

# NOW IS THE SPRING OF OUR MILD CONTENT

**Greg Craven** describes the survival of Australian federalism as a potent constitutional and political force

Incredibly for a phenomenon that has scarcely dared speak its name for the last half century, Australian federalism is undergoing a brief moment, if not of sunshine, then of faintly lightened gloom. Perhaps for the first time since the early 1960s, it almost is respectable to describe yourself as a ‘federalist,’ provided you are not too strident about it.

This compares starkly to decades of café discussions, constitutional law tutes, and Carlton wine sippings, where to confess to even the faintest defence of ‘states’ rights’ was instant social, and quite possibly career, death. Federalism routinely was disparaged as a historical accident, foisted upon the country by dead nineteenth-century naifs. It obstructed every progressive project, mostly of the Left but occasionally of the Right. It protected divisive hicks from Western Australia from profound schemes designed purely for their own enlightenment. As a form of government, it was as outdated as the *Ancien Régime*, and centred on the postulated existence of distinct states that were in fact as alike as unpleasant green caterpillars in an empty peapod. In short, Australian federalism was so antiquated, counter-productive, and deeply uncool that no serious thinker supported it.

That federalism now is even a serious subject of discussion in Australia owes much to the efforts of former Prime Minister John Howard, one of its most dedicated opponents. Howard’s disdain for the limits imposed upon central power by the federal Constitution, coupled with his determination that this power, once liberated, was to be used for such conservative projects as the

robust industrial relations approach embodied in WorkChoices marks 1 to 446, forced Australia’s left-leaning intellectual establishment—including its Labor components—to contemplate almost for the first time the joys of divided power. An omni-competent Commonwealth apparently might be a good thing if directed by Gough Whitlam or Paul Keating, but not by John Howard or Peter Costello. Astonishingly, in the first decade of the twenty-first century, a remarkable number of Labor politicians and Labor-leaning thinkers began shyly courting a mild form of federalism, feeling their way towards its deployment not as a mechanism of states’ rights but as a restraint upon power.

This tendency was reinforced by the attitude of Kevin Rudd, Howard’s Labor successor. Rudd, who had a substantial background in inter-governmental relations in Queensland, was significantly inclined to see federalism as a possible vehicle for change rather than as complicating the Commonwealth agenda. He announced ambitious changes in health and water policy that relied heavily on cooperation between the Commonwealth and the states through agencies such as the Council of

**Greg Craven** is Vice Chancellor of the Australian Catholic University, Deputy Chairman, Council of Australian Governments (COAG) Reform Council, and a constitutional lawyer.

Australian Governments (COAG). For a substantial portion of the Rudd Camelot, federalism almost became synonymous with potential and possibility, rather than obstruction and disappointment. Hopes faded with a reversal towards more coercive approaches towards the end of his reign, prompted partly by the exigencies of the global financial crisis and partly by bureaucratic habit in such contexts as education. But hope is not an experience easily forgotten. Nor were all the cooperative gains of Rudd transitory or dismantled.

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Paradoxically, the comparative waning of Rudd's program of federal cooperation, and the Commonwealth resuming a more traditional directive approach, has underscored the survival of Australian federalism as a potent constitutional and political force, after many years of being regarded as having all the resilience of a wilted lettuce. Perhaps for the first time in living memory, Canberra is being confronted by the reality that there are many areas—education, health and water—where it simply cannot unilaterally achieve its objectives at an acceptable political or real cost without the grudging cooperation of the states. Like the British Celts facing the invading Saxons, states have been forced to retreat so far into the rocky heartland of their few remaining powers that overcoming them is highly problematic. This is less because of their inherent strength and more the result of the unpromising policy terrain. With premiers having nowhere else to run, the states could look feistier and more determined, if also a good deal more desperate, than ever before.

This new dawn of Australian federalism is hardly a golden one, but there are welcome signs of progress. Federalism is being spoken of for good or ill as a subsisting reality, rather than as

a dying constitutionalism in need of palliative care, which is a far cry from the denunciation of federalism over most of Australia's history.

That denunciation proceeded upon a more or less wilful misunderstanding of the twin pillars of federalism that stood firmly in the minds of Australia's founding fathers. The 'subsidiarity axis' posits that in a country especially the size of Australia, with its consequent economic, geographical, climatic and other diversities, decisions should be made as close to the people affected by them. In Australia, this quite reasonable philosophy of governmental system, with its strong roots in both European and American political theory, was rendered as a blind commitment to non-existent regional diversity regardless of the national imperatives of the day.

The second great rationale of the founders—the 'balance axis'—fared even worse at the hands of subsequent federal detractors. The idea as understood by the founders, who were deeply versed in both British conservative and American constitutional theory, proceeded on the not entirely unknown premise that power is dangerous, and that absolute power is very, very dangerous. It therefore makes sense to design a constitutional system in which power is balanced, with federalism achieving this object within a geographical framework to much the same ends as the separation of powers operates upon an analytical terrain of types of powers. This line of reasoning was less pooh-poohed by detractors as written out of history. Doubtless to their own posthumous surprise, the founders were dismissed as far too rusticated, colonial and Anglo-centric to have ever been motivated by such new-fangled Yankee ideologies. Edmund Burke would have smiled.

Despite its widespread dismissal by intellectual, cultural and political elites, Australian federalism clung grimly to certain headlands of legitimacy and plausibility. Most fundamentally, it remained, in A.V. Dicey's words, 'The Law of the Constitution.' For all their self-certitude, Canberra's reformers could rarely persuade Australians to modify the federal principle under the distressingly federal (and even more distressingly egalitarian) referendum

procedures ordained by section 128. Less direct means, such as sympathetic high courts and fiscal arm-twisting, were needed.

Even less conveniently for federal doomsayers, Australia's divided Constitution on the whole has proven remarkably effective by world standards. It is undeniably inconvenient that a Constitution allegedly programmed to produce policy paralysis and crippling regional strife—and unable to grapple with changing circumstances—has in fact presided over one of the world's most stable and prosperous democracies. Moreover, it has outperformed the most splendidly centralised states in economic terms in the world's worst financial crisis of the last 70 years. Either the fatal effects of Australian federalism have been exaggerated, or we have developed sustained coping mechanisms.

The original axes of the Australian Constitution—subsidiarity and balance—have stood up remarkably well to the tests of time. Notwithstanding the invention of the aeroplane, television, personal computers and Twitter, Western Australia still is a very long way from Sydney; its economy is fundamentally different; its health and education systems have to cope with challenges of distance unknown between Fitzroy and Daylesford; the extent of its responsibilities to Indigenous peoples is immense and particular; and its population no more wants to become part of an undifferentiated herd of Australians than it would welcome annexation by Cuba.

In the same way, the notion of balance of powers has turned out to be a rather underrated constitutional commodity. In reality, the detractors of Howard's WorkChoices and its attendant battery of constitutional artillery should not have been surprised by their own insights. Throughout Australia's history, with all of its inconveniences and annoyances, federalism has operated as a force for restraint and moderation against the hasty and excessive use of federal power. Probably the two biggest and worst policy ideas in Australia's nationhood—Menzies' proscription of the Communist Party and Chifley's attempted nationalisation of the banks—were frustrated by Australia's federal

structure, not the glories of Westminster parliamentary democracy. We need more such safeguards as second- and third-generation Canberrans—and graduates of the Australian National University—tighten their grip on the senior ranks of the Commonwealth policy bureaucracy.

Of course, our federalism has its flaws, many which have undermined the institution itself. The founders' reliance on the tripartite defences of a States-House Senate, limited central powers, and an independent High Court collapsed when the Senate operated along party lines and routinely endorsed laws that undermined federation and cheerfully upheld by High Court appointees of the Commonwealth Executive. Of course, this is easy to predict with hindsight. In the pre-party days of the 1890s, Deakin was the exception in predicting the dominance of the Commonwealth.

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Rather less disputable is the proposition that the federal financial arrangements of the new Constitution would end in disaster for the states. The founders were great statesmen and excellent constitutionalists, but by and large, dreadful accountants. With an enduring financial settlement proving beyond them, they left transitional arrangements in place. Inevitably, the Commonwealth's superior taxing powers and the wider centralising developments reduced the states to financial subservience long before they realised they had foregone most of their constitutional independence.

One critical but understated outcome of this process is that not only do the oxygen-starved states compare unimpressively with their former selves, but their decline is readily and painfully apparent—not just to the citizenry at large but also to themselves. In terms of popular perception, this means the substantive problems

of the states are exacerbated by Australians, who quite rightly, see states as waning institutions. Those seeking favours and kudos turn towards the ascending sun of the Commonwealth, particularly when it streams rays of useful cash. Compared to Canberra and its coffers, the states present as faintly down at heel propositions, and are regarded accordingly.

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Within the states themselves, the ongoing psychological effects of perpetual decline have been almost as unhelpful. Some states, have developed a range of less than feisty learned behaviours in response to repeated pulverisation by the Commonwealth. Like the Commonwealth, the states too regard themselves as lesser orders of constitutional being. They are not only beaten before they start, but know it, and act accordingly. The consequence is that more 'obstreperous' states find it difficult to form united fronts because some other state is ready to sell its patrimony for a mess of pottage. Trust in such circumstances is not an option. Any jurisdiction prepared to take a stand against the Commonwealth knows it may end up standing, if not alone, then in limited company. The only thing more destructive to self-respect and independence is knowing that you are likely to lose again. Worse, after the first thousand or so catastrophic defeats at the hands of the High Court, the Treasury, or other agencies of Commonwealth dominance, hope not only starts to fade but injury can, in more submissive states, subtly hurt and matter less and less. Demoralised states make for compliant (or resigned) states subsisting within a demoralised and compliant federation. Against such tendencies is the inter-governmental agreement on federal financial relations, which has at least given the states a principled line to hold; however, it may bend and bulge in practice.

In general terms, it sometimes seems the survival of Australian federalism in practical terms owes much to the complete implausibility of any alternative. Conversion to a unitary state would flounder catastrophically upon the conservatism of Australian voters when faced with any referendum, let alone one recasting the entire Constitution, which is what would be involved. Sporadic outbursts of enthusiasm for replacing federalism with 'regionalism' are recognised for what they are—Trojan horses used to advance central power by dissecting states into smaller, more manageable units.

Against this gloomy posterity is the recent resurgence in the reputation of Australian federalism, and whether it will substantially improve the position of the states and the federalism they comprise. In this context, Australian federalism is highly volatile and deeply responsive to economic and political change within the nation. For example, in the short term, the emergence of relatively strong coalition governments in all eastern states and Western Australia obviously will alter the dynamics of Australian federalism, not only for the Gillard Labor government but also the style and practical considerations of any potential conservative successor. In the much longer term, the transformation of the Australian federation from an asymmetric one in which two powerful states—NSW and Victoria—dominated four relative minnows, will be profoundly challenged by the ongoing emergence of Western Australia and Queensland as potent economically driven middle powers.

There are perhaps three reasons why the next few years may see a modest resurgence in federalism, and even a slight increase in cooperation by the Commonwealth. These factors correlate closely but not precisely with some of the reasons for the improved reputation of federalism in Australia.

First is the 'Cornwall' factor. Over the past 90 years, the Commonwealth has gone from picking the low-hanging fruit among state powers to reaching ever higher, and constructing progressively longer and increasingly daunting ladders. It is now clambering around the spindly

outer braches of education, health, water, resources and assorted micro-economic reforms, with gains becoming harder, state resistance more desperate, and progress more difficult to demonstrate. There must come a point when even Canberra realises that if it is to drain the last and most stubborn swamps of perceived duplication and inefficiency, it is going to require, even if it does not desire, state cooperation. This will come at a price. Significantly, such recent tendencies as the Commonwealth moving from its traditional position of coercing the states with promised largesse in return for concessions to the almost bizarre position to programs such as the Gonski reforms in school education—where much of the promised funding is to be siphoned from the states themselves—suggests the outer limits of Australian federal fiscal banditry may well have been reached. From here, there is nowhere to go but very, very slightly backwards.

Second, this perception of tough going for limited gains tends to be verified by the vast rafts of federal reform propounded by the Rudd government. At the time of its election, it almost seemed that within the life of the government, Canberra would occupy the commanding hills of health provision, direct education from kindergarten to cloister, and direct the Murray-Darling Basin from the backblocks of Queensland to the SA coast. Five years and thousands of pleas, demands and threats later, Australia remains proudly federally bifurcated on all these issues, notwithstanding increased cooperation in minor matters. Surely, the chequered history of Rudderism must suggest to his Commonwealth successors, as the statue of Ramses suggested to the poet Shelley, that there are more effective courses to success than grand programs of general subjection.

Finally, if the Gillard government is succeeded by a conservative administration, Australian Tories will have had six years to contemplate the realities of the prodigious batteries of centralised power assembled by Howard. The corporations' power is not nearly as much fun from a conservative perspective when it is being deployed not for industrial reform but to alleviate climate change and regulate resources. Oppositions, like goldfish, have notoriously

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short memories, but is too much to hope that the side of Australian politics that supposedly espouses a philosophy of limited federal power might rediscover, in the light of painful experience, a qualified commitment to federalism? Might such a lesson be reinforced by contemplating the mistakes and difficulties of their Labor predecessors in their pursuit of forced rather than cooperative federalism, and the law of diminishing returns that is making the process of centralisation so much less fun than it used to be? Might the ruthless disciplines of surplus budgets finally suggest to a conservative government that it might be worthwhile to return functions to the states, even if it means returning at least some of the inadequate fiscal base that supported them?

Only time, and possibly a healthy dose of reality, will tell.