

Ten Advantages of a Federal Constitution

Geoffrey de Q. Walker

The constitutional debate in Australia tends to concentrate on and exaggerate the minor inconveniences of federalism, making no mention of its great advantages.

Worldwide support for federalism is greater today than ever before.¹ The old attitude of benign contempt towards the federal political structure has been replaced by a growing conviction that it enables a nation to have the best of both worlds, those of shared rule and self-rule, coordinated national government and diversity, creative experimentation and liberty. Within Australian political-intellectual circles, however, attitudes to federalism range from viewing it as a necessary evil to, as one recent work puts it, 'waiting for an appropriate time in which to abolish our spent State legislatures'.²

To some extent those attitudes are understandable. The pattern of constitutional interpretation followed by the High Court over most of this century has consistently tended to favour the expansion of Commonwealth power at the expense of the states. This has made it harder for the states to perform their proper role, so that the advantages of constitutionally decentralised government are increasingly difficult to identify and evaluate. These advantages are discussed below.

1. The right of choice and exit

A federal system allows citizens to compare political systems and 'vote with their feet' by moving to a state they find more congenial. That this right of exit is a political right as important but much older than the right to vote is obvious from the events leading up to the fall of the Soviet Union. The communist governments were the only regimes in history ever to suppress the right of exit almost completely. The Soviet authorities well knew that if their subjects should ever seize or be granted that right, the communist system would instantly collapse. And that, of course, is what happened.

The citizen in a liberal unitary state who is dissatisfied with the national government may move to another country. But it is becoming harder to obtain a permanent resident visa for the kind of country to which one might wish to emigrate. Globalisation notwithstanding, immigration is increasingly unpopular with voters the world over.

In a federation, however (including a quasi-federal association such as the European Union), there is complete freedom to migrate to other states. This has occurred on a massive scale in Australia, especially during the 1980s and early 1990s when Australians moved in huge numbers from the then heavily governed southern states to the then wide open spaces of Queensland. When centralists give federalism the disparaging label 'states' rights', they are therefore obscuring the fact that it is above all the *people's* right to vote with their feet that is protected by the constitutional division of sovereignty in a federal system.

2. The possibility of experiment

Federalism allows and encourages experimentation in political, social and economic matters. It is more conducive to rational progress because it enables the results of different approaches to be compared easily. The results of experience in one's own country are also less easily ignored than evidence from foreign lands. All this is particularly important in times of rapid social change. As Karl Mannheim pointed out, 'every major phase of social

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change constitutes a choice between alternatives',³ and there is no way a legislator can be certain in advance which policy will work best.

Nonetheless, hardly a week passes without some activist group lamenting the 'inconsistent' (the term being misused to mean merely 'different') approaches taken by state laws and calling for uniform 'national' legislation to deal with a particular problem. Behind these calls for uniformity lies a desire to impose the activists' preferred approach on the whole Commonwealth, precisely so that evidence about the effectiveness of other approaches in Australian conditions will not become available.

Centralists also tend to assume that uniformity and centralisation of the law bring greater legal and commercial certainty. But uniformity and certainty are quite unrelated. That is clear from experience with the federal tax laws and family tax law, which are uniform but at the same time severely lack certainty or predictability.

Sometimes the gains from nationwide uniformity will outweigh the benefits of independent experimentation. This will usually be the case in areas where there is long experience to draw on, such as defence arrangements, the official language, railway gauges, currency, bills of exchange, weights and measures, and sale of goods. But experimentation has special advantages in dealing with the new problems presented in a rapidly changing society, or in developing new solutions when the old ones are no longer working.

3. Accommodating regional preferences and diversity

Unity in diversity. The decentralisation of power under a federal constitution gives a nation the flexibility to accommodate economic and cultural differences. These characteristics correlate significantly with geography, and state laws in a federation can be adapted to local conditions in a way that is difficult to achieve through a national government. By these means overall satisfaction can be maximised⁴ and the winner-take-all problem inherent in raw democracy alleviated.

Paradoxically, perhaps, a structure that provides an outlet for minority views strengthens overall national unity. Without the guarantee of regional self-government, for instance, Western Australia would not have joined the Commonwealth. If that guarantee were abolished, the West might secede, perhaps taking one or two other states

with it. Federalism thus has an important role, as Lord Bryce observed, in keeping the peace and preventing national fragmentation.⁵

Cultural differences in Australia. Some commentators see sociocultural diversity as the only possible explanation and justification of federalism and argue that Australia is too homogeneous to be a federation. Yet federalism plainly works best when sociocultural differences are not *too* great or too territorially delineated. Multi-ethnic federations are among the hardest to sustain. Australia's relative sociocultural homogeneity is therefore an argument for, not against, a federal structure.

Isolating discord. Federalism's tolerance for diversity has the further advantage of preventing the national government from being forced to take sides on matters of purely regional concern. This is consistent with the axiom of modern management science that problems should so far as possible be dealt with where they arise. For example, the Northern Territory's voluntary euthanasia legislation became a national political issue because, as a territory enactment, it could be overridden by a Commonwealth Act. Had the issue arisen in a state, there might still have been a nationwide debate but the federal government would not have been directly involved.

4. Participation in government and the countering of elitism

A federation is inherently more democratic than a unitary system because there are more levels of government for public opinion to affect.⁶

The fall and rise of political elitism. This more deeply democratic aspect of federalism is especially important at a time when elitist theories of government, albeit clothed in democratic rhetoric, are once again in vogue. The struggle between the idea of government by the people and government by an elite is as old as the Western political tradition itself. Elitism, however, has been

dominant throughout most of history.

Throughout the 19th century, critics assailed the belief that the common man could govern as being contrary to experience and an absurdity. One after another, new theories were advanced to justify rule by a select few, on technocratic grounds, on the basis of some romantic 'superman' mystique, or by reason of a supposed historical

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inevitability. In the 20th century those theories brought forth the twin poisoned fruit of communism and Hitlerian national socialism.

The 1960s saw the sprouting of a new hybrid model of government that lies somewhere between the traditional poles of democracy and elitism, a model in which the power of an enlightened minority would help democracy to survive and progress. Variations of this model have come to be known as the 'theories of democratic elitism'.

The new wave of elitism has gained momentum from the trend towards globalisation. The growth of global consciousness is no doubt a good thing, but the other side of the coin is that it has opened the way for undemocratic bodies such as the United Nations and its agencies to implement an elitist agenda under the pretext of promulgating 'international norms'.⁷ International relations circles have acknowledged this problem and labelled it 'democratic deficit',⁸ but no steps other than cosmetic measures have been taken to overcome it.

Creative controversy. So long as people are free, they will disagree. In that sense conflict is an inescapable part of civilised life. It is only authoritarian governments that see liberal freedom as encouraging social division and seek to abolish conflict by creating a false consensus.

The 'voice' factor. Democratic participation in a federation is also enhanced by what is called the factor of 'voice'. The basic logic of this idea is that the size of the political unit, as measured by the number of members, is a relevant variable in upholding the individual's political sovereignty, quite apart from the opportunity for exit.⁹ If for any reason people are unwilling or unable to exercise their right of exit, they may be able to exercise 'voice', defined as activity that participates in determining political choices. Voice is more effective in small than in large political units—one vote is more likely to be decisive in an electorate of 100 than in an electorate of 1000 or 1 million. It is also easier for one person or small group to organise an influential coalition in a localised community than in a large and complex polity.¹⁰

5. The federal division of powers protects liberty

Barrier of our liberty: The diffusion of lawmaking power under federalism is a shield against an arbitrary central

government. By dividing sovereignty, the federal division of powers reduces both the risk of authoritarianism and the apprehension of it. The states help to preserve judicial independence and impartiality as well. The existence of independent state court structures prevents a national government from filling all the courts in the land with judges believed to be its supporters.

That this aspect of the federal compact has not attracted much attention or comment in Australia is probably a function of history. Newcomers from Europe often remark that Australians are too complacent about their freedom because they have never had to fight for it. That is not quite true, but the perception is generally correct regarding internal threats. There was no turbulent formative period in

Australia comparable to the American revolutionary era, which seems permanently to have sensitised Americans to infringements of their freedom.

Recent assaults. A succession of federal government attacks on civil and political rights over recent decades make such nonchalance now quite unjustified. Malcolm Fraser's retrospective tax legislation, for instance, broke the constitutional convention against ex post facto lawmaking and led in due course to the widely criticised practice of 'legislation by ministerial fiat'.¹¹ Proliferating quasi-judicial tribunals took politically sensitive areas of law away from the ordinary courts, thereby depriving accused persons of due process and subjecting them to rulings by tribunals whose members may have been appointed precisely because they were known not to be impartial.¹²

One of the most dramatic challenges to liberty was the Australia Card Bill 1985, which would have required citizens to carry a government number recorded on an identity card. Among its many other consequences, this legislation would have reversed the constitutional presumption that it is for the government to justify its actions to the people, not the other way around.¹³

Especially arresting is the fact that such attacks on liberty have occurred, not during a war or similar calamity that might have excused or explained some of them, but in a period of peace and general prosperity. A country with a recent record like that has no reason to assume that its freedom and democratic rights are secure. It has much to fear from any further concentration of government power.

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An end in itself. In a properly working federation, a national government seeking to implement a uniform policy in an area where it has no constitutional power must learn to proceed by negotiating and seeking consensus, not by diktat, bribery or menaces. Government by consensus can not only be more efficient, it can also be an end in itself. The relative slowness of the process of consensus-seeking, especially in a federation, is a source of the great stability of federal systems and of their exceptional political efficiency.

6. Better supervision of government

Decentralised governments make better decisions than centralised ones, for reasons additional to the spur of competition provided by the citizen's right of choice and exit.¹⁴ State governments can be more closely supervised because of lower monitoring costs. There are fewer programmes and employees, and the amounts of tax revenue involved are smaller. Citizens can exercise more effective control over government officials when everything is on a smaller scale.¹⁵ Unlike the Commonwealth, the states cannot create money, and this further limits the scope for abuse of power.

Large governments encourage wasteful lobbying by interest groups engaged in what economists call 'rent-seeking', the pursuit of special group benefits or privileges. Rent-seeking is easier in large than in small governments because it is harder for ordinary citizens to see who is preying on them.

All but one of the world's geographically large countries are now federations (in China's case, de facto) for reasons of effective supervision or sheer governability. The exception is Indonesia, which is belatedly considering a federal solution.

7. Stability

Stability is a cardinal virtue in government. Stable government enables individuals and groups to plan their activities with some confidence and so makes innovation and lasting progress possible. Political stability is much valued by ordinary people because they are the ones likely to suffer the most from sudden shocks or changes of direction in the government of the country.

Stability is obviously a high priority with the Australian people. This can be seen from their widespread practice of voting for different parties in each of the two houses of parliament, thereby denying the government a free hand in passing whatever legislation it likes. Based on the voters'

distrust of the career politician, this practice reduces the destabilising potential of transient majorities in the lower house.

Federations are exceptionally stable. Of the five countries that survived the 20th century without a violent change of government, four are federations: the USA, Canada, Australia and Switzerland. The unitary United Kingdom (UK), on the other hand, is slowly disintegrating, with Ireland's secession in 1921, 30 years of Ulster civil war and a Scots separatism only partly satisfied by the bizarre 1998 devolution scheme. Adopted in time, a federal structure might have saved the UK.

8. Fail-safe design

Besides acting as a brake on extreme or impetuous action by the national government, federalism cushions the nation as a whole from the full impact of government blunders by making it harder for any one group of politicians to ruin the entire economy at once.

The mixture of neo-corporatism and public sector expansion on borrowed money that undid Victoria, South Australia and Western Australia in the 1980s, for instance, was also the fashionable policy in Canberra at the time. It might well have been comprehensively extended to the whole country if the constitutional power to do so had existed. Had that happened, Australia might not have weathered the Asian economic storm as well as it did.

For the same reasons, damage control can bring results more quickly when the impact of an economic mistake or misfortune can be localised in this way. The three states that were devastated in the 1980s have now recovered from their tribulations. In their reconstruction processes they were able to borrow policies that had proved successful in other states: fiscal policy from Queensland, privatisation and reform

of government business enterprises from New South Wales, scaling back the public sector from Tasmania. Repairing the damage done by a policy error in an area where the Commonwealth has a monopoly, such as monetary policy, seems to take longer, however. The unprecedented inflation ignited by treasurer Frank Crean's 1973 and 1974 federal budgets has only recently been brought under control, almost a generation later.

One should therefore not assume that a healthy national economy requires comprehensive macroeconomic and microeconomic control from the centre. The

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economic commentator P. P. McGuinness maintains that there is no good reason for Canberra to deny to states the possibility of divergent policies with respect to the overall level of revenue raising and spending. Most of the powers the Commonwealth exercises in relation to economic policy are not only unnecessary but positively counterproductive. 'In fact,' he writes, 'the need for central macroeconomic policy is largely the product of over-regulation and mistaken micro-economic policies'.¹⁶

9. Competition and efficiency in government

Government of the people, for the governors. Inefficiency in government usually takes either or both of two forms. One is a tendency to higher tax rates, which is obvious and easy to detect. The other, less obvious, has been identified and extensively described by the economists who have developed the 'public choice' model of government.

This model proposes that government agents (elected representatives and public servants) act from the same motives of rational self-interest as other people. It predicts that government programmes will be administered so as to minimise the proportion of the programme's budget that is actually received by the intended beneficiaries, with the remainder—the surplus—being used to further the interests of the administrators.

A government that enjoys monopoly power is able to generate such a surplus for discretionary use by officials and politicians.¹⁷ An example is Australia's public university system. In the days when they were administered by the states, the universities were efficient bodies with the 'flattened' management profile so admired today. Commonwealth involvement consisted mainly of funding Commonwealth scholarships. These were essentially a voucher system and were awarded to anyone who did better than average in the final school examinations.

The transformation began in 1974 when the Commonwealth assumed financial control over the universities. Access to the proceeds of the Commonwealth's monopoly over income taxation generated a revenue surplus which, as the public choice model predicts, was increasingly used to expand the bureaucracy, both in government and in the universities themselves. Finally, the Dawkins revolution converted higher education into a total command economy administered from Canberra. Just when the world was abandoning the many-layered,

command-and-control management model, the Commonwealth forced the universities to adopt it.

Competitive federalism. By creating a competitive market for public goods, governments can provide consumer-taxpayers with their preferred mix of public goods at the lowest tax price.¹⁸ Though the composition of the tax/service bundles may vary, the proportion of revenue that is appropriated for the purposes of the bureaucracy and politicians is less because no government is able to exact a surplus from its citizens.¹⁹ Competition coupled with the right of exit also makes it harder for states systematically to favour particular regions while imposing the costs on other regions.²⁰

The efficiency gains from competitive federalism are not significantly reduced by the smaller size of state governments. There are

few economies of scale in government except in the areas of foreign relations and defence (and even here the problems of the Collins submarine, the Steyr rifle and the Enfield artillery piece arouse reservations), nor are large organisations necessarily any better at dealing with complex problems than smaller ones.

Competitive federalism will assume greater importance as the structural changes wrought by the new technologies continue to work themselves out. In recent years most of the net addition to employment has come from self-employment and small businesses, and the trend is likely to accelerate as the effects of the information revolution spread through the economy. Small entrepreneurs need simpler and less intrusive government, union structures and taxes, and will pressure governments to provide them. As the New Economy is uniquely mobile, governments that fail to adapt will lose business.²¹

The duplication issue. A common criticism based on vertical duplication (overlap between federal and state activities) is that with two sets of politicians, state and Commonwealth, Australia is over-governed and that it would be more efficient to dispense with the lower tier.

Australia has 576 state parliamentarians.²² That is not a huge number when compared with the 378,700 people employed in government (not counting those engaged in education, health care or social welfare, or working for government corporations) or with the nation's 878,800 managers and administrators. But it is unrealistic to

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suppose that abolishing the states would lead to a net saving of those 576 positions plus their support staffs.

Centralists always suggest replacing the six states with 'regions', between 20 and 37 in number.²³ That structure would require the appointment of regional governors, prefects, sub-prefects, together with support staff. France's regions are administered by an elite *corps préfectoral*, a highly-paid class who live like diplomats in their own country, with official residences, servants and entertainment budgets. Sooner or later, as in France, our national government would be forced by public dissatisfaction to create elected regional assemblies, between 20 and 37 in number. By then any savings would long since have evaporated.

As matters stand the 32.7% of GDP that Australia allocates to general government expenditure is lower than unitary New Zealand's 39.6%, the United Kingdom's 40.1% (before devolution) or France's 52.4%.²⁴ Australia's figure is closer to the United States' 30.5%. Six sets of state parliamentarians thus seems quite an efficient arrangement.

A variant of the vertical duplication argument is that Australia's population is just too small to support six state governments. Some comparisons may be helpful here. In 1788 the population of the 13 American states was 3 million, significantly less than Australia's population in 1901. By 1832 it had risen to 15 million²⁵ but probably did not match Australia's current population of 19 million until about 1845. Switzerland, that land of supreme efficiency, has 5.5 million people for its 26 cantons. It is a more decentralised federation than Australia, with even some defence functions being performed by the cantons.

10. A competitive edge for the nation

Often overlooked even by advocates of federalism is the value of competition among the states as a means of enhancing the international competitiveness of the nation as a whole. In other contexts, this is quite a familiar principle. It is, for example, the basis on which international sporting teams are selected. Out of the deliberately encouraged rivalry between local, regional and state teams emerges the squad that will represent Australia in the Olympics or other international events. Competitive

federalism harnesses this principle to the goal of earning a better standard of living for all.

The truth about railway gauges. No discussion of governmental competition and efficiency in the Australian federation can overlook the old reproach that Australia's mixture of railway gauges is a consequence of the federal system. But the rail networks were established long before federation. Further, Britain had more gauges than Australia, but all were standardised by the 1880s. Our federal structure does not explain why, over a century later, most of Australia's non-standard track remains unconverted. The answer, as Gary Sturges has suggested, probably lies in the fact that until the reforms of the last decade Australian's railways were from the outset almost all government-owned.²⁶

Towards more effective federalism

At the dawn of the Commonwealth's second century, changes are in progress that may help revitalise Australian federalism. The goods and services tax in practice provides the secure revenue basis the states have long needed and is a step towards more balanced federal-state fiscal relations. The lack of a formal national bill of rights denies the federal judiciary the de facto veto power over state legislation that they enjoy in the United States and Canada.

Despite this, many of the world's other federations tap the benefits of federalism better than

Australia does. There are, however, a number of simple and inexpensive steps that would improve Australia's performance. They include reviving the Senate's role as the states' house by establishing a standing committee on federal-state relations, formalising present inter-governmental bodies by requiring regular meetings and public hearings, and by recognising that the usual drive towards national conformism should be balanced by an appreciation of the benefits of diversity. The High Court should be invited to emulate the United States Supreme Court and revisit some of the centralist decisions that have undermined the Constitution. Some purely symbolic measures, such as the award of honours at the state level, would also help re-awaken the spirit of independence, self-reliance and community solidarity.

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Conclusion

An awareness of the positive benefits of federalism will make the constitutional debate a more equal and fruitful one. This will mean recognising that in a properly working federation government is more adaptable to the preferences of the people, more open to experiment and its rational evaluation, more resistant to shock and misadventure, more politically efficient and more stable. Its decentralised, participatory structure is a buttress of liberty, a counterweight to elitism, and a seedbed of 'social capital'. It fosters the traditionally Australian, but currently atrophying, qualities of responsibility and self-reliance. Through greater ease of monitoring and the action of competition, it makes government less of a burden on the people. It is desirable in a small country and indispensable in a large one.

Endnotes

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- ² G. Maddox and T. Moore, 'In Defence of Parliamentary Sovereignty', in *Power, Parliament and the People*, M. Coper and G. Williams (eds), (Annandale, NSW: Federation Press, 1997), 67, 82. On this issue see Parliament of Victoria, Federal-State Relations Committee, *Australian Federalism: The Role of the States*, 2nd Report, (Parliament of Victoria: Melbourne, 1998), 9-12.
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- ⁹ J. Buchanan, 'Federalism and Individual Sovereignty', *Cato Journal* 15: 2-3 (1996), 25, 263.
- ¹⁰ As above, 261-62.
- ¹¹ G. Walker, 'The Law that Wasn't There: Retrospectivity Becomes Routine', *Australia and World Affairs* 5 (Winter 1990), 47.
- ¹² G. Walker, 'The Tribunal Trap', *Australia and World Affairs* 8, (Autumn 1991), 53. The High Court restored some legal rigour to this area in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR245, 69ALJR 191.
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- ¹⁴ Calabresi, 'Limited and Enumerated Powers', 777.
- ¹⁵ Calabresi, 'Limited and Enumerated Powers', 777-778.
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- ¹⁷ P. Grossman, *Fiscal Federalism: Constraining Governments with Competition* (Perth: AIPP, 1989), vi, 31.
- ¹⁸ Calabresi, 'Limited and Enumerated Powers', 775; Grossman, *Fiscal Federalism*, chs. 3-6.
- ¹⁹ Vertical competition in federations can also improve governmental efficiency. See A. Breton, 'Towards a Theory of Competitive Federalism', *European Journal of Political Economy* 1, 2 (1987), 263-329.
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- ²¹ H. McRae, 'Giving the little guy a hand', *Forbes* (24 January 2000), 32; W. Kasper, *Building Prosperity: Australia's Future as a Global Player* (St Leonards, NSW: The Centre for Independent Studies, 2000), ch. 4.
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