The National Legal Eagle

Volume 7
Issue 2 *Spring 2001*

Article 5

11-1-2001

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Introduction

This year celebrates the centenary of the federation of the six original British colonies in Australia into the Commonwealth of Australia. National and regional celebrations dot the landscape, focusing on both the past and the future, amidst a population of 18 million who are largely unmoved by the achievement. Yet, this milestone provides an opportunity to raise public awareness of the nature of our constitutional system, its successes and failures, and its future.

This essay examines why federation occurred, how it was achieved, the extent to which the expectations of those who promoted it have been disappointed and exceeded, as well as the challenges for the future.

Australia of the 1890s

By the 1890s, there were six independent British colonies spanning the continent of Australia and the island of Tasmania. Each had attained self-government with a Westminster style parliament and executive. Queen Victoria appointed and was represented by a Governor in each colony who was under the direct control of the British Government. However, the internal affairs of each colony were virtually the exclusive responsibility of their own colonial administration. Nonetheless, the British Parliament retained imperial power over these colonies.

New South Wales was the first of the colonies to be established in 1788 at Sydney. Originally, it occupied the whole of the eastern coast of Australia. Commencing in 1825 four colonies were created from New South Wales: Tasmania (1825); South Australia (1836); Victoria (1851); and Queensland (1859). Western Australia was established separately in 1828. As well, New Zealand was carved off from New South Wales in 1840.

The movement for closer links between these colonies began in the 1840s and gathered pace with the establishment of the Federal Council of Australasia in 1885. Composed of two representatives from each of the colonies including Fiji, this Council had limited legislative authority and no executive, meeting only for several days every two years. Moreover, New South Wales and New Zealand never joined. The obvious limitations of this body prompted the movement towards federation.

The principal factors which supported this movement were: defence; removal of tariff barriers; control of immigration; the need for co-operation in the areas of transport, communications, quarantine, control of rivers; and a sense of national patriotism combined with some disillusionment with the Imperial authorities.

The main factor relied on to oppose federation was the threat to economic interests, in particular, the fear that the more wealthy colonies of New South Wales and Victoria would need to support those less endowed, while the latter feared being dominated by those two States.

Progress toward the resolution of these competing factors was protracted. A draft Commonwealth Constitution was produced in 1891 at the first of the Constitutional Debates. Pivotal was the political requirement that the people of each colony approve this draft at a referendum. But it was never submitted. Political support died away but the movement was kept alive by various groups of supporters, notably the Australian Natives Association. Three further conventions were held (this time elected) between March 1897 and March 1898 from which emerged a draft Constitution Bill to be submitted to the people of each colony. It was passed in three colonies but not in New South Wales. Finally in 1899, it was passed there (after succeeding in obtaining the national capital) and in Queensland. Western Australia only agreed to join in 1900, while New Zealand decided to remain independent.

The Constitution was still not legally effective. It had to be approved and enacted by the United Kingdom Parliament. With this done in July 1900, it came into effect on 1 January 1901.

Evident from that brief outline of history are two significant facts. The first is that federation occurred voluntarily and not the result of revolution, decolonisation, or other supervening event. Secondly, the focus of the process was on the rights of the colonial governments and how far their sovereignty was to be eroded in creating the new central authority. Hence, there is no bill of rights.

Commonwealth of Australia

The new Constitution combined elements of two quite different constitutional systems: the Westminster system and that of the United States. From the former, came the principle of responsible government whereby the executive comprising a prime minister and ministers must be members of the parliament and enjoy office only with the confidence of the lower house. The head of the executive branch is the English Sovereign who is represented by a Governor-General. Consequently, the prerogative powers of the Crown were vested in the executive branch. Most of the Westminster conventions, typically, are not expressly included, but their continued observance is critical for constitutional stability.

From the United States system, came: an elected upper house with equal numbers of representatives from each State (originally five, now twelve); a division of legislative powers with specific powers vested in the Commonwealth (ss 51 and 52) and residual power left to the States; judicial review by the High Court of any exercise of power; and the entrenchment of the Constitution by referendum.

The text of the Constitution remains substantially unchanged since 1901. Of 43 proposed amendments, only eight have been successfully approved by referendum, that is, approved by a majority of all Australian electors as well as by a majority in four of the six States. Yet, the division of powers between the Commonwealth and the States and their relationship differ markedly from that envisaged by the "founding fathers". What caused this difference? Various factors have played a role: High Court interpretation, the evolution of Australia as a nation state, World War II, international conventions especially in the fields of human rights

and environmental protection, reconciliation with Australian Aborigines and Torres Strait Islanders, and most recently, globalisation.

High Court interpretation

The drafters of the Constitution envisaged the new federal system to be a marriage of "equals". The States would continue to be responsible for practically all of their internal affairs, while the Commonwealth would deal with those external matters which were of common concern to the States, such as interstate trade and commerce, defence, immigration, etc. Indeed, the express list of specific Commonwealth powers was adopted from the United States Constitution, over the Canadian approach, in the belief that this would better protect the States from federal encroachment.

However, this belief proved to be misplaced as certain specific Commonwealth powers assumed greater importance: the corporations power, the taxation power and the external affairs power. Central to this development was the rejection by the High Court in 1920 of the doctrine of reserve powers enunciated by the first High Court in 1903. In 1920, the Court established in the Engineers Case the fundamental principle of interpretation which requires each head of Commonwealth legislative power to be given full scope and effect, according to its ordinary meaning and without implied restrictions. Effectively, the Court rejected any general principle or concept of "a federal balance" as qualifying the width of Commonwealth heads of legislative power.

The High Court also adopted the technique of characterising a law according to its direct legal effect. This means that the Court is not usually concerned with what motive lies behind the law, only its legal effect. Thus the Commonwealth uses its tax power to further wide ranging policies from superannuation to investment in the film industry, despite having no specific powers in those areas.

The practical effect of the law can be important though in two areas. The first is in giving an incidental operation to Commonwealth powers to enable them to regulate activities not squarely within the core power. The second is in relation to the few restrictions on power prescribed by the Constitution. For much of the twentieth century, the Court narrowly interpreted these restrictions, applying formalistic tests which rendered them practically useless. However, in the last decade or so, the Court assumed more seriously its responsibility to uphold these constitutionally prescribed restrictions on power by examining the practical effect of the impugned law to determine whether in substance an infringement had occurred. In so doing, the Court has embraced the European concepts of proportionality and margin of appreciation.

Distinctive of High Court judicial review, is the Court's concern to judge the validity of the exercise of legislative and executive power according to accepted principles of interpretation. One of its most prominent Chief Justices, Sir Owen Dixon, proudly defended at his swearing-in the Court's "strict and complete legalism". In this way, the Court has endeavoured to cloak itself with neutrality, to distance itself from the political process, and emphasise that it is not judging the merits of the case, rather its legality. Its record on this score is not bad, better than that of the United States Supreme Court. And this is partly due to the absence of having to interpret and apply a bill of rights. Nonetheless, the High Court does live through phases of variable activism, having passed through, probably, its most active period between 1983 and 1995.

Evolution as a nation state

At federation, the Commonwealth of Australia was legally a colony of the United Kingdom. Its creation was by an imperial enactment. The UK Parliament retained the power to legislate in relation to Australia. However, the political relationship with the United Kingdom continued to evolve as Australia assumed more of a presence on the world stage. Australian troops fought gallantly in World War I and Australia, along with Canada and South Africa, were represented at the signing of the Treaty of Versailles. Recognition of the growing international status of these colonies culminated in the Balfour Declaration of 1926 by which they were accorded "dominion" status. The Statute of Westminster of 1931 gave legal effect to this Declaration. No longer would the UK Parliament enact legislation in relation to the Commonwealth without its consent, while the Sovereign would in future only exercise power in a dominion on the advice of her ministers there.

The Australian States retained colony status until 1986 with the enactment of joint Commonwealth and UK legislation (Australia Acts). By this legislation, the UK renounced all legislative and executive power over the Commonwealth and the States. Hence, only since 1986 has Australia been legally independent and sovereign, although in practical terms both politically and diplomatically, this has been the position since the end of World War II.

There remains one tenuous legal and constitutional link with the United Kingdom: the Head of State in Australia remains the Queen of England (also the position still in Canada and New Zealand). Her only powers today are to appoint and to dismiss her representatives, the Governor-General and the six State Governors. And those powers are always exercised on the advice of the Prime Minister and the State Premiers respectively. In November 1999, a referendum was held to amend the Commonwealth Constitution to replace the Queen with an Australian President. It failed to achieve the requisite majorities, due principally, to a split in the republican vote over the mechanism for appointing and dismissing the President. The proposal was for a President appointed by Parliament on the joint recommendation of the Prime Minister and the Opposition Leader after a process of public nominations. A proportion of opponents sought a President directly elected by the people. Given that the President is intended to act as both a ceremonial head of state and as a constitutional guardian, the debate wages on.

International Conventions

The increased role of international co-operation, particularly by way of treaties and conventions, impacted on the Commonwealth in relation to its power over "external affairs" in s 51(xxix). The High Court debated for several decades whether the Commonwealth could implement, pursuant to this power, any treaty irrespective of its subject-matter or only treaties whose subject-matter fell within another of the Commonwealth heads of power. The restricted view was justified on the basis of maintaining the division of powers ordained by the Constitution. However, the unrestricted view eventually prevailed in 1983 when the Court upheld Commonwealth legislation implementing the World Heritage Convention. Central to its success was the principle from the Engineers Case and the importance of ensuring that the Commonwealth was capable of giving effect to its international legal obligations.

Consequently, the Commonwealth has used its external affairs power to implement wide ranging treaties, especially in the field of human rights (eg the Racial Discrimination Act and the Sex Discrimination Act).

Aboriginal reconciliation

Aboriginal reconciliation is currently a political and social priority in Australia. At least since 1967, when the Commonwealth obtained by constitutional referendum the power to enact laws for Aborigines and the Torres Strait Islanders, greater efforts have been made to improve their well-being. Nevertheless, despite increased public funding, the paternalistic and assimilistic policy pursued has proven to be ineffective in alleviating their under-privileged condition. The response was to transfer greater autonomy to aboriginal groups. However, native title claims went largely unanswered by State Governments. In the end, the High Court in Mabo in 1992 recognised a form of native title at common law. This sparked a significant movement throughout the country in support of aboriginal reconciliation - that is, a change in attitude, an apology for past injustices, and recognition of their original ownership of the land.

Co-operative federalism

At least during the middle of the twentieth century, the future of federation was hotly debated with calls for the abolition of the States and the creation of regional local governments under the control of the Commonwealth. That debate has waned in recent years for several reasons: the Australian Labor Party dropped its policy to abolish the States; national responses became more feasible with expanded Commonwealth powers, especially over corporations and external affairs; better appreciation of the benefits of decentralised power; and increased Commonwealth-State co-operative schemes.

Co-operative schemes exist in a wide range of areas, usually with the objective to either avoid duplication or to ensure the efficacy of government regulation. Such areas include criminal enforcement, fishing regulation, taxation, interstate trade, and transportation.

While the achievements of co-operative federalism are to be applauded, they come at a cost given the enormous effort required on the part of all governments to formulate and administer the necessary arrangements. What is weighed against that cost and inconvenience is the benefit of two-levels of government for a continent of immense distances between both the largest and smallest centres of population, with widely different interests and concerns. Nonetheless, in two particular areas, the end result remains unsatisfactory: corporate regulation; and the judicial system. The Commonwealth lacks the power to regulate the incorporation of companies, but is empowered to regulate them once incorporated. This distinction is farcical.

As for the judicial system, the Commonwealth Constitution expressly allows the vesting of federal jurisdiction in State courts. But, in the absence of any provision allowing the reverse, the High Court has recently held invalid the vesting of State jurisdiction in federal courts. This means that some proceedings may have to be instituted

in two different courts. The Court justifies its position on the crucial importance of maintaining the so-called purity of federal judicial power.

Conclusion - Challenges for the Future

The Australian federal system is by no means perfect. It is probably more expensive to maintain than a unitary system. It allows buck-passing. It results in duplication. On the other hand, it provides for a division of responsibility which is capable of generating a more responsive and accessible system of government. It would take a cataclysmic event to undo the Australian federation. The challenge is continually to improve it. And the responsibility for that lies with the politicians and the bureaucrats, since the referendum process has proven too difficult to satisfy.

Discussion point:

1. *Think of ways in which the Commonwealth Constitution has an impact on your everyday life?*
2. *Why do you think that Australians have been reluctant to vote to change the constitution at referendums over the past 100 years?*
3. *If you were asked to make amendments to the Commonwealth Constitution what changes would they be and why?*