

The Future of Federalism

Greg Craven*

As the theme of this conference was very much the future I thought I would just try to put this in a more futuristic context than usual. Federalism is something we often think about in the context of the past, all Sir Henry Parkes and whiskers and an artefact that we have inherited. It is something that we really have to think about very much in terms of the future. I am trying to give this presentation a future orientation because when you are talking about federalism you are actually talking about systems of government. When you are talking about whole systems of government you are designing for the future. You are not designing for 10 months, you are not designing for the next election, you are not designing for 10 years and you are not designing for four decades: you are designing for a century. If you get things wrong they will go wrong on a century-wide basis and they will keep going wrong. It is incredibly important that one thinks about that when you are dealing with governmental systems. It is not myopically just about money, though money is important. It is not just about hospitals, though hospitals are hugely important. It is enduring.

One of the difficulties I think with a lot of our analyses of federalism is they are very short-term, quite understandably. 'The hospitals aren't working, it's federalism — fix federalism.' 'The train isn't working. Quick, it must be federalism, so I'll fix it.' 'We are going to lose an election. It's got something to do with federalism — abolish the States.' That is not a rational way to do it because if you are talking about design of systems and constitutional systems you actually are talking about issues bigger even than money. Bigger even than hospitals. There are even things bigger than hospitals. You are talking about power and how you control power, how you balance power, how you prevent tyranny, how you guarantee democracy, and how you guarantee constitutional stability into the indefinite future. The consequences of failure in this are disastrous.

If you look at failed constitutions you are looking at epic failures. You are looking at the United States Civil War. You are looking at the types of problems that

* Speech by Professor Greg Craven, Vice Chancellor, Australian Catholic University

democracies like France and Italy have had. Of course, the good news is that the typical default setting for a constitution is abject failure. Nine out of 10 constitutional lawyers — in this case, eight, because the two of us are fascinating — are really boring. Nine out of 10 constitutions are abject disasters. You can look at that statistically. That is the context, I think, in which we have to analyse Australian federalism. We are looking at something really big and very enduring and we are asking the big questions about the nature of society and government.

One of the problems around federalism is that it is often misrepresented as having come about purely out of historical pragmatism. You know, Victoria and New South Wales did not like each other therefore we had a federation rather than a unitary nation. Of course there was pragmatism in Federation and of course there was jealousy, but that was not all there was. For a start, the plain truth is, as someone who has spent the last 12 years living in Western Australia can tell you, there is a fundamental difference between places like Western Australia and New South Wales. I can expatiate on that endlessly, but quite frankly it is a view that is very clear from St George's Terrace, Perth, but not as clear from Pitt Street in Sydney. There are indeed still very strong differences of State feelings. That is a view that is extremely clear in St George's Terrace, Perth. It is simply a fact that Australians in different States, particularly the outlying States — you may say 'outlying from what?' which is the question they tend to ask in Western Australia — do have strong differences of feeling and view. I know the argument, common among my Victorian and New South Wales friends: 'What is wrong with these people when they say they are West Australian? Aren't they all Australians?' To which the answer is both, and if you do not have a mind that can cope with more than one digit, that is your problem, not theirs.

Quite beyond that sort of idea of a real difference I think we have to understand that there is a highly principled governance case for Australian federalism that has to be understood, that was understood by the founding fathers, and that is as enduring and arguable today as it was in the 1890s. In terms of high constitutional design it starts at a point not often talked of in relation to Australian federalism, and that is the division of power. The fundamental argument in favour of federalism in Australia as anywhere else is that it prevents the abuse of power by dividing it. It is like the separation of powers. It is the geographic cousin of the separation of powers. Just as the separation of powers that we all love divides power analytically and thereby prevents tyranny, separation of powers or division of powers federally divides it geographically so that no one Government can do absolutely everything anywhere any time it likes.

If you think that is high theory, and politicians are inclined not to like high theory, remember this: Probably the two greatest potential mistakes and active abuse in the history of Australia were prevented by the Federal division of power denying to the Commonwealth Parliament the necessary competence. Ben Chifley could not nationalise the banks, with all the disasters that would have involved, even though it looks slightly more plausible at the moment than it has for a long time, because he

lacked the power under our Federal division of power. Sir Robert Menzies, may God rest his soul, could not in the greatest mistake of his career abolish the Communist Party because he was prevented by the Federal division of power. This is high practicality not just theory.

The second thing that I think federalism does correspondingly is it guarantees a balance of discourses. There is not just one dirty great governmental soapbox in this country, there are at least seven. It means that different points of view are regularly put. Issues do not go through to the constitutional wicketkeeper and the reason that changes in government are so often oriented in a Federal course from movements in the States follows precisely from that reality. The balance of discourse, I think, is a major force for democracy. Federalism is a force for subsidiarity: the idea that, in principle, issues should as far as possible be decided at the most convenient, workable and proximate point to those people affected by them. Put another way, in principle the drinking regime of water in Adelaide should be decided by someone who has at least slept there once; the reality that, by and large, better decisions are made by people who have once visited the place to which those decisions will apply — a view, again, well-known in Perth. And, finally, that idea of policy exploration and experimentation. It is a good thing that we have different jurisdictions trying different things, with different types of policy options coming forward on the basis that they work — the great example always being compulsory seatbelts from Victoria. As a Victorian, I'm fond of that. I'm not fond of it when people say: Yes, the Athenians gave the world democracy; the Victorians gave them seatbelts.

Of course, there is the argument that this costs a lot. And we will talk a bit about money. It is doubtless true that federalism is not the most efficient form of government in the world. That is, in fact, a Mussolini-style dictatorship. But the reality is that with federalism, when you are working out costs, you are asking not what does it cost; you are asking, 'What do we get for the cost expended?' And if the answer is democracy, is constitutional stability, is balanced power, and is good government, then that is money well spent, even if there are difficulties. Now, I know some of you — the more wicked of the New South Welsh among you — will be sitting there thinking, 'Well, this is all very well, but wouldn't it be absolutely wonderful if we could get uniformity in all these areas that create all sorts of difficulties, and our lives would be solved?' — like, as the example often is, education. As a person who currently lives in Mosman, in the vice-chancellor's house of my university, with my wife and children still in Perth because I have a boy in year 12 and it is pretty hard to shift people in year 12 in country, I have some sympathy for that.

But I would ask you this question: Is it not the case that, when we think of the joys of uniformity, we always assume that when that uniform legislation comes down from the Commonwealth it's always going to be uniformly right? What if it is uniformly wrong? What if, instead of the best education Act in the whole world, we get the worst? What if it is not New South Wales, it's Joan Kerner's VCE iteration one from that period in the nineties? It is a question, I think, that has to be

answered, because the reality is that if federalism does not guarantee us perfection, it guarantees against uniform disaster. I would also caution against some of the arguments that are typically put forward as being a lay-down misere against federalism. What of the argument, ‘There’s a world trend against federalism; we’re the last ones with it?’ Wrong. That federalism costs more than unitary governments. Wrong. That federalism inhibits economic growth. Wrong. That federalism necessarily produces large government. Wrong. That uniformity will always produce efficiency in areas like health and infrastructure and so on and so forth. Wrong, wrong, wrong. And why?

One of the questions one ponders when someone says, ‘Why doesn’t the Commonwealth take it over?’ is this. If the Commonwealth is going to take over the same problem, in the same States, with the same hospitals, and employ the same people on elevated wages to do the same things, why exactly is it going to work better? It will certainly make life interesting for the Commonwealth, and that is a good thing. But is it actually going to do anything else? I guess that leaves us with the question: Where do we think federalism is going to go? There is no doubt that federalism in this country has significant changes. There are constitutional design faults in the Constitution, which I will not trouble you with, unless there is provocation. There have been changes in world history that have made the position of the States extraordinarily difficult. I think we have in fact reached a point now where the Commonwealth can pretty well do what it likes, through a combination either of financial muscle or super powers, like the corporation powers, provided it is prepared to wear the political flax. So the balance is really political rather than constitutional.

We have also reached a very dangerous point where the morale of the States and the morale of the populations in those States are critically low. I mean, the States have been the five-pound victims kicked around now for a hundred years. And, frankly, with all due respect, they look like it, and I think the population can sense that. But we have to be realistic about it. There is one thing that is never going to happen in this country. We are never going to abolish the States. I mean, are there any of you who believe that this is going to happen, that there is this great bridge that I own just out there and I’m happy to sell it to you for a modest sum? We know from the Republican referendum — for which I fought, and died — just how hard it is. And the Republican referendum was a two-minute joke compared to abolition of the States.

So the question is: What do we do with the system that we have got? The answer, I think, is: We have to make it work. What does that mean? Firstly, I think it means what I have said: we have to think of it in terms of governmental systems. We have to think beyond just hospital waiting queues. They are important, but we have to think beyond that. We have to ask what sort of system we have. We need to think how we accommodate a fallen Federal reality today. My own view is that we have reached a point of leadership federalism, where the States are going to have to accept that the Commonwealth is going to be able to say, ‘We’re going in this

direction,' on a whole lot of issues that the Commonwealth does not technically have power on, but on which the Commonwealth is taken to have the elementary brains that in going in that direction each State is going to have to be given a vast degree of latitude in interpreting what that degree is. That is a psychological challenge of epic proportions.

I think that we are also going to have to think that it is not the case that every difficult problem that confronts our country and our world automatically will be solved if we can just bring to bear on it the great guns of absolute central government. I accept that the global world economic crisis — or whatever is the acronym the Prime Minister uses today — will require an awful lot of national coordination. But if anyone thinks, for example, that global climate change is going to be resolvable simply through the application of absolute central power, to address the vastly different climatic circumstances in which we find this country, without highly effective, median governmental clusters, which is the nature of the States, they really have another think coming. In conclusion, what I would say is simply this. I know that Anne will give you a highly pragmatic and sensible case why a lot of the stuff said against federalism does not make as much sense as one might think. What I am saying is that, in addition to that, we need to think at the highest level. We need to think what sort of country, what sort of constitution we want to be living under in a hundred years, and we need to design for that. My view is, the answer is federalism. But, whatever the answer is, it has to get there in the long term, not the short. ▲