WHAT SHOULD WE DO WITH THE STATES?

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A. INTRODUCTION

1. This is a paper in which I look at the current position of the States in the federation, I do so with a view to identifying how they have fared since1901. In practical terms that means fared *vis a vis* the Commonwealth.

2. I shall discuss first the Commonwealth Parliament, then move to legislative powers and questions of revenue and expenditure. I shall also say something about the judicial system. Finally I shall mention the rather forlorn topic of new States.

3. In the course of the paper I try to give some responses – by no means necessarily satisfactory – to my question in the title.

B. THE PARLIAMENT

4. In the present context this is a discussion of the Senate, the upper House of the Commonwealth Parliament.

5. It has often been said that the Senate was to be a "States' House", a view supported by the first paragraph of s. 7 of the Constitution:

> "The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one State."

"Composed" in s. 7 has to be read subject to the power in s. 122 to make provision for senators representing a territory.[1]

6. The six Original States were each to have, and to continue to have, the same number of Senators (s. 7, third paragraph). Also, somewhat reflecting the position in the United States, the senators were to have longer terms of office than the members of the House, six years compared to three. In the United States, a senator's term is six years[2] while that of a member of the House of Representatives is only two years.[3] In

[1] *Queensland v. The Commonwealth* (1975) 134 CLR 201; *Queensland v. The Commonwealth* (1977) 139 CLR 585.
[2] *Constitution of the United States*, Art. 1, s. 3.
[3] *Constitution of the United States*, Art. 1, s. 2.

the United States, there are only two Senators per State.[4] The number of Australian senators was to be many more, at least six for each Original State (s. 7, third paragraph).

7. The view that the Senate was to "represent" the States was vigorously advanced by Quick and Garran in *The Annotated Constitution of the Australian Commonwealth* (1901). There it was said[5] that the Senate was:

> "… not merely a second chamber of revision and review representing the sober second thought of the nation, such as the House of Lords is supposed to be; it is that, but something more than that. It is the chamber in which the States, considered as separate entities, and corporate parts of the Commonwealth, are represented. They are so represented for the purpose of enabling them to maintain and protect their constitutional rights against attempted invasions, and to give them every facility for the advocacy of their peculiar and special interests, as well as for the ventilation and consideration of their grievances."

Quick and Garran also said that it was not sufficient that the States were able to challenge in the High Court legislation which they might regard as being in excess of Commonwealth powers but that in addition[6]:

> "… it was deemed advisable that Original States at least should be endowed with a parity of representation in one chamber of the Parliament for the purpose of enabling them effectively to resist, in the legislative stage, proposals threatening to invade and violate the domain of rights reserved to the States."

8. This was a view of the operation of the Constitution which was lawyerly, ordered and perhaps aspirational, but I think even by the standards of that time, politically naïve. It has never prevailed. A large nail in its coffin was the rigidity of the political party system, where the parties' interests and programs were national rather than State based.

9. A second large nail was a voting system that allowed representation by minor parties, and sometimes allowed the election of Senators with very low primary votes. Senator Helen Coonan, writing in 2001, noted that for all but five years since 1948, minor

[4] *Constitution of the United States*, Art. 1, s. 1.
[5] At 414.
[6] Quick & Garran, 414.

parties (including independents in that term) had held the balance of power in the Senate.[7]

10. This remains the position. Following the last election, the balance of power in the Senate was shared by the Greens and eight cross bench senators including three Palmer United Party Senators. Two former members of the Palmer United Party, Senators Lambe and Lazarus have since turned independent.

11. Some Senators, of course do have a bent towards the position of *their* State, or towards the position of the States collectively, but many in the minor parties have rather sectional interests. For example Senator Lambie, then still a member of the Palmer United Party, in November 2014, threatened to oppose all government legislation unless it boosted the pay raise of 1.5 per cent given to Australian Defence Force personnel to at least double.

12. I don't mean to convey that views and approaches will not change in the future but at present it seems clear that the "protection" thought to be given to the States by the existence of the Senate has provided illusory. I think it was always likely to be. Even if the major parties could agree on electoral reform which might squeeze out minor parties, it would not follow at all that the result would be a Senate which was "represent" the States in the Quick and Garran sense. One can't avoid the fact that members of the Senate have to think of the effect of their votes *in relation to the national as a whole*.

C. COMMONWEALTH LEGISLATIVE POWERS

13. I shall mention a number of matters concerning legislative powers. For the moment I shall exclude reference to powers relating to money; I deal with those in the next Section, although some of the more general observations I make here are also apposite there.

14. The arrangement of legislative powers in the Constitution is relatively simply and, I'm sure, known to all here. Pursuant to s. 51 the Commonwealth has power to make laws with respect to the various subjects listed in the thirty-nine *placita* of that

[7] *The Role of Upper Houses. Is Washminster Washed Up?* in Sampford C. and Round T., *Beyond the Republic*, Federation Press (2001) at 157.

section. The power to legislate with respect to those subjects is not exclusive to the Commonwealth: The States retain a concurrent power: Constitution s. 106. The Commonwealth has some exclusive legislative powers (ss. 52, 90, 122 for example). There are some specific restrictions on Commonwealth legislative powers (ss. 92, 114 and 116 for example) and some too on State legislative powers (ss. 92, 114, 115 and 116 for example). The existence of the Commonwealth's power to legislate does not ordinarily prevent a State from legislating on the same topic, but the State law will be inoperative to the extent of any inconsistency with Commonwealth law: Constitution s. 109.

15. It was inevitable that with the passage of time more and more matters in s. 51 would become the subject of Commonwealth legislation. That, of course, has occurred. After all one of the purposes of federation was to enable uniform legislation on these topics. What also occurred, however, was change in the approaches adopted to interpretation of those powers .

16. The idea of there being some "reserved State powers" died with the *Engineers Case*[8] 95 years ago, and I won't seek to go over that ground. The more modern approach to the interpretation of s. 51 powers has been stated on many occasions, two notable examples of which are *Grain Pool of Western Australia v. The Commonwealth* (2002)[9] and the *Work Choices Case*. In the latter case it was said:[10]

> "The general principles to be applied in determining whether a law is with respect to a head of legislative power are well settled. It is necessary, always, to construe the constitutional text and to do that "with all the generality which the words used admit". The character of the law must then be determined by reference to the rights, powers, liabilities, duties and privileges which it creates. The practical as well as the legal operation of the law must be examined. If a law fairly answers the description of being a law with respect of two subject matters, one a subject matter within s 51 and the other not, it is valid notwithstanding there is no independent connection between the two subject matters. Finally, as remarked in *Grain Pool (WA) v. The Commonwealth*, "if a sufficient connection with the head of power does exist, the justice and wisdom of the law, and the degree to which the means it adopts are necessary or desirable, are matters of legislative choice."

[8] *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd* (1920) 28 CLR 129.
[9] (2002) 202 CLR 479 at 492, [.6].
[10] *Australian Workers Union and others v. The Commonwealth* (2006) 229 CLR 1at 103, [142] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

17. The application of these tests, particularly the first (namely to construe the s. 51 head of power with all the generality which the words would admit) and the third (characterisation), has inevitably resulted in Commonwealth legislation making significant inroads into areas which previously were or might have been the subject of State legislation. Some brief examples.

18. Take first the external affairs power, s. 51(xxix). By that provision the Commonwealth is given power to make laws with respect to "external affairs". That term has been given two broad operations. One is that it confers power to make laws in relation to matters geographically outside Australian territory[11].

19. The second operation concerns international treaties, accords, etc to which Australia has become a party. Very often those arrangements will involve an undertaking by Australia to implement the agreement. The subject matter may well be one which would not otherwise fall within a Commonwealth head of legislative power. In *Koowarta v. Bjelke-Petersen*[12] and the *Tasmanian Dams Case*[13] it was held (or again held) that the legislative power under s. 51(xxix) extended to making such laws. The result is a very broad power, unlimited as to subject matter. It is a power which has been exercised on many occasions. Many aspects of State life are governed by legislation implementing such accords.

20. A second power which has been much exercised is the corporations power in s. 51(xx). It empowers the making of laws with respect to foreign corporations and trading or financial corporations formed within the limits of the Commonwealth. The provision permits the regulation of activities of or in relation to, such corporations, whether such activities have anything to do with the body being a corporation or a foreign or trading or financial corporation "as such". Because so much of business in Australia is carried on by corporations falling within s. 51(xx) the Commonwealth's power has been widely exercised. It is the basic foundation for amongst other things the trade practices and industrial relations legislation[14] and of course the *Corporations Act 2001* and other corporations legislation.

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[11] *New South Wales v. The Commonwealth* (*Seas and Submerged Lands Act Case* (1975) CLR 337.
[12] (1982) 153 CLR 168.
[13] *Commonwealth v. Tasmania* (1983) 158 CLR 1.
[14] *Work Choices Case* (2006) 229 CLR 1.

21. And there are other areas where the Commonwealth's legislation deals with the whole of the subject matter, sometimes augmented by a reference of powers by States pursuant to s. 51xxxvii).

22. Since the *Matrimonial Causes Act 1959* and the *Marriage Act* 1961 it has been essentially legislation of the Commonwealth, now the *Marriage Act* and the *Family Law Act 1975*, which deals with marriage and matrimonial causes (ss. 51(xx) and 51(xxi)). There is also the array of social services legislation enacted pursuant to the provisions of s. 51(xxiiiA) inserted by the *Constitution Alteration (Social Services) 1946*. And a very broad meaning has been attributed to s. 51(v) ("postal, telegraphic, telephonic, and other like services").

23. It has not all been one way, however. The *Melbourne Corporation*[15] doctrine arises from time to time to protect the existence of the States and at least the central elements of their being as polities.

24. I should mention a "flow-on" effect of the expanded coverage by federal laws. It is that matters arising under such laws, to the extent that they are matters capable of adjudication by a court, are in federal jurisdiction. Sometimes jurisdiction to determine them will be given to a federal court exclusively, sometimes it will be given to both Commonwealth and State courts and sometimes only to State courts.

25. The flow-on effect also includes administrative matters arising under such laws. They are most likely to be administered by Commonwealth officers and by Commonwealth administrative tribunals.

D. MONEY

26. I said that I would deal separately with the question of money. Both raising it and spending it are of vital importance. Both the Commonwealth and the States need it. The States need it for public order and safety, transport and communications, education, health and other expenses.

27. Today we tend to think, rightly enough, of income tax and the GST as the principal sources of revenue. But that was not always the case. At federation income tax had

come onto the State scene but the principal sources of colonial funds remained duties of customs and excise.[16] The first Commonwealth income tax was not imposed until 1915. I would note that the Commonwealth has offered to vacate the area of income tax on a number of occasions, including as early as 1934, but its offer has not been accepted by the States.

28. As is well known the Commonwealth's need for funds to prosecute World War II resulted in it becoming the only polity practically able to impose income tax. The legislation in its essential elements was held valid in the *First Uniform Tax Case*[17] and the *Second Uniform Tax Case*[18]. The central elements of the legislation were the *Income Tax Act 1942* which provided for the tax and the *States Grants (Income Tax Reimbursement Act) 1942* which gave the States financial assistance if the States had not imposed income tax. In the event Commonwealth income tax has remained as the only income tax.

29. The States, however, had a variety of other taxes, some of which they lost by judicial decision, some they gave up voluntarily, or more or less voluntarily.

30. As to judicial decision, views as to the breadth of the concept of "excise" in s. 90 had waxed and waned. Based on *Dennis Hotels Pty Ltd v. Victoria*[19] a view had developed that licence fees for the privilege of carrying on a business (business franchise fees) were not a tax on goods because the fee was calculated on sales in a period before the period for which the licence was granted. This was much relied on in State legislation dealing with liquor, tobacco and some other items.

31. This view was in effect overruled in *Ha v. New South Wales* (1997) 180 CLR 465. The decision cost the States a great deal of money: New South Wales had collected $852m in 1995-1996 from tobacco licensing fees alone[20].

32. Some taxes were given up by States voluntarily. Queensland was the first State to abolish a form of estate duty – succession duty as it was named. The move was

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[15] *Melbourne Corporation v. The Commonwealth* (1947) 74 CLR 31. See too *Austin v. The Commonwealth* (2003) 215 CLR 185.
[16] *Ha v. New South Wales* (1997) 189 CLR 465 at 491.
[17] *South Australia v. The Commonwealth* (1942) 65 CLR 373.
[18] *Victoria v. The Commonwealth* (1957) 99 CLR 575.
[19] (1960) 104 CLR 529.

designed to encourage well to do persons from the chilly south to move themselves to sunny Queensland. It was very successful.

33. Some taxes were given up "more or less" voluntarily. In return for giving up some taxes, and getting the exclusive right to some (land tax and payroll tax) the States collectively now are given the amount levied by the Commonwealth as GST.

34. The problem, however, for the States is that they need far more for their expenditure than they have been able to raise from their own sources. To take the 2013-2014 years by way of example the States' own-source revenue was only 55.3% of their expenditure. About half of that 55.3% came from State taxes, the rest from sales of goods and services, royalties and other receipts.[21]

35. Where does the balance of 44.7% come from? The answer, of course, is from the Commonwealth and it comes in two forms, general revenue assistance not tied to specific purposes and revenue assistance for specific purposes. The largest component of general revenue assistance of it comes from the distribution to the States of the revenue from the GST. The figures from the Commonwealth Budget 2014-2015 indicated that 53% of Commonwealth funding for the States ($52.1bn) comes as general revenue assistance.[22]

36. Much of the money provided to the States by the Commonwealth comes as grants under legislation enacted pursuant to s. 96 of the Constitution. It provides that:

> "the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit."

37. It is established that the conditions of grants under s. 96 may include a requirement that the money be expended by a State on matters which would not otherwise be within Commonwealth legislative power.[23] There is subject to a qualification in that because the grants power is a legislative power it may not be used to override constitutional prohibitions (such as those relating to laws about religion) in s. 116[24])

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[20] *Ha v. New South Wales* (1997) 189 CLR 465 at 502. Some interim relief was later provided by the Commonwealth.
[21] *A Federation for our Future:* Reform of the Federation White Paper, Issues Paper No 1: Australian Government September 2015 p. 30.
[22] *A Federation for Our Future* p.31.
[23] *Attorney General for Victoria, Ex rel Black v. The Commonwealth* (1981) 146 CLR 559.
[24] *Attorney General for Victoria, Ex rel Black v. The Commonwealth* (1981) 146 CLR 559.

or guarantees ("just terms" in s. 51(xxxi)[25]). Where grants are "tied grants" they have the effect of restricting the freedom of the States as to use of the moneys. There are negotiations about these matters. of course, but the Commonwealth is generally in the dominant position.

E. WHAT SHOULD BE DONE? SHOULD ANYTHING BE DONE?

38. These are topics about which a great deal has, and will be said and they are, I think, topics on which it is not very easy to arrive at a very satisfactory answer. The factors which seem to me important are these.

39. We live in a nation where the population is far more mobile than say 50 years ago. There is not, I think, *quite* the attachment of persons to a State that there was, although it clearly still exists, particularly outside the capital cities.

40. Citizens are also much more used to there being federal laws and to laws being the same throughout Australia. Also many of the programs that are implemented nationally are ones where it is known that the programs are federally funded.

41. One of the problems, however, is that the State governments end up on the one hand administering federal programs and on the other having a lesser range of areas in respect of which they can themselves legislate. That may be one of the reasons lying behind enthusiasm in States to legislate on "law and order" type issues.

42. I find it difficult to see a satisfactory long-term solution to these problems, if it be right to describe them as such.

43. If one says that some legislative powers should be given exclusively to the States, that means identifying what those areas should be, and why the Commonwealth should be prevented from legislating with respect to them. None of this is very immediately obvious, and it is certainly not obvious why such decisions should be made *now* for a future which is uncertain.

[25] *P.J. Magennis Pty Ltd v. The Commonwealth* (1949) 80 CLR 382, *ICM Agriculture Pty Ltd v. The Commonwealth* (2009) 240 CLR 140.

44. If one says that there should be more federal-state co-operation, that is a proposition which is laudable but there is now a great deal of co-operation in any event and in such negotiations the federal government really has the stronger hand.

45. So I'm afraid I don't have any obvious solutions or suggestions, except for one thing.

46. That is that I think the need for s. 90 in its present form has passed. If the exclusion of the States from the ability to impose duties of excise were removed, it would allow them to impose their own forms of GST in relation to goods. It would mean that a clothing in one State might cost more than the same clothing in another State, but that is all. Of course, it would take an amendment to the Constitution to enable that to happen, and political will on the part of a State to introduce such a measure.

F. THE COURTS AND THE LAW

47. It has been said many times that the content of "the law" has changed significantly in the sense that it has moved from the general law – meaning common law and equity – to law found in statutes[26].

48. More and more, however, the statutory law is a law of the Commonwealth. That has the consequence that the jurisdiction being exercised by a court in relation to such a law will be federal, even if the court is a court of a State.

49. It also means that when the enactment of such a law is in contemplation, there is a choice available to the Commonwealth as to the Court which is to exercise such federal jurisdiction.

50. The Commonwealth now has three of its own courts below the High Court. Two, the Federal Court and the Family Court, are of a status equivalent to the Supreme Courts of the States. The third, the Federal Circuit Court of Australia, has a jurisdiction equivalent to that of both a District Court and a Magistrates Court.

51. The pace of legislative change will vary from time to time. So too will the reasons for conferral of jurisdiction on federal courts in lieu of or in addition to State courts. Inefficiency in the progress of a matter in one State court may be a reason why the

[26] See e.g. Gleeson M, "*The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights* (2009) 20 Public Law Review 26 at 26.

jurisdiction is given to a federal court. So too may simply be the view that federal matters should be in federal courts.

52. The Constitution requires that there continue to be State Supreme Courts[27], but it does not preserve the *content* of their jurisdiction. It is important, I think, for the States to be vigilant to see that jurisdiction in federal matters is, so far as possible and appropriate, continued to be vested in courts of the States.

G. NEW STATES

53. I described this earlier as a rather forlorn topic. And so, I think, it is.

54. The Constitution contains a number of provisions dealing with new States.

55. The Constitution contains a number of provisions dealing with new States. First s. 126 provides that the Commonwealth Parliament may admit to the Commonwealth new States, or establish new States.

56. A new State from outside the existing territory of any of the Stats could be the Northern Territory or any of the territories outside mainland Australia and Tasmania. An example, probably the only one, might be Norfolk Island.

57. Section 128 also provides for two methods in which new States may be established from existing States. One is by separation of territory from a State. In that case the consent of the Parliament of that State is required. The second method is by the union of two States or parts of States. The Parliaments of the States affected must be given.

58. There was once a strong movement for a New England state. That was defeated in a referendum in 1967. And there have been movements to divide Queensland into two, or three, States. But all have foundered.

59. Queensland is perhaps the State where the possibility will keep raising its head. The population is decentralised, the capital far from the centre of the State and the central and northern areas are ones where there are not just agriculture and pastoral pursuits, but also mineral wealth and tourism. If the notion of turning inland some of the

[27] *Kirk v. Industrial Court of New South Wales* (2010) 239 CLR 531.

northern rivers which presently run off Cape York ever comes to anything, the case would be strengthened.

60. But again one has to ask "Why do it?" After a short settling in period the Senators for the new State[28] are no more likely to be States-righters than their predecessors from the unsubdivided State. The position as to dominance of Commonwealth law will be unchanged. It is true to say that government would be closer to the governed, but the governed are likely to have to pay more for that privilege.

[28] See Constitution, s. 121.