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REINVIGORATING AUSTRALIAN FEDERALISM

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Reinvigorating Australian Federalism*

Dr Nicholas Aroney**

I

Many people think that Australian federalism is in a state of near-terminal decline.¹ Progressively since 1901, it is said, Australian federalism has seen the power and influence of the Commonwealth grow ever larger, while the power and influence of the States has progressively diminished. The Commonwealth has used its constitutional powers to the full, always finding ever more ingenious ways to enter into more and more fields of government regulation. And especially since the fateful *Engineers Case* of 1920,² the High Court of Australia has generally approved of these devices.³

Financially, the Commonwealth has managed to monopolise all of the major sources of taxation revenue. In the early years, it was customs and excise duties — taxes which the States voluntarily abandoned,⁴ but subject to the provision that the surplus excise and customs revenues

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1 H Gibbs, 'The Decline of Federalism?' (1994) 18 *University of Queensland Law Journal* 1; Greg Craven, 'The High Court of Australia: A Study in the Abuse of Power' (1999) 22(1) *University of New South Wales Law Journal* 216, 241.

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

3 J Allan and N Aroney, 'An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism' (2008) 30 *Sydney Law Review* 245.

4 *Commonwealth Constitution* s 90.

of the Commonwealth would be reimbursed to the States.⁵ However the Commonwealth quickly and very easily avoided this by ensuring that there was no surplus revenue to be distributed.⁶ Furthermore, during the Second World War, the Commonwealth took over income tax entirely, and the High Court approved of the scheme.⁷ Since then the States have been unwilling to wrest it back, fearful that the pursuit of a new tax would be political suicide.⁸ Although thereafter the States found an important and growing source of revenue in the form of business franchise fees, in 1997 the High Court altered its approach to assessing their validity, holding that most such fees amount to excise duties and are therefore unconstitutional.⁹ As a result of these developments, the Commonwealth has come to dominate the States financially. Having made them dependent on its funding, they are now ‘tethered to its chariot wheels’, as Alfred Deakin foresaw.¹⁰ The Commonwealth has made full use of its power to make special grants to the States on the conditions that it thinks fit¹¹ — turning a provision in the Constitution intended only for emergencies into a device for institutionalised supervision, regulation and control.¹²

As far as its legislative powers are concerned, the Commonwealth has managed to convince the High Court that its powers, though intended to be specific and limited and read in the context of the federal objectives of the Constitution as a whole,¹³ ought rather to be read as widely as the language used could possibly embrace, enabling the Commonwealth —

- a) through the taxation power¹⁴ — not only to generate revenue, but also to create a complex set of financial inducements which enable it to affect many policy areas supposedly reserved to the States;¹⁵
- b) through the external affairs power¹⁶ — to implement the terms of any international treaty, even if the topic addressed by the treaty was meant to be a preserve of the States;¹⁷

5 *Commonwealth Constitution* ss 93–94.

6 *New South Wales v Commonwealth* (1908) 7 CLR 179.

7 *South Australia v Commonwealth* (1942) 65 CLR 373; *Victoria v Commonwealth* (1957) 99 CLR 575.

8 C Saunders, ‘The Uniform Income Tax Cases’ in HP Lee and G Winterton (eds), *Australian Constitutional Landmarks* (2003) 62.

9 *Ha v New South Wales* (1997) 189 CLR 465.

10 Letter from Alfred Deakin to *The Morning Post*, 1 April 1902, in Alfred Deakin, *Federated Australia: Selections from Letters to the Morning Post 1900–1910* (1968).

11 *Commonwealth Constitution* s 96.

12 J Hancock and J Smith, *Financing the Federation* (2001) 19–20.

13 N Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (2009) chs 9–10.

14 *Commonwealth Constitution* s 51(ii).

15 The qualifications on the taxation power enunciated in *R v Barger* (1908) 6 CLR 41 have become practically irrelevant if not directly overthrown. See *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1, discussed in *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1 at 23 (Mason J).

16 *Commonwealth Constitution* s 51(xxix).

17 *Commonwealth v Tasmania* (1983) 158 CLR 1.

- c) through the corporations power¹⁸ — effectively to take over the regulation of industrial relations and, by implication, to regulate any activity at all that a constitutional corporation might engage in;¹⁹ and
- d) through the defence power²⁰ — to adjust prices, control markets, and regulate all manner of things — provided that Australia is at war and the regulation has a relationship to the war effort.²¹

Through mechanisms such as these — primarily financial and legislative — the Commonwealth now has an active and often directive role in fields never contemplated by the founding generation: in health and hospitals; in schools and education; in universities, vocational training and child care; in infrastructure of all kinds, including roads, rail and transport; in sport, recreation and the arts; not to mention human rights and anti-discrimination. Indeed, the Prime Minister recently announced an intention to seize greater control over urban planning by denying infrastructure funding to states and local councils that will not agree to improve public transport and ban haphazard housing development²² — noting that what is meant by ‘improvement’ and ‘haphazard’ will be something determined by the Commonwealth.

In 1901, John Quick and Robert Garran, in their magisterial *Annotated Constitution of the Australian Commonwealth*, set out a list of the powers that, under the Constitution, had been reserved to the States.²³ Since then successive Prime Ministers have railed against this, and have on numerous occasions unsuccessfully sought the people’s approval of constitutional amendments expanding the Commonwealth’s powers over corporations, industrial relations, trade practices, human rights, and so on.²⁴ But they needn’t have bothered. There has been no need for any constitutional amendment. Looking at the Quick and Garran list today, it is difficult to find a single field that is not now regulated in some way, often substantially, by the Commonwealth. The academic consensus is — whether approving of this trend or not — that the Commonwealth’s regulatory reach has only gotten wider and deeper as time has gone by.²⁵ The exceptions that prove the rule — such as the High Court’s recent decision in

18 *Commonwealth Constitution* s 51(xx).

19 *New South Wales v Commonwealth* (2006) 229 CLR 1.

20 *Commonwealth Constitution* s 51(vi).

21 *Farey v Burvett* (1916) 21 CLR 433 at 453–6 (Isaacs J); *Andrews v Howell* (1941) 65 CLR 255; *Stenhouse v Coleman* (1944) 69 CLR 457.

22 M Franklin, ‘Kevin Rudd Launches Planning Takeover’, *The Australian* (Sydney), 28 October 2009.

23 J Quick and RR Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 935–6.

24 The attempts to do so in relation to industrial relations are catalogued in *New South Wales v Commonwealth* (2006) 229 CLR 1 at 284–301 (Callinan J, dissenting).

25 Compare RD Lumb, ‘The Franklin Dam Decision and The External Affairs Power: A Comment’ (1984) 13 *University of Queensland Law Journal* 138; Gregory Craven, ‘The States — Decline, Fall or What?’ in Gregory Craven (ed), *Australian Federalism: Towards the Second Century* (1992); Gibbs, above n 1; Geoffrey de Q Walker, ‘The Seven Pillars of Centralism: *Engineers’ Case* and Federalism’ (2002) 76 *Australian Law Journal* 678; Leslie Zines, ‘Changing Attitudes to Federalism and its Purpose’ in Robert French, Geoffrey Lindell & Cheryl Saunders (eds), *Reflections on the Australian Constitution* (2003) 86; George Winterton, ‘The High Court and Federalism: A Centenary Evaluation’ in Peter Cain (ed), *Centenary Essays for the High Court of Australia* (2004) 197.

the *Pape* case,²⁶ the *Incorporation* case²⁷ and *Melbourne Corporation v Commonwealth* and its progeny²⁸ — have been just that: exceptions to the general rule.

Australia is now among the very most centralised federations in the world — more centralised certainly than the United States, Canada, Germany and Switzerland.²⁹ Many of our political leaders — past and present — would embrace and extend that trend. A long line of Labor Prime Ministers, including Andrew Fisher, John Curtin, Ben Chifley, Gough Whitlam, Bob Hawke and Paul Keating come readily to mind. The general reputation of John Howard is that he too, against the Liberal tradition some would say, contributed significantly to the centralising trend.³⁰ And many of today's political leaders are calling for further centralisation. Some of them, like Tony Abbott, go so far as to propose that the Commonwealth should have the legislative power to overrule the States on any issue whatsoever.³¹ Others, however, say that they are opposed to outright centralisation, and that they are committed to finding ways of reinvigorating our federal system. The Council for the Australian Federation — a body consisting of the Premiers of the States and the Chief Ministers of the Territories — was formed in 2006 specifically for the purpose of defending and reforming the federal system.³² Indeed, the current Prime Minister came to power with promises to fix the federal system, to clarify the responsibilities of the Commonwealth and the States, to tackle duplication and overlap, and to bring the blame game to an end.³³ Numerous business leaders, academics and senior bureaucrats, are also calling for federalism reform — at

26 *Pape v Commissioner of Taxation* [2009] HCA 23.

27 *New South Wales v Commonwealth* (1990) 169 CLR 482.

28 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

29 See, eg, Daniel J Elazar, *Federal Systems of the World: A Handbook of Federal, Confederal and Autonomy Arrangements* (2nd ed, 1994) 19–25; Ronald L. Watts, *Comparing Federal Systems* (2nd ed, 1999) 25, 39, 46; John Williams and Clement Macintyre, 'Commonwealth of Australia' in Akhtar Majeed, Ronald Watts & Douglas Brown (eds), *Distribution of Powers and Responsibilities in Federal Countries* (2006) 8, 23–4; Thomas Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Inquiry* (2006) 165–6, 309–11; Greg Taylor, *Characterisation in Federations: Six Countries Compared* (2006) 17–20.

30 Greg Craven, 'The New Centralism and the Collapse of the Conservative Constitution' in Kay Walsh (ed), *Papers on Parliament No. 44* (2006) 133–149; 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. Mr Howard is reported to have said: '[I]f we were starting Australia all over again, I wouldn't support having the existing state structure. I would actually support having a national government, and perhaps a series of regional governments...'. Tim Colebatch and Farrah Tomazin, 'Australia Doesn't Need States: Howard', *The Age* (Melbourne), 25 March 2005.

31 T Abbott, 'Responsible Federalism' in Wayne Hudson and AJ Brown (eds), *Restructuring Australia: Regionalism, Republicanism and Reform of the Nation-State* (2004). As George Williams has observed, Mr Abbott's proposal 'that the Commonwealth be able to pass laws "for the peace, order and good government of the country" [is] constitutional code for having the power to make laws on any topic whatsoever.' George Williams, 'Health Reform Needs a Federal Fix First', *Sydney Morning Herald* (Sydney), 28 July 2009.

32 See <<http://www.caf.gov.au/>>.

33 'Australia's health system at tipping point: Rudd', *The Age* (Melbourne), 28 July 2009.

venues such as the 2020 Summit, at numerous conferences, and through various academic institutes and think-tanks.³⁴

What has caused all of this centralisation? For some, like Glen Withers and Anne Twomey, it has been ‘constitutional amendment by stealth’ and a system of ‘opportunistic federalism’, by which the Commonwealth has progressively expanded the field of its operations, piece by piece.³⁵ John Wanna has similarly referred to ‘the opportunistic character of federal politicking, ... constructing band-aids, [involving] tortuous negotiations, fed by disingenuous inducements and mutual backsliding’ — all in a context in which ‘[r]hetoric about collaboration and cooperation [is] interpreted as code for centralisation or partisan agendas’.³⁶ Others however, caution that much (although not all) of the centralisation has been driven by factors quite external to politics and political manoeuvring. Andrew Podger, for example, names things like:

- (a) increased mobility — both real and virtual — leading people to identify with their national and supranational communities rather than their states or localities;
- (b) national and supra-national business operations that demand greater regulatory harmony;
- (c) increasing awareness of the things that connect us globally, such as climate and environmental issues, as well as increased access to information and education, transport and communications; and
- (d) the raising of expectations through knowledge of what might be available elsewhere, for example, in health, technology and community services.³⁷

Political scientists Robyn Hollander and Haig Patapan have argued that Australian politics has been shaped by an underlying pragmatism — a pragmatism in which policy problems have been addressed, not in terms of any overarching theory of federalism, but rather through pragmatic compromises geared to respond to the practical exigencies of the moment. ‘[W]ithout a theoretical compass’, they continue, ‘prevailing powerful winds have directed the course of federalism’; and, given ‘the judicial preference for greater central influence’, pragmatic federalism in Australia has in practice meant ‘centralised federalism’.³⁸ Thus, whether we like it or not, even the political scientists tell us that the High Court’s interpretation of the Constitution has been one of the key institutional forces for centralism in Australia. The High Court has long been committed to an approach to constitutional interpretation that has

34 Three major conferences on federalism reform were held in 2008 alone: *Future of Federalism Conference*, Brisbane, 2008; *Making Federalism Work Conference*, Melbourne, 2008; *Australian Federalism: Rescue or Reform Conference*, Tenterfield, 2008. Federalism also waxed large during the 2020 Summit. See, in particular, Commonwealth of Australia, *Australia 2020 Summit — Final Report* (2008) ch 9 (‘The Future of Australian Governance’). See, further, Business Council of Australia, *A Charter for a New Federalism* (Melbourne, 2007).

35 A Twomey, ‘Australian Federalism — Options for Reform’ (Paper presented at the 2007 National IR Conference, Brisbane, 11 September 2007); Anne Twomey and Glenn Withers, *Australia’s Federal Future: Delivering Growth and Prosperity* (2007) 33.

36 J Wanna, ‘Improving Federalism: Drivers of Change, Repair Options and Reform Scenarios’ (2007) 66(3) *Australian Journal of Public Administration* 275, 275.

37 A Podger, ‘Federalism Reform’ (January–March 2008) *Public Administration Today* 35, 36.

38 R Hollander and Haig Patapan, ‘Pragmatic Federalism: Australian Federalism from Hawke to Howard’ (2007) 66(3) *Australian Journal of Public Administration* 280, 281.

favoured the expansion of Commonwealth power. In response, we can argue all we want that the Court ought to take into consideration the ‘federal balance’ between the Commonwealth and the States.³⁹ But, as we saw in the *Work Choices* case, such arguments are likely to prevail with only a minority of justices, at best.

What is the prospect, then, of a reinvigoration of Australian federalism? What hope is there for a revitalisation of the States? There is a widespread consensus that at least some reform is necessary. As Professor Cheryl Saunders recently observed: ‘it is urgent, in the interests of democracy as well as federalism, to restore capacity, self-respect and self-reliance [to] the Australian States’.⁴⁰ But what kinds of reforms are likely to achieve a reinvigoration of this kind?

II

The specific reform proposals have been diverse. Moderate reform proposals have involved suggestions of a reallocation of powers and responsibilities between the Commonwealth and the States,⁴¹ improvements in the methods and structures of intergovernmental co-operation,⁴² and the readjustment of Commonwealth-State financial relations.⁴³ More ‘radical’ reform proposals have included restructuring the Senate,⁴⁴ and the abolition of the states altogether, and their replacement by ‘regions’.⁴⁵

While there is a strong case to be made for some of the more moderate reforms that have been mentioned, what I want to suggest is that almost all of the reform proposals have been overwhelmingly governmental in orientation. A certain pragmatic ‘governmentality’ has dominated the way we have thought about federalism reform, and intergovernmental relations and federal finances have accordingly taken centre stage. Now it is true that recent changes to the way in which Council of Australian Governments (COAG) operates seem to be a step in the right direction. These changes have involved an apparently more consensual and structured approach to agenda setting and decision-making between the Commonwealth and the States — in contrast to the outright Commonwealth domination of previous times. Moreover, in the critical realm of intergovernmental finance a new Intergovernmental

39 I have made such arguments. See N Aroney, ‘Constitutional Choices in the *Work Choices* Case, or What Exactly Is Wrong with the Reserved Powers Doctrine?’ (2008) 32(1) *Melbourne University Law Review* 1.

40 C Saunders, ‘Federalism and Australian Democracy’ (Paper presented at the Australian Federalism: Rescue and Reform Conference, Tenterfield, 23–25 October 2008) 7.

41 A Twomey, ‘Federalism in Australia: Gazing in the Crystal Ball of Constitutional Reform’ (Paper presented at the Future of Federalism Conference, Brisbane, 10–12 July 2008) 6–9.

42 C Saunders, ‘Co-operative Arrangements in Comparative Perspective’ (Paper presented at the Future of Federalism Conference, Brisbane, 10–12 July 2008).

43 A Morris, ‘Commonwealth of Australia’, in Anwar Shah (ed), *The Practice of Fiscal Federalism: Comparative Perspectives* (2007); Alan Fenna, ‘Commonwealth Fiscal Power and Australian Federalism’ (2008) 31(2) *University of New South Wales Law Journal* 509.

44 P Beattie, ‘A Vision Beyond the Blame Game’ in Julianne Schultz (ed), *Griffith Review 19: Reimagining Australia* (2008) 38.

45 AJ Brown, ‘Regionalism: An Introduction’ in Wayne Hudson and AJ Brown (eds), *Restructuring Australia: Regionalism, Republicanism and Reform of the Nation-State* (2004).

Agreement on Federal Financial Relations has been reached which is intended:

- a) to provide greater certainty for the States about the provision of Commonwealth funding;
- b) to simplify and streamline the overly complex system of Specific Purpose Payments (SSPs);
- c) to introduce a series of 'National Partnerships' to provide funding in areas of joint responsibility for specific projects; and
- d) to tie state funding to clearer performance criteria that are
 - (i) outcomes oriented and
 - (ii) assessed by a body that is independent of both levels of government — the newly-created COAG Reform Council.⁴⁶

As the Chair of the COAG Reform Council explained in a recent speech,⁴⁷ the underlying problems intended to be addressed are the blurring of roles and responsibilities, and the resulting duplication and overlap between the Commonwealth and the States — complexities that both increase the costs of providing government services and undermine government accountability. The new financial framework, he further explained, aims to improve the accountability of all levels of government, enabling the community to know which level of government is responsible for the delivery of each particular service, whether it be in health, education, infrastructure, and so on.⁴⁸ But as his speech also helps to make clear, the basic financial context of the new arrangements remains essentially the same, on two counts. First, the Commonwealth continues to provide the States with the vast preponderance of their revenues. Second, it is the States in particular that are primarily made accountable for their administration of these funds — accountable ostensibly to the voters, yes, but in substance and in practice, to the Commonwealth. Thus, the underlying context of the new scheme is that it will continue to be the Commonwealth that will be assessing the performance of the States and it will be the Commonwealth that will be allocating funds in the future based on its assessment of State performance — something that is made explicit in relation to the National Partnerships, but always lurking in the background in relation to the SSPs. In other words, the States are yet again being made accountable to the Commonwealth; the idea that they should be made accountable to the voters of each State is largely lost sight of. Or, to put it technically, the vertical fiscal imbalance between the Commonwealth and the States is not being addressed, and so the lines of public accountability — accountability to the people — remain confused and distorted. Accordingly, there is an underlying governmentality in the recent reforms — reforms that are meant to improve accountability, but which in substance make the States primarily responsible to the Commonwealth, not to the people. As Professor Kenneth Wiltshire has put it, the new system will continue to cajole the States into seeing

46 Council of Australian Governments, *Intergovernmental Agreement on Federal Financial Relations* (2008).

47 P McClintock, 'The COAG Reform Council's Role Within the New Commonwealth-State Financial Architecture' (Paper presented at the Committee for Economic Development of Australia, Melbourne, 23 September 2008).

48 The reforms are also intended to give the States more certainty (the SSPs are continuing, not limited to a term of five years) and flexibility (the States are able to make decisions about spending priorities within the scope of the SSPs). See Anne Twomey, 'Commonwealth Coercion and Cooperation' in John Stone (ed), *Upholding the Australian Constitution, Volume 20: Proceedings of the Twentieth Conference of the Samuel Griffith Society* (2008) 64.

their ‘main stakeholder’ as the Commonwealth ‘rather than the citizens and clients they are meant to serve’.⁴⁹ Or as Anne Twomey has put it: the ‘Commonwealth will retain control of the public purse while the States remain the beggars of the Federation’.⁵⁰

In this connection, it is worth recalling, as Cheryl Saunders has pointed out, that intergovernmental arrangements *by their very nature* ‘detract significantly from the openness of Australian government’ and ‘contribute [significantly] to the weakness of Australia[’s] Parliaments’.⁵¹ Such arrangements are negotiated by governments and are therefore dominated by the interests of those governments, recalling to mind the predicament of the European Union, a system beset by criticisms that it is too governmental, too ministerial, too bureaucratic and too remote from the people.⁵² But the ‘democratic deficit’ that besets Europe is fast becoming the problem of Australia too.

Unlike the EU, however, we in Australia can at least point to constitutional fundamentals that are profoundly democratic. The Australian Constitution was enacted into law only after it was first drafted by delegates at directly elected conventions held in the 1890s, and then approved by the voters in referendums held in each colony. And the Constitution that emerged from this process itself provides for a system in which both the Commonwealth and the States are separately and directly responsible to the voters through the electoral system. The EU cannot boast of such foundations. Witness the debacle of the European Constitution and more recently the Lisbon Treaty — approved by the governments of the Member States but all too often rejected by the voters. By contrast, the Australian Constitution has profoundly democratic foundations — and what I want to suggest is that the revitalisation of our federal system should begin, fundamentally, with a certain kind of democratic revitalisation *at a state level*.

But before I come to that, I need first to observe that this ‘governmentality’ — this pre-occupation with the needs and resources of government — is equally apparent at a state level. The Queensland Premier is to be commended for the speech she gave last year in which she delivered a ‘spirited’ defence of federalism as an appropriate system of government for Australia going into the twenty-first century.⁵³ She rightly drew attention to the suitability of federalism in Australia, given its vast territory and sparse population, as well as the benefits of federalism in dividing power, in facilitating healthy competition and in enabling governments to be responsive to the diverse needs and aspirations of particular regions and communities. However, as the Premier candidly acknowledged, the record of successive Queensland governments does not entirely live up to these ideals. In particular, there is one specific area in which the State Government has tended to exacerbate the problematic governmentality to which reference has been made. The example I have in mind concerns recent changes to the Constitution of Queensland.

Over the last two decades or so, the Queensland Parliament, together with the Legal, Constitutional and Administrative Review Committee of the Queensland Parliament

49 K Wiltshire, ‘Chariot Wheels Federalism’ in John Stone (ed), *Upholding the Australian Constitution, Volume 20: Proceedings of the Twentieth Conference of the Samuel Griffith Society* (2008) 74, 86.

50 Twomey, above n 48, 72.

51 C Saunders, ‘Federalism and Australian Democracy’ (Paper presented at the Australian Federalism: Rescue and Reform Conference, Tenterfield, 23–25 October 2008) 8.

52 A Follesdal and S Hix, ‘Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik’ (2006) 44(3) *Journal of Common Market Studies* 533.

53 A Bligh, *Inaugural ANZSOG Public Lecture*, Brisbane, 4 July 2008.

(LCARC), has engaged in a long and detailed process of constitutional reform. This reform process culminated in the enactment of the *Constitution of Queensland* in 2001. Right now, moreover, the Parliament is considering a bill introduced by the Premier that will insert a new preamble into the Constitution. The proposed preamble states:

The people of Queensland, free and equal citizens of Australia —

- a) intend through this Constitution to foster the peace, welfare and good government of Queensland; and
- b) adopt the principle of the sovereignty of the people, under the rule of law, and the system of representative and responsible government, prescribed by this Constitution; and
- c) honour the Aboriginal peoples and Torres Strait Islander peoples, the First Australians, whose lands, winds and waters we all now share; and pay tribute to their unique values, and their ancient and enduring cultures, which deepen and enrich the life of our community; and
- d) determine to protect our unique environment; and
- e) acknowledge the achievements of our forebears, coming from many backgrounds, who together faced and overcame adversity and injustice, and whose efforts bequeathed to us, and future generations, a realistic opportunity to strive for social harmony; and
- f) resolve, in this, the 150th anniversary year of the establishment of Queensland, to nurture our inheritance, and build a society based on democracy, freedom and peace.⁵⁴

So we have a newly proposed preamble to the Constitution that purports to speak in the name of the people. But there is reason to wonder: how many members of the general public are aware of this and actively participating in the debate? It is true that the proposal has been made public, and submissions have been received from many interested individuals and groups on the issue.⁵⁵ And yet, the proposal is to insert a new preamble into the State Constitution by simple enactment, speaking in the name of the people without being approved by the voters in a referendum. Is this yet another example of the kind of governmentality that has all too often dominated thinking about constitutional reform in Australia?

Nine years ago, the Queensland Government commissioned an inquiry into the reform of the State Constitution, chaired by Emeritus Professor Colin Hughes. In the Commission's Report it was recommended not only that a new preamble be inserted and that the Queensland Constitution be consolidated and modernised in its language, but also that the entire document be submitted to the people of Queensland in a referendum for their approval, and that special procedures be stipulated for the amendment of the Constitution in the future — including a referendum for the most important parts of the document.⁵⁶ However, the Government chose not to accept this particular recommendation, choosing

54 Constitution (Preamble) Amendment Bill 2009 (Qld) cl 4. [Addendum: Since this paper was written the bill has been passed. See *Constitution (Preamble) Amendment Act 2010* (Qld).]

55 See Law, Justice and Safety Committee, *A Preamble for the Constitution of Queensland 2001*, Report No. 70 (2009).

56 Queensland Constitutional Review Commission, *Report on the Possible Reform of and Changes to The Acts and Laws that Relate to the Queensland Constitution* (2000).

rather to introduce into the Parliament a modernised and consolidated Constitution that was not first submitted to the people for their approval and which could be changed in the future by a simple majority vote in the Parliament — a Parliament which, in the absence of an upper house, the Government controls.⁵⁷

Why was this decision taken? Several reasons were given, some of them concerning ‘technical’ problems and uncertainties about entrenching the Constitution under section 6 of the *Australia Acts* — difficulties that I have elsewhere argued are no problems at all.⁵⁸ The most remarkable reason given by the Government, however, was that it did not want to make the State Constitution a document that can only be altered by some special procedure such as a referendum because this ‘would prevent a government from moving quickly to make machinery-of-government amendments if required’.⁵⁹

What are we to make of this response? In the first place, it is a real cause for concern that, without any hint of embarrassment, the Government referred to itself — the Government — as needing to make these ‘machinery-of-government amendments’, overlooking the fact that it is the Parliament, not the Government, that has the legitimate power to make alterations to the Constitution.⁶⁰ Further, the concern of the Government that entrenchment of the Constitution would prevent ‘machinery-of-government amendments’ elides the very reason why constitutional provisions are entrenched — namely, in order to ensure that governments *cannot* move quickly to make what are presented as merely ‘machinery-of-government’ changes but which actually alter the fundamental balances and limitations of power preserved by the Constitution. Indeed, just this sort of thing arguably occurred in 2005 when the Government introduced into Parliament a suite of further proposed changes to the Constitution which somewhat ambiguously reconfigured the powers of the Premier in a manner that raised widespread concerns.⁶¹ But a profound governmentality continues to shape the Government’s approach to the Constitution — the same kind of governmentality which, I have said, has tended to shape the kinds of reforms that have been made to our federal system as whole.

57 See N Aroney, Scott Prasser and John Nethercote (eds), *Restraining Elective Dictatorship: The Upper House Solution?* (2008).

58 N Aroney, ‘The People of Queensland and their Constitution’, in Michael White and Aladin Rahemtula (eds), *Queensland’s Constitution at 150: Past, Present and Future* (2010).

59 *Government Response to the Legal, Constitutional and Administrative Review Committee Report No. 41* (tabled 28 April 2004).

60 A similar attitude was alluded to in the Statement of Reservation attached to the Law, Justice and Safety Committee’s report, *A Preamble for the Constitution of Queensland 2001*, (Report No. 70, 2009). The dissenting members of the committee drew attention to the fact that the Minister for Local Government and Aboriginal and Torres Strait Islander Partnerships, in her capacity as Chair of the Aboriginal and Torres Strait Islander Advisory Council, had written to the committee stating that the Advisory Council ‘required’ that the language of the proposed preamble be altered in certain respects. The Statement of Reservation expressed concern about the manner in which the Minister had tendered her advice, noting that the committee, as a committee of the Parliament, cannot be dictated to by any entity, save for the Parliament itself.

61 Constitutional and Other Legislation Amendment Bill 2005 (Qld). See ‘Constitutional Concerns’, *ABC Television Stateline Program*, 16 September 2005; Richard Murray, ‘Amendment to Constitution “dangerous”, “unnecessary”’, *The Independent Monthly* (2005), 1–2; Legal, Constitutional and Administrative Review Committee, *Constitutional and Other Legislation Amendment Bill 2005 (Qld)* Report No. 50 (2005) 6–8.

III

Now, it is precisely here that a step towards a decisive reform of both our State and federal constitutional systems could be made. The reform that I have in mind harks back to the founding generation — to the framers of the Australian Constitution and to the vision of federalism that they embraced. The statesmen of that era had a vision of Australian federalism that was much more principled than is generally realised. The founders intended to create a Constitution appropriate for what they called a ‘federal commonwealth’,⁶² by which they meant a national political community itself constituted by a collection of self-governing political communities at a state level. Their aim was to design a Constitution that would enable the diverse peoples of Australia to participate in their own local self-government. This meant that the people of each State should be able to govern themselves in relation to matters that concerned them — without undue interference from the Commonwealth; and also that the people of the entire nation should be free to govern themselves without undue interference from Britain. This shared commitment to the idea of a federal commonwealth and to local self-government had a tremendously important influence on the entire Constitution, from its overarching structures to many of its most minute details. It determined the way in which the Constitution came into being, especially that it was first approved by the peoples of each colony before being submitted to the British Parliament.⁶³ It shaped the representative institutions of the Commonwealth Parliament — in particular the insistence that the people of each State should be equally represented in the Senate and that the Senate should have near-equal power to the House of Representatives.⁶⁴ It also implied that only specific and limited powers would be conferred upon the Commonwealth, with the States, as the very presuppositions and building blocks of the federation, continuing to exercise the powers of local self-government that they had exercised beforehand — except on those limited topics in respect of which it was agreed that the Commonwealth ought to have primary responsibility.⁶⁵ Finally, the framers’ shared commitment to the creation of a federal commonwealth led them to insist that the Constitution could only be amended after first being approved by the voters in a referendum in which any proposed change must be agreed to by a majority in the nation as whole as well as by a majority of states.⁶⁶ In these general ways, as well as in many of the nuances of the system, the founders drafted a Constitution appropriate to a federal Commonwealth.

However, with all due respect, the High Court of Australia has, over the course of its institutional life, largely lost sight of this vision and generally failed to interpret the Constitution in the light of this fundamental idea. By common assent, the decisive case which led to this way of thinking was the *Engineers Case* in 1920.⁶⁷ Justice Isaac Isaacs, who was one of the framers of the Constitution, but who was consistently outvoted on all of the big federalism issues at the conventions of the 1890s, was the prime author of the *Engineers’* joint judgment, and he proposed in that case two very fundamental things about the Constitution that directly contradicted this idea of a federal Commonwealth. Firstly, he

62 *Commonwealth Constitution*, Preamble and Covering Clause 3.

63 Aroney, above n 13, ch 6.

64 *Ibid* chs 7–8.

65 *Ibid* chs 9–10.

66 *Ibid* ch 11.

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

proposed that the Constitution is best understood, not as a compact or agreement among the States as constituent political communities, but rather as a statute of the Imperial Parliament. Secondly, he said that if the Constitution did derive its political legitimacy from ‘the people’ it was the people of the entire nation, and not the peoples of the several states, to whom the legitimacy of the Constitution ought to be traced.

This general conception of the Constitution’s nature has largely dominated the High Court’s interpretation of the document ever since. Legally, the Constitution is interpreted as a British statute. Politically, it is interpreted as deriving its legitimacy from the people of the nation as a whole. Both conceptions have served to reinforce the High Court’s preference for interpreting the Commonwealth’s powers as widely as the language used can possibly sustain, without any substantial concern about the amount of power left to the States. And this general approach to the nature of the Constitution as a document and the method of its interpretation has not seriously been challenged since 1920 — except in one very important respect. In 1992, the High Court took the unprecedented step of finding that the Constitution contains an implied freedom of political communication.⁶⁸ Rather than interpret the Constitution as a British statute which embodies primarily British ideas of government, the Court in these cases read the Constitution as founded upon the consent of the Australian people, and therefore as a document which, like the US Constitution, is concerned with preserving the rights and liberties of individual citizens. In so doing, the Court opened up a fissure between two ideas that Isaacs had put together: the Constitution as a British statute and the Constitution as a popular document.

In this context, however, a very interesting question arises: given that the federal Constitution was adopted in referenda held in each of the constituent colonies, what would be the consequence if the State Constitutions were themselves adopted by their respective peoples in popular referenda? If the State of Queensland — or any other State (and especially if all the States were to follow suit) — if the States were to amend their Constitutions so that they were approved by the people of each State, what would this imply for how we understand the federal system as a whole? For too long, the system has been understood in governmental terms; and if there is a popular basis for the system, it is thought to lie in the Australian people as a whole, and not in the several peoples of the states. But what if the peoples of the states were to take action to make their state Constitutions just as a ‘popular’ and just as a ‘democratically legitimate’ as the Australian Constitution? Would this, over time, give the High Court reason to reconsider its approach to the interpretation of the Commonwealth Constitution — as a *federal* document, not only founded upon the consent of the peoples of the several States, but operating in the context of several State Constitutions, themselves approved in popular referenda held in each State?

Certainly, the Constitutional Review Commission chaired by Professor Hughes observed that a State Constitution approved by the people of the State could help to ensure, with the abdication of the sovereignty of the British Parliament over Australia,⁶⁹ that the Commonwealth does not simply take its place. If the State Constitutions were to be adopted by referendum, I want to suggest, it could eventually lead to a long overdue recalibration of the relationship between the Commonwealth and the States in which the legitimacy of the

68 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; see also *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, discussed in Nicholas Aroney, *Freedom of Speech in the Constitution* (1998).

69 *Australia Acts 1986* (Cth and UK).

State Constitutions, no less than the Constitution of the Commonwealth, is conceived to rest on the consent of the peoples of the several States. Such a conception would have the potential to replace the idea, basic to *Engineers'* centralism, that the Constitution is to be interpreted as a statute of the British Parliament — substituting for this the idea that the Constitution derives its legitimacy, not simply from the people of Australia as a whole, but from the peoples of the States, standing behind their respective state Constitutions.

The implications of such a step are of course difficult to predict with certainty. But at the least we can be sure that to take such a step would be to recover the vision of the founders of the federation. For not only did they provide for the Commonwealth Constitution to be ratified by the voters of each of the constituent States, but the prime leader among them, Sir Samuel Griffith, was a declared supporter of the idea that the State Constitutions should similarly be adopted and approved by the people of each State — that is, rather than be seen as documents that derive their authority solely from British sources.⁷⁰ Re-establishing the State Constitutions on genuinely popular grounds in this way would not be guaranteed to alter the High Court's approach to constitutional interpretation, but it would certainly provide some fundamentally persuasive grounds for doing so. In particular, it would reinforce the framers' intention to create a Constitution appropriate to a federal commonwealth, one that would enable the people of Australia to govern themselves at a national level in a manner substantially independent of the British government, while preserving the capacity of the people of each State to continue to engage in their own self-government in respect of their own domestic affairs.

70 See N Aroney, 'Sir Samuel Griffith's Vision of Australian Federalism' in Michael White and Aladin Rahemtula (eds), *Sir Samuel Walker Griffith: The Law and the Constitution* (2002) 179.