicial Governance in Federal Countries* (2006) 344.

light of greater experience with the use of the power.[6] These problems are more readily resolved, however, than those that accompany a *Hughes*-type scheme. Precisely because of its consistency with Australian constitutional structure, the reference power remains a more straightforward solution where deep uniformity is required.

This symposium suggests that Australian federalism is at a cross-road. The choice is not between whether Australia remains federal or not, at least in formal terms. The choice is between whether Australia has a working federal system, capable of delivering the benefits of federalism, or one that is merely a mask for the effective centralisation of power, with all the other implications of that choice. Neither of these paths is necessarily inconsistent with deepening the national market. But a working federal system, with healthy and accountable democratic institutions at all levels of government, is likely to be a greater asset in dealing with complex governmental problems in the longer run. In their different ways, each of the articles in this symposium suggests ways in which this might be achieved.

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6 *Thomas v Mowbray* [2007] HCA 33 (Unreported, Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ, 2 August 2007) [210] (Kirby J).