

## PROCESSES FOR REFORMING AUSTRALIAN FEDERALISM

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### I INTRODUCTION

It used to be said of Canada in the last decades of the 20<sup>th</sup> century that it was the only country in the world where one could buy a book on federalism at the airport. That was because federalism was at the heart of intense national debates that raged over placating secessionist Quebec and accommodating the alienated and resource-rich Western Provinces, particularly Alberta, while at the same time acknowledging Ontario's primary provincial status and supporting the weak Maritime Provinces. Federalism in Australia has never had quite that public notoriety or popular interest, due in part to the absence of such distinctive regional and cultural differences and clashes as those existing in Canada. However, the ups and downs of Australian federalism, including its successes and failures and much 'muddling through', have been on and off the public and scholarly radars, and periodically the national agenda for reform.

Reforming Australian federalism is currently high on the national agenda due to electoral politics and globalisation, with the November 2007 federal election signalling a major change in direction. The Howard-led Liberal Coalition Government, with its anti-federalist slogan of 'aspirational nationalism', was soundly defeated. The Rudd Labor Opposition, which pledged to end the 'blame game' and reform our 'dysfunctional' federal system through greater co-operation with the States and Territories, was elected. While the election was not primarily about federalist issues, federal-State relations clearly played a part and were interlinked with other factors. A less dramatic component of the push for federal reform has been the ongoing pursuit of greater domestic efficiency in economic management and governance to improve global competitiveness. In the longer term, meeting the challenges associated with globalisation will likely play

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a dominant role in the reshaping of Australian federalism, and probably in a decentralist way.<sup>1</sup>

Whether and in what respects Australian federalism is in need of reform are contentious issues over which there is dispute. Some advocate a ‘root and branch’ onslaught of wholesale restructuring, perhaps making the States largely administrative agencies of the Commonwealth. Others champion the ideal of a more co-ordinate, as distinct from concurrent, distribution of Commonwealth and State roles and responsibilities with greater, and more precisely specified, State constitutional powers. Between these two extremes are various positions ranging from major changes to minor tinkering. My purpose in this paper is not so much to evaluate the substantive merits of the various reform claims and the centralised/decentralised governance models that underpin them. Rather, I wish to explore and articulate processes for reform: how they have occurred and how they might occur. I do not consider the radical alternative, proffered surprisingly often by Australian commentators, of abolishing federalism and the States altogether in favour of a centralised or unitary system of government. That proposal would mean doing away with, rather than reforming, Australian federalism, and in my view is both unlikely and ill-considered.

Somewhat more constructive proposals for strengthening regional governance or, more radically, replacing the existing States with regions, are also being proffered. Regionalism is a variant of decentralised government situated within a predominantly centralist paradigm. Hence, regionalism cannot strictly be called a variant of federalism, which entails two spheres of government with powers shared between them in such a way that neither is predominant.<sup>2</sup> In my view, substituting regionalism for federalism is not a plausible option for Australia because the States and Territories are already well-established super-regions with distinctive geographical domains, State cultures and semi-autonomous governments. Moreover, regionalism is alive and well at the sub-State level for certain governance purposes and policy delivery regimes, and can be a preferred identifier for groupings of people concerned with or responding to certain issues. However, it remains only one of numerous identifiers and tends to be fluid and ill-defined, as Anne Twomey counters in this volume.<sup>3</sup> Nevertheless, regionalism

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1 Many Australian commentators see greater centralisation of national power as the more likely consequence of Australia’s response to globalisation. This view ignores the larger ‘paradigm shift from a world of sovereign nation-states to a world of diminished state sovereignty and increased interstate linkages of a constitutionally federal character’: Ronald L Watts, *Comparing Federal Systems* (2<sup>nd</sup> ed, 1999) ix. See also Harvey Lazar, Hamish Telford and Ronald L Watts (eds), *The Impact of Global and Regional Integration on Federal Systems: A Comparative Analysis* (2003).

2 For a classic account of federalism, see Daniel J Elazar, *Exploring Federalism* (1987). For an account of federalism in the Australian context, see Brian Galligan, *A Federal Republic: Australia’s Constitutional System of Government* (1995) 38–62.

3 Anne Twomey, ‘Regionalism – A Cure for Federal Ills?’ (2008) 31(2) *University of New South Wales Law Journal* 467. For the most extensive and current work on current regionalism, see A J Brown, ‘Regional Governance and Regionalism in Australia’ in Robyn Eversole and John Martin (eds), *Participation and Governance in Regional Development: Global Trends in an Australian Context* (2006) 17.

is significant because, as A J Brown forcefully shows,<sup>4</sup> it is out there, alive and well. I agree: in my view, while regionalism adds to the richness and complexity of identity, governance and policy communities in Australia, it is a sub-federal matter which is likely to remain within the interstices of the federal system.

In this paper, I argue a number of propositions concerning the process of federal reform which are developed from an examination of the institutional parameters and logic of Australian federalism, references to historical examples and institutional processes for reform. Such an exercise is potentially very large, so my coverage is inevitably selective, and it is also skewed towards the political aspects of the reform process. Primarily, this is because I hope to demonstrate that the most promising avenues for reforming Australian federalism are political rather than constitutional. In this respect, my views are probably at odds with those of constitutional lawyers and others who, when they perceive a problem with Australian federalism, tend to reach for the *Constitution* and set about devising legal remedies. While this keeps constitutional discourse alive in a political culture that takes its constitutional heritage for granted (and is hence a noble enterprise) it is largely a waste of time. This is for two reasons that will be developed further in this article: first, constitutional change has proven an unlikely vehicle for federal change; and second, most reforms can be undertaken via sub-constitutional politics. I agree with Anne Twomey that '[t]he time is ripe for review of our federal system' and that there is a need for 'thorough consideration of constitutional reform'.<sup>5</sup> I argue, however, that thorough consideration of the shortcomings of constitutional and judicial reform shows us that we should look mainly to politics and sub-constitutional institutional reform as the most promising avenues for reforming Australian federalism.

The thrust of the article can be summarised in a series of arguments or propositions. The first is that there are multiple processes for reforming Australian federalism and that these processes are more varied and complex than is often assumed in essentialist notions of reform discourse that tend to view federalism as a static institutional or conceptual construct. The second is that the interactivity of these processes is significant in achieving, or indeed frustrating, reforms. The third is that reform processes are more developmental and incremental, rather than programmatic and discrete. The fourth is that federal reform processes – mainly political, though involving competitive and cooperative aspects – are already in place and working tolerably well. The fifth is that negative prognostications often draw upon unexamined assumptions and models of federalism that generate problems more imagined than real. The appropriate reform process for these federal problems is an academic one: more critical reflection and argument to improve our conceptual grasp of the complex governmental beast that Australian federalism truly is, and further research to establish what is really going on in a period of dynamic political federalism.

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4 A J Brown, 'In Pursuit of the "Genuine Partner": Local Government and Federal Constitutional Reform in Australia' (2008) 31(2) *University of New South Wales Law Journal* 435.

5 Anne Twomey, 'Reforming Australian's Federal System' (2008) 26(1) *Federal Law Review* 57, 81.

There are a number of conceptual issues that require clarification at the outset. One is that ‘reform’, like most concepts in political discourse, is a contested term. Whether a process can be called a ‘reform’ depends upon a certain view of federalism that the proposed change advances or approximates. For example, a lack of clarity in the delineation between the powers and responsibilities of the Commonwealth and the States might appear to the tidy-minded co-ordinate federalist as a problem to be fixed or ‘reformed’ via clearer definitional structures. To the messy-minded cooperative federalist, that same characteristic is likely to be considered more of a positive feature that allows for the ongoing adjustment of respective roles. A related example is overlap and duplication: a supposed source of inefficiency to be remedied by the cooperative federalists, but for the competitive federalist a necessary part of the mechanism for sorting out roles of respective governments. In view of the contentious nature of the word ‘reform’, the term is used in this article to mean changing Australian federalism to achieve preferred arrangements or processes. While taking a somewhat agnostic stance on the merits of particular views of the federal system and concomitant proposals to reform existing arrangements in line with those views, I want to show that the way in which ‘reform’ is conceptualised affects both the subject of what is proposed and its likely chances of success.

The second issue for clarification concerns the way in which we conceptualise institutions more generally, since this will affect the way we think about reforming federalism. The view of ‘new institutionalism’ that this paper draws upon sees institutions as complex structuring entities rather than discrete arrangements. Institutions include defined rules, organised practices, prescribed behaviours, supporting resources, incentives and coercive enforcements that order collective behaviour and both direct and restrict various forms of personal deviance.<sup>6</sup> Moreover, institutions are in dynamic interaction among themselves and with those who operate or seek to influence them: politicians, bureaucrats, political parties, interest groups and stakeholders. They are affected by non-institutional factors such as technological, demographic and cultural changes, and by global influences. This ‘new institutionalist’ perspective of political science might seem complex and imprecise to constitutional lawyers. However, I argue that such an approach to the topic of ‘processes for reforming Australian federalism’ enriches the subject by allowing us to engage more fully with its reality. Australian federalism, in this view, is not an easily defined entity that can be readily taken apart or re-tuned like a motor; nor is it a well-defined concept to which changes are proposed and made in an instrumental way. Rather, federalism itself is a complex system of processes including those indicated above. Once we acknowledge this, the heuristic exercise of articulating and explaining processes

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6 Some key works in an extensive literature include James G March and Johan P Olsen, ‘Elaborating the “New Institutionalism”’ in R A W Rhodes, Sarah A Binder and Bert A Rockman (eds), *The Oxford Handbook of Political Institutions* (2006) 3; James G March and Johan P Olsen, *Rediscovering Institutions* (1989); Robert E Goodin, ‘Institutions and their design’ in Robert E Goodin (ed), *The Theory of Institutional Design* (1996) 1.

for reforming a system of processes, rules and patterned behaviours becomes complex and challenging, but also conceptually easier to understand.<sup>7</sup>

Having cleared our minds, as it were, by strolling in the fertile but somewhat chaotic garden of new institutional thinking, we still need ways of ordering and clarifying our topic. In order to achieve this, this article groups the processes for reforming Australian federalism into two broad conventional types: constitutional and political. Each of these types involves a number of avenues for affecting change, and they are inter-related in various ways. Indeed, from a political science perspective, the two types might both be considered as categories of the political. Alternatively, one might distinguish the political from the intergovernmental, with the latter focused on intergovernmental arrangements such as the Council of Australian Governments ('COAG') and other ministerial councils. In this article, however, the intergovernmental sphere is considered as an important subset of political processes, with COAG being the most significant and, as Geoff Anderson shows, currently the focus of intensive reformist mania.<sup>8</sup>

## II CONCEPTUAL MODELS OF CHANGE

Australian debate about the dynamics of constitutional change is often more rhetorically robust than theoretically reflective. It is typically framed in ways that highlight different aspects and accentuate different propensities for shaping federalism, rather than addressing the topic holistically. Great emphasis is placed on the original design of the *Constitution* that was put in place in 1901. This constitutional framework endures in a path-dependent way, shaping Australian politics in a flexible and sensible way according to its supporters, or becoming increasingly irrelevant to the governance needs of modern Australia, according to its critics. Along the way and over more than a century of federal nationhood right up to the present, changes both large and small have been made that have more or less accommodated the developmental needs and challenges of the nation, according to supporters; but opened up a chasm of dissonance, according to critics. For supporters, the *Constitution* has travelled well and is in reasonable shape; its detractors, however, argue that it needs radical surgery.

Here we might identify two different models through which to conceptualise constitutional developments: either as singular events indicating a 'punctuated equilibrium', or as processes of incremental change. While in practice the two often morph and mix, articulating them as distinct types might assist our understanding. By way of illustration, the more alarmist, end-of-federalism prognostications sparked by landmark decisions such as *New South Wales v Commonwealth*<sup>9</sup> seem to presume a punctuated equilibrium paradigm; the more

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7 The new institutionalism heuristic is explained further below.

8 See Geoff Anderson, 'The Council of Australian Governments: A New Institution of Governance for Australia's Conditional Federalism' (2008) 31(2) *University of New South Wales Law Journal* 493.

9 *New South Wales v Commonwealth* (2006) 229 CLR 1 ('*Work Choices*').

benign view is that the case extended a well-established line of jurisprudence reflecting notions of incremental change.

As James March and Johan Olsen have pointed out, ‘the standard model of punctuated equilibrium assumes discontinuous change’ and ‘[l]ong periods of institutional continuity, where institutions are reproduced, are assumed to be interrupted only at critical junctures of radical change, where political agency (re)fashions institutional structures’.<sup>10</sup> In this view, stable continuity is the norm and change is the product of exceptional interventions or events. Institutions are viewed as heavily path-dependent, encapsulating past political formative events and compromises, and continuing on in a more-or-less independent role of shaping subsequent political activity. Change occurs through significant agency intervention or because of exceptional events. Historical institutionalism draws heavily upon the standard model of punctuated equilibrium sketched above. Yet, as critics like Colin Hay have pointed out, within historical institutionalism there has been ‘an emphasis upon institutional genesis at the expense of an adequate account of post-formative institutional change’.<sup>11</sup> Insofar as post-formative institutional dynamics have been considered, Hay claims, ‘they tend either to be seen as a consequence of path dependent lock-in effects or, where more ruptural in nature, as the product of exogenous shocks such as wars or revolutions’.<sup>12</sup>

New institutionalism has moved to a more dynamic, if less determinate, view of change. It has long been recognised that institutions can both shape and constrain political activities, and as well be shaped by political agents and activities.<sup>13</sup> In this view, there is typically a dynamic interplay between structures, agents and ideas, which Hay calls ‘constructivist institutionalism’.<sup>14</sup> Moreover, the process of interdependency is ongoing, adaptive and often opaque – perhaps more akin to an evolutionary process of mutation, adaptation and struggle than rational design or measured dialectic. Political (and especially constitutional) institutions operate in a crowded environment with other institutions that have different purposes, logics and human agents so there are clashes and collisions as well as ordered agency, and large areas of indeterminacy where ‘reformers are often institutional gardeners more than institutional engineers’.<sup>15</sup>

In such an unruly garden, we should expect to see incrementalism – but of a non-linear kind – as well as some disjunctive change, perhaps in response to dramatic external shocks or adaptive selection of deviant mutations. While constitutionalism in a polity like that of Australia is certainly at the more

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10 March and Olsen, ‘Elaborating the “New Institutionalism”’, above n 6, 12.

11 Colin Hay, ‘Constructivist Institutionalism’ in Rhodes, Sarah Binder and Rockman (eds), *The Oxford Handbook of Political Institutions*, above n 6, 60.

12 Ibid.

13 Kathleen Thelen and Sven Steinmo, ‘Historical institutionalism in comparative politics’ in Sven Steinmo, Kathleen Thelen and Frank Longstreth (eds), *Structuring Politics: Historical Institutionalism in Comparative Perspective* (1992) 1.

14 Hay, above n 11, 56.

15 March and Olsen, ‘Elaborating the “New Institutionalism”’, above n 6, 15.

structured end of institutionalism, the process of change remains dynamic and evolutionary, with multiple actors involved. Government legislative initiatives provoke court challenges; in deciding cases the High Court reinterprets constitutional provisions that go beyond the case in point; and in the face of these decisions, governments can respond with a range of strategies to adapt to or circumvent formal constraints on their power. Even so, we still have to confront the challenges that the punctuated equilibrium model frames more directly: when does incremental creep add up to substantial institutional change? Is there a tipping point when an incremental change pushes the established order over into something different? And in a choked garden, how might we spot this point? If these questions are not already difficult enough, there is also scope for dialectical responses, regressions and digressions as the implications of particular change become apparent.

If these considerations from new institutionalism are to be helpful in examining federal constitutionalism of the Australian kind, and in framing our analysis of major constitutional cases, trends and changes, we should keep in mind the multiple levels at which our analysis ought to proceed. To illustrate, *Work Choices* might be considered an instance of punctuated equilibrium for the section 51(xx) corporations power, but only an incremental change for constitutional federalism more broadly. But in the context of other incremental changes, such as the decisions in *South Australia v Commonwealth*<sup>16</sup> and *Victoria v Commonwealth*,<sup>17</sup> which legitimated the Commonwealth's monopoly over income tax, and the decision in *Commonwealth v Tasmania*,<sup>18</sup> which sanctioned an open-ended Commonwealth power over external affairs to include domestic matters with external aspects, *Work Choices* might still be regarded a tipping point in reshaping constitutional federalism in a centrist manner.

### III CONSTITUTIONAL DESIGN: EXAMPLES AND CONSEQUENCES

What sorts of things should be put or not put into a constitution? Opinions vary, with some commentators wanting to be highly prescriptive and others preferring a sparser framework document. Inevitably, there are debates and compromises over what goes in and in what form; sometimes these are crucial for future developments and sometimes they are not. To demonstrate this, we can draw upon two of the biggest issues that confronted Australia's founders: the question of balancing navigation and irrigation rights; and fiscal federalism that had to be shaped around the Commonwealth's monopolisation of the main tax base of the day – customs and excise duties. These examples also shed some light on issues of judicial and political federalism that will be considered later on.

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16 (1942) 65 CLR 373 ('*First Uniform Tax Case*').

17 (1957) 99 CLR 575 ('*Second Uniform Tax Case*').

18 (1983) 158 CLR 1 ('*Tasmanian Dam Case*').

### A The Rivers Issue

I have already pointed out that the Founding Fathers of the *Constitution* deliberately left matters of great public importance and policy consequence constitutionally unspecified in order that future governments could have some latitude in their decision-making. A notable example was the rivers issue<sup>19</sup> – balancing irrigation against navigation – which took up more time in the Convention Debates than any other issue. It was a classic horizontal federal dispute, with Victoria and New South Wales (‘NSW’) insisting on entrenching State riparian rights for irrigation, and South Australia (‘SA’) wanting to keep the Murray–Darling river system open to its lucrative steamer trade. During the Convention Debates, Richard O’Connor insisted that federal control over navigation was sufficiently protected under the trade and commerce clause, as was the case in the United States, and that the High Court would decide both the merits of any particular case and ‘absolutely and definitely the rights and the principles upon which the decisions should proceed’.<sup>20</sup> Henry Higgins argued strongly for leaving it to future parliaments to determine.<sup>21</sup> Both wanted the matter left for future determination either by the Court or the Commonwealth Parliament, and neither satisfied opposing State camps. The navigationists managed to get an additional clause 98 inserted to spell out the obvious: that the commerce clause did extend to navigation and shipping. The irrigationists countered with a special clause, section 100, specifying that the federal commerce power did not abridge the States’ right to use its rivers for irrigation purposes, but this was accepted only after the qualifier ‘reasonable’ was added.<sup>22</sup> These additional qualifiers left the matter essentially unspecified and for a future court to decide upon. Higgins lamented that a Commonwealth power had not been agreed to, and joined the O’Connor position, pointedly describing the situation as leaving the matter to ‘the glorious uncertainty of the construction of the law to operate’ on the trade and commerce power.<sup>23</sup>

In a few years, the entire matter had become a non-issue because of the rapid growth of rail transport that replaced river steamers. As such, it could be argued that the matter could not have been resolved acceptably in advance, and that it would have been unwise to put some brokered deal into the *Constitution*. It is worth reflecting on this arcane but voluminous part of the Convention Debates, particularly since the matter has re-arisen in the form of irrigation versus environmental sustainability and is the subject of current intergovernmental

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19 For a more detailed account of the rivers issue, see Brian Galligan, *Politics of the High Court* (1987) 63–5.

20 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1 February 1898, 388 (Richard O’Connor).

21 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1 February 1898, 510 (Henry Higgins).

22 See *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 22 January – 17 March 1898.

23 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 February 1898, 573 (Henry Higgins).



reforms. Ironically, the reforms are now being driven by the Commonwealth Government and Parliament, as Higgins would have preferred.

### B Financial Provisions

A second example that has never been off the main federal agenda is taxing and spending powers. Taxing powers, like most other areas, were to be shared, for the obvious reason that governments require their own revenue streams to fund expenditure. While grants might in theory cover all the States' revenue needs, such a fiscal system would hardly satisfy basic federal and public finance principles. Yet at Federation the primary tax base was customs and excise, which had to be an exclusive Commonwealth power to ensure a national economic market free of inter-colonial tariff barriers. Sorting out fiscal federalism was seen prior to Federation as the 'lion in the path' and 'the hardest nut to crack'.<sup>24</sup>

It is worth going over precisely what was set down in order to properly grasp the constitutional design of fiscal federalism. Giving the Commonwealth exclusive power over customs and excise was simply done by the enactment of section 88, which mandated that uniform duties of customs be imposed within two years of establishing the Commonwealth, and by section 90, which made the Commonwealth's power over customs and excise exclusive. But equally importantly, the Colonies cum States needed to receive back most of the revenue they would be giving up. This was more difficult and was done through a three-stage set of formulae. The first covered the interim period up to two years before the imposition of uniform duties; the second covered the five years after that; and the third covered the period beyond those five years. In addition, the States' share of net revenues was set at three-fourths for 10 years.

More particularly, section 89 covered the period prior to a uniform tariff being imposed, and specified that actual revenues collected in each State would be offset by actual expenditures on departments transferred from the States to the Commonwealth, and a proportion of the other Commonwealth expenditure distributed on a population basis. It ended on an ominous note for the States: 'The Commonwealth shall pay to each State month by month the balance (*if any*) in favour of the State'.<sup>25</sup>

Section 93 covered the first five years after the imposition of uniform customs duties and '*thereafter until the Parliament otherwise provides*',<sup>26</sup> prescribing the same formula as in section 89, but with a refinement that State revenues would be calculated at the point of final consumption. This would require a complicated book-keeping process. Section 94 covered the period beyond five years but gave no formula; rather, the Commonwealth Parliament was left free to provide 'on such basis as it deems fair, for the monthly payment to the several States of all

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24 Cheryl Saunders, 'The Hardest Nut to Crack: The Financial Settlement in the *Commonwealth Constitution*' in Greg Craven (ed), *The Convention Debates 1891-98: Commentaries, Indices and Guide* (1986) 149.

25 *Constitution* s 89(iii) (emphasis added).

26 *Constitution* s 93 (emphasis added).

surplus revenue of the Commonwealth'.<sup>27</sup> The 'Braddon clause', section 87, was the closest the Convention got to specifying a fixed share of net customs revenue – 'not more than one-fourth for the Commonwealth' to be applied annually towards its expenditure – but this was limited for 10 years, 'and thereafter until the Parliament otherwise provides'. To round off the fiscal arrangements, section 95 gave Western Australia ('WA') special easing-in provisions to soften the impact of uniform tariffs. Finally, section 96 gave the Commonwealth a blank cheque to 'grant financial assistance to any State on such terms and conditions as the Parliament thinks fit' during a period of 10 years after Federation 'and thereafter until the Parliament otherwise provides'.<sup>28</sup>

What can we make of this? First, it is evident that the Commonwealth was given the whip hand. It would collect all the revenue from the main tax base of the day; indeed, this was a constitutional requirement for good uniform taxation and national market reasons. Second, the sharing formulae were interim measures and extended for only seven years. Thereafter, the Commonwealth could decide to continue the interim scheme or provide revenue on any other basis that it deemed fair. Third, the guaranteed share of three-quarters of net revenues allocated to the States was fixed for only 10 years, because there was no agreement on a permanent formula. Finally, even if section 96 were assumed to have been intended for making bail-out payments to poor States like Tasmania, it left the Commonwealth entirely in charge. If there was any State-owned surplus it would be calculated after special purpose payments had been taken into account.

My conclusion is therefore that vertical fiscal imbalance ('VFI') was not precluded by Australia's constitutional design; indeed, it was there at the beginning, and only diminished as the States began levying their own income taxes – which they did up until the Commonwealth monopolised the field from 1942. Paul Keating embellished upon this point, in opposing aspects of Hawke's new federalism that entailed winding back VFI, by claiming that VFI was not a design fault of the *Constitution*, but rather a design feature.<sup>29</sup>

#### IV FEDERAL CONSTITUTIONAL CHANGE

Federal constitutional change can occur through referendums, albeit rarely in practice, or through judicial review by the High Court – a more ongoing means of federal development and adjustment in Australia. There is an extensive and rich literature on how Australian federalism has been developed and changed through judicial review by the High Court, particularly by constitutional

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27 *Constitution* s 94.

28 *Constitution* s 96.

29 Paul Keating, 'The Commonwealth and the States and the November Special Premiers' Conference' (Speech delivered at the National Press Club, Canberra, 22 October 1991).

lawyers.<sup>30</sup> Referendums have also received considerable attention from both constitutional lawyers and political scientists.<sup>31</sup> However, while these avenues might seem to some to be the most obvious ways of reforming Australian federalism, they are in fact not the most promising ones. It is actually political and intergovernmental processes that are the likely avenues for change. We need to understand why this is the case, and how these processes are shaped and constrained in various ways by established constitutional patterns and blockages.

### A Referendums

Examples of successful changes to Australian federalism by referendum include the addition of a new Commonwealth power to provide certain social services in 1946, and the amendment of the section 51(xxvi) 'races power' to allow the Commonwealth to pass laws with respect to Aboriginal people in 1967. The social services amendment was endorsed by 54 per cent of voters and the 'races power' amendment by a record 91 per cent of voters; both were carried in all six States. These are among the eight referendums that have passed successfully since Federation, among 44 that have been put to the people and failed. Many more have been mooted and brought to Parliament, but were not put to a national vote. This has led many commentators to ask why Australia's referendum record is so poor, with some going so far as to conclude that constitutionally speaking, Australia is 'a frozen continent'.<sup>32</sup> Such a conclusion is hardly warranted<sup>33</sup> given the High Court's expansion of Commonwealth powers and the flexibility that has allowed extensive political and intergovernmental changes to occur. Those more common and successful avenues for changing federalism are discussed in subsequent sections. Nevertheless, it is appropriate to briefly account for Australia's meagre referendum scorecard.<sup>34</sup>

The first point to make is that Australia's referendum record is not unlike that of comparable federal countries like the United States and Canada, which were founded as democracies and have not experienced revolution or conquest. However, Australia is rather exceptional in its persistent hankering for

30 See, eg. Geoffrey Sawer, *Australian Federalism in the Courts* (1967); Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17 *Federal Law Review* 162; Greg Craven, 'The Crisis of Constitutional Literalism in Australia' in H P Lee and George Winterton (eds), *Australian Constitutional Perspectives* (1992) 1; Michael Coper and George Williams (eds), *How Many Cheers for Engineers?* (1997); Geoffrey de Q Walker, 'The Seven Pillars of Centralism: *Engineers' Case* and Federalism' (2002) 76 *Australian Law Journal* 678; James Allan and Nicholas Aroney, 'An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism' (2008) 30 *Sydney Law Review* 245.

31 See, eg. Brian Galligan, 'Referendums' in Brian Galligan and Winsome Roberts (eds), *The Oxford Companion to Australian Politics* (2007) 498; Ian McAllister, 'Elections Without Cues: The 1999 Australian Republican Referendum' (2001) 36(2) *Australian Journal of Political Science* 247.

32 Sawer, above n 30, 208.

33 Though Geoffrey Sawer, surprisingly, reaches this conclusion: Sawer, above n 30.

34 This section draws upon a number of my previous works: see 'Referendums', above n 31 and Brian Galligan, 'Amending Constitutions Through the Referendum Device' in Matthew Mendelsohn and Andrew Parkin (eds), *Referendum Democracy: Citizens, Elites and Deliberation in Referendum Campaigns* (2001) 109.

constitutional change – though Canada too has more recently canvassed an increasing number of proposals to accommodate the demands of the Québécois. As Peter Russell has explained, attempting macro constitutional change has been ‘a politics of frustration’.<sup>35</sup>

Australia’s exceptional record is also due in part to the Labor Party’s sporadic efforts when in federal government to expand central powers and curb the independent electoral cycle of the Senate. Until the 1960s the Labor Party had a federal policy geared towards abolishing federalism; to this end various referendums to increase Commonwealth powers were initiated by Labor, though from a total of 25 of the 44 referendum proposals put to the Australian people, only one of the eight successful referendums – the 1946 social services amendment – was initiated by Labor. The only other referendum that was successful in expanding Commonwealth powers was the 1967 amendment to the races power, put by the Holt-led Liberal Coalition Government.

A brief review of Australia’s referendums allows us to discern a number of the reasons for their high rate of failure. The Australian Labor Party has been persistent in hankering after expanded Commonwealth powers, but has been largely unsuccessful. All 15 of Labor’s referendum proposals prior to 1974 were for this purpose: sometimes to acquire new Commonwealth powers, for instance, over capital and labour in 1911; and at other times to allow the Commonwealth discrete powers, such as over railway disputes in 1911, or rents and prices in 1948. All of these were part of Labor’s push to centralise the Australian economy, and all failed.

By the 1970s, when Labor returned under Whitlam to federal office after more than 23 years in opposition, the federal Party had jettisoned its socialisation objective and became ‘reconciled with federalism’.<sup>36</sup> Whitlam and the new Labor Party were dedicated to working with federalism and capitalism. Since 1974 Labor’s referendum proposals have focused on the machinery of government, with 10 proposals being put in three batches in 1974, 1984 and 1988. All have failed, including on each occasion a proposal to vary the Senate’s electoral cycle and bring it more into line with that of the House of Representatives.

In contrast, Liberal-style governments (Protectionist, Fusion, Nationalist, and Liberal Coalition) have been in office for most of Australia’s federal history and have put 19 proposals to referendum, with seven passing. Early Liberal attempts to increase Commonwealth powers failed, as have subsequent attempts to resurrect proposals that have previously failed. In a similar manner to the experience of the Labor Party, only one of the eight Liberal proposals to increase Commonwealth power has ever passed – in 1967, to allow the Commonwealth the power to make laws with respect to Aboriginal people. In contrast, six of the 11 non-power proposals have passed. Three were earlier on and relatively minor:

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35 Peter H Russell, ‘Attempting Macro Constitutional Change in Australia and Canada: The Politics of Frustration’ (1993) 7–8 *International Journal of Canadian Studies* 41. See also Peter H Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (3<sup>rd</sup> ed, 2004).

36 Brian Galligan and David Mardiste, ‘Labor’s Reconciliation with Federalism’ (1992) 27(1) *Australian Journal of Political Science* 71.

one made an electoral adjustment for the Senate; the other two entrenched fiscal arrangements. The other three successes were put as a suite of changes in 1977: filling casual Senate vacancies from the same party; allowing Territorians to vote in referendums; and setting the retirement ages for federal judges at 70.

The record shows clearly that Australian people do not usually support increasing Commonwealth constitutional powers, or changing the independent electoral cycle of the Senate. They are discerning in approving some measures and rejecting others when suites of proposals are put, as was the case in 1946, 1967 and 1977. Only four proposals have been supported by narrow majorities overall, but failed to win support in a majority of States: two in 1946 carrying three States, and two in 1937 and 1984 carrying only two States.

In other words, the explanation for the usual failure of referendums is not to be found in the conservatism or ignorance of the people, but in the poor judgment of politicians in putting contested proposals forward that lack support. Since 1977 all eight proposals put on three occasions, 1984, 1988 and 1999, have been defeated, seven of them voted down in all States and five receiving less than 40 per cent support from voters. On the face of it, some of these proposals might appear sensible, but in the political context of their time they were all half-baked or contentious, and likely to fail. Two, in 1984 and 1988, were repeats of past failures to change the Senate's fixed term. The other three failures in 1988 were for 'fair elections' that would bring the States under Commonwealth purview; recognition of local government, and extending three rights guarantees applying to the Commonwealth to the States. The occasion was the 1988 Bicentenary, and the referendums were a precursor to more sweeping proposals for an entrenched bill of rights that the Constitutional Commission was drafting. The package was seen as a teaser for more substantial changes down the track, poorly supported by the Labor Government and stridently opposed by the Opposition. Not surprisingly, all failed badly. The 1999 proposals for an Australian Republic and the adoption of a preamble to the *Constitution* were even worse. They were put by a Liberal Coalition government, with Prime Minister Howard opposed to the idea but honouring an undertaking he had made during the previous election campaign (essentially to sideline the issue). If most people supported a republic, as opinion polls suggested, the republican majority was deeply divided over the presidential model, with 'real republicans' who supported an elected head of state joining with monarchists to defeat the proposal, with almost two-thirds of Australians voting 'No'. The preamble was a hotchpotch of aspirational banalities that appealed to even fewer people.

A number of conclusions pertinent to our topic may be drawn from this. The first is that Australia does not have a poor referendum record, but a record of poor referendums. Those who claim the former have either not bothered to examine the record or they hope for changes that are out of step with broad national opinion. True, referendum campaigns politicise issues, but that is the nature of politics and collective decision-making.

The second point is that the Australian people do not usually support Commonwealth proposals for expanding economic and regulatory powers – a

point emphasised by Kirby J in rejecting the majority decision in *Work Choices* to greatly expand the corporations power.<sup>37</sup>

The third point concerns process: Australia has a mono-Commonwealth process in which referendum proposals can come only from the Commonwealth Parliament – this invariably means the government of the day. There is no avenue for State proposals or citizen-initiated referendums, both of which would no doubt bring forward different sorts of proposals. But given the system we have, and this is the fourth point, referendums remain a possible avenue for federal reform – provided sensible proposals with broad support are put to the people, as 1946 and 1967 demonstrate.

My fifth point is that there is no real need to reform Australian constitutional federalism via referendums. There is enormous flexibility in the existing concurrent division of federal powers; there is also further scope through taxing and spending provisions. Indeed, these powers have all been broadly interpreted by the High Court. This suggests that those who flirt with the idea of using referendums in the 21<sup>st</sup> century are likely to be federalists wanting to curb Commonwealth powers, rather than centralists wanting to expand them. Referendums may, however, prove an unlikely avenue for restraining the Commonwealth, since the Commonwealth controls the process. Nor are referendums that might seek to overturn High Court decisions promising, as Menzies' abortive attempt in 1951 to ban the Communist Party through a referendum demonstrates.<sup>38</sup>

My conclusion is that the referendum process remains viable. Its poor reputation is unwarranted and is due in part to past and persistent abuses by Commonwealth governments from both sides of politics. Referendums are prone to politicisation, and the politics of opposing the government's proposals often appeals to the opposition at the time. But that is politics, and there is no point in putting up proposals that are divisive, lack broad public support and are easily politicised. Regardless, governments on both sides have persisted in putting proposals that were likely to fail – most have. Consequently, referendums have played a relatively minor role in reforming Australian constitutional federalism. The other reason why referendums are likely to play a minor role in reforming Australian federalism is that most reforms can be done politically and through improving intergovernmental relations. In other words, the *Constitution* has provided, and will likely continue to provide, a flexible and robust foundational framework for federalism outside of the referendum process.

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37 *Work Choices* (2006) 229 CLR 1, 200–01.

38 This was a response to the High Court's finding in *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 ('*Communist Party Case*') that the *Communist Party Dissolution Act 1951* (Cth) was an invalid exercise of Commonwealth power. See further George Williams, 'The Suppression of Communism by Force of Law: Australia in the Early 1950s' (1996) 42 *Australian Journal of Politics and History* 220; George Winterton, 'The *Communist Party Case*' in H P Lee and George Winterton (eds) *Australian Constitutional Landmarks* (2003) 108.

## B Judicial Review by the High Court

The more common means of changing constitutional federalism has been through judicial review by the High Court. While often an incremental process, landmark cases such as *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*,<sup>39</sup> which established the interpretive method of the Court, have periodically signalled a fundamental reorientation of the Australian federal system. Landmark applications of the Court's expansionist methodology include the *First Uniform Tax Case*, the *Second Uniform Tax Case*, the *Tasmanian Dam Case* and *Work Choices*. The recent *Work Choices* decision, which greatly expanded the Commonwealth's section 51(xx) corporations power to cover much of the extensive field of industrial relations, illustrates just how potent the High Court can be in shaping Australian federalism through sanctioning extensive centralisation of Commonwealth power.

Part of the reason that the federal division of powers in the *Constitution* could be left in broad terms and with scope for development was that the High Court was intended to settle jurisdictional disputes between the Commonwealth and the States and, in the process, to refine and develop constitutional meaning. This was a prominent theme throughout the Federal Convention of 1897–98. The 'Federal Judiciary must be the bulwark of the Constitution. It must be the supreme interpreter of the Constitution',<sup>40</sup> Convention leader Edmund Barton argued, deciding 'between the States and the Commonwealth, the validity of State laws, and the validity of Commonwealth laws which may overlap or override them'.<sup>41</sup> While many conceived of the future court as primarily an appeals court, Barton insisted that its primary function was federal adjudication. This was affirmed by fellow distinguished draftsman John Downer who said that judges would have the 'greatest part in forming this Commonwealth' because they would have 'the vast powers of judicial decision, in saying what are the relative functions of the Commonwealth and of the states'; they would be charged not only with asserting the principles of the federal *Constitution* but with 'the application of those principles, and the discovery as to where the principles are applicable and where they are not'.<sup>42</sup> Similarly, Alfred Deakin's eloquent justification for the High Court's establishment in 1902 cast it as the 'keystone of the federal arch', its role to safeguard and apply the *Constitution* as the 'supreme law'. That meant determining 'how far and between what boundaries it is supreme' and deciding 'the orbit and boundary of every power'.<sup>43</sup>

In my view, and in the view of many constitutionalists, the High Court has performed its federal arbitral role with distinction. While its decisions since the

39 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 ('Engineers' Case').

40 *Official Record of the Debates of the Australasian Federal Convention (1891–1898)*, Adelaide, 20 April, 1987, 952 (Sir Edmund Barton).

41 *Ibid* 962.

42 *Official Record of the Debates of the Australasian Federal Convention (1891–1898)*, Melbourne, 28 January 1898, 275 (Sir John Downer).

43 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 8:10967 (Alfred Deakin).

*Engineers' Case* have broadly sanctioned the ever-increasing expansion of Commonwealth powers, those decisions have arguably been in accordance with the development and consolidation of the Australian nation. In saying this, it is important to keep in mind that the Court sanctions rather than initiates, and probably follows rather than leads in the nation-building process. That being said, the Court's interpretive method, adopted in the *Engineers' Case* and applied ever since, purports to be federally neutral; but when it is applied to the *Australian Constitution's* American-style specification of Commonwealth powers, it is anti-federal. If only one set of powers is spelt out and those are interpreted in a full and plenary way regardless of the impact on the States' unspecified residual powers, the result is the inevitable expansion of Commonwealth powers and a shrinking of the States' residual powers.

*Work Choices* is the most recent landmark case in this respect. In his dissenting judgment in that case, Kirby J claimed that the majority's sanctioning of the use of the section 51(xx) corporations power to support the Howard Government's *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) ('*Work Choices Act*') entailed 'a very large risk of destabilising the federal character of the *Australian Constitution*'.<sup>44</sup> This was, Kirby J said:

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 lawmaking 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.<sup>45</sup>

Lamenting the High Court's decision 'to hand inordinate power to Canberra', Greg Craven concluded that '[a]ll in all, the High Court has delivered what Liberal conservatives have long feared: an omniscient national government effectively unrestrained by a constitutional division of powers'.<sup>46</sup> However, other constitutionalists like Leslie Zines<sup>47</sup> are more supportive of the High Court majority in *Work Choices*, and view the decision as an important, although more benign and routine, extension of a well-established line of constitutional jurisprudence dominant since the *Engineers' Case*.

There is debate among both constitutionalists and political scientists about the character and federal consequences of both *Work Choices* and the Howard Government's about-face in adopting 'aspirational nationalism' or 'opportunistic federalism' as a policy platform. Liberal Coalition governments in the past have been considered friends, if not champions, of federalism, although, on closer examination, two of the greatest Liberal Prime Ministers, Deakin and Menzies,

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44 *Work Choices* (2006) 229 CLR 1, 225 (Kirby J).

45 *Ibid* 225.

46 Greg Craven, 'Struggle ahead for the states', *The Age* (Melbourne), 16 November 2006, 10. For a more measured and sustained critique, see Greg Craven, 'Industrial Relations, the *Constitution* and Federalism: facing the Avalanche' (2006) 29(1) *University of New South Wales Law Journal* 203.

47 Leslie Zines, 'The High Court and the *Constitution* in 2006' (2007) 30(1) *University of New South Wales Law Journal* 174.



could be opportunistic centralists when the circumstances so required. How changes to constitutional federalism affect political federalism is not a simple process. The *Work Choices Act* was significant in sparking the High Court challenge that greatly expanded Commonwealth power. However, the political reaction and consequences of Howard's electoral defeat, and the subsequent winding-back of the *Work Choices Act* by the Rudd Labor Government, might mean that future Commonwealth governments will resile from such initiatives.

The High Court's opening up of avenues for expanding Commonwealth power through broad interpretation of its section 51 heads of enumerated power may or may not be taken up by governments, depending on political circumstances and opportunities. A notable historical example was the reluctance of the Bruce–Page Government in the 1920s to exploit the jurisdictional space that the *Engineers' Case* opened up, including through a curious interpretation of section 92 that made its restrictive guarantee of 'absolutely free trade' applicable only against States' interferences. Subsequent courts closed off this avenue of Commonwealth regulation of trade by re-applying section 92 restrictions to the Commonwealth.

A more recent example, recognised in the *Tasmanian Dam Case*, is the Commonwealth's power to legislate with respect to the environment; the result in that case was lamented by critics at the time as another nail in the coffin of Australian federalism. In the environmental sphere, however, the Commonwealth retains a broad constitutional power that it only partly draws upon. Because of the complexity of environmental challenges and policy, it is unlikely that the Commonwealth will ever occupy the entire field. Indeed, the environment is typical of many large and complex policy domains that have sub-national – State and local – as well as international dimensions that make monopoly regulation by any one sphere of government unlikely.

The *Work Choices Act* was scuttled by the incoming Rudd Labor Government, and is generally considered to have been politically unwise given its extreme nature (ironically, it was passed only after the Coalition parties won control of the Senate). The *Work Choices* case has changed constitutional federalism, but also sparked renewed controversy over the Court's interpretive method, which was also strongly contested by Kirby and Callinan JJ in dissent.<sup>48</sup> Whether the ensuing row is sufficient to cause a future Court to draw back from the extremes of the *Engineers' Case* methodology, or begin to craft an interpretive method more suited to a federal constitution, remains to be seen. This is likely to be necessary, as judicial review based upon the extreme *Engineers' Case* methodology is not, in principle, a credible process for reforming the *Australian Constitution* and, in practice, it has proved to be increasingly distorting. Proposals for this kind of reform are already being canvassed, including that by Andrew Lynch and George Williams to commit to a federal relationship rather

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48 *Work Choices* (2006) 229 CLR 1, 182–246 (Kirby J), 246–385 (Callinan J).

than an arid acknowledgment of federal structure that has little interpretive scope.<sup>49</sup>

Does it really matter if the High Court has effectively abandoned federalism by giving the Commonwealth virtually unlimited powers? Formally, yes, though in practice the federal balance might then be determined in the political sphere, through the push and pull, and competition and cooperation, of Commonwealth, State and Territory governments. Federalism can find its balance through the political process, and that balance will broadly reflect the preferences of the sovereign Australian people who can sanction greater centralism, or new forms of federalism. Indeed, the Australian people might prefer political federalism over judicial federalism, because they have a more direct voice in its outcome. In a somewhat similar vein, Australians have stuck with parliamentary protection of human rights supported by the courts' common and statutory law regimes – that which the NSW Supreme Court Chief Justice Spigelman has recently called a 'Common Law Bill of Rights'<sup>50</sup> – and eschewed judicial protection under entrenched bills and charters of rights. If this is the case, it leaves us with politics as the main means of reforming Australian federalism.

### C Federal Change Through Politics

Politics has always been significant in federal reform processes, and has become more so as the High Court's role in federal adjudication has effectively waned. Through its constitutional jurisprudence of interpreting Commonwealth powers in a full and plenary way regardless of the consequences for State powers, the High Court has largely left the detail of sorting respective Commonwealth and State roles and responsibilities to the political process, in which the Commonwealth has both formal and fiscal dominance. How much real power the Commonwealth exercises, what roles and responsibilities it actually takes on vis-à-vis the States, and how the federal balance between the two is determined, all depend on politics. There are two main sorts of politics to consider: party/electoral politics at the Commonwealth level, and inter-governmental rivalry and cooperation between the Commonwealth and States, including through new and established institutions of intergovernmental relations. We can illustrate both sorts of political change to federalism by reference to developments in Australian politics over recent decades.

The Hawke–Keating period (1983–96) was significant in demonstrating not only that Labor could be reconciled with federalism, but also that constructive reforms to make federalism work better could be successful. The Hawke–Keating Governments' version of 'New Labor' went further than that of the Whitlam Government (1972–75) by accepting that federalism was here to stay, working within or around its constraints on Commonwealth powers, and including an

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49 Andrew Lynch and George Williams, 'Beyond a Federal Structure: Is a Constitutional Commitment to a Federal Relationship Possible?' (2008) 31(2) *University of New South Wales Law Journal* 395.

50 The Hon J J Spigelman, 'The Common Law Bill of Rights' (Speech delivered at the inaugural McPherson Lectures, University of Queensland, Brisbane, 10 March 2008).

active program for making federalism more effective. Despite some slippage on fiscal reform (linked to Keating's more traditional Labor commitment to centralised fiscal arrangements) there was also extensive reform of intergovernmental affairs through a series of special Premiers' Conferences culminating in the formation of the COAG. Both the Commonwealth and States were major players in an extensive overhaul of intergovernmental arrangements and adoption of national standards, competition policy and mutual recognition of regulatory provisions across jurisdictions, and integration of road, rail and electricity systems.<sup>51</sup> Much was achieved in streamlining governments' roles and greater efficiencies were achieved in major policy areas, the results of which are evident today.<sup>52</sup> Of course, there is much more to be done in policy areas such as health, and in 2006 COAG agreed to a National Reform Agenda ('NRA') for further reforms in key areas of human capital, competition and regulatory reform.<sup>53</sup> Nevertheless, intergovernmental reform, along with key microeconomic measures such as extensive tariff reduction, a more flexible labour regime, and the floating of the Australian dollar, helped deliver the subsequent sustained period of high economic performance during the late 20<sup>th</sup> and early 21<sup>st</sup> centuries.

In contrast, the Howard Government had a somewhat mixed federalist record. Prime Minister Howard's achievement in winning electoral support<sup>54</sup> in 1998 for the Goods and Services Tax ('GST') seemed to signal his federalist convictions. Although levied by the constitutionally competent Commonwealth, the entire revenue from the GST (less collection costs) was to be returned to the States and Territories in place of financial assistance grants. The 10 per cent GST rate had been agreed with State and Territories and could only be changed with their unanimous consent. At long last, the States and Territories had de facto access to, if not constitutional ownership of, a significant growth tax.

A decade on, however, the Howard Government adopted a stridently anti-federal rhetoric in pursuit of what Howard called 'aspirational nationalism' and what others have dubbed 'opportunistic federalism'.<sup>55</sup> This entailed unilateral Commonwealth initiatives in areas of State and Territory or shared jurisdiction. Notable examples include the take-over of industrial relations through the *Work*

51 Martin Painter, *Collaborative Federalism: Economic Reform in Australia in the 1990s* (1998).

52 Anne Twomey and Glenn Withers, *Federalist Paper 1 – Australia's Federal Future*, Report for the Council for the Australian Federation (2007) 28–9; Jonathan Pincus, *Six Myths of Federal–State Financial Relations* (2008) Committee for Economic Development of Australia <[http://ceda.com.au/public/research/federal/six\\_myths\\_federal\\_state.html](http://ceda.com.au/public/research/federal/six_myths_federal_state.html)> at 26 July 2008.

53 Council of Australian Governments, *Communiqué*, 10 February 2006.

54 Admittedly, Howard's electoral support was hardly the firmest of mandates, since the 1998 election was extremely close, with Labor winning a majority of the national vote (50.98 per cent).

55 See Anne Twomey, 'Aspirational Nationalism or Opportunistic Federalism?' (2007) 51(10) *Quadrant* 8. Robyn Hollander comes up with a more principled diagnosis of how Howard's values influenced his downplaying of the importance of federalism. Hollander argues that Howard's support for 'the principle of small government' meant the curtailment of government provision and hence a down-sizing of the States, while his economic liberalism again supported reduced State power in favour of a centralised national economy: Robyn Hollander, 'John Howard, Economic Liberalism, Social Conservatism, and Australian Federalism' (2008) 53(1) *Australian Journal of Politics and History* 85.

*Choices Act*, the army-backed intervention in the Northern Territory to address Aboriginal child abuse and dysfunctional communities, and the takeover of the Murray–Darling river system to restore water sustainability. Much more was proposed but not developed: for example, taking over ports to unclog export bottlenecks, and public hospitals to keep them viable and responsive to local communities (taking over the Mersey Valley hospital in northern Tasmania to prevent its downgrading in a State restructuring program was a notorious instance). True, these initiatives, with the exception of the *Work Choices Act*, might be seen as the last ditch attempts of a waning Government to present itself as a bold policy initiator. Blaming the States and Territories for policy failures was adopted as a promising electoral strategy: it shifted blame from the Commonwealth to the States and Territories, and also to the Labor side because Labor Governments held office in all those sub-national jurisdictions. Federalists like Anne Twomey sounded the alarm:

In brutal terms, it is in the Commonwealth's political interests for the states to be starved of funds so that they are regarded as 'failing', and for the federal system itself to be regarded as failing because of the squabbling, blame-shifting and cost-shifting that results from inadequate funding and blurred responsibilities. This is the excuse for greater centralization and the accumulation of increased Commonwealth power as well as an opportunity for the Commonwealth to charge in and save the day to win political points.<sup>56</sup>

Previously, Howard had been pro-federalist in introducing the GST, and also in reviving COAG.<sup>57</sup> Howard's late anti-federal switch, then, might best be viewed as an electoral strategy that failed: his Government was badly defeated in the 2007 election, with Howard even losing his own seat. Labor won government with 83 of the 150 seats (up 23 from 2004) and 52.7 per cent of the two party preferred vote for the House of Representatives (up 5.45 per cent).<sup>58</sup> Howard's anti-federal strategy failed to save the Liberal Coalition's electoral hide; indeed, it may well have been a factor in its demise. The new Labor leader, Kevin Rudd, promised to end the Commonwealth–State 'blame game' and bring in a new era of intergovernmental cooperation. The Rudd Labor Government also acted quickly to wind back the *Work Choices Act* so as to honour its commitment to the trade union movement, which had mounted an effective campaign against the legislation. This also served a federalist purpose and, since taking office, Rudd has upgraded COAG and committed to the NRA in partnership with the States and Territories.

One consequence of the 2007 election turn-around might be that the anti-federalism of the Howard Government has helped stimulate a new Labor-led era of pro-federal reforms. In the dialectic of federal electoral politics, this might in turn cause future Liberal leaders and coalition governments to compete with their

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56 Twomey, 'Aspirational Nationalism or Opportunistic Federalism?', above n 55.

57 Andrew Parkin and Geoff Anderson, 'The Howard Government, Regulatory Federalism and the Transformation of Commonwealth–State Relations' (2007) 42(2) *Australian Journal of Political Science* 295; Anderson, above n 8.

58 Paul D Williams, 'The 2007 Australian Federal Election: The Story of Labor's Return from the Electoral Wilderness' (2008) 54(1) *Australian Journal of Politics and History* 104.

own pro-federalist rhetoric and strategies. However that may be, Australian politics over the last two decades shows how politics can reform and change Australian federalism, for better or worse.

## V CONCURRENCY

As federalists of whatever centralist or decentralist bent, we can be more relaxed about the High Court's expansion of Commonwealth powers and VFI if we accept fully the institutional logic of concurrency and its consequences. As I have argued elsewhere, concurrency is the defining character of the Australian division of powers.<sup>59</sup> This is clearly evident from the structuring of the division of powers in the *Constitution*. Section 51 lists the bulk of powers with respect to which the Commonwealth has 'power to make laws'. Many are appropriate for national government, for example, defence, external affairs, quarantine, immigration, naturalisation, weights and measures, and trade and commerce with other countries. Some other key powers like taxation are clearly necessary for both spheres of government. Others can be shared in particular circumstances: immigration, for example, was shared in the past, with some of the States having immigration ministers until the 1960s and 1970s.<sup>60</sup> In any case, the Commonwealth decides whether and to what extent it occupies the jurisdictional field in these areas because its laws have precedence over State laws by virtue of section 109 of the *Constitution*. By way of contrast, section 52 lists three matters of 'exclusive' Commonwealth power: its own seat of government and other Commonwealth places; its public service; and other matters declared by the *Constitution* to be within its exclusive power, the most notable example of which is power over customs, excise and bounties declared in section 90.

There are good reasons for such a design. One was to allow an orderly transition from separate colonial to common federal legislation. But the notion of concurrency as a constitutional paradigm was not limited to the transitional period around Federation; nor have we necessarily seen its end point. Just as the Commonwealth might oust the States completely in the future, it might also allow them to share national functions in various ways. A second strength of concurrency is that it allows flexibility and fluidity, rather than packaging up and boxing respective roles and responsibilities.

Even if Commonwealth expansion makes most of the section 51 powers de facto exclusive, concurrency is still powerfully evident in the financial provisions. The 'taxing power' in section 51(ii) is the most notable example. Originally, the States had a monopoly over income tax, until the Commonwealth assumed secondary control over it during World War I. In World War II the

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59 Galligan, *A Federal Republic*, above n 2, 192–202.

60 See the portfolio lists for various States in C A Hughes and B D Graham, *A Handbook of Australian Government and Politics 1890–1964* (1968). Hughes notes that Thomas Playford was Minister of Immigration during his whole term as Premier of South Australia (1938–65) and Victoria had a Minister of Immigration into the 1970s: C A Hughes, *A Handbook of Australian Government & Politics 1965–1974* (1977) 39, 54.

Commonwealth then seized monopoly control, taking over the States' tax offices and ousting them from the field of taxation through a scheme of high uniform taxes, grants back to the States, and penalties if they levied their own income tax. Later, the Fraser Government passed legislation to allow State taxes to return in a minor way – through imposing an additional levy on the Commonwealth rate. In reality, however, this provided no tax room, so the scheme was later aborted, and the Keating Government closed off the avenue entirely.<sup>61</sup> It is contentious whether the States should once again collect income tax, as occurs in most comparable federations such as Canada and the United States. The important point, however, is that such a change remains possible under the current Australian federal system and similar changes have already occurred in the past. Whether it will occur again in the future is a political matter, though such a change appears, at this point, unlikely.

On the spending side of fiscal federalism, concurrency is also predominant, so much so that the section 51 division of powers hardly matters. Although the Founding Fathers might not have intended it, section 96 has allowed the Commonwealth Government to bring health, education and welfare among its main policy concerns and expenditures. These changes are the result of both popular demand and political opportunity, and have been funded by growing taxation revenues. They have also been made in response to the complex and multi-dimensional character of most major policy issues that have national as well as sub-national, and also international, aspects and opportunities for government responses. In other words, many complex modern policy areas require national action, not exclusively, but essentially. Once again, the most important aspect of this analysis to note is that such action is possible under the current Australian federal system, albeit too easily in the view of some.

Concurrency gives legitimate weight to political processes, which in my view is a good thing. Although it may be mediated through a system that advantages the Commonwealth in both formal and fiscal powers, the Australian people can shape their federation in whatever way they choose and in whichever way circumstances allow. It is therefore presumptive to assume that ever-increasing centralisation will occur at the national level simply because of globalisation. With the decline of national sovereignty and significant standard-setting and rule-making shifting to the international sphere, a more informed citizenry demanding greater local governance might well see a swing back towards greater decentralisation. If this occurs, Australia's current constitutional structure will stand the country in good stead.

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61 In contrast, the Commonwealth's exclusive power over customs and excise has been given an extremely broad interpretation by the High Court to mean any tax on the production or sale of goods. This head of power is used to levy the GST, the proceeds of which are hypothecated to the States and Territories.

## VI MODES OF INTERGOVERNMENTAL RELATIONS

Concurrency allows for a range of federal modes or styles of intergovernmental relations. Two that have been prominent in Australian federal history are *coercive* intergovernmental relations, with the Commonwealth driving the interstate agenda, and *cooperative* intergovernmental relations, where there is more harmonious interaction between levels of government.<sup>62</sup> The Commonwealth Grants Commission is usually characterised as a cooperative institution, although Victoria and NSW have voiced spirited criticisms of its work over the last couple of decades.<sup>63</sup> On the other hand, section 96 tied grants are seen as coercive of States, even though the States might avidly pursue them. Cooperation is currently dominant in public discourse, with Labor Prime Minister Rudd working intensively with wall-to-wall Labor State and Territory Governments to improve 'dysfunctional' federalism and improve intergovernmental relations.

There are other possible modes that are also in play, or which are at least plausible. These are *coordinate* and *competitive* intergovernmental relations. I have argued that coordinate intergovernmental relations are not paradigmatic of Australian federalism, nor do I think they could be of any sophisticated modern federal system. If they have any value at all, it might be as a conceptual counter in discussions about federalism. Too often, however, the concept is a quixotic distraction that leads analysts into the futile exercise of trying to distil separate and distinct roles and responsibilities for Commonwealth and State governments. If there were ever a bottle with separate internal compartments for Commonwealth and State powers, the genie escaped long ago, and has so infused major policy domains that there is no putting it back. The Commonwealth and States share roles and responsibilities *within* most major policy areas. That is not to deny that there can be clear delineation of respective Commonwealth and State roles within a major policy area, for example, health or environmental protection.

Competitive federalism is much more potent and important for understanding how federalism works and the processes for its reform, and is the preferred reform paradigm of economists. Indeed, Cliff Walsh argues that competition is the main principle of federal systems and best explains their operation. In Walsh's view, competition is the dominant mode, and cooperation a lesser mode that is nevertheless important and finds its place alongside, or within the competitive paradigm.<sup>64</sup> Competition occurs at both the vertical level (between the Commonwealth and the States) and the horizontal level (among the States). It is the primary way that roles and responsibilities are sorted between the Commonwealth and the States. The most basic expression of horizontal competition would be through citizens migrating to preferred State regimes. But

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62 See especially Russell Mathews, 'Innovations and Developments in Australian Federalism' (1977) 7(3) *Publius: The Journal of Federalism* 9.

63 Vince Fitzgerald and Ross Garnaut, *Review of Commonwealth–State Funding: Final Report* (2002).

64 Cliff Walsh, 'Competitive Federalism: Wasteful or Welfare Enhancing?' in Productivity Commission, *Productive Reform in a Federal System: Roundtable Proceedings* (2006) 53.

more significant, as Albert Breton has explained, is the process of political competition through benchmarking: citizens seeing better programs in different jurisdictions and demanding the same from their own government.<sup>65</sup> Similarly, vertical competition draws the Commonwealth into areas of demand or opportunity where States have taken the lead in developing policy.

Walsh's championing of competitive federalism draws mainly on economic arguments and evidence; it is, however, even more strongly supported by political ones. Indeed, political competition is behind much of my analysis of Australian federalism, including the Commonwealth's expansion of section 96 grants and its takeover of income taxation. We should not pose competition and cooperation as binary opposites, but rather accept that they can co-exist and adjust in dynamic combinations.

Once this perspective of concurrent and competitive federalism is adopted, many of the perceived problems with Australian federalism disappear since they are really products of ill-conceived thinking about federalism. Further, the processes for reforming Australian federalism may also be better appreciated; indeed, they are already in operation and working tolerably well in the federal processes and outcomes that we see around us.

A notable process is so-called 'overlap and duplication', which is actually part of the process of governments at Commonwealth and State levels 'sorting' themselves between activities. Governments compete through policy initiatives where they have some political or economic advantage in their delivery. There is also obvious room for cooperation where complementarities and externalities need addressing.

Australian fiscal federalism is a prime example of competitive and cooperative modes. VFI might be considered coercive on the Commonwealth's part, but is accepted across all governments. Hence it is better explained, as Walsh puts it, 'as being a result of mutually-beneficial agreements between national and state governments to centralise revenue-collection from at least some tax bases', with the proviso that the resulting transfers of revenue back to the States will entail tied grants 'by mutual agreement'.<sup>66</sup> Horizontal fiscal equalisation is a means for stabilising potential inter-jurisdictional rivalries and avoiding 'a race to the bottom'.<sup>67</sup>

Competition and cooperation are complementary dynamics in Australian intergovernmental politics and public policy. Besides explaining fiscal federalism and how it has developed in Australia, these two modes capture the dynamics of political federalism and intergovernmental relations. The processes operate both within and across major policy areas, something that is not readily appreciated by those with a coordinate mindset.

We hear a good deal of loose talk from politicians, senior bureaucrats and advisors about one government controlling one big policy area, such as health,

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65 Albert Breton, *Competitive Governments: An Economic Theory of Politics and Public Finance* (1996).

66 Walsh, above n 64, 82.

67 *Ibid.*



and the other level of government controlling a separate and distinct policy area, such as education. Both, however, are large and complex policy areas with multiple sub-domains and intersections requiring aspects of both national and State policy input and management. It is unrealistic not to have shared jurisdiction within a particular policy area, particularly in challenging areas such as the environment and water sustainability.

Working out better arrangements and systems for intergovernmental management across jurisdictions within large policy areas is the biggest challenge facing modern Australian federalism, and is where our attention and effort should be focused. Happily, it is precisely these issues that are currently being tackled by COAG.

## VII FEDERALISM REFORM: THE MISSING COUNTER-FACTUAL

The final purpose of this article is to address the negative prognostications of critics who draw upon unexamined assumptions and models of federalism that generate problems more imagined than real. Public discourse on Australian federalism in the past often centred around abolition of the federal model, with arguments between progressives and conservatives raging over whether we should have it or not. A classic example is Gordon Greenwood's *Future of Australian Federalism*.<sup>68</sup> Greenwood argued that Australian federalism had no future, but based his arguments upon a mix of polemics and a poor appreciation of how government and economy were developing in the 20<sup>th</sup> century. Nevertheless, with the federal Labor Party of the time committed to federal abolition, there was some saliency in Greenwood's attempted justification of the policy. Federal abolitionists are dinosaurs in today's world, however, and the debates around federalism have shifted to ways in which to make it work better.

Nevertheless, there are two sorts of problems hampering both contemporary public discourse and the reform process. The first is poorly developed ideas about what federalism is or should be, and a tendency to neglect the rich experience of Australian federal history. Much of this article has been an attempt to reflect upon ways of thinking about federalism and its complexities so that we are aware of the various avenues open for development and change. The processes for federal reform are all available – through referendums, judicial review by the High Court, political competition, and intergovernmental relations. Some have worked better than others: judicial review more than referendums; more recently, competitive politics and cooperative intergovernmental relations better than either of these. I have argued that this latter arena of intergovernmental relations and management is the most promising one for contemporary reforms; indeed, in some cases, reforms are already in place.

A second major problem hampering public policy discourse and the reform process is the lack of plausible counter-factuals in diagnostic and reform

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68 Gordon Greenwood, *The Future of Australian Federalism* (2<sup>nd</sup> ed, 1976).

proposals. An all too common tendency is to assume inefficiencies, or to quantify them using crude guesstimates or dubious methodologies that purport to measure the costs of federal inefficiencies. According to figures touted by the Business Council of Australia, these figures range from \$9 billion to perhaps \$20 billion per year.<sup>69</sup> These estimated costs of supposed duplication and overlap are probably exaggerated given that they take no account of other benefits of competition that might be accruing at the same time and they assume no additional costs associated with the proposed alternative.<sup>70</sup>

Another common fallacy is to assume that all these supposed problems and inefficiencies will simply disappear in some alternative counter-institutional proposal, and that other unintended ones will not surface. For example, health policy in Australia is said to be a federal mess, and in certain respects that is no doubt the case. Australia's overall health system, however, seems tolerable when compared to other comparable federal and unitary countries. All developed nations are struggling with rising costs and new technologies, changing (and particularly aging) demographics, and raised community expectations. We need to be careful in framing health policy problems as federal ones, and in assuming they might be solved if only one level of government occupied the field.

The idea that regional government could replace all or much of State government relies upon bold assumptions about how things might work and how well they might be managed. Without such knowledge, it must remain an imagined alternative – like Plato's 'just regime' in *The Republic*. There is, of course, virtue in proposing and attempting to cost such alternative regimes, but we should not confuse mere proposals with plausible reform processes.

We might conclude, then, that even if there is much to be reformed in Australian federalism, there are multiple processes available. Some, like judicial review, are constitutional; others are political and intergovernmental. We need to be clear about what needs reforming and why, and what are the appropriate and likely avenues and conditions for making particular reforms. And we need evidence-based proposals that include careful assessment of what the current situation actually is, including its benefits as well as its costs, and what the counter-factual situation might plausibly be. This might save us from a good deal of effort in devising dubious reform proposals, and increase the chances of achieving real reforms.

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69 Business Council of Australia, *Reshaping Australia's Federation: A New Contract for Federal–State Relations* (2006) vii <<http://www.bca.com.au/Content/100802.aspx>> at 23 July 2008. The Business Council's report draws heavily upon a secondary report by Access Economics, *The Costs of Federalism* (2006) <<http://www.accesseconomics.com.au/publicationsreports/showreport.php?id=107>> at 30 July 2008, which in turn relies upon Mark Drummond, 'Costing Constitutional Change: Estimating the Costs of Five Variations on Australia's Federal System' (2002) 61(4) *Australian Journal of Public Administration* 43.

70 Pincus, above n 52.