'The Future of Federalism' Conference
Stamford Plaza, Brisbane
11 July 2008, 9 am

The Hon P de Jersey AC
Chief Justice

I am very pleased to have the opportunity to welcome you all to Brisbane, and especially if I may, to welcome those attending from elsewhere in the Australian Federation, and from overseas. I congratulate the Conference Committee upon the prospectively very interesting program, and upon the Committee's success in harnessing such a distinguished array of highly qualified and experienced speakers from diverse jurisdictions.

I wish to speak briefly this morning on some more than incipient concern over the effectiveness of federalism as it operates in this nation. There have been very recent high-level expressions of that concern, with the Defence Minister Joel Fitzgibbon reportedly advocating the abolition of the States, and the former Health Minister Tony Abbott only yesterday reportedly advocating unlimited legislative power for the parliament of the Commonwealth.

Notwithstanding the frustration or impatience behind those calls, most would, I believe, accept that the Australian Constitution has generally served the people well. In its 107 year history, the people have seen fit to utilize its mechanism for amendment only eight times, which may suggest general satisfaction with its operation, even allowing for the height of the hurdle set by that mechanism. In a paper delivered in the year 2000 (*Centenary of the Enactment of the Commonwealth of Australia Constitution Act*, published in 75 ALJ 31), the Chairman of this conference session, Sir Gerard Brennan, observed that our Constitution has stood the test of time:

> ' – It has maintained our institutions through two world wars and other international conflict; it has sufficed, with some amendment, to support stability and growth in the economy; it has permitted the development of national and international independence; it has seen the transformation and multiplication of the population so that we are now a multi-racial, multi-cultural population of 19 million; it has provided the foundation for a system of social services; and, above all, it has underpinned the rule of law.'

Yet it would be disingenuous to ignore today the substantial debate which lends this conference its theme, 'an evaluation of the state of the Federation focusing on the distribution of powers and fiscal arrangements'. Indeed, the Australia 2020 Summit held earlier this year identified, as one of five 'priority themes', the creation of a 'modern federation'.

That Summit's relevant 'top idea' was to:

> 'Reinvigorate the federation to enhance Australian democracy and make it work for all Australians by reviewing the roles, responsibilities, functions, structures and financial arrangements at all levels of governance ... by 2020'.

The Summit proposed:

> 'A three-stage process ... with:
>
> - an expert commission to propose a new mix of responsibilities
> - a convention of the people, informed by the commission and by a process of deliberative democracy
> - implementation by inter-governmental co-operation or referendum'

The basis of that drive for reform seems to be an absence of so-called 'co-operative federalism', and an imperative 'to eliminate waste and extravagance in the way the federal system works today'.

This address is not the occasion for any further exploration of those practical realities. In any event, a properly informed exploration would require a comprehensive experience of inter-governmental relations, which I obviously have not had. But now does provide an opportunity to remind ourselves of the overwhelmingly federal nature of the Australian Constitution, and one highly publicised recent High Court proceeding which may have activated to some extent an otherwise largely latent level of discontent.

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The concept of federalism permeates our Constitution. The word 'federal' occurs 15 times apart from references to the *Federal Council of Australasia Act* 1885. Significantly, the Queen's power to inaugurate the Federation by proclamation, provided for in covering Clause 3, refers to the people being 'united in a Federal Commonwealth'. And so we have seven autonomous governments, the Commonwealth and the six States, the situation of the latter to be contrasted with the two Territorial governments which are subject to the Commonwealth, and the local governments which are subject to the States. Of course,

notwithstanding the proclamation, the federal nature of our Constitution is a feature <u>not</u> inherited from Westminster.

100 and more years on, we see the popularity of federations in geographically vast nations.

As suggested by Professor Walker ('The Seven Pillars of Centralism: Engineers' Case and Federalism', 76 ALJ 678, 712):

> ' ... A federal structure enables a nation to have the best of both worlds, those of shared rule and self-rule, co-ordinated national government and diversity, creative experiment and liberty'.

Terminology aside, it is of course the distribution of legislative powers between the Federal Parliament and the State Parliaments which fundamentally established and maintains our federal compact. That has spawned the principal tension attending our federal experience.

The States have been understandably protective of their legislative domains. Ultimately, a replete power in the States is essential to their capacity to attract investment and raise the revenue necessary to facilitate the implementation of their programs. They need to be able to compete in the worldwide economy, and to that end, to 'control as many as

possible of the factors that influence investment and productivity growth' (Ibid, p 713). Stunted legislative and executive power is inimical to that.

Yet as long ago as through the Engineers' Case in 1920 (*Amalgamated Society of Engineers v Adelaide Steamship Ltd* (1920) 28 CLR 129), the High Court of Australia paved the way for an expansive construction of the powers reserved by s 51 to the Commonwealth Parliament, a trend which has centralised power in that Parliament. Only 16 years earlier, in *D'Emden v Pedder* (1904) 1 CLR 91, 109, a differently constituted court, comprising the original three Justices, had espoused 'co-ordinate federalism', saying that:

> 'In considering the respective powers of the Commonwealth and the States it is essential to bear in mind that each is, within the ambit of its authority, a sovereign state.'

We move a century on to the decision which has most recently reignited debate about the appropriateness of the operation of the s 51 distribution of power.

While the result in the *Work Choices* case (*New South Wales and Others v The Commonwealth* (2006) 229 CLR 1) may be seen as the product of orthodox construction, it is that result which sparked renewed concern whether this living Constitution may not have outgrown genuine federalism. The concern emerges most clearly of course from the reasons of the dissenting members of the Court.

Justice Kirby referred (p 225) to:

> ' ... A shift in constitutional realities from the present mixed federal arrangements to a kind of optional or "opportunistic" federalism in which the Federal Parliament may enact laws in almost every sphere of what has hitherto been a State field of law-making by the simple expedient (as in this case) of enacting a law on the chosen subject matter whilst applying it to corporations, their officers, agents, representatives, employees, consumers, contractors, providers and others having some postulated connection with the Corporation.'

He warned of 'a radical shift in the constitutional arrangements of the nation'.

Justice Callinan uncontroversially defined the 'federal balance' (p 321) as:

> ' ... essentially, a sharing of power, even of power which the Commonwealth can monopolise under a specific constitutional ground if and when it chooses to do so, and can successfully invoke s 109 of the Constitution, and the exercise of different powers of varying importance by each of the Commonwealth and the States, but not so that, relevantly for present purposes, the essential functions and institutions of the States, for example, internal law and order, their judiciaries, and their executives, are obstructed, impeded, diminished or curtailed.'

'Federations', he suggested (p 322) 'compel comity, that is to say, mutual respect and deference in allocated areas'.

Justice Callinan expressed the fear that progressive enlargement of Commonwealth power, through an expansive construction of s 51, ran the risk of emasculating State Parliaments, to the point where they may become 'no more than an impotent debating society'. He spoke, again uncontroversially, of the need to respect the federal balance. As he put it (p 333):

> 'That the federal balance exists, and that it must continue to exist, and that the States must continue to exist and exercise political power and function independently both in form and substance, until the people otherwise decide in a referendum under s 128 of the Constitution, are matters that necessarily inform and influence the proper construction of the Constitution.'

Lauding democratic government, Justice Callinan invoked (p 320) the Cambridge professor of divinity William Ralph Inge, the so-called "Gloomy Dean", who wrote that 'democracy is a form of government which may be rationally defended, not as being good, but as being less bad than any other.' In similar vein was Churchill's probably better-

known observation that 'it has been said that democracy is the worst form of government except all those other forms that have been tried from time to time.' Justice Callinan offered this synthesis of his own (p 320):

> 'It may equally perhaps be argued that despite their faults, federations are the least undemocratic of all forms of government. The framers of the Constititution and the people who endorsed it by a popular vote could not have been unaware of the problems, and the frustrations, to which the division of powers in a federation may give rise. Nor would they have been ignorant of the aversion that those who exercise power generally have to any sharing of it. The legislation which is in question here, if valid, would subvert the Constitution and the delicate distributional balancing of powers which it contemplates.'

While the *Workplace Relations Amendment (Work Choices) Act* 2005 is no longer, its legacy includes another demonstration of the amplitude of Commonwealth power, an amplitude which, under the Corporations power, would allow the Commonwealth to regulate a vast majority of the Australian workforce. Justice Kirby referred (p 224) to the prospect of a radical reduction in 'the application of State laws in many fields that, for more than a century, have been the subject of the State's principal governmental activities'. He went on:

> 'Such fields include education, where universities, tertiary colleges and a lately expanding cohort of private schools and colleges are already, or may easily become, incorporated. Likewise, in health care, where hospitals (public and private), clinics, hospices, pathology providers and medical practices are, or may readily become, incorporated. Similarly, with the privatisation and outsourcing of activities formerly conducted by State governments, departments or statutory authorities, through corporatised Boards now providing services in town planning, security and protective activities, local transport, energy, environmental protection, aged and disability services, land and water conservation, agricultural activities, corrective services, gaming and racing, sport and recreation services, fisheries and many Aboriginal activities.'

'All of the foregoing fields of regulation', he concludes, 'might potentially be changed, in whole or in part, from their traditional place as subjects of State law and regulation, to federal legal regulation, through the propounded ambit of the Corporations power.'

Although the then Prime Minister reassured the States he did not regard the High Court's decision as giving a 'green light' to 'massive expansion of Commonwealth power', the reality is the decision does establish that opportunity. "Establish" is perhaps the wrong word. "Confirm" may be more appropriate. That is because the potential expansiveness of Commonwealth legislative power was clarified a quarter of a century and ten days ago, when on 1 July 1983, in this City, the High Court gave judgment in the Commonwealth's favour in the Tasmanian Dam Case (*The Commonwealth v Tasmania* (1983) 158 CLR 1) – said by some to have involved a seismic shift to the Commonwealth.

Now my objective today is not to criticise the Work Choices decision. My purpose is simply to sketch parts of the landscape which I believe has inspired a somewhat more strident contemporary call for re-examination of the effectiveness of our federation.

Federalism was no doubt pursued, at the end of the 19th century, because it was the model most likely to appeal to self-governing colonial voters, and that was for the very reason that power would not be centralised in the Commonwealth. A concentration of power in the Commonwealth, and its persistent augmentation, will unsurprisingly disappoint those who favour federalism in the true sense, respecting the decision-making of the States in the areas for which they rationally should have responsibility.

Yet on one view, the power of the Commonwealth has reached such concentration that some even question whether State government should continue to exist. Some suggest that it would be more rational to replace State government with more powerful municipal governments.

In this country, the contention we are 'over-governed' has become a regular theme. It could be argued that any over-government is a consequence of the over-concentration of power in the Commonwealth, with decreasing relevance in the governments of the States.

The argument probably overstates any problem. But that it is advanced at all warrants our pausing to ask whether the Australian Federation has developed consistently with the will of our founding fathers, and whether any divergence from that original intent is justified by the shifts in needs and expectations which have occurred over the last 100 years.

The authors of 'Federal Constitutional Law: A Contemporary View' (Law Book, 2001), S Joseph and M Castin, suggested in 2001 that:

> 'The prevailing interpretations of the taxation power ... the grants power ... and the prohibition of States' powers to impose excise duties in s 90 ... have left financial resources and power disproportionately in the hands of the Commonwealth. Broad interpretations of powers such as the external affairs power ... and the appropriation power ... have allowed the Commonwealth to exercise legislative authority in areas which were traditionally understood to be exclusively in the States' domain. The prevailing interpretation of s 109 ... arguably renders it too easy for the Commonwealth to oust the States from areas of supposed concurrent power' (pp 11-12).

Speaking of disproportion in resources, my own experience of our court systems over the last decade especially, has shown up a vast disproportion between the comparatively generously funded Federal courts and their much less financially endowed State counterparts, and that is not the result of any State parsimony.

It will be interesting for Australians to see what if anything is done to explore and advance the very generally cast 'ideas' about federalism which emerged from the 2020 Summit. One senses they emerged from a feeling of frustration with the practical workings of our Federation.

It will be interesting to monitor the ongoing work of bodies like the Council for Australian Governments – the formal meeting of State Premiers, the Commonwealth and the Australian Local Government Association. At its recent meeting COAG appeared to be making worthwhile progress on important matters like greater national uniformity in business regulation, and securing water resources. In addition to COAG, there is the work of the Council for Australian Federation, the forum for the State Premiers. It will be interesting to see whether those bodies can achieve a more co-operative, and less coercive, federation.

The 2020 Summit proposed a 'national co-operation commission', to 'register, monitor and resolve disputes concerning intergovernmental agreements'. The purpose was expressed as 'to drive effective intergovernmental collaboration.'

Our history is sprinkled with instances of co-operative federalism in the formal sense. The Corporations Law and its creature the cross-vesting scheme, and the State referral of power in relation to the maintenance and custody of children, to ensure the Family Court's capacity to give complete relief, come to mind in that regard. As Sir William Deane said in Duncan's case (*R v Duncan; ex parte Australian Iron and Steel Pty Ltd* (1982-3) 158 CLR 535, 589):

> ' ... co-operation between the parliaments of the Commonwealth and the States is in no way antithetic to the provisions of the Constitution: to the contrary, it is a positive objective of the Constitution.'

But there is also obvious scope for co-operation in the less formal sense. Chief Justice Gleeson referred, in *Re Wakim* (1999) 198 CLR 511, 540 to 'co-operation between the parliaments of the Federation'. One may add a reference to co-operation between the executive governments within the Federation.

One must acknowledge the extent of cooperation which does occur. The Standing Committee of Attorneys General has shown a commendable drive to remove jurisdictional discrepancies where national uniformity is plainly desirable. It is hard, for example, to justify continuing differences from jurisdiction to jurisdiction in laws of evidence, and procedure, especially now we are moving to a national legal profession. I recently encountered an odd discrepancy in the criminal arena. Queensland and the Commonwealth have parallel laws forbidding use of the internet to procure a child under 16 years of age to engage in a sexual act, s 218A(1)(a) of the Queensland Criminal Code and s 474.26(1) of the Commonwealth Criminal Code. Yet while the maximum Queensland penalty is five years' imprisonment, it is 15 years under the Commonwealth provision. I was confronted with an indictment including an offence under each provision: similar criminal offending, yet substantially disparate penalties. This is the sort of discomforting discord which a cooperative effort might address.

There is no doubt that concerned and thoughtful citizens would believe that co-operative governmental interaction within our federal system will optimise the prospect of productive outcomes. And in this nation at least, that seems to afford the only realistic prospect of more effective government. I put it that way because the High Court delineation of the presently relevant aspects of our federal compact is now very plainly laid out, and with our history of referenda, the prospect of any relevant Constitutional change would seem very slight indeed. It is in any case fanciful to think that a Commonwealth government would sponsor a referendum with a view to reducing its legislative powers.