

Tomorrow's Federation: Reforming Australian Government

Paul Kildea, Andrew Lynch and George Williams (eds)

Australia: Federation Press 2012, pp 400, ISBN 978 186287 822 8, \$59.95

Tomorrow's Federation is a newly published edited collection of articles on Australian federalism. While some of the chapters are based on the authors' existing literature and therefore do not add new content, the book fills a void in holistic analyses of federalism. This is particularly timely given the recent focus on structural change in federalism, in areas such as health and water policy. The first part of the book is concerned with the processes and structure of federalism, such as the Council of Australian Governments ('COAG'). While still of interest, it is easy for the reader to get bogged down in the many acronyms and organisations. This makes the first part of *Tomorrow's Federation* less accessible. Part two considers intergovernmental grants; the third considers legal mechanisms for reform. This is followed by case studies and a discussion of the constitutional aspects of reform.

Two themes may be distilled from the book: firstly, dissatisfaction with the current state of federalism, and, secondly, a trend towards centralisation of power. Problems with the current form of federalism are manifested in two strands. First, the current form of federalism in Australia results in inefficiency and waste. Second, there is widespread dissatisfaction with the current practice of federalism. Public opinion on federalism is usefully analysed in *Tomorrow's Federation*. The use of tables and charts means that the data will be of use in further studies. AJ Brown establishes that the public is dissatisfied with the attributes of the current structure and practice of federalism, rather than with the concept of federalism itself. While calls for the abolition of the states are frequent,¹ two thirds of the voting population in each state wants to maintain state (or a similar incarnation such as large regional) governments.² This suggests that dissatisfaction is with the practice of federalism rather than the concept of federalism.

The second theme that may be distilled is the trend towards centralisation of power. Aside from the holistic discussion of federalism; gender, health policy and water reform as examples of centralisation receive separate analyses. The latter is perhaps the most interesting of these case studies.

¹ See, eg, Australian Broadcasting Corporation, *Fitzgibbon Renews Calls to Abolish States* (15 April 2012) ABC News Online <<http://www.abc.net.au/news/2012-04-15/fitzgibbon-renews-call-to-abolish-states/3950876>>.

² AJ Brown, 'Measuring the Mysteries of Federal Political Culture in Australia' in Paul Kildea, Andrew Lynch and George Williams (eds), *Tomorrow's Federation: Reforming Australian Government* (Federation Press, 2012), 316.

The key problem facing water policy today - how to balance ecological sustainability with economic needs - was not the focus of the framers. Instead, section 100 of the *Constitution*, which prevents the Commonwealth from abridging the reasonable use of rivers, reflected the 1890s desire to protect the now non-existent South Australian riverboat trade. This emphasis on the framers' intent is particularly important. The authors argue that the trend towards centralisation (largely through the High Court's expansive view of federal power) is contrary to the framers' intent. As noted by George Williams, the fact that High Court judges – the ultimate arbiters of federal power – are appointed by the Commonwealth means that they are likely to be sympathetic to an expansive view of federal power.³

Notwithstanding that, the judicial and academic consensus is that the framers envisaged *some* expansion of federal power as Australia grew as a nation.⁴ This begs the further question of the degree to which we should defer to the framers' original intent - what Justice Michael Kirby has called 'ancestor worship'.⁵ Ultimately, it is likely that the framers were both prescient and naïve at the same time: prescient in that our federal arrangement has been so stable in the face of such little reform, while naïve in that power has steadily been captured by the Commonwealth, even beyond that which the framers likely intended. Although not explicit, this perhaps underlies *Tomorrow's Federation*. While there has been little structural reform to federalism, the Commonwealth's power has increased over time. This has led to the problems discussed in this book, such as the vertical fiscal imbalance.

The book draws a distinction between adaption (accommodation of new circumstances) and reform (deliberate structural change). Means of adaption such as increasing the frequency of COAG meetings and addressing the vertical fiscal imbalance are considered. While these relatively minor changes would improve federalism, ultimately greater structural reforms are required. Usefully, this leads onto a discussion of referendums. Theorists such as Lawrence Lessig have asserted that the text of a constitution is less important than a culture of respect for and practice of the rule of law.⁶ Regrettably, *Tomorrow's Federation* does not discuss this. The book alludes to but does not state that a constitution is a

³ George Williams, 'Seven High Court Judges to Retire in Next 3 Years', *Sydney Morning Herald* (online), 13 March 2012, <<http://www.smh.com.au/opinion/politics/easier-to-pick-a-melbourne-cup-winner-than-next-high-court-judge-20120312-1uwds.html>>.

⁴ See, eg, *Tasmania v Commonwealth* (1983) 158 CLR 1, 127 (Mason J).

⁵ Michael Kirby, 'Constitutional Interpretation and Original Intent – A Form of Ancestor Worship' (Speech delivered at the Sir Anthony Mason Lecture, Melbourne, 9 September 1999) <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_constitu.htm>.

⁶ Lawrence Lessig, 'West Wing Lessons' on Lawrence Lessig, *Lessig Blog* (10 February 2005). <http://lessig.org/blog/2005/02/west_wing_lessons.html>.

manifestation of a people's philosophies, aspirations and conceptualisations of government. It is in this way that a constitution is more than the sum of its parts. The corollary of this is that democratic legitimacy is important, and therefore public dissatisfaction itself necessitates change. Once this has been established, the various means by which the current form of federalism may be changed can be addressed. A referendum has the democratic legitimacy that structures such as COAG and referrals of power lack. For the same reason, *Tomorrow's Federation* cautions against reliance on constitutional interpretation to change federalism.

One of the book's strengths is that its focus is not confined to discussion of the *Constitution*. There is a plethora of constitutional literature on federalism, making *Tomorrow's Federation's* discussion of both constitutional and other aspects more important. One such aspect is the final chapter's consideration of deliberative decision-making. Used in countries such as Switzerland, deliberative decision-making involves a small sample of voters investigating and deciding on certain proposals or options. Ron Levy's chapter considers its application to undeveloped referendum proposals: sample groups could decide the proposals that are put to referendums. The noted referendum drought (particularly, successful referendums) necessitates the importance of proposals such as deliberative decision-making.

Ultimately, the book's greatest strength also proves to be a weakness. In providing such a comprehensive discussion of federalism, it lacks a consistent narrative across the chapters. It is up to the reader to distil themes. However, the somewhat disjointed nature of the book is outweighed by its importance in collating discussions of what is wrong with Australian federalism with how it can be improved. *Tomorrow's Federation's* comprehensiveness will rightfully ensure its importance in shaping Australian federalism.

*Sam Thompson**

* Final year BEc-LLB student at the University of Tasmania, and co-editor of the University of Tasmania Law Review for 2012.