## **Chapter Eight**

## The Threat to Federalism

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As the end of the Century approaches, the movement to change our Constitution gathers force. Although the movement is intended to bear fruit in the first year of the new millennium, it probably owes less to an enthusiasm for reform born of the approach of a new chronological era, than to political expediency or ideological conviction.

Two fundamental features of the Constitution are under attack. As the Constitution Act declares, the people of the Australian colonies "agreed to unite in one indissoluble Federal Commonwealth under the Crown". The attack on the Monarchy is at present the more vociferous, but it can hardly be doubted that the ultimate aim of many of those who are seeking change is to destroy federalism. They may be encouraged in the pursuit of that objective by the fact that federalism in Australia has already been weakened by the actions of Governments and the decisions of the Courts.

Associations of States can of course take various forms, but the essential character of a federal Constitution is that there should be two levels of government, each of which is limited to its own sphere, but neither of which is subordinate to the other. There must be a division of powers, effected by a written Constitution which binds both levels of government, so that neither has absolute sovereignty. Each level of government should be independent and supreme within the area of its powers, and each should have under its control the financial resources necessary to enable it to perform its functions.

It is clear that the Australian Constitution was intended by those who framed it to establish a federal system of government. As the eponym of this Society, Sir Samuel Griffith, said during the first of the convention debates in 1891, "We must not lose sight of the essential condition that this is to be a federation of States and not a single government of Australia". He added "The separate States are to continue as autonomous bodies, surrendering only so much of their power as is necessary to the establishment of a general government to do for them collectively what they cannot do individually for themselves, and which they cannot do as a collective body for themselves."

It appears from the debates that most delegates to the Constitutional Conventions during the 1890s shared the view that the Constitution was to be federal in character. The Constitution itself makes it plain that this was intended. It gives to the Commonwealth certain powers which, although wide, are limited and defined, but otherwise leaves the powers of the States intact. It contains provisions intended to protect the position of the States, and to restrict the application of certain Commonwealth powers to the States. It was recognised that a Commonwealth law made in the exercise of a limited power might come into conflict with a law of a State, and it was provided that if that occurred the Commonwealth law should prevail. Nevertheless, the Constitution expressly states that every power of the Parliament of a colony which has become a State shall continue, unless it is exclusively vested in the Commonwealth or withdrawn from the State.

True federations are rare, although there are some associations of states which cannot be called federal because the central authority dominates over the constituent states. No federation can be successful if any of its component states differs significantly from the others in race, religion or culture; for want of homogeneity federations in Africa, Asia, the Caribbean and more recently

Yugo—Slavia have collapsed, often in flames. A separate State composed of, say, Torres Strait Islanders or Aboriginal people would be a threat to Australian federalism. However, those federations that do succeed are among the most liberal and wealthy countries of the world.

Sir Owen Dixon has said – and it has often been repeated – that experience shows that it is only those who dwell under a federal constitution who become adequately qualified to interpret and apply its provisions. Unfortunately, experience also suggests that even those who dwell under a federal constitution do not always successfully interpret and apply its provisions.

It is a basic rule in the interpretation of any written document – and indeed a matter of common sense – that the whole document must be looked at in order to ascertain the meaning of any particular part. It might therefore have been supposed that in deciding on the meaning of the paragraphs of the Constitution which confer power on the Commonwealth Parliament, the Courts would have resolved any ambiguity by interpreting the provisions in a way that would maintain the federal distribution of power which the Constitution so obviously appears to guarantee. In other words, on principle one would have expected the Courts to hold that no single power of the Commonwealth should be given so wide an effect that the careful definition of other powers would be meaningless and that the States would be rendered subordinate to the Commonwealth in areas of power left to them by the Constitution. However, since 1920 the High Court has consistently rejected an approach of that kind.

The Court has rightly laid emphasis on the need to give a broad interpretation to constitutional provisions, but has ignored the necessary qualification that the Constitution as a whole may indicate that to give a narrower meaning to particular provisions would better preserve the federal balance that the Constitution intends to maintain. It has consistently declined to limit the scope of a Commonwealth power to prevent it from encroaching on to the area of power apparently left to the States. The only effect that the Court has been willing to give to the fact that the Constitution is federal in character is to hold that the Commonwealth cannot exercise its powers in a way that would threaten the continued existence of a State, or that would discriminate against any State. There is not much value in a principle that protects the existence of the States and at the same time places no limit on the extent to which the Commonwealth can deprive the States of their functions.

The most striking illustration of a Commonwealth power to which the Court has given an undefined and unlimited scope is, as you will be well aware, that with regard to external affairs. An Act which gives effect to an international treaty or convention has been held to be one with respect to external affairs, although the treaty deals with a matter internal to Australia. The result threatens the very basis of federalism. The scope of the Commonwealth power can in effect be extended by Executive action, for the Commonwealth Government, by agreeing to enter into a treaty, can give the Parliament a foothold to exercise the external affairs power in relation to matters concerning the internal government of a State. The scope of this power of the Commonwealth has thus become completely undefined.

Other Commonwealth powers, also, have been given an expansive interpretation which invades or reduces the power of the States. Powers which have, or threaten to have this effect, include those with respect to trade and commerce, corporations, conciliation and arbitration and the people of any race for whom it is deemed necessary to make special laws. It has been said, with some truth, that in future the issue between State and Commonwealth Governments is more likely to be whether a Commonwealth power should be exercised, than whether the power exists. Another, and major, departure from the federal principle has been in the field of financial relations between the Commonwealth and the States. The States are unable to raise for themselves sufficient revenues to discharge their financial responsibilities, and rely for that purpose on grants made by the Commonwealth out of its revenues. This situation has come about

in a number of ways. First, the power of the States to impose taxation is limited. The Constitution itself, by section 90, forbids the States to impose duties of excise. The reason why it does so remains obscure. The section was probably intended to give the Commonwealth full control of its tariff policy. However, some members of the High Court have suggested that it has a wider economic purpose, although there has been no agreement as to what the purpose is, and under the influence of that view the word "excise", which is very imprecise in its meaning, has been given an interpretation which is wide and unpredictable in its results.

The section prevents the States not only from imposing taxes at the point of production of goods, but also from taxing the sale or distribution of goods, and even invalidates receipts for payments on sale, and a fee for operating a gas and oil pipeline. To escape from the section the States sought to impose business franchise fees, and legislation imposing licence fees, calculated by reference to sales or production during a period other than that in respect of which the licence was granted, has been held valid in relation to licences for the sale of tobacco or alcohol, but not in relation to licences for the processing of fish or the slaughtering of meat. This distinction seems difficult to maintain, and the High Court may reconsider the question in a case in which judgment is at present reserved. The decision in that case may render the effect of the section less uncertain, but it is too much to hope that it will remove its inconvenience. Section 90 is an impediment to the rational division of financial powers between the Commonwealth and the States.

Since 1942 the States have also in effect been prevented from levying income tax. There is no constitutional barrier to their doing so, but there was until 1978 a legal barrier, raised by Commonwealth legislation. Although the legal barrier no longer exists, practical obstacles still remain.

These restrictions on the taxing power of the States – in part constitutional and in part practical – have so reduced the tax base of the States that they are forced to impose taxes which are unsatisfactory from an economic point of view, such as payroll tax and taxes on financial dealings.

Perhaps the most important cause of the distortion of the financial relations between the Commonwealth and the States is section 96 of the Constitution, which provides that the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

It appears likely that the Section was intended to be only a transitional one, and was intended to be applied when some special need arose for supplementing the financial resources of a State, but the Section now permanently governs Commonwealth–State relations, and it has been established that there is no limitation on the purposes for which a grant may be made, or the terms and conditions that may be imposed on the grant. It has become the practice to make grants for specific purposes which are beyond the power of the Commonwealth to effect directly, and which would otherwise have been the sole responsibility of the States. For example, the Constitution does not give the Commonwealth any power with regard to the provision of roads, education, housing or legal aid, but grants are made to the States to be applied for those purposes in accordance with detailed conditions laid down by the Commonwealth.

It would appear that the framers of the Constitution intended that the Commonwealth and the States could each take effective steps to raise for themselves the revenues each needed for the performance of its own functions. However, that has not proved to be the case. The Commonwealth raises more than 75 per cent of all taxes levied in Australia, but its expenditure represents only about 50 per cent of all governmental expenditure. The States rely on Commonwealth grants for about 55 percent of their revenue.

In other words, the Commonwealth raises many millions of dollars more than it needs for its constitutional purposes, and the States raise less than they need for their purposes. State Governments are thus rendered less able to control their own affairs and find it more difficult to plan for the future. At the same time, the system leads to a lack of accountability, since the Commonwealth raises money but is not responsible for the way in which all of it is spent, while the States spend money without being responsible for the manner in which it is raised. A drift of financial power to the central government seems typical of all federations, but the imbalance between financial responsibility and financial resources appears to be greater in Australia than in other federations.

Constitutional arrangements are not set in stone. There is no immutable principle that requires that our Constitution should remain strictly federal in character. It is to be expected that in any federation changes will occur in practice in the relations between the central government and the states, and not uncommonly any change will take the form of increased centralisation. In Australia, where political pragmatism often prevails over constitutional theory, there are many people who would support the reduction of the role of the States, or their replacement by subordinate regional governments. Many people would agree with the opinion that we are overgoverned, and others would point to the fact that all too often the performance of State Governments has been less than satisfactory, as a reason for getting rid of them. Those engaged in commerce may well believe that national recovery and growth would best be assisted by uniformity of law and regulation.

The arguments in favour of centralisation as against federalism are plausible. There are, however, strong arguments in favour of the maintenance of the federal system in Australia. One argument is that, in a country so vast geographically as Australia, politicians and public servants in the States are more likely to keep in touch with local feeling, and to understand local problems, than are those who work in the unpolluted air of Canberra. Another is that the competition and diversity that can be provided in a federation tend to stimulate efficiency. A very strong argument is the fact that a successful federation assists to guarantee the maintenance of democracy.

There is no more effective way to curb abuses of political power than to divide it. Australia has been a notably free and tolerant country, but it cannot be taken for granted that those conditions will always prevail. Already legislation is passed which appears to limit unnecessarily the freedom of the individual, and already citizens incur public obloquy, if not punishment, for speaking truths which offend against political and social orthodoxy. A federal system cannot guarantee freedom and tolerance, but it can help to protect them.

In any case, I think it unlikely that the necessary majority would be obtained in the foreseeable future at any referendum which sought to abolish the federal system. While Australia remains a federation, its constitutional mechanism should be made to work effectively.

It is not easy to suggest remedies for the present deficiencies in the working of the Constitution – at least remedies that are likely to be given effect. Clearly, an amendment to section 90 of the Constitution, to enable the States to impose duties of excise, would be desirable, and perhaps the Commonwealth Government might support it, for this restriction on the taxing power of the States is of no value to the Commonwealth. The High Court is unlikely to change its approach to the interpretation of Commonwealth powers, and any Commonwealth Government with centralist tendencies is unlikely to support amendments that would confine those powers so as to prevent their encroachment into areas more properly left to the States.

The problem of fiscal imbalance needs to be solved in the interests of economic efficiency. It might be solved by co-operation. Although fortunately the Australian Constitution places no impediment in the way of co-operative action between Commonwealth and States, political

considerations often do impede such co-operative action. Our Constitution has worked passably well, and we should oppose changes designed further to weaken its federal structure, while at the same time attempting the difficult task of endeavouring to bring about such constitutional change as will strengthen the federal nature of the Constitution.

That does not mean that every increase in Commonwealth power should be opposed, but it does mean that we should support the clear definition of Commonwealth powers, so that they do not intrude into the affairs of the States, with all the duplication of cost and bureaucratic activity that results. The practical problem, of course, is that the strongest pressures for change now being exerted are in the wrong direction.