

AUSTRALIAN FEDERAL DEMOCRACY

LAW ORATION 2015

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1. Introduction

It is an honour to have been asked to deliver the Law Oration for 2015. I thank both the Victoria Law Foundation and Melbourne Law School for the invitation to do so. I am pleased to have the opportunity to speak on such a significant occasion, to such a distinguished audience, on a topic that I consider both topical and important.

The theme of the oration is Australian federal democracy. It builds on the premise that, in 21st century Australia, as elsewhere, democracy is the principal rationale for federalism. Federalism offers the means by which elected government can take place at different levels, in a manner responsive to the needs of different constituencies, in complex societies, often spread over large areas, struggling with the anonymity of globalisation. Federalism and democracy are intertwined in the Constitutions of all federated democracies, including the Constitution of Australia. They shape each other, so as to produce a compound arrangement best described as federal democracy. The goal is to ensure that federalism and democracy are mutually enhancing. Changes in one will have implications for the other.

I have been interested in the intersection between federalism and democracy for much of my professional life. The subject has recently been placed on the public agenda, however, by a project to reform the Australian federation, initiated by the Commonwealth Government in 2014.¹ Such a project is potentially both timely and useful. It needs a clear purpose, however, by reference to which problems can be identified and proposals for change developed. These are also important issues that deserve to be canvassed in the public domain and not settled between governments in house. The nexus between federalism and democracy supplies such a purpose: or so I have argued, in collaboration with my colleague, Michael Crommelin.² My purpose here is to examine the Australian federation, in form and operation, from that perspective, as a guide to direction that any change might take.

¹ Australian Government, *Reform of the Federation White Paper* website: <https://federation.dpmc.gov.au/>

² Cheryl Saunders and Michael Crommelin, 'Reforming Australian Federal Democracy', *Meanjin Quarterly*, Vol 74, No 3, Spring 2015.

I will begin, however, by placing Australian federalism in the context of comparative federal experience. The details of the design of both federalism and democracy vary across the federations of the world and the dynamics of federal democracy necessarily differ for this reason. Nevertheless, all federations that also are democracies are concerned to ensure that the two sets of principles interact productively.³ Understanding how this occurs elsewhere can throw light on federal democracy in Australia as well.

2. Federal democracy in comparative perspective

Deep devolution that is constitutionally protected is in vogue in countries across the world, some of which describe it as federalism and some of which do not. Devolution sometimes is driven by ethnic divisions. Increasingly, however, it is simply associated with good governance. It offers relief from the typical centralisation of power and resources in national capitals that often are remote, physically, culturally or both. It is a reaction against globalisation, to the extent that it enables more localised ownership of some public decisions, the choice ideally guided by the now-fashionable principle of subsidiarity. It responds to demands for innovation and agility. It contributes to checks and balances. It is an integral element of the ongoing struggle to make representative democracy work effectively in the conditions of the 21st century.

At the risk of overgeneralisation, it is possible to identify two broad approaches to designing a federation. The federal model, turn, should be chosen with an eye to the form of representative democracy with which it must co-exist. This will usually be presidential, parliamentary, or a combination of the two.

The first broad approach to federal design can be described as thematic, or dualist. The United States and Canada are (quite different) examples. The United Kingdom is another, insofar as legislative as well as executive authority is devolved to Scotland, Northern Ireland and Wales.⁴

Under this approach, areas of governmental responsibility are allocated by the Constitution between two or more spheres of government, typically by reference to legislative power, as the principal manifestation of sovereign authority. Each sphere of government is accountable to its own body of voters for legislation, administration and (often) adjudication in the areas of responsibility constitutionally allocated to it. The manner of accountability depends on the forms of representative democracy operating in each sphere. In parliamentary systems, which are the most common, Parliaments are the only elected institutions and accountability lies through them to the relevant

³ Johanne Poirier, Cheryl Saunders, John Kincaid (eds) *Intergovernmental Relations in Federal Systems* (OUP, 2015)

⁴ Scotland Act 1998 (UK); Northern Ireland Act 1998 (UK); Government of Wales Acts 1998, 2006 (UK).

configuration of the people. A second chamber in a bicameral central legislature is likely to reflect the federal character of the country in some way, but may not otherwise play a distinctive federal role. There are multiple ways of dividing governmental responsibilities along thematic lines for federal purposes, drawing on different combinations of exclusive and concurrent power.

Concurrency itself means different things in different systems; a matter to which I will return.⁵

By definition, under a dualist approach to federal design, each sphere of government has a full set of institutions to carry out its responsibilities including executive government, legislature, administration and, usually, courts. Authority to tax and spend typically is divided in the same way as other areas of responsibility, in the sense that each sphere is empowered to raise moneys for its own purposes, in a manner for which it is democratically accountable.⁶ Governments may co-operate with each other, vertically or horizontally, across jurisdictional boundaries, in exercising the powers constitutionally assigned to them. Co-operation risks blurring the lines of democratic accountability that operate within jurisdictions, however, on which this model relies.

The second approach to federal design is functional or integrated. It may have thematic features too, in the sense that some areas of responsibility are assigned to one or other spheres of government for the purposes of both legislation and administration. The defining characteristic of this design, however, is that it also allocates authority by reference to function, conferring (sometimes extensive) legislative power on the centre but assigning to the sub-national sphere of government authority to administer most central legislation as of right. Administration may involve considerable discretion in adapting central legislation to local conditions. The sub-national governments are accountable to their own voters for the performance of their constitutional responsibilities, including both the administration of central legislation and the enactment and administration of their own. They are not directly accountable to the centre except, perhaps, in extreme circumstances, although both spheres may have an obligation to act in good faith.⁷ It follows that, in federations of this kind, administrative agencies are concentrated in the sub-national sphere. Consistently with this model, the power to impose taxation, through legislation, may be assigned solely or at least largely to the centre. In this case, taxes may be collected locally, however. The proceeds in any event are considered to belong to both spheres, to be allocated between them as the Constitution requires.

⁵ Anna Dziedzic and Cheryl Saunders, 'The Meanings of Concurrency' (August 20, 2015), forthcoming in Nico Steytler (ed), *Concurrent Powers in Federal Systems*, (Martinus Nijhoff Publishers, 2015), <http://ssrn.com/abstract=2648673>

⁶ Cheryl Saunders, "Budgetary Federalism: Balance of Interests and Contradictions" in International Academy of Comparative Law, *Convergence of Legal Systems in the 21st Century*, (Bruylant, Bruxelles, 2006), 1473

⁷ Anna Gamper, 'On Loyalty and the Federal Constitution', (2010) 4 *Vienna Online Journal on Constitutional Law* 157

Many federal-type systems have elements of functional design. India, South Africa, Switzerland and Austria are examples, in all of which sub-national governments administer a significant body of central legislation, in addition to their own. The prototype of this approach to federal design, however, is Germany. The German Constitution confers extensive legislative power on the centre.⁸ The sub-national sphere, the *Länder*, have limited legislative power, which nevertheless includes education and culture. *Land* authority extends, however, to the administration of most central legislation, including the collection of centrally imposed taxes.⁹ And what effectively is a second chamber of the central legislature, the *Bundesrat*, is comprised of representatives of *Land* governments, enabling the *Länder* to contribute directly to the formulation of the laws that they will administer and internalising co-operation within the central legislative process.¹⁰

I will move in a moment to place Australia within this schema of federal design. First, however, there are two issues on which I have touched already that require more elaboration before considering Australia.

The first is the concept of concurrent legislative power.¹¹ Almost every federation uses the device of concurrent power, although generally as a supplement to the allocation of power exclusively to the centre, the regions or both. Wherever it is used, it invokes the idea that the power may be exercised by either sphere of government subject to a principle of paramountcy, generally although by no means invariably in favour of the centre, if two otherwise valid laws collide. This similarity is deceptive, however, because concurrency imports other understandings as well. Sometimes, as in Germany, it is used to indicate matters on which central legislation may be enacted if conditions make central legislation necessary within the meaning of the Constitution; a criterion that may be justiciable.¹² Sometimes, instead, as in Italy, concurrent powers have been understood to authorise only framework legislation by the central state.¹³ In a variation of a different kind sometimes, as in India, concurrent legislative powers are used to designate the central laws that, as a default position, are administered by the Indian States.¹⁴ Sometimes, as in the United States, concurrency has become a useful term to describe broad and general areas of legislative authority that are conferred on the centre, only parts of which are likely to be subject to central legislation at any one time, leaving the rest to the States. It is sometimes claimed that provision for concurrent power in an

⁸ *Grundgesetz*, Articles 73, 74.

⁹ *Grundgesetz*, Article 83 ff

¹⁰ *Grundgesetz*, Article Part IV

¹¹ See generally, Dziedzic and Saunders, *op.cit.*

¹² *Grundgesetz*, Article 72(2); see Markus Rau, 'Subsidiarity and Judicial Review in German Federalism: The Decision of the Federal Constitutional Court in the Geriatric Nursing Act Case' [2003] *Public Law* 223.

¹³ *Constitution of the Italian Republic* Article 117

¹⁴ *Constitution of India*, Article 73(1)(a)

indicator that the federation is intended to be based on a culture of co-operation. Whether this is so or not depends critically on the understanding of what concurrency means.

The second issue is this. Federal systems tend to be dynamic in their operation. Shifts in ideas who can best do what may occur in consequence of pressures of a wide range of kinds: economic, political, social and global. Shifts that are significant and lasting can be accommodated through constitutional change, constitutional interpretation or, sometimes, intergovernmental co-operation. Some modern federal Constitutions provide mechanisms for co-operation. Informal co-operative mechanisms also are widely used, but notoriously co-exist precariously with constitutional norms, including the democratic values of accountability, transparency, responsive public decision-making and the rule of law.

There is a sense arising from global federal experience over the past few decades that intergovernmental co-operation has too often lost sight of these values, giving rise to a form of democratic deficit. The result has been a spate of experimentation, in federations across the world, designed to redress the balance. Remedial measures typically include strengthening of central and sub-national legislatures, to play a role in co-operation, with the inevitable concomitant of greater transparency. They also include the formalisation of co-operative decision-making processes.¹⁵ A very recent report from the Scottish Parliament illustrates the genre.¹⁶ The report recommends, *inter alia*, a statutory underpinning for the principles of accountability and transparency in relation to intergovernmental arrangements; an obligation on the Scottish executive to provide information to the legislature on intergovernmental agreements; and the inclusion in the Memorandum of Understanding between the United Kingdom and Scotland, which seeks to manage the operation of devolution in practice, of procedures to facilitate scrutiny by the Parliaments.

3. Federal democracy in Australia

The Commonwealth Constitution establishes Australia as a dualist federation, with six, viable States (and now two territories) comprising the sub-national sphere of government. Its dualist characteristics are pronounced. Not only does each sphere of government have a full set of institutions, including administrative agencies, but each has its own Constitution, allowing it considerable leeway in organising its own affairs, to the point of adopting individual rights protection regimes. Considered in this light, Sir Owen Dixon's observation was perceptive when he

¹⁵ A recent analysis is in Johanne Poirier and Cheryl Saunders, 'Comparative Experiences of Intergovernmental Relations in Federal Systems' in Johanne Poirier, Cheryl Saunders and John Kincaid (eds), *op.cit.*

¹⁶ 8th Report 2015: *Changing Relationships: Parliamentary Scrutiny of Intergovernmental Relations*
<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/92901.aspx>

referred to the 'foundation of the Constitution' as 'the conception of a central government and a number of State governments separately organized'.¹⁷

Consistently with dualist assumptions, the Constitution leaves each sphere of government to raise moneys for its own purposes, with the important exception of duties of customs and excise which were vested exclusively in the Commonwealth from the start, by section 90. The fiscal imbalance to which this arrangement gave rise was met by the recognition in section 94 that the result would leave the Commonwealth with a 'surplus' in proportion to its own expenditure responsibilities, requiring its regular redistribution to the States on a basis that was 'fair'. For practical purposes, section 94 has long since been a dead letter, but it has interpretive significance, insofar as it evidences a constitutional scheme that for reasons of convenience the Commonwealth might raise moneys surplus to its own responsibilities to which the States are entitled for expenditure on theirs.¹⁸

Dualist federalism in Australia is coupled with parliamentary government. The mechanisms for democratic accountability therefore lie through Parliaments in both spheres to the people, more or less in accordance with the principles of parliamentary government that apply in the 'union' of the United Kingdom, from which they were derived. But not quite. Modifications that shape the concept of Australian federal democracy include the extensive powers of a Senate, representing the States equally and in which the government does not necessarily have a majority. They also include the implication to which section 94 gives rise that different spheres of government may have democratic responsibility for raising funds by taxation and for spending them. The Constitution provides several specific mechanisms for intergovernmental co-operation, including the reference power in section 51(xxxvii) and the grants power in section 96. Notably, however, both are consistent with the role of Parliament as the critical link in the accountability chain. References are made from Parliament to Parliament under s.51 (xxxvii) and the authority to determine conditions on which grants may be made under section 96 is formally conferred on the Parliament of the Commonwealth.

The Australian Constitution adopts a simple scheme for the federal allocation of areas of government responsibility. Consistently with the logic of dualism, all three forms of public power, legislative, executive and judicial, are divided between the Commonwealth and the States.¹⁹ The principal emphasis, however, in Australia as elsewhere, is placed on the allocation of legislative power, as the basis for the enactment of laws to be administered by the enacting jurisdiction. This division is effected by identifying the powers of the Commonwealth, leaving the remainder to the

¹⁷ *Melbourne Corporation v Commonwealth (State Banking case)* (1947) 74 CLR 31

¹⁸ *New South Wales v Commonwealth* (1908) 7 CLR 179

¹⁹ *Commonwealth Constitution* sections 51, 52, 61, 73, 75, 76

States. Most, although not all, of the Commonwealth powers are understood to be concurrent. While this aspect of the design of the Australian Constitution clearly was modelled on that of the United States, the Australian list of legislative powers is longer, more specific and, on their face, at least, appropriate for a national sphere of government. A perception that the legislative powers assigned to the Commonwealth are inadequate may have been encouraged by the jurisprudence of the early years of federation, when the High Court drew highly restrictive implications from the otherwise accurate observation that the scheme of the Constitution is to reserve at least some legislative powers to the States. The reaction against that doctrine, in the *Engineers* and associated cases,²⁰ eventually caused interpretive method to veer to the other extreme, leaving the concept of 'connection' as the primary touchstone by which to determine the validity of Commonwealth law and precluding any consideration of the rationale for the federal allocation of powers. The immediate result has been to vastly expand the legislative powers of the Commonwealth and, with them, the scope of federal executive power and federal jurisdiction. There is a question whether the understanding and use of concurrent powers in Australia is sufficiently distinctive to be recognised as yet another variation on the concept for comparative purposes. There is certainly nothing particularly co-operative about the unilateral exercise of Commonwealth legislative power except, perhaps, where a Commonwealth statute explicitly saves State laws or is designed so as to be rolled back where State legislation meets prescribed standards.

Over the long century since the Constitution came into effect, two developments have had a marked impact on the operation of the Australian federation, in ways that also have implications for democracy.

The first is the extent of reliance on intergovernmental co-operation. Co-operation serves a range of purposes in Australia, from information exchange to securing deep uniformity in the exercise of legislative power in areas of State or shared responsibility. Many co-operative projects have beneficial results, when assessed in terms of the public interest, but co-operation is not an end in itself. In each case, ideally, consideration should be given to whether co-operation is needed and the form that it should take. Also to be weighed in the balance, in the course of such deliberation, are the values of innovation, diversity, and the likely impact of intergovernmental co-operation on democratic accountability, as it cuts across jurisdictional lines.

Relatively little is done in Australia either to calibrate recourse to co-operation or to mitigate its effects. The principal tools for co-operation all serve to augment the authority of the executive branch and in particular the authority of the Commonwealth executive. Meetings of ministers, with

²⁰ *Amalgamated Society of Engineers v Adelaide Steamship Co* (1920) 28 CLR 129

COAG at their apex, provide fora in which major decisions affecting Australians ostensibly are taken.²¹ They account to no-one, however, and the dependence of most of them on logistical support from the Commonwealth administration makes it difficult to determine whether and to what extent they genuinely involve collective decisions at all. Formal intergovernmental decisions take effect as soft law in intergovernmental agreements: purely executive instruments that regulate significant areas of governmental activity. Agreements always underpin the now numerous and highly complex intergovernmental legislative schemes; they may be the vehicle through which conditions are attached to funding (of which, more soon); they often provide the framework for joint administrative exercises. There is no mechanism for their regular, accessible publication, however, even when they amplify the terms of legislation. Even treaty-making procedures are more advanced, from the standpoint of transparency and parliamentary involvement. Parliaments are involved in co-operative arrangements only when legislation is necessary and then they are confronted with a *fait accompli*. Under the most complex form of legislative scheme, involving the automatic adoption of an agreed template law by all participating jurisdictions, all Parliaments effectively surrender their legislative power to a ministerial council.

To be fair, there have been some improvements in recent years, which should be acknowledged and welcomed. COAG communiqués are a little more informative than they once were and are made publically available on line.²² Major intergovernmental agreements can be found on the COAG website.²³ Horizontal co-operation, once rare, is now increasing: the Legal Profession Uniform Law is an example. ‘Applied law compilations’ in which the Commonwealth is a party now can be found on ComLaw, under the mysterious rubric of ‘other’. ‘Laws’ that result from horizontal co-operation alone may be on the website of the template State.²⁴ The website of the New South Wales Parliamentary Counsel also hosts the website of the Australasian Parliamentary Counsel’s Committee, which is a mine of information about the 86 legislative schemes that are presently in operation and the procedures followed to bring them into effect.²⁵ But there is still much more to be done before what has in reality become a regular process of law-making and administration is accommodated to the Australian framework for democracy and the rule of law.

²¹ There are current eight such councils, in addition to COAG itself: https://www.coag.gov.au/coag_councils. They are currently designated ‘COAG Councils’. The designation, number and responsibilities of Councils change, sometimes frequently, presumably through executive agreement.

²² COAG meeting outcomes: https://www.coag.gov.au/meeting_outcomes

²³ Agreements and Reporting: https://www.coag.gov.au/agreements_and_reports

²⁴ Thus the Legal Profession Uniform Law is published on the New South Wales legislation website, linked to the Legal Profession Uniform Law Application Act 2014 (NSW).

²⁵ Australasian Parliamentary Counsels’ Committee: <http://www.pcc.gov.au/>; see in particular ‘National uniform legislation – Acts of jurisdictions implementing uniform legislation, <http://www.pcc.gov.au/uniform/National%20Uniform%20Legislation%20table.pdf>

The second and even more significant development concerns the extent of what now is called the federal fiscal imbalance. At the heart of this phenomenon is the de facto power of the Commonwealth to raise much of the revenue for public purposes in Australia, juxtaposed with the constitutional responsibility of the States for many of the most costly but significant governmental programs including education, health, housing and public infrastructure. From a dualist perspective, the fiscal settlement in the Constitution was imperfect from the outset, although a balance was achieved for a short period after the Financial Agreement of 1927. This was overtaken on two fronts. The first was the introduction of the uniform income tax arrangements in 1942, their indefinite extension after the war, and confirmation of their validity by the High Court.²⁶ The second was the progressive expansion through judicial review of the meaning of the exclusive Commonwealth power to impose duties of excise until finally it came to encompass all taxation of goods.²⁷ The result was to deny to the States the two most significant sources of revenue, on which the sub-national orders in other dualist federations rely. The imbalance has since been worsened by continuing pressure on the States to abandon some of their remaining tax sources on the grounds of their claimed deleterious effects.

The consequences of the fiscal imbalance for federal democracy in Australia need to be considered for their effects in both the Commonwealth and State spheres.

The impact on the latter is more familiar. The fiscal imbalance makes State governments dependent on Commonwealth transfers for their ability to function effectively, generally and in relation to their major areas of constitutional responsibility. There was no tailored constitutional arrangement for this purpose, once the surplus revenue provision was disabled. The fortuitous existence of section 96, however, provided a mechanism through which 'financial assistance' could be provided including, if necessary, 'on such... conditions as the [Commonwealth] Parliament thinks fit'. Ironically, the presence in the Constitution of section 96 has inhibited judicial acceptance of an implied Commonwealth spending power of the kind that has been found in Canada and the United States.

Section 96 has been used to transfer moneys from the Commonwealth to the States since the 1920s. Huge sums now are involved each year: Commonwealth transfers to the States and territories in 2015-16 are estimated at \$107.7 billion.²⁸ About half of the Commonwealth assistance comes as general grants, without conditions: at the moment, these are equated to the proceeds of the Goods

²⁶ *South Australia v Commonwealth* (1942) 65 CLR 373; *Victoria v Commonwealth* (1957) 99 CLR 575

²⁷ *Ha v New South Wales* (1997) 189 CLR 465

²⁸ Australian Government, *Budget Paper No 3, 2015-2016*, Executive Summary, http://budget.gov.au/2015-16/content/bp3/html/bp3_01_executive_summary.htm

and Services Tax (GST). It remains to be seen whether the principle will hold if the GST is increased. General revenue funds now are distributed between all States by reference to fiscal equalisation principles that take into account State revenue raising disabilities and expenditure needs. The remaining grants come with conditions attached, governing the purpose of expenditure, the manner of expenditure, required outcomes or as incentive payments. These grants structure the way in which most State constitutional responsibilities are carried out. The conditions themselves, however, are not necessarily accessible in the public domain. Despite the wording of section 96, they are rarely determined or even scrutinised by the Commonwealth Parliament. They are accepted by State governments with no reference to Parliament at all.

The fiscal imbalance leaves the Commonwealth with a considerably larger proportion of public revenue than its constitutional responsibilities warrant. This has had a range of consequences, two of which require consideration for present purposes. First, it has enabled successive Commonwealth governments to extend their policy influence into most areas of State responsibility through conditions attached to grants. Reliance on conditional rather than general purpose grants has political attractions for elected Members of Parliament in the Commonwealth sphere. It also sometimes is justified as a corollary of the traditional principle that the government responsible for raising revenue must also be responsible for its expenditure. This principle necessarily is modified by context of federal democracy, given the constitutional scheme for State reliance on some revenue redistribution. The second consequence is that its relative affluence has encouraged the Commonwealth over the years to engage in direct expenditure on a wide range of matters beyond the scope of its legislative power, generally in areas of State responsibility, relying on the executive power in section 61. The *Williams* decisions have now put a brake on this option,²⁹ in ways that have been beneficial for federal democracy, although it also is apparent that old habits continue to die hard.³⁰

Against that background, it is now possible to take stock of Australian federalism by reference to the comparative federal models that I outlined earlier.

²⁹ *Williams v Commonwealth of Australia* [2012] HCA 23; *Williams v Commonwealth of Australia* [2014] HCA 23.

³⁰ Some insight into new, questionable expenditure items can be gleaned from the Delegated Legislation Monitors of the Senate Standing Committee on Regulations and Ordinances, reporting on regulations made under the Financial Framework Supplementary Powers Act 1997 (Cth), which now purports to provide adequate statutory support, through regulations, for Commonwealth spending programs that lack any other legislative base. See, for example, Monitor No. 6 of 2015, reporting on the addition of five new expenditure items in the field of education: at page 10.

In terms of the Constitution, Australia remains a dualist federation. The mechanisms for democratic accountability continue to centre around the assumption that governments are responsible to the people, through their Parliaments, for matters allocated to them under the Constitution. Judicial review makes comparable assumptions. In fact, however, many areas of legislative power retained by the States are now constrained by participation in uniform legislative schemes. Many more are exercised in accordance with conditions attached to Commonwealth grants. Most of the operative decisions for both purposes are made by governments acting collectively in ministerial meetings or bilateral dealings or by the Commonwealth executive unilaterally. Opportunities for innovation and local responsiveness are squeezed. There is very little involvement of the Parliaments in either sphere. In the absence of parliamentary involvement, accountability to the public also is limited, opaque and diffuse.

In practice, Australian federalism now has a significant functionalist dimension. This is even, occasionally, formalised. In one startling example, the opening ‘principle’ of the Federal Financial Relations Agreement of 2011, which was the last attempt at wholesale federalism reform, provides that: ‘The primacy of State and Territory responsibility in the delivery of services in these areas is implicit in the Constitution of the Commonwealth of Australia’.³¹ This is not functionalism as it operates elsewhere, however. It does not involve State administration of Commonwealth legislation as a means of adapting it to local conditions. Rather, it operates almost exclusively in areas of State responsibility, further reducing the opportunity for responsiveness to local preferences and needs. Because of this, it involves the duplication of administration in areas of State responsibility at the Commonwealth and State levels. The national standards that apply in areas of State responsibility are set by executive processes of one kind or another, for which there is little public accountability. There is a growing assumption that the States should be accountable to the Commonwealth, directly or through COAG, rather than to their own voters, for the execution of State responsibilities wholly or partly funded by Commonwealth revenues. Occasionally, it is suggested that they should also be responsible to the Commonwealth for the expenditure of untied grants on the expenditure needs that contributed to their share of revenues under the equalisation principles. Voters are confused about who is responsible for what. The incentives for State governments to innovate, or aspire to excellence, are undercut. And the Commonwealth government is, at best, only indirectly responsible to voters for the acceptability of its policies in areas of State responsibility. Moneys for State programs may be more readily cut in Commonwealth budgets. Commonwealth policy can be less

³¹ *Intergovernmental Agreement on Federal Financial Relations* 2011, clause 6, http://www.federalfinancialrelations.gov.au/content/intergovernmental_agreements/IGA_federal_financial_relations_aug11.pdf

responsive to voter preferences in areas of State responsibility, where it does not need immediately to manage the fallout.

4. Reforming Australian federalism

There can be no doubt that federalism, as currently practised, erodes the principles of federal democracy in Australia. Equally seriously, it dissipates the opportunities that federal democracy offers. There could be no more important perspective from which to examine federalism reform. And once this is accepted, the way forward seems obvious, although it may be no easier for that.

In the *Meanjin* article to which I referred earlier, Michael Crommelin and I identified 10 principles by which federalism reform should be guided.³² I attach these for convenience. Their general effect is as follows..

The starting point is to understand the concept of federal democracy, its significance and its potential. Australians are not accustomed to thinking of federalism and democracy as being linked in a way that, effectively, provides the foundation for their constitutional arrangements. In fact, however, the notion is straightforward enough. Multi-level government infuses our democratic arrangements. If we can make it work, so that each sphere of government is both responsible and responsive, it has the potential to revitalise representative government as well as delivering the benefits that federalism can bring.

To take advantage of federal democracy it is necessary to come to grips with the phenomena of intergovernmentalism and fiscal imbalance that have combined so substantially to undermine it. This cannot be an exercise in turning back the clock, however. Whatever remedies are adopted should seek to retain the advantages inherent in these developments while mitigating their defects from the standpoint of federal democracy.

Of course, intergovernmental co-operation should continue, where it is in the public interest. But the decision to resolve problems in this way needs to be taken deliberately and publically, in the light of competing considerations. And the intergovernmental machinery that is used for the purpose should be refashioned, in the interests of accountability and effectiveness. Given that co-operation is here to stay, the mechanisms through which it occurs should be integrated into the constitutional landscape, rather than evolving ad hoc, to be refashioned at will. At the very least, the network of ministerial meetings should be given a dedicated, supporting infrastructure that is appropriate for an intergovernmental organisation. Agreements and scheme legislation should be

³² Cheryl Saunders and Michael Crommelin, 'Reforming Australian Federal Democracy', *Meanjin Quarterly*, Vol 74, No 3, Spring 2015

acknowledged as having a place in the Australian legal system and handled accordingly. Each government should be publically accountable to its own cabinet and Parliament for decisions taken in the intergovernmental sphere.

The problem of the fiscal imbalance, which lies at the heart of much of the present malaise, is less tractable. There are two distinct ways forward, which are not necessarily mutually exclusive. One is to reallocate authority for revenue-raising so as to reduce the imbalance. This is attractive in terms of constitutional structure and political culture but may now be a step too far. The other is to leave the imbalance in place but to readjust our understanding of what it means. This would involve accepting that the Commonwealth raises money on behalf of both spheres of government as a matter of convenience, but that this has no necessary implications for the distribution or expenditure of the proceeds. In these circumstances, it would be necessary to find a transparent means of allocating revenues between the spheres of government in proportion to their expenditure responsibilities. It is odd, after all this time, how well the principles in section 94 express these goals, even if the means for achieving them were flawed. On either of these scenarios, conditional grants should be minimised. To the extent that they continue, Parliaments should be involved in both setting and accepting the conditions on which they are made.

None of this requires constitutional change. On the contrary, these initiatives would accommodate practice more closely to what the Constitution provides. Constitutional change might nevertheless be useful in due course, on three scores. First, a constitutional framework for the network of ministerial meetings might usefully take the place of the now defunct sections dealing with the interstate commission (ss 101-104). Secondly, authority to execute intergovernmental agreements might be expressly structured by a new section 105B, modelled broadly on the existing section 105A. The advantage would be to extend the capabilities of intergovernmental agreements by, for example, facilitating the creation of joint administrative agencies and massaging the problems of extraterritoriality. A third change might constitutionalise the mechanism for the allocation of revenues between the Commonwealth and the States, by building on and replacing section 94.

I do not underestimate the difficulties of reforming Australian federalism in a way that uses federal democracy as the touchstone. There are major hurdles, in the form of entrenched assumptions, entrenched interests and widespread public ignorance about how these very complex arrangements presently work. Full implementation would require capacity building, in some and, perhaps, all States and a revitalisation of representative democracy at the State level. There would be a host of significant decisions to be made about the extent to which particular policies should continue to be co-ordinated nationally, rather than left to the decision of individual States and local governments

and their people. To what extent if at all, for example, should decisions about urban infrastructure be made nationally rather than by the States and cities into which the infrastructure must fit? How much of the school curriculum should be uniform across Australia and how much left to genuine innovation on the part of the States or individual schools? Does windfarm noise need to be regulated nationally at all? Whatever the outcomes, it would be refreshing to publically consider these issues in these terms.

I do not hold out great hopes that the current formal review process will proceed along these lines. I would be happy to be proved wrong but indications, such as they are, suggest that its horizons are likely to be significantly more limited. That would be a pity, but it would not be the end of the world. There is work to be done, in raising public consciousness about the possibilities of federal democracy. And incremental progress could be made on many of the matters that I have discussed tonight. We should value and acknowledge innovation by State institutions, of which this court is a splendid example. Individual governments and Parliaments in both spheres should be encouraged to adopt measures that enhance accountability for intergovernmental relations in their jurisdictions. The legal profession could press for more transparent and accessible handling of intergovernmental scheme legislation and agreements on the legislation data bases of the Commonwealth and the States. The decisions of the High Court on the scope of inherent executive power have already strengthened the authority of the Parliament vis-à-vis the government on which the scrutiny processes of Parliament should continue to build, with public support.

When Michael Crommelin and I began making the case for federal democracy, we met with a degree of incomprehension. Some pressed on us the claims of efficiency and effectiveness as alternative yardsticks by which to evaluate Australian federalism. This familiar Australian standby, however, arguably is responsible for the problems that we have now and would do nothing to resolve them. Others, occasionally, suggested abolishing the federal system altogether. The impracticality of this course of action makes it a do-nothing option, whatever one's view of its merits. My own is that it would be foolish. One, much less usual reaction was to accuse us of taking too narrow a disciplinary perspective, on the grounds that democracy is a 'lawyers' thing'.

The public response to the possibilities of federal democracy makes it clear that support is much more broad-based than that. It was a pleasure, nevertheless, to canvass these issues with lawyers on the occasion of the Law Oration, which also offered the opportunity to explore and explain some of the more technical aspects of the subject.

TEN PRINCIPLES TO GUIDE FEDERALISM REFORM

1. The purpose of federalism reform should be to invigorate and enrich Australian democracy.
2. In Australia, democracy is organised through different levels of government, each of which derives limited authority to govern from the Australian people, or a segment of them, to whom it is accountable.
3. Democratic accountability relies on the elected Parliaments of the Commonwealth and the States and territories in which public deliberation on significant decisions can take place and through which transparency can be secured.
4. The Australian Constitution confers limited authority on both the Commonwealth and State levels of government having regard to which level of government is more appropriate to do what.
5. Dealings between levels of government must be conducted with the mutual respect, trust and good faith that are due to democratically elected representatives of the Australian people.
6. Intergovernmental collaboration is an integral part of Australian federal democracy when properly used. It should be undertaken only for purposes that are clear and publically justifiable by reference to a specific need, using machinery that is consistent with democratic principle and practice
7. The Australian Constitution provides authority to the Commonwealth level of government to raise the public revenues that are required not only to meet its own constitutional responsibilities but also to assist the States to meet theirs.
8. Each State is accountable to the people of the State for the expenditure of public moneys derived from public revenues raised by the Commonwealth but surplus to its own constitutional responsibilities.
9. Australian federal democracy recognises a principle of solidarity that requires horizontal sharing of public revenues to redress substantial economic disparities among States and territories.
10. The values of the composite concept of Australian federal democracy apply also in relation to other levels of Australian government, including local government, indigenous self-government, city government and territory government.