

# Australian Federalism — Fathered by a Son of Wales

## Public Law Wales

Chief Justice Robert French AC

15 September 2016, Cardiff, Wales

We live in interesting times in the history of the United Kingdom. Its people have voted to leave the European Union at a time when the devolution of legislative powers by the United Kingdom Parliament to Scotland, Wales and Northern Ireland, a process commenced in 1998, is evolving. It is not surprising to find a good deal being written about federalism in the United Kingdom and some of that coming out of Wales. It is no doubt an interest in the possibilities of federalism engendered by the changing landscape of devolution that has led to your invitation to me to speak about it, at least from an Australian perspective.

Wales is a good place for an Australian to speak on that topic because one of the fathers of the Australian Federation, Samuel Griffith, was born not far from here at Merthyr Tydfil in 1845. His family migrated to Brisbane in the colony of New South Wales in 1853. In 1859 the colony of Queensland was carved out of New South Wales. Griffith rose to become the Premier of that Colony, its Chief Justice and in 1903 the first Chief Justice of Australia.

Griffith was a dominant figure in the drafting of the Australian Constitution in 1891 when the first Convention of delegates from the Australian colonies met for that purpose. It is an interesting footnote to Australian constitutional history that in November 1890, a few months before that Convention, as Premier of Queensland he proposed by way of motion in the Queensland Legislative Assembly a federal constitution for that colony involving the creation of three provinces. His motion was a political response to a long-running separatist movement.<sup>1</sup> Griffith proposed executive governments for the provinces and a central 'United Provinces' executive government. Their functions, he said, 'should correspond with the

---

<sup>1</sup> Charles Arrowsmith Bernays, *Queensland Politics During Sixty (1859-1919) Years* (Queensland Government, 1919) 506–24; James A Thomson, 'Drafting the Australian Constitution: The Neglected Documents' (1986) 15 *Melbourne University Law Review* 533.

functions assigned to their respective Legislatures'.<sup>2</sup> Queensland did not itself become a federation but ultimately a State in the Commonwealth of Australia that came into existence in 1901 and about which I wish to say something this evening.

This presentation will offer something of a whistle-stop tour of:

- the nature of federalism;
- the history and structure of the Australian Federation; and
- some of the issues that have emerged from the making of that Federation which illustrate both the benefits and the cost of federation generally.

There will also be reference to the contrast to be drawn between current devolution arrangements in the United Kingdom and federalism and the analogy to be drawn between devolution and the position of Australian self-governing territories, which derive their legislative powers from legislation enacted by the Commonwealth Parliament.

There may of course be some amongst you who have the urge to be the Samuel Griffith of the United Kingdom with a view to doing the same job as he did for Australia. If you have that aspiration an examination of federal systems around the world, including that of Australia, may be of assistance. However, literal translation from one historical political and cultural context to another is fraught with risk. Samuel Griffith demonstrated the risks of literalism in another context when he undertook a translation of the *Divine Comedy*. The translation set out to reproduce Dante's original metre. On the title page Griffith wrote '[a] translation should provide a true photograph of the original.' The photograph yielded some awkward images. A reviewer in the *English Review* published in London in 1912, praised the Chief Justice's modesty, and said that it seemed 'almost ungracious' to criticise the work. However the review continued:

He has given a very faithful and not unpoetic translation. At the same time we cannot pretend to think that the effect produced is at all comparable to that of Dante's magical cadence.<sup>3</sup>

---

<sup>2</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 11 November 1890, 1331 (Samuel Griffith).

<sup>3</sup> 'The Divina Commedia of Dante Alighieri' (1912) 10 *The English Review* 740, 740

One of the lines quoted in the review read '[b]ut when that I the foot of a hill had come to', which was described by the reviewer as 'a line in which no poet could take pleasure.' That and similar lines were said by the reviewer to show 'whither rigid principles of translation lead'.<sup>4</sup> In evaluating federalism by reference to existing federations, it is necessary to take account of their particular contexts.

Australia makes the point. It is different from the United Kingdom. The colonies which formed the Federation are not really equivalent to what might become the polities of a federated United Kingdom. With that disclaimer, our experience can offer some insights among many to be derived from a rather large menu of federal models.

## The spectrum of federalism

The word 'federal' originates with the Latin '*foedus*' which refers to an alliance of individuals or groups to promote specific and common interests. The word was the common root of confederation and federation which were treated as synonyms in dictionaries of the 18th and 19th centuries.<sup>5</sup> Federalism today denotes a class of systems of government in which power is distributed between one national government and several sub-national governments, each responsible for a part of the national territory. The powers of the national and sub-national governments directly affect individuals and other legal persons within their respective areas of responsibility. The distribution of governmental powers between the centre and the regions is effected by a constitution which cannot be amended unilaterally by the central government or by the regions acting separately or together. The distribution of competencies between the national government and the regional governments is interpreted and policed by a judicial authority.<sup>6</sup> That is an important feature of federation. As AV Dicey wrote: 'Federalism ... means legalism — the predominance of the judiciary in the Constitution — the prevalence of a spirit of legality among the people.' He described the courts in a federation like the United States as 'the pivot on which the constitutional arrangements of the country turn.' The bench, he said, 'can and must determine the limits to the authority both of

---

<sup>4</sup> Ibid.

<sup>5</sup> Dimitrios Karmis and Wayne Norman 'The Revival of Federalism in Normative Political Theory' in Dimitrios Karmis and Wayne Norman (eds), *Theories of Federalism: A Reader* (Palgrave Macmillan, 2005) 3, 5–6.

<sup>6</sup> Geoffrey Sawer, *Modern Federalism* (Pitman, 2nd ed, 1976) 1.

the government and of the legislature; its decision is without appeal; the consequence follows that the Bench of judges is not only the guardian but also at a given moment the master of the constitution.<sup>7</sup>

One of Australia's leading constitutional law academics of the 20th century, Geoffrey Sawer, thought any attempt to define federalism was likely to be futile.<sup>8</sup> He preferred the term 'spectrum of federalism' describing the range of responses to the problem of achieving a geographical distribution of the power to govern between units of governments such that they have some guarantee of continued existence as organisations and as holders of power.<sup>9</sup> It was a term taken from a well-known paper by William S Livingston, published in 1952 in which the author said:

[T]here is no specific point at which a society ceases to be unified and becomes diversified. The differences are of degree rather than of kind. All countries fall somewhere in a spectrum which runs from what we may call a theoretically wholly integrated society at one extreme to a theoretically wholly diversified society at the other ... But there is no point at which it can be said that all societies on one side are unitary and all those on the other are federal or diversified.<sup>10</sup>

Federalism under the generic description includes a federation in which a strong central government presides over something close to a unitary State. At the other end of the spectrum strong regional polities under a weak central government may approximate a confederation.<sup>11</sup> The difference is that the latter term usually describes an association of States rather than one State with an internal distribution of powers. That is not to exclude the possibility of a 'federative pact' which is not a federal state, a concept which some have sought to apply to Europe.<sup>12</sup> Livingston also suggested that the essential nature of federalism was to be sought not only in shadings of legal and constitutional terminology but in the forces economic, social, political and cultural that make the outward forms of federalism necessary.

---

<sup>7</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959) 175.

<sup>8</sup> Sawer, above n 4, 2.

<sup>9</sup> Ibid.

<sup>10</sup> William S Livingston, 'A Note on the Nature of Federalism' (1952) 67 *Political Science Quarterly* 81, 88.

<sup>11</sup> Michael Burgess, *Comparative Federalism: Theory and Practice* (Routledge, 2006) 6.

<sup>12</sup> See Charles Leben, 'A Federation of Nation States or a Federal State?' in Christian Joerges, Yves Mény and JHH Weiler (eds), *What Kind of Constitution for What Kind of Polity? Response to Joschka Fischer* (European University Institute, 2000) 99, 110.

His theory was that the essence of federalism lies not in the institutional or constitutional structure but in the society itself. Federal government, therefore, is a device by which the federal qualities of the society are articulated and protected.<sup>13</sup>

Federalism has a particular application in the world today in multi-ethnic societies as a constitutional form which can accommodate ethnic or cultural diversity in distinct territorial concentrations within one national polity. A federated Britain might to some degree reflect that kind of application. Australia does not fall into that category. It was not a federation born out of the need to provide a *modus vivendi* between different geographically defined ethnic and linguistic communities. Diversity was not on the nation-building agenda. Nor was social inclusion. There was very little recognition in the Constitution of the position of Indigenous people except to marginalise them for electoral purposes<sup>14</sup> and to expressly carve them out from the application of the Commonwealth power to make special laws for the people of particular races.<sup>15</sup> That carve-out, which had left the States as the principal repositories of the power to make laws with respect to Aboriginal and Torres Strait Islander peoples, was removed by referendum in 1967.<sup>16</sup> Its removal conferred legislative power with respect to Indigenous Australians on the Commonwealth Parliament. It marked an important step forward in the evolution of national attitudes towards them.

Against that background let me offer you a potted history of the way in which the Australian Federation came into existence.

## The pre-federation colonies

The Australian colonies that came together in the 1890s to create a Constitution for a continent began their existence in 1786 when New South Wales was designated by the British Crown as a place to which British convicts might be transported.<sup>17</sup> 1823 saw the first appointed local legislative body in New South Wales and the establishment in that colony of a Supreme Court.<sup>18</sup> Tasmania was separated from New South Wales in 1825 to form a

<sup>13</sup> Livingstone, above n 8, 83–4.

<sup>14</sup> By the device of excluding 'aboriginal natives' from a count of the people of the Commonwealth or of a State or other part of the Commonwealth: Constitution, s 127.

<sup>15</sup> Constitution, s 51(xxvi) (as made).

<sup>16</sup> Robert French, 'The Race Power: A Constitutional Chimera' in HP Lee and George Winterton, *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 180–212.

<sup>17</sup> Declaration by Order in Council in 1786 pursuant to *Transportation, etc Act 1784*, 24 Geo III, c 56.

<sup>18</sup> *New South Wales Act 1823*, 4 Geo IV, c 96.

separate colony.<sup>19</sup> In 1855, Victoria was separated out of the Colony of New South Wales under the provisions of the Imperial Statute known as the *Australian Constitutions Act 1850* (Imp). Common form constitutions were established in New South Wales and Victoria in the same year. In 1859, Queensland separated out of New South Wales by operation of Letters Patent and an Order in Council. South Australia was created as a Province in 1834 by Imperial Statute.<sup>20</sup> Western Australia was established as a colony by Imperial Statute in 1829.<sup>21</sup>

At the time of the federation movement in the 1890s, the Australian colonies were self-governing. Western Australia was the last to achieve that status in 1893. Their legislatures all derived their legal authority directly or indirectly from Acts of the Imperial Parliament. They were subject under the *Colonial Laws Validity Act 1865* (Imp) to the sovereignty of the United Kingdom Parliament whose laws, extending expressly to the colonies, would prevail by paramount force. Ironically, the *Colonial Laws Validity Act 1865* had been enacted to overcome persistent invalidation of South Australian statutes for inconsistency with United Kingdom law by Justice Boothby of the Supreme Court of South Australia.<sup>22</sup> He was subsequently removed from office.<sup>23</sup>

## The Conventions

Conventions of representatives of the colonies came together to discuss and draft an Australian Federal Constitution in the 1890s. The concerns that brought them together included foreign affairs, immigration, defence, trade and commerce and industrial relations. A draft Constitution Bill, prepared by Andrew Inglis Clark, Samuel Griffith and others was adopted by the 1891 Convention. However it failed to gain general acceptance with the colonial legislatures. There was a degree of distrust of it as the work of a rather conservative body only indirectly representative of the people and without any detailed mandate even by the parliaments which created it.<sup>24</sup>

---

<sup>19</sup> This occurred by Order in Council pursuant to s 44 of the Act of 1823 which authorised separation of Van Diemen's Land from New South Wales.

<sup>20</sup> *South Australia Colonisation Act 1834*, 4 & 5 Will IV, c 95.

<sup>21</sup> *Government of Western Australia Act 1829*, 10 Geo IV, c 22.

<sup>22</sup> Bradley Selway, *The Constitution of South Australia* (Federation Press, 1997) 7–8.

<sup>23</sup> South Australia, *South Australian Government Gazette Extraordinary*, No 33, 29 July 1867 737–9.

<sup>24</sup> John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 144.

Nevertheless the Federation movement continued and was restarted in earnest in 1893 with a further round of Conventions in 1897 and 1898. A revised Constitution Bill was adopted by a National Convention of colonial delegates in March 1898 and submitted to a popular vote — twice before the requisite majorities were obtained. The Bill was then submitted to the Imperial Parliament together with addresses from the Colonial Legislatures. Subject to some relatively minor changes, the Bill was passed by both the House of Commons and the House of Lords and on 9 July 1900 it received the Royal Assent as the *Commonwealth of Australia Constitution Act 1900* (Imp). The Constitution itself was found in s 9 of that Act.

The formal legal authority of the Constitution on 1 January 1901 derived from the legislative power of the Imperial Parliament. Sir Owen Dixon, a former Chief Justice of the High Court, said of it:

It is not a supreme law purporting to obtain its force from the direct expression of a people's inherent authority to constitute a government. It is a statute of the British Parliament enacted in the exercise of its legal sovereignty over the law everywhere in the King's Dominions.<sup>25</sup>

Australia at the beginning of its existence was, in truth, still a self-governing colony. The move to full independent nationhood proceeded by steps with executive independence in foreign relations, as a matter of convention, effected in 1926 and legislative independence at the Commonwealth level in 1942 with the adoption of the *Statute of Westminster 1931* (Imp) under which the British Parliament effectively renounced its legislative power under the *Colonial Laws Validity Act* in so far as it affected the Commonwealth.<sup>26</sup> Rather bizarrely, that legislative power continued to extend to the States for reasons to do with State political paranoia about the Commonwealth. The final umbilical cords, including that of the *Colonial Laws Validity Act*, were cut by the *Australia Acts* of 1986. At that time also the last avenue for appeals to the Privy Council from State courts was closed off.

Much else has changed since the Constitution came into existence. Contemporary Australia is a multi-ethnic society comprising people from 180 different countries and a

<sup>25</sup> Owen Dixon, 'The Law and the Constitution' (1935) 51 *Law Quarterly Review* 590, 597.

<sup>26</sup> *Statute of Westminster Adoption Act 1942* (Cth).

population of whom nearly half were born overseas or had one parent born overseas. Its ethnic diversity is a product of immigration. Cultural and ethnic diversity and the special position of Australia's Indigenous peoples give rise to issues to which all levels of government must respond and respond co-operatively in order to avoid overlap and duplication.

## The shape of Australia's Constitution

Australia's Federal Constitution confers legislative power on the Commonwealth Parliament with respect to enumerated topics set out in s 51. Although for the most part those powers are concurrent with the legislative powers of State Parliaments, they are paramount. A State law inconsistent with a Commonwealth law is invalid to the extent of the inconsistency by operation of s 109 of the Constitution. By reason of that paramountcy, the broad judicial interpretation of Commonwealth legislative powers, its financial strength as a primary revenue raiser deriving from its taxation power and the power to make conditional grants to the States, the Commonwealth is the dominant party in the Federation. In 1920, in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*<sup>27</sup> the High Court held that Commonwealth legislative power was to be interpreted broadly and that the Commonwealth could enact legislation affecting States and their agencies. The decision marked a significant departure from previous decisions of the High Court when Sir Samuel Griffith was Chief Justice and which had interpreted Commonwealth powers narrowly so as not to impact upon the 'reserved' powers of the States.

Some of the powers conferred upon the Commonwealth Parliament have been interpreted as ambulatory and enable it effectively to legislate with respect to subjects outside the enumerated list. Leading examples are the taxation power,<sup>28</sup> the external affairs power<sup>29</sup> and the corporations power.<sup>30</sup> Nevertheless, unlike the United Kingdom, Australia is not a unitary State and Commonwealth powers do not cover all the matters which might be the

<sup>27</sup> (1920) 28 CLR 129 ('*Engineers' Case*').

<sup>28</sup> Constitution, s 51(ii); *South Australia v Commonwealth* (1942) 65 CLR 373 ('*First Uniform Tax Case*'); *Victoria v Commonwealth* (1957) 99 CLR 575 ('*Second Uniform Tax Case*'); *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1; *Ray Morgan Research Pty Ltd v Federal Commissioner of Taxation* (2011) 244 CLR 97.

<sup>29</sup> Constitution, s 51(xxix); *R v Burgess; Ex parte Henry* (1936) 55 CLR 608; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*'); *Richardson v Forestry Commission* (1988) 164 CLR 261; *Victoria v Commonwealth* (1996) 187 CLR 416 ('*Industrial Relations Act Case*').

<sup>30</sup> Constitution, s 51(xx); *New South Wales v Commonwealth* (2006) 229 CLR 1 ('*Work Choices Case*').



subject of legislation. Moreover there are limits imposed on the legislative power of the Commonwealth and the States by express guarantees and prohibitions and judicially developed doctrines. Those doctrines include the proposition that the Commonwealth cannot make a law which will destroy or weaken the functioning of the States or their capacity to govern. That important qualification was developed in a number of cases dating back to 1947.<sup>31</sup>

A central element of the Constitution was the creation of an economic union in which the States and their people were accorded formal equality. Accordingly, trade, commerce and intercourse among the States is 'absolutely free'.<sup>32</sup> The Commonwealth Parliament has exclusive power with respect to customs, excise and bounties.<sup>33</sup> It was to impose uniform duties of customs within two years after its establishment.<sup>34</sup> It can make laws with respect to taxation under s 51(ii) but not so as to discriminate between States or parts of States.<sup>35</sup> It can also make laws providing for bounties, uniform throughout the Commonwealth, on the production or export of goods.<sup>36</sup> Section 99 provides that the Parliament could not, by any law or regulation of trade, commerce or revenue, give preference to one State or any part thereof over another. A resident in any State cannot be subject, in any other State, to any disability or discrimination which would not be equally applicable to him or her if resident in such other State.<sup>37</sup>

The Constitution also confers powers on the Commonwealth Parliament to give national effect to certain classes of State governmental action. They are powers to make laws with respect to the service and execution throughout the Commonwealth of the civil and

---

<sup>31</sup> *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31; *Victoria v Commonwealth* (1971) 122 CLR 353; *R v Coldham*; *Ex parte Australian Social Welfare Union* (1983) 153 CLR 297; *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192; *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188; *Austin v Commonwealth* (2003) 215 CLR 185; *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272; *Fortescue Metals Group Ltd v Commonwealth* (2013) 250 CLR 548.

<sup>32</sup> Constitution, s 92.

<sup>33</sup> Constitution, s 90.

<sup>34</sup> Constitution, s 88.

<sup>35</sup> As to the application of which see *R v Barger* (1908) 6 CLR 41, 78, 107; *Elliott v Commonwealth* (1936) 54 CLR 657, 668 and 683; *Conroy v Carter* (1968) 118 CLR 90; *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vic)* (2004) 220 CLR 388; *Fortescue Metals Group Ltd v Commonwealth* (2013) 250 CLR 548.

<sup>36</sup> Constitution, s 51(iii).

<sup>37</sup> Constitution, s 117. See *Street v Queensland Bar Association* (1989) 168 CLR 461.

criminal process and the judgments of the courts of the States<sup>38</sup> and the recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States.<sup>39</sup> There is a mandate imposed upon the Commonwealth by s 118 to give full faith and credit 'to the laws, the public Acts and records, and the judicial proceedings of every State.'<sup>40</sup>

## The territories power

There is one area of Commonwealth legislative power which has some analogical relevance for devolution in the United Kingdom. That is the territories power. Section 122 of the Constitution provides that:

The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

The territories relevant for present purposes are the Northern Territory, the Australian Capital Territory and the territory of Norfolk Island. The Northern Territory was carved out of the State of South Australia on 1 January 1911. On that day its inhabitants ceased to be residents of a State and became subject to the legislative powers conferred on the Commonwealth Parliament by s 122 of the Constitution.

Thereafter for many years the Northern Territory was governed by an Administrator appointed by the Governor-General. In July 1977 the Commonwealth announced its intention to grant self-government to the Territory. That self-government commenced with the enactment of the *Northern Territory (Self-Government) Act 1978* (Cth). It established the

---

<sup>38</sup> Constitution, s 51(xxiv) and see generally *McGlew v New South Wales Malting Co Ltd* (1918) 25 CLR 416; *Aston v Irvine* (1955) 92 CLR 353; *Ammann v Wegener* (1972) 129 CLR 415; *Dalton v New South Wales Crime Commission* (2006) 227 CLR 490; *Mok v Director of Public Prosecutions (NSW)* (2016) 330 ALR 201; *Service and Execution of Process Act 1992* (Cth) made under this provision.

<sup>39</sup> Constitution, s 51(xxv). See *Renton v Renton* (1918) 25 CLR 291.

<sup>40</sup> *Breavington v Godleman* (1988) 169 CLR 41; *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1; *Stevens v Head* (1993) 176 CLR 433; *Kruger v Commonwealth* (1997) 190 CLR 1; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

Northern Territory as a 'body politic under the Crown ...'.<sup>41</sup> A Parliament comprising a Legislative Assembly was created and, under the *Self-Government Act*, was empowered to make laws for the 'peace order and good government of the Northern Territory'. There were some limitation on the power of the Territory legislature precluding acquisition of property other than on just terms<sup>42</sup> and maintaining the free trade guarantee under s 92 of the Constitution.<sup>43</sup>

It is of importance to note that the grant of legislative power did not qualify or reduce the power of the Commonwealth under s 122. It could still make laws for the Territory. What has been given by the Parliament could be taken away, although that possibility is a long way from any practical reality. Similar self-government arrangements are in place under Commonwealth law for the Australian Capital Territory.

The Commonwealth can and has legislated specifically with respect to the territories. In 1976, it enacted the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) which created a regime for the grant of fee simple titles over traditional Aboriginal land to statutory bodies representing the traditional owners of those areas. That legislation led to two years of mostly fruitless litigation by the Northern Territory Government in the High Court.

In 1995, the Legislative Assembly of the Northern Territory enacted the *Rights of the Terminally Ill Act 1995* (NT), which came into effect on 1 July 1995 and allowed terminally ill patients to hasten their own death with medical assistance. In 1997, the Commonwealth Parliament enacted the *Euthanasia Laws Act 1997* (Cth), which amended the *Northern Territory (Self-Government) Act 1978* (Cth) by providing that the power of the Legislative Assembly did not extend to the making of laws providing for euthanasia. The Commonwealth law also expressly provided that the Northern Territory law was to have no force or effect as a law of the Territory.

A similar amendment was made to the *Australian Capital Territory (Self-Government) Act 1988* (Cth) and to the *Norfolk Island Act 1979* (Cth) to prevent the enactment of any similar laws there.

---

<sup>41</sup> *Northern Territory (Self-Government) Act 1978* (Cth), s 5.

<sup>42</sup> *Northern Territory (Self-Government) Act 1978* (Cth), s 50

<sup>43</sup> *Northern Territory (Self-Government) Act 1978* (Cth), s 49.

There is no equivalent in the grant of legislative powers to the self-governing territories of Australia of s 63A of the *Scotland Act 1998* and the proposed insertion of s 92A and s 107(6) into the Government of Wales Act 2006 by the Wales Bill which was introduced into the House of Commons on 7 June 2016. Those provisions incorporate a self-denying ordinance by the Parliament of the United Kingdom, coupled with a recognition that the Parliament of the United Kingdom will not normally legislate with respect to devolved matters without the consent of the Scottish or Welsh Parliaments as the case may be. Any such provision in the Australian context with respect to a territory which remained a territory and had not advanced to statehood could not be entrenched.

The position of the territories in Australia is different in history and character from that of the sub-national components of the United Kingdom. It is interesting, however, to reflect upon an observation about the pathway for the progression of Australian territories to statehood which was discussed by Mason CJ, Dawson and McHugh JJ in their joint dissenting judgment in *Capital Duplicators Pty Ltd v Australian Capital Territory [No 1]*.<sup>44</sup> They observed, uncontroversially, that a Commonwealth territory could advance to statehood. They said:

In the course of its evolution towards Statehood, it is natural, indeed inevitable, that a territory will be progressively endowed with institutions appropriate to self-government. That has been the history of democratic development in this country and in many parts of what was formerly the British Empire and is now the Commonwealth of Nations. Section 122 was and is the source of legislative power for the advancement of the territories along this path towards the final step of Statehood, at which point s 121 becomes the relevant source of power.<sup>45</sup>

This might say something to us about at least the nature of the process by which devolution within a unitary system might put a decentralised polity on the path towards membership of a fully-fledged constitutionalised federal system.

---

<sup>44</sup> (1992) 177 CLR 248.

<sup>45</sup> Ibid 266.

## Co-operative federalism and the other kind

The free trade and anti-discrimination provisions of the Constitution created a 'Commonwealth economic union, not an association of States each with its own separate economy.'<sup>46</sup> There is generally scope within federations for their sub-national and national components to take different approaches to their working. One is known as competitive federalism in which sub-national components vie to be the most attractive destination for capital and productive population. Another, which has dominated in Australia, is cooperative federalism involving voluntary arrangements between the States and the Commonwealth in the service of national objectives which neither, acting separately, could achieve. This is manifested by the existence of a significant number of cooperative regulatory schemes involving mirror legislation or the enactment of a Commonwealth law outside its constitutional competency on the basis of a referral of power by the States. Such referrals are possible under s 51(xxxvii) of the Constitution. By way of example, the *Corporations Act 2001* (Cth) is made by the Commonwealth in the exercise of a referred power. For although the Commonwealth has power to make laws with respect to foreign corporations and trading and financial corporations formed within Australia, that power was held not to extend to the formation of corporations. It now has that power pursuant to a referral from the States.

There is talk from time to time within Australia of competitive federalism. However manifested it cannot extend to discriminatory or protectionist measures which would infringe those provisions of the Constitution designed to maintain the economic union. On the other hand, the Constitution does not mandate co-operative federalism. Co-operative federalism tends to be driven by factors including, but not limited to, national objectives of economic efficiencies calculated to enhance Australia's ability to compete in global markets. A disadvantage of co-operative schemes is that they frequently vest responsibility in joint authorities with both State and Commonwealth elements. That can lead to a dilution of political accountability for their administration.

---

<sup>46</sup> *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561, 585 (Mason CJ, Brennan, Deane and McHugh JJ) (footnote omitted).

## Cost and benefits

Federalism has obvious benefits. It can lend strength to the working of a representative democracy where sub-national units consist of subsets of the population who elect governments which are close to their concerns in matters of significance that can be called 'local' relative to matters of national concern. A federation can work to preserve the distinctive cultural and ethnic identities of people living within particular geographic regions. As sub-national units they can enjoy the benefits of being part of a larger and stronger polity which can operate more effectively in the global sphere than the sub-units taken individually. To the extent that federation requires co-operation in order to function effectively, it can have positive effects upon political culture.

However, political culture as we know is something of a curate's egg. The politics of federation can give rise to phenomena which are less than ideal from the perspective of the participants. They include the following:

1. A tendency towards centralisation of power, which in Australia has been driven by:
  - judicial interpretation of the legislative powers of the Commonwealth;
  - paramountcy provisions favouring Commonwealth legislation in the exercise of concurrent powers;
  - the existence of ambulatory powers which enable the Commonwealth to enter into fields outside those otherwise enumerated, eg the external affairs power, corporations power, the taxation power and the power to make grants to the States on conditions which do not have to be limited on matters on which the Commonwealth can make laws;
  - the use of executive spending and contracting powers, although this has recently been the subject of constitutional limitations explained by the High Court in a series of decisions over the last few years.
2. Elector expectations of governments that are not defined by reference to federal demarcations thus eliciting centralising responses.

3. Related to the above, blame shifting between national and sub-national governments which tends to obscure the location of political responsibility and accountability.
4. The judicialisation of politics. The significance of the judicial role in policing the boundaries of power in a federation leads to disputes with a strong political flavour between components of the federation having to be resolved by the courts.
5. Unnecessary complexity where courts exercise distinct federal and state jurisdictions. In Australia, federal jurisdiction is invested in State courts and in Federal courts created by the Parliament. The distinction between federal and state jurisdictions has given rise to occasional uncertainties about their respective boundaries and an evolved doctrine of accrued jurisdiction enabling federal claims and state claims which are part of the same dispute to be resolved by the one court.

While, as I have said, co-operative federalism has been prominent in the Australian scene there are certain intractable areas in which economic reform seems to depend upon a reform of the fiscal relationships between the Commonwealth and the States as to the allocation of income tax revenues and revenues derived from goods and services taxes.

It is necessary in the design of any federation today to have regard to the lessons which can be learnt from the kinds of problems which I have described. They are the subject of ongoing debate within Australia which is sometimes framed with a gloomy prognosis of Australian evolution towards a de facto unitary State in which the States themselves are mere agents for the carrying out of Commonwealth programs.

## **Devolution and federation**

It should be apparent from what has gone earlier, that I would not regard the United Kingdom as a species of federation. In a recent publication on comparative federalism by Hueglin and Fenna,<sup>47</sup> the authors observe that the main distinction between a federal and unitary state resides in the legal basis for any sub-national division of power. In a federation sub-national entities are sovereign. Neither level of government can unilaterally alter the powers of the other.

---

<sup>47</sup> Thomas O Hueglin and Alan Fenna (eds) *Comparative Federalism: A Systematic Inquiry* (University of Toronto Press, 2nd ed, 2015).

On that basis the authors conclude that the United Kingdom is plainly a unitary State. Devolution has occurred within an established system in which the United Kingdom Parliament remains sovereign. The basis for the division of powers between the United Kingdom Parliament and the devolved institutions is delegation by statute. The United Kingdom Parliament would appear to be in a position analogous to that of the Parliament of the Commonwealth of Australia exercising its territory powers. The statutory constraint against legislating with respect to matters within the competence of the devolved governments without their agreement is not entrenched. It is arguable that a statute in contravention of that principle would be an implied *pro tanto* repeal of the constraint.<sup>48</sup> As it presently stands, it is suggested that the United Kingdom answers the description of a decentralised unitary state in contrast with a centralised unitary state such as France, a centralised federation such as Australia and a decentralised federation such as Canada.

Of course it may be said that the statutory declarations of the Scottish and Welsh Parliaments and Governments are respectively 'a permanent part' of the United Kingdom's constitutional arrangements and are not far from what Dicey called 'constitutional conventions or practices ... as important as any laws.'<sup>49</sup> Indeed, the Constitution Committee of the House of Lords expressed concern that the statutory provisions providing for the permanence of the Scottish Parliament might be given some legal effect in the unlikely scenario in which the United Kingdom sought to abolish the Scottish Parliament without consent if the unilateral act of abolition were to be challenged.<sup>50</sup>

It is interesting to see that devolution has already attracted the involvement of the judiciary. Recent cases of significance in that respect are *AXA General Insurance Ltd v HM Advocate*<sup>51</sup> concerning the powers conferred on the Scottish Parliament by the *Scotland Act 1998* and the limitation on those powers with respect to rights protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms. The very first Bill to be passed by the Welsh National Assembly, following the coming into force of the *Assembly Act* provisions empowering it to make primary legislation, was the subject of referral to the Supreme Court in *Attorney General v National Assembly for Wales*

---

<sup>48</sup> Ibid 17.

<sup>49</sup> Dicey, above n 5, 27.

<sup>50</sup> Select Committee on the Constitution, '*Scotland Bill: Sixth Report*', House of Lords, Session 2015-2016 (23 November 2015) 13–15 [26]–[36].

<sup>51</sup> [2012] 1 AC 868.



*Commission*.<sup>52</sup> The Supreme Court upheld the validity of ss 6 and 9 of the Local Government Byelaws (Wales) Bill. Section 6 removed the power of Welsh Ministers and the Secretary of State to confirm by-laws under certain scheduled enactments. Section 9 permitted the Welsh Ministers to add to the list of by-laws which could be enacted without confirmation.

Another reference arose in relation to the scope of the Assembly's power to make legislation in relation to agriculture. The Agricultural Sector (Wales) Bill set out a statutory regime for the minimum terms and conditions of employment for agricultural workers. The Court took an expansive approach to the concept of agriculture. It accepted multiple characterisation, a familiar concept in Australia, and held that the legislation was within the competence of the Assembly so long as it 'fairly and realistically satisfies the test' of relating to one of the listed subjects and did not fall within an exception.<sup>53</sup>

An Australian observer may say there are hours of innocent amusement awaiting the Judges of the Supreme Court of the United Kingdom as devolution proceeds, a fortiori, if it proceeds towards federation.

## **Conclusion**

Federalism is a well-tried and tested system for democratic government around the world. It would be a mistake, however, to think that any particular model of federation can simply be transplanted from one country in one blow to another. I do not know whether the evolution of devolution will ultimately lead to a federated United Kingdom but it seems to me, with respect, that step-by-step and testing the water is a good way to go.

---

<sup>52</sup> [2013] 1 AC 792.

<sup>53</sup> *In Re Agricultural Sector (Wales) Bill* [2014] 1 WLR 2622.