Example of australian federalism: changes since 1901 essay

Law, Constitution

Abstract

This essay assesses whether Australian federalism has or has not changed dramatically since the Constitution was inaugurated in 1901. It looks at the way the central government (the Commonwealth) and the State governments have interacted, and the various changes along the way that have shifted the balance of powers to reach the point we are at today. In addition to considering the general situation, the essay looks at specific issues such as fiscal changes including taxation, and at specific areas of policy such as education and health (including Aboriginal health issues). From the research undertaken it is evident that the Australian High Court has played a major role in the changes that have been implemented – most of which have arisen from High Court decisions involving interpretations of Constitutional instruments rather than through formal Constitutional amendments. As a consequence, the majority of what has to be considered as an overall dramatic change in Australia's federalism since 1901 has been made without full and proper approval of the Australian electorate.

- Introduction

This essay examines and discusses the Australian federal system of government and how changes have been made over time to the original Constitution established in 1901, in particular how the division of power between the central, federal government and the individual state governments has been modified. According to Brown and Bellamy (Eds.) (2007), institutional reform of the Australian federal system of government has been debated for many years, and now " dramatic shifts are occurring in the way in which power and responsibility are shared between federal, state

and local governments, and in the emergence of an increasingly important ' fourth sphere' of governance at the regional level of Australian society" (p. 3). An important factor in the perceived need for further reform is that the present degree of centralisation of Australia's government has arisen from a whole series of incremental changes and previous reforms that have occurred since 1901 " in an ad hoc, largely unplanned way" (Brown and Bellamy (Eds.) (2007), Appendix: " Reform of Australia's Federal System Identifying the Benefits: (2006-2007) p. 1). As a consequence, according to their discussion paper, more nationally uniform centralised federal power has resulted in part, but in numerous and important aspects gains achieved are not complete or are " constitutionally fragile" (p. 1). This essay seeks to assess the validity of those statements and to determine the extent to which power has shifted from the original structure in 1901.

2. A Lack of National Awareness

Sadly, a 1987 survey found a generally poor level of awareness among Australians regarding not only the details of the (changing) Australian federal system, but even the form of government in Australia (Williams 2011). According to Williams, the survey found that almost half of those surveyed (47 percent) were unaware of the existence of a written Constitution. Even fewer (18 percent) have an idea of what is in it, and only 40 percent could provide the correct names for both Australian Houses of Parliament. Over a quarter mistakenly thought the highest Australian court is the Supreme Court (should be the High Court) and some younger Australians knew more of America's Constitution than their own.

3. The Winds of Change

Bennett and Webb published on behalf of the Australian Parliament " Chronology of Australian federalism" (last updated May 2007). According to the authors it is a publication that is maintained up-to-date in the online version. Their preamble includes the comment that the Australian federal system has in latter years been increasingly criticized as being not only outdated but potentially harmful to the future of Australia. As background to the original 1901 Constitution, they remind readers that the Australian federal system as one of the world's oldest was derived from a system based on colonial parliaments each possessing considerable autonomous powers. Hence those involved in drafting the Constitution were eager to see that their six home colonies (now individual states) retained legislative power. The Chronology lists the main events affecting the division of powers between the central government (referred to as the Commonwealth) and the individual states of Australia. Some of the more significant items extracted from that Chronology are listed below:

1908: The government to pay surplus revenues into trust accounts. That affected Constitution Section 94.

1910: The Commonwealth can take over State debts. Provision to reimburse customs & excise revenues to the States ended. Commonwealth imposes land taxes, thus sharing State tax on land.

1911: South Australia cedes Northern Territory control to the Commonwealth.

1914: Commonwealth levies estate duties.

1915: Commonwealth starts income tax system.

1920: Commonwealth gains right to exercise full powers irrespective of any

existing State powers.

1926 & 1927: Government funding and borrowing now under central control.

1927-29: Royal Commission recommends increased Commonwealth powers.

1942: Commonwealth gains full control of income taxation.

1945: Education Act: new Universities Commission & Office of Education.

1967: Commonwealth granted powers reference Aboriginals in the States.

1978: Northern Territory now self-governing.

1986: Towards Australian independence from the UK; States can now repeal or amend any pertinent UK legislation affecting them.

Most of the published opinion appears to echo the view that the trend is towards more power entrenched in central government, at the expense of fiscal and policy powers formerly wielded by the States. Carling (2010) aligns himself with that body of opinion in his Australian Financial Review article " Continental drift: inching away from federalism." He also makes the point that whilst individual changes have not been major in themselves, cumulatively they have resulted in " a huge shift of political power and policy control from the states to the Commonwealth."

A similar sentiment is expressed by Moon and Sharman (2003) in their book Australian Politics and Government: The Commonwealth, The States and The Territories. In the book's Introduction (p. 1), the authors note that although the States continue to provide the great majority of government services to their citizens, central government now has considerable influence in most areas of public policies, largely as a result of its fiscal control over State revenues and in part due to previous High Court decisions in interpreting

various aspects of the Constitution.

Fenna (2012) covers similar ground in his journal article The Character of Australian Federalism, in which he refers to the “ character” of Australian federalism as being “ the interaction between constitutional design, judicial interpretation, economic and social change, and political processes over the past century” (p. 12). He also sees the Australian model of federalism as one that was designed for a situation that has since changed over time, so that there has of necessity been considerable change and adaptation to match the social and economic needs of today (p. 12). Further, he acknowledges that those changes have had the effect of increasing the centralization of power (p. 12). Fenna notes that in the original Constitution, the States were intended to hold exclusive responsibility for domestic policies including “ infrastructure; resources; the environment; education; health; policing; criminal and civil law” (p. 13). He points out that whilst attempts to amend the Constitution over the years have largely failed (only eight of 44 proposed Amendments were voted in), the interpretation of its measures has in practice allowed a great deal of centralizing change (p. 15). Of all the changes that have occurred since 1901, Fenna picks out three as being of greatest significance. These occurred in 1920, 1926 and 1942, ultimately giving the Commonwealth full control over Australia’s most important taxes, effectively reversing the originally intended relationship between the States and central government (p. 15-16).

Saunders (2013) claims that the “ meaning and operation of the Constitution has changed dramatically since federation, through judicial interpretation in response to political action” (p. 392). She is referring to the various High

Court decisions that have occurred since 1920, from when their interpretations of the clauses of the Constitution appear to have changed. Regarding the effects of federal reform in specific areas of policy, education is one such area where reform has been ongoing for the best part of four decades, yet there are still numerous problems that need to be addressed such as achievement disparities, low success rates for indigenous students, fragmented policies for school governance, diverse curriculums and more (Caldwell, 2011 p. 2). The effect of that series of reform efforts in terms of school funding is that the amount of Commonwealth involvement in education has increased so much that – although in Constitutional terms it is a State responsibility – it is today known as a shared responsibility (between central government and the States) (Hinz 2010 p. 2). She notes that the current complex funding arrangements for schooling are the result of " hundreds of complex agreements between federal and state authorities made through intergovernmental forums that have no formal authority under the Australian constitution" (p. 3). She also points out that under the present arrangements, because each State still has responsibility in both legislative and regulatory terms for their education and training, there are effectively eight separate systems of public schools, whereas the Commonwealth is predominantly responsible for private schools, which have far fewer students categorized as " disadvantaged" (p. 5).

As an indication of education reforms still needed, according to " The Future of Schooling in Australia" (2007) published by the Council for the Australian Federation (CAF), keys to the future of schooling in Australia are the establishment of a shared, high quality curriculum, an integrated plan for

student testing, improved performance reporting, raising quality of the workforce (teachers and others, including standardizing teacher registrations systems), and reducing bureaucracy (p. 31-35).

Health policy is primarily set by the central government, effectively having moved a long way away from the original 1901 Constitution (Banting and Corbett 2008). In 1946 the Commonwealth extended its powers by Constitutional amendment " to include laws on pharmaceutical, sickness and hospital benefits, and medical and dental services" (p. 12). Because of that change, the Australian national Medicare system that began in 1984 comprises two parts – one entirely federal, and the other one part federal and part State controlled. The government part operates nationwide under the auspices of the Health Insurance Commission, providing access to doctors, medications and care homes via the Medical and Pharmaceutical Benefits schemes. The second part covers care in public hospitals and is the subject of federal and State authority agreements, which are renegotiated on a five-yearly basis. However, in practice the federal government ensures that through its influence and measures such as performance targets the system has a national feel and character (p. 12).

Anderson and Sanders (1996) discuss the effects of federalism reforms on Aboriginal health in their discussion paper entitled: " Aboriginal health and institutional reform within Australian federalism." As mentioned by others, they note that when the Constitution was first established in 1901, health care was the constitutional responsibility of each State (p. 1).

Following years of minimal Commonwealth involvement in day-to-day health care, the Labour government of the 1940s passed the Commonwealth of

Australia Constitution Act which amended the Constitution and gave the Commonwealth powers in the areas of “ pharmaceutical, sickness and hospital benefits, medical and dental services” (p. 2). The result was increased Commonwealth funding to the States for health care, both in payments to medical professionals for their services and in the form of health-related grants to the States (p. 2). That role and the amounts of funding were increased considerably in the 1970s and 1980s when Medibank and Medicare were introduced (p. 2). Subsequently, there have been various criticisms of aspects of the health care as a whole, although little progress is yet to be made in terms of any perceived needed reforms to the system (p. 3). In terms of Aboriginal health in particular, there was pressure on the Commonwealth to take an expanded role in the affairs of the Aboriginals, although Section 51 of the Constitution apparently made that difficult, but that was resolved in 1967 when the Constitution was amended following a referendum (p. 3-4). From the 1970’s the government’s new Office of Aboriginal Affairs made grants to the States for the purpose of “ Aboriginal advancement” which were used in part for the provision of Aboriginal health units (p. 4). The Whitlam Labour government and the subsequent Fraser Coalition government in the 1970s did more to improve Aboriginal health services, though a report in 1979 suggested “ little progress” had in fact been made and that the health of Aborigines was still “ far lower than that of the majority of Australians” (p. 5). Years of in-fighting between various organizations involved with Aboriginal health followed, and it took until 1996 before real progress and improvements had been secured (p. 7-16).

Hancock (2008) reports that health in Australia is “ high on the political

agenda" and because of the shared responsibility between central and State governments it is not only a politically-sensitive issue but is also the subject of ongoing battles between the Commonwealth and the States (p. 107). She notes that under the terms of the Constitution (section 96) the Commonwealth government may grant funding to the States " on its own terms and conditions" which clearly gives central government the whip hand, especially as over the years the fiscal imbalance between the Commonwealth and the States has been engineered by the Commonwealth to be increasingly in its favour (p. 110).

That move to increasing centralization of power in the Commonwealth is also stated in " Australian Federalism" (2011), which mentions the so-called Engineers Case of 1926 in the Australian High Court, which effectively set a precedent in giving the Commonwealth " pre-eminence" over the States. Commenting upon how much federalism in Australia has been changed since 1901, the article concludes by suggesting that " The long term success, indeed survival, of Australian federalism, appears dependent upon a return to a mutually beneficial form of collaborative federalism."

Allan and Aroney (1998-2008) also focus on Australia's High Court as the cause of the flawed version of Australian federalism that exists today. In their view, whilst each individual ruling of the High Court over the years in interpreting clauses of the Constitution in respect of decisions to be made regarding powers of the Commonwealth and/or the States seemed – in isolation – quite reasonable, (though maybe biased towards the Commonwealth as the judges involved were appointed by the Commonwealth), in sum they have resulted in what the authors call " a most

uncommon body of constitutional law, generated by a most uncommon court" (p. 246). Essentially, suggest Allan and Aroney, those who drafted the rules of the Constitution way back at the beginning of the 20th century " would never have envisaged that they would be used or interpreted in this way" (p. 246). For example, those founders of the Constitution would never have expected the Commonwealth to control industrial relations. Similarly they would not have been in favour of the four separate federal statutes that were passed individually in 1942 (at the same time), and which in combination resulted in the States losing the power to levy and collect income tax (p. 247).

Grewal and Sheehan (2003) discuss the evolution of Australian federalism in the century or so since it was first established in the Constitution of 1901. They note that " The current distribution of powers of legislative power is vastly different from the original design" and that it " has become highly centralized at the Commonwealth level" (p. 2). Further, that this centralizing of power has for the most part happened without formal changes to the Constitution and therefore without " the express approval of the majority of voters in majority of States, as originally required" (p. 2). In fiscal terms, whereas the States and local authorities collected 87 percent of tax revenues at the inception of the Constitution, that percentage had fallen to just 18 percent by 2001-2, meaning that the States have become heavily dependent on funding from Commonwealth sources. In addition, almost half of that funding is provided as specific purpose payments; i. e. the money must be spent according to imposed directions / conditions (p. 3). As mentioned by others, most of the changes that have dramatically changed the fiscal

balance between the Commonwealth and the States have occurred without amendment to the Constitution, instead being the outcome of interpretations by the Australian High Court of Constitutional instruments. Those interpretations were made in response to challenges of the validity of existing laws; i. e. the changes were initiated by the central government, shifting the balance of power in their favour (p. 6).

That view offered by Grewal and Sheehan that the High Court was not the instigator of the series of its interpretations that caused major changes in the operation of Australian federalism is echoed by Selway and Williams (2005). They also note that the High Court decisions have “ provided a framework for the development of the Australian federation over the last century in increasing the relative importance of the federal government at the cost of the state governments” but suggest that those decisions reflected rather than created the consequent changes.

Andrews (2010) also places the blame on the High Court for the shift of federalism towards central government. He cites the government’s ploy in 1913 of increasing the Court strength from five to seven judges, with the extra two being known centralists, as the first step towards loading the court in the Commonwealth’s favour.

Jellis (2012) provides news of the High Court when he reports that the Howard government replaced all but two of the High Court judges during its 11-year term in office from 1996, as well as appointing a new Chief Justice. These changes were seen as a “ return of a more orthodox approach to judging.” However, many see the decline of federalism continuing unabated nonetheless.

4. Conclusions

Without question, Australian federalism has changed dramatically since 1901.

References

Allan, James and Aroney, Nicholas. (1998-2008). “ An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism.” Sydney Law Review, Vol. 30: 245 p. 245-294. Available at: http://sydney. edu. au/law/slr/slr30_2/Allan. pdf

Anderson, I., and Sanders, W. (1996). “ Aboriginal health and institutional reform within Australian federalism.” The Australian National University: Centre for Aboriginal Economic Policy Research (CAEPR). Available at: http://caepr. anu. edu. au/sites/default/files/Publications/DP/1996_DP117. pdf

Andrews, Tim. (2010). “ The High Court’s attack on Federalism.” Liberty Australia. Available at: http://www. la. org. au/opinion/280710/high-courts-attack-federalism

“ Australian Federalism.” (2011). Curtin University. Available at: http://www. curtin. edu. au/research/jcipp/local/docs/Australian_Federalism. pdf

Banting, Keith, G. and Corbett, Stan. (2008). “ Health Policy and Federalism: An Introduction (p. 1-38).” Institute of Intergovernmental Relations, Queens University, Ontario, Canada. Available at: http://queensu. ca/iigr/pub/archive/socialunionseries/BantingCorbett. pdf

Bennett, Scott and Webb, Richard. (last updated May 2007). “ Chronology of Australian federalism.” The Australian Parliament. Available at: http://www.

aph. gov.

au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/

Publications_Archive/online/AustFederalism

Brown, A., J., and Bellamy, J., A. (Eds.). (2007). " Federalism and Regionalism in Australia: New Approaches, New Institutions?" Australian National University E Press, Canberra, ACT, Australia. Available at: http://press. anu. edu. au//wp-content/uploads/2011/05/whole_book5. pdf

Caldwell, Brian, J. (2011). " Educational Reform and Change in Australia." Educational Transformations Australia. Available at: http://www. ied. edu. hk/apclc/roundtable2011/paper/Brian%20J. Caldwell. pdf

Carling, Robert. (2010). " Continental drift: inching away from federalism." Australian Financial Review. Available at: http://www. cis. org. au/media-information/opinion-pieces/article/1402-continental-drift-inching-away-from-federalism

Fenna, Alan. (2012). " The Character of Australian Federalism." eJournal of Tax Research, Volume 10, No. 1, Feb. 2012, pp. 12-20. Available at: http://www. asb. unsw. edu. au/research/publications/ejournaloftaxresearch/Documents/paper2_v10n1_Fenna. pdf

Grewal, Bhajan and Sheehan, Peter. (2003). " The Evolution of Constitutional Federalism in Australia: An Incomplete Contracts Approach." Centre for Strategic Economic Studies, Victoria University of Technology. Available at: http://www. cfses. com/documents/wp22. pdf

Hancock, Linda. (2008). " Australian Intergovernmental Relations and Health (p. 107-142)." Institute of Intergovernmental Relations, Queens University,

Ontario, Canada. Available at: http://queensu. ca/iigr/pub/archive/socialunionseries/BantingCorbett. pdf

Hinz, Bronwyn. (2010). " Australian federalism and school funding arrangement: An examination of competing models and recurrent techniques." Canadian Political Science Association Annual Conference, Montreal 1-3 June 2010. Available at: http://www. bronwynhinz. com/wp-content/uploads/2009/06/Hinz-2010-CPSA-paper-Aussie-federalism-school-funding-arrangements-v61. pdf

Jellis, Benjamin. (2012). " The High Court under Howard." The Samuel Griffith Society. Available at: http://samuelgriffith. org. au/docs/vol23/vol23chap7. pdf

Moon, Jeremy and Sharman, Campbell. (2003). Australian Politics and Government: The Commonwealth, The States and The Territories. Cambridge University Press, Cambridge, United Kingdom. Print.

Saunders, Cheryl. (2013). Routledge Handbook of Regionalism and Federalism, 27: Australia: an ' integrated' federation? (p. 389-400). Routledge, Abingdon, Oxon, United Kingdom. Print.

Selway, Bradley and Williams, John, M. (2005). " The High Court and Australian Federalism." Publius (2005) 35 (3): 467-488. doi: 10. 1093/publius/pji018. Available at: http://publius. oxfordjournals. org/content/35/3/467. abstract

" The Future of Schooling in Australia." (Sep. 2007). The Council for the Australian Federation. Available at: http://www. caf. gov. au/Documents/TheFutureofSchoolinginAustralia. pdf

Twomey, Ann. (2007). " Federalism – the good, the bad and the

opportunities." Australian Policy Online. Available at: http://apo. org. au/commentary/federalism-good-bad-and-opportunities

Williams, George. (2011). " A Guide to Our Constitution." National Archives of Australia. Available at: http://www. naa. gov. au/collection/publications/papers-and-podcasts/australian-constitution/ professor-george-williams. aspx