FEDERALISM AND SUBSIDIARITY:
PRINCIPLES AND PROCESSES IN THE REFORM OF THE AUSTRALIAN FEDERATION

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ABSTRACT

The principle of subsidiarity offers a criterion for the rational allocation of roles within federations between federal and state governments. The principle states that 'functions should be performed by the lowest level of government competent to do so effectively'. However, embedded in the principle is a hierarchy: there are 'higher' and there are 'lower' levels of government. This hierarchy suggests a point of view from which assessments of optimal allocation are to be made. The deeper question, therefore, is this: 'who will decide for whom?' The reform of a federal system turns not only on what principles are used, but on questions of process: who will decide what those principles require, and how will they go about doing it? A problem of path dependency lies at the heart of Australia's federal malaise. It is this problem that we need to be grappling with when considering the optimal design of the system. To do so, we need to consider not only the principles but also the processes by which the federal system is to be reformed. This paper draws on the comparative experience of Switzerland, Germany and Austria to provide guidance about how Australia's federal system might best be reformed.

If we want to know how to change institutions, we must be attuned to the fact that there is frequently a mismatch between the initial aims of institution-builders and the contemporary value we attach to them.[1]

I. INTRODUCTION

For some time now, the principle of subsidiarity has figured prominently in academic and official discussion of the reform of federal systems. The principle is conspicuous, for example, in the Terms of Reference and Issues Papers published by the Australian government in connection with the Reform of the Federation White Paper.[2] There it appears

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[1] Daniel Ziblatt, *Structuring the State: The Formation of Italy, Germany, and the Puzzle of Federalism* (Princeton University Press, 2006) xi.

[2] Eg, *Reform of the Federation White Paper: A Federation for Our Future: Issues Paper 1* (Commonwealth of Australia, September 2014) v, 18, 20-21.

as the principle that 'functions should be performed by the lowest level of government competent to do so effectively'.[3] In its classic form, the principle of subsidiarity states that—

> a community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to coordinate its activity with the activities of the rest of society, always with a view to the common good.[4]

As such, the principle of subsidiarity contains within itself an explicit hierarchy: there are 'higher' and there are 'lower' levels of government. But from what point of view are assessments of optimal allocation of responsibilities to be made? Is it from the point of view of the lower levels of government, the higher levels of government, or the federal system as a whole? There is embedded in the principle of subsidiarity a vital question of process. Who will decide for whom? According to some scholars, federalism is best thought of as being constituted by a matrix of relationships rather than a hierarchy of 'higher' and 'lower' levels. On this view, federalism is about 'non-centralisation', rather than 'decentralisation'.[5] What implications does such a view have for the application of the principle of subsidiarity to the reform of the Australian federal system?

In the European Union the principle of subsidiarity means that the Union will only exercise its competences in circumstances where—

> the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.[6]

The principle was introduced into the law of the European Union as a response to Member State perceptions of undue centralisation and bureaucratisation within the European system of government.[7] When it first appeared, the idea of subsidiarity was little more than an aspiration.[8] Although it was a justiciable principle,[9] the European Court of Justice did little to apply it in the assessment of the scope of European lawmaking power.[10] This experience led the Member States to secure a concrete process by which the idea could be applied in practice

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[3] *Reform of the Federation White Paper: A Federation for Our Future: Issues Paper 5* (Commonwealth of Australia, September 2014) 5.

[4] John Paul II, *Centesimus Annus: Encyclical Letter on the Hundredth Anniversary of Rerum Novarum* (May 1, 1991) [48]. The best explanation of origin and nature of the idea in Roman Catholic social teaching is Russell Hittinger, 'Social Pluralism and Subsidiarity in Catholic Social Doctrine' (2002) 16 *Annales Theologici* 385.

[5] Daniel J. Elazar, *Exploring Federalism* (University of Alabama Press, 1987) 64.

[6] Treaty on European Union, Article 5.

[7] George Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States' (1994) 94(2) *Columbia Law Review* 331, 348–66.

[8] *Treaty on European Union*, opened for signature 7 February 1992, [1992] OJ C 191/1 (entered into force 1 November 1993) Preamble, Article 5.

[9] Alan Dashwood, 'The Relationship between the Member States and the European Union/European Community' (2004) 41(2) *Common Market Law Review* 355, 368; A G Toth, 'Is Subsidiarity Justiciable?' (1994) 19 *European Law Review* 268.

[10] Nicholas Aroney, 'Subsidiarity: European Lessons for Australia's Federal Balance' (2011) 39(2) *Federal Law Review* 213, 221-9.

to control the exercise of power by European institutions,[11] a process that gave the Parliaments of the Member States an active role in 'seeing to it that the principle of subsidiarity is respected'.[12] Opinions are divided as to the efficacy of these procedures.[13] What seems clear, however, is that it was recognised that the abstract principle had to be accompanied by an enforcement process vested in institutions appropriately situated and likely to have a substantial interest in defending its application against incursions by 'higher' authorities into the spheres of 'lower' ones.

There are several reasons why the principle of subsidiarity has broad appeal. The first is moral. It is inconsistent with respect for a particular group of people to intervene in their affairs and do for them what they can already do for themselves.[14] The second reason is democratic. Individuals have greater prospect of participating in their own self-government at a local level. The smaller the scale of government the more democratic it can be.[15] The third is economic. When localities or states have primary responsibility for regulating a matter, provided that individuals, families, associations and corporations have opportunity to 'exit' the jurisdiction, inter-jurisdictional competition encourages each local or state government to provide public goods in accord with local preferences and needs as efficiently and effectively as possible.[16] Subsidiarity also enables localities and states to undertake policy experimentation: policy failures will be confined to particular jurisdictions, while policy successes will be emulated.[17]

The principle of subsidiarity recognises that while there are real benefits in local and state government, there are also benefits in having a federal level of government. There is a temptation for local jurisdictions to free ride on public goods provided by other jurisdictions (e.g. defence), to tax activities the benefits of which are enjoyed in other jurisdictions (e.g. protectionism), and to under-regulate activities the costs of which are borne by other jurisdictions (e.g. pollution). The principle of subsidiarity suggests that some matters are best dealt with by the federal level of government in order to avoid these temptations. Local and state governments may also lack recourses, capacity or expertise to address certain issues.

[11] Protocol on the Application of the Principles of Subsidiarity and Proportionality [1997] OJ C 340/150; Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality [2010] OJ C 83/206.
[12] *Consolidated Version of the Treaty on the European Union* [2010] OJ C 83/13, art 12(b). See also *Protocol (No 1) on the Role of National Parliaments in the European Union* [2010] OJ C 83/203.
[13] Some early assessments of the system are reviewed in Aroney, above n , 218-21.
[14] Pius XI, *Quadragesimo Anno: Encyclical Letter on Reconstruction of Social Order* (May 15, 1931) [79]-[80].
[15] Charles De Secondat Montesquieu, *The Spirit of Laws (L'esprit Des Lois)* (Hafner, 1949) pp 183-4 (IX.1).
[16] Charles M. Tiebout, 'A Pure Theory of Local Expenditures' (1956) 64(5) *Journal of Political Econonomy* 416. For a collection of articles on the topic, see Bruce H. Kobayashi and Larry E. Ribstein, *Economics of Federalism* (Edward Elgar, 2007).
[17] *New State Ice Co v Liebmann* 285 US 262, 311 (1932) (Brandeis J).

The principle of subsidiarity suggests that federal governments are sometimes better situated to address such issues by virtue of their larger resources, economies of scale, and the like. There are also some issues on which uniformity of regulation and maintenance of common standards may be beneficial. Such matters are often thought to include inter-state trade and intercourse and the provision of social welfare, at least as far as the government sector is concerned. However, even in the field of welfare, the principle of subsidiarity has an influence in supporting the idea that welfare provision is best provided, in the first instance, by local community-based organisations, such as charities and churches.[18]

There is an important sense in which the structure of the Australian Constitution embodies the principle of subsidiarity.[19] This is the case in two important respects. First, the States have general powers of legislation, while the Commonwealth has only specific, mostly concurrent powers.[20] This creates a presumption that the States will ordinarily have responsibility for regulating a matter unless the matter falls within Commonwealth legislative power and the Commonwealth decides to legislate. While the term 'subsidiarity' does not seem to have been known to the framers of the Constitution, when determining what powers should be attributed to the Commonwealth, they applied the principle that only those functions that the states could not effectively do themselves, individually or collectively, should be granted to the Commonwealth.[21] Secondly, in the usual case the Commonwealth only legislates if a majority in both houses of Parliament consent to the legislation.[22] This ensures that the Commonwealth will ordinarily legislate only with the consent of a majority of the representatives of the people of the Commonwealth (in the House of Representatives) and a majority of the representatives of the people of the states (in the Senate). Both of these features flow from the origin of the Constitution in a 'federal compact' negotiated by the elected representatives of the Australian colonies,[23] and they are protected by the requirement that the Constitution can only be amended through a referendum in which a majority of voters in the Commonwealth and a majority of voters in a majority of states consent to the

[18] Matthew Turnour, *Beyond Charity: Outlines of a Jurisprudence for Civil Society* (PhD Thesis, Queensland University of Technology, 2009) 102; Robert A. Sirico, 'Subsidiarity and the Reform of the Welfare of the Nation State' in Michelle Evans and Augusto Zimmermann (eds), *Global Perspectives on Subsidiarity* (Springer Netherlands, 2014) 107.

[19] Michelle Evans, 'Subsidiarity and Federalism: A Case Study of the Australian Constitution and Its Interpretation' in Evans and Zimmermann, above n , 185, 188-94.

[20] Commonwealth Constitution, ss 51, 52, 106 and 107; *Australia Acts 1986* (Cth) and (UK), s 2.

[21] *Official Report of the National Australasian Convention Debates, Sydney* (Acting Government Printer, 1891) 31–2.

[22] Commonwealth Constitution, ss 1, 7 and 24. Note, however, the possibility of joint sittings of both houses under s 57.

[23] *Commonwealth of Australia Constitution Act 1900* (UK), preamble.

proposed change.[24] These four features of the Constitution – *formation* through a federal compact between the people of the states, *representation* of the people of the Commonwealth and the states, *distribution* of powers between the Commonwealth and states, and *amendment* of the Constitution by the people of the Commonwealth and states – are the central elements of its federal design.[25]

As is well-known, these features of the Constitution have been undermined by political practice and judicial interpretation. The High Court has committed itself to an approach to constitutional interpretation under which each head of Commonwealth legislative power is interpreted to extend to as many matters as the language used in the Constitution can possibly sustain without having regard to the effect on the capacity of the states to regulate those matters or the overall 'balance' of power between the Commonwealth and the states.[26] While the Senate is elected by the voters in each state, party discipline is such that senators vote on the basis of decisions made within the parliamentary caucus of their party, a body dominated numerically by members of the House of Representatives. As a consequence the Senate has only marginally operated to protect the interests of the states; certainly not in the robust sense that the German Bundesrat represents the interests of the Länder governments.[27] In addition, the Commonwealth has monopolised the most significant sources of government revenue and the states have become highly dependent upon Commonwealth grants to sustain their budgets. Through its fiscal powers, the Commonwealth is able to shape and influence state government policy in virtually any field that it wishes. There is now considerable overlap in responsibilities between the Commonwealth and the states (and local government), so that it is not clear which level of government is responsible for the effective provision of public goods in particular fields. Australia has a relatively very high level of vertical fiscal imbalance. This diminishes political accountability because it reduces the extent to which each government is accountable to its citizens for the efficiency with which it provides public goods in return for taxation revenues.[28]

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[24] Commonwealth Constitution, s 128.
[25] Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009).
[26] Nicholas 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.
[27] Geoffrey Sawer, *Australian Federal Politics and Law 1901–1929* (Melbourne University Press, 1956) 128–9. This point is often exaggerated, however. For a discussion, see Nicholas Aroney, Peter Gerangelos, James Stellios and Sarah Murray, *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (Cambridge University Press, forthcoming 2015) 58-60.
[28] *Issues Paper 1*, 30-32; *Issues Paper 5*, 26-34.

It is in this context that the principle of subsidiarity is proposed as a standard according to which the functioning of Australian federalism can be assessed and reformed.[29] On the whole, it is a worthy principle. But we have to be careful what we mean by it. For it carries within itself a way of thinking about the political order that is potentially quite foreign to federalism.

II. PRINCIPLE AND PROCESS

The principle of subsidiarity is prominent in the Issues Papers prepared for the federal government's White Paper on Reform of the Federation. As noted, it is defined as the principle that: 'functions should be performed by the lowest level of government competent to do so effectively'.[30] It plays a crucial role with the principles of equity, efficiency and effectiveness in indicating how responsibilities should be distributed among the Commonwealth, states, territories, and local government.[31] It also appears as a reason why governments at all levels should aim to support rather than supplant the roles within society traditionally and more appropriately performed by families, businesses, and civil society organisations.[32] The principle is said to recognise that states, territories and local governments are more likely than the Commonwealth to understand their communities' needs. Even when there is a need for the federal government to set national goals, the principle suggests that states and territories should be free to adopt 'flexible approaches' to the achievement of such goals, as they are 'more likely to understand what is required to improve outcomes in their jurisdiction'.[33] As such, the principle affirms a presumption in favour of local and state government and a rule that federal powers should only be recognised and applied where there is a clear affirmative case for their existence and exercise, and even when this is the case, federal power should be exercised in carefully circumscribed ways so as not to 'interfere' with the performance of local government and the states of their particular constitutional functions.

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[29] Eg, Jonathan Pincus, 'Productive Reform in a Federal System' in *Productive Reform in a Federal System: Roundtable Proceedings* (Australian Government: Productivity Commission, 2005) 25, 27; Neil Warren, *Benchmarking Australia's Intergovernmental Fiscal Arrangements: Final Report* (New South Wales Government, 2006) 31; Anne Twomey, 'Reforming Australia's Federal System' (2008) 36 *Federal Law Review* 57, 59; Brian Head, 'Taking Subsidiarity Seriously: What Role for the States?' in A J Brown and J A Bellamy (eds), *Federalism and Regionalism in Australia: New Approaches, New Institutions?* (ANU E Press, 2007) 155.
[30] *Issues Paper 5*, 5.
[31] *Issues Paper 1*, 20.
[32] *Issues Paper 1*, 17, 20.
[33] *Issues Paper 1*, 20.

However, as noted, the principle of subsidiarity contains within itself an explicit hierarchy: there are 'higher' and there are 'lower' levels of government. What are the higher and what are the lower levels of government? It is readily assumed in discussion that the higher level is the Commonwealth, the lower level is the states, and the lowest level of all is local government. But why do we so readily assume this? And what does such an outlook imply?

The constitutional law of Australia gives some basis for conceiving of the Commonwealth as 'higher', and the states and local government as 'lower'. As regards the relationship between the states and local government, it is an established principle that local government is a creature of the states and lacks constitutional status as such.[34] As regards the relationship between the Commonwealth and the states, there are two important features of the Constitution that place the Commonwealth in a superior position. These are, firstly, that federal laws prevail over inconsistent state laws and, secondly, that the jurisdiction of the High Court includes appeals from the Supreme Courts of the States.[35] But does this make the Commonwealth 'higher' in every respect? To think so lies at the heart of what is problematic in the reasoning of Sir Owen Dixon in the *Uther* and *Cigamatic* cases.[36] As his Honour proclaimed in *Uther*: 'supremacy, where it exists, belongs to the Commonwealth'. This supremacy consists, he said, in the fact that the Commonwealth has an affirmative grant of particular powers, some of which specifically authorise Commonwealth interference with the affairs of the States, and that when the Commonwealth exercises these powers they operate with paramount force pursuant to s 109. This sets the powers of the Commonwealth in sharp contrast to the legislative powers of the States, which, he said, are only the 'undefined residue' which remains after 'full effect' is given to the exercise of Commonwealth legislative power.[37] As such, Dixon J reasoned, 'the Commonwealth' did not fall within State power. As he colourfully put it:

> Like the goddess of wisdom the Commonwealth *uno ictu* [with one blow] sprang from the brain of its begetters armed and of full stature. At the same instant the Colonies became States; but whence did the States obtain the power to regulate the legal relations of this new polity with its subjects? It formed no part of the old colonial power. The Federal constitution does not give it.[38]

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[34] *Federated Municipal and Shire Council Employees' Union of Australia v Melbourne Corporation* (1919) 26 CLR 508.
[35] Commonwealth Constitution, ss 73 and 109.
[36] *Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508, 529-32; *Commonwealth v Cigamatic Pty Ltd (in liq)* (1962) 108 CLR 372, 377-8. For a trenchant criticism, see R P Meagher and W M C Gummow, 'Sir Owen Dixon's Heresy' (1980) 54 *Australian Law Journal* 25.
[37] *Uther*, 529–30.
[38] *Uther*, 530.

However, to reason in this way is to turn the federal nature of the Constitution on its head. The specificity of the heads of power conferred upon the Commonwealth were meant to limit the Commonwealth to particular topics, whereas the legislative powers retained by the states were deliberately 'continued' (ss 106 and 107) in their generally plenary nature. This latter feature of state power was premised on a view of the states as the original contracting parties which created the federation. In political substance, if not in formal constitutional law, the people of the states were the constitutive authority from which the Commonwealth derived its existence. As James Bryce put it, the states are more fundamental to the existence of the Commonwealth than the Commonwealth is theirs.[39] On Dixon J's reasoning, however, the states are treated like limited governments, whose powers did not extend to regulating all matters within their territorial jurisdictions, including, in principle, activities of other governments, such as the Commonwealth. On Dixon J's analysis, the specificity of federal power authorises the Commonwealth to interfere with state rights, while the absence of specificity in the description of state power makes it merely residual and limited, and therefore incompetent to interfere with the rights of the Commonwealth.[40]

How, then, is the scheme of the federal Constitution best understood? It is instructive to compare our current federal arrangements with the Federal Council of Australasia, established in 1885.[41] The Federal Council was empowered to enact laws in respect of a limited number of topics. The Council itself consisted of two representatives from each of the self-governing colonies (including New Zealand) and one representative from the two Crown colonies (Western Australia and Fiji). Although decisions within the Council were taken by majority vote and although laws passed by the Council were to prevail over inconsistent colonial laws, participation in the Council was voluntary and a colony could withdraw from the Council at will. With no executive power and no capacity to impose taxes, the Council was radically dependent upon the colonies. In effect, the Council was nothing more than a means by which the colonies could meet to discuss and agree to the enactment of general laws.[42] To adapt Sir Owen Dixon's words, 'supremacy, where it existed, belonged to the colonies'. With this in mind, how different is the federal Constitution? The primary points of difference are that the Commonwealth has executive power and a capacity to impose and collect its own taxes, the Commonwealth Parliament is directly elected by and accountable to the people, and the states are not able to withdraw from the federation unilaterally. These

[39] James Bryce, *The American Commonwealth* (2nd ed., London: Macmillan, 1889) vol I, 12-15, 332.
[40] Aroney, Gerangelos, Stellios and Murray, above n , 272-6.
[41] *Federal Council of Australasia Act 1885* (UK).
[42] Aroney, above n , 146-8.

differences are of enormous significance, of course. They make the Commonwealth politically independent of the states and bind the states to the federation. The states have no control over Commonwealth decisions to legislate, and when it does legislate Commonwealth laws prevail over inconsistent state laws. To that extent, the Commonwealth is 'higher' and the states are 'lower'. But that is not the whole story. In other important respects, the constitutional destiny of the federation is as much in the hands of the states as it is in the hands of the Commonwealth. Considered in democratic terms, the people of the states play an equal role with the people of the Commonwealth in the enactment of legislation (indirectly through representatives) and in formal amendment of the Constitution (directly through referendum). In governmental terms, future adjustments to the federal system depend upon joint action by the Commonwealth and the states: the reference of legislative powers (s 51(xxxvii)); the exercise of British parliamentary powers (s 51(xxxviii)); alteration of the limits of states, separation of territory of states and surrender of territory to the Commonwealth (ss 122, 123 and 124); executive agreements between and cooperative legislation enacted by the Commonwealth and the states in pursuance of their respective executive and legislative powers; and the amendment of the *Statute of Westminster 1931* (UK) and *Australia Acts 1986* (UK) and (Cth) pursuant to s 15 thereof.[43] The Commonwealth is supreme within its sphere, but its sphere is constitutionally limited, and can only be increased with the consent of (the people of) the states. In these particular fundamental respects, the federation established by the Australian Constitution is not so different from the Federal Council of Australasia which it replaced. Which is 'higher' and which is 'lower'? It depends.

Nonetheless, we have become accustomed to thinking of the Commonwealth as the higher authority in a general sense, and this infects discussion about the application of the principle of subsidiarity to the reform of the federal system. Consider the classic formulation of the principle of subsidiarity. It says that a higher authority should not intervene unless certain conditions are satisfied. But what the principle does not clarify is *who* is to decide whether or not to intervene. The hierarchy of 'higher' and 'lower' suggests a point of view from which assessments of optimal allocation of competences are to be made. That point of view seems to be the vantage point of the whole – that is, a point of view from which the entire system is taken into consideration, consisting of the Commonwealth, the states, the

[43] Unanimity among the people of the states is arguably the deepest constitutive principle of the federation. See Nicholas Aroney, 'A Public Choice? Federalism and the Prospects of a Republican Preamble' (1999) 21 *University of Queensland Law Journal* 205.

territories and local government. The real risk, however, is that assessing allocations of responsibility from this point of view will tend to favour the Commonwealth over the states.[44]

There is an old dispute in federal theory that relates to this.[45] On one view, the Australian federation is a trichotomy consisting of three components: the Commonwealth, the states, and the federal system as a whole. On this first view, both the Commonwealth and the states are 'parts' of the federal system. On the other view, the federation is a dichotomy consisting of only two components: the Commonwealth and the states. On this second view, the Commonwealth embraces the states and is the relevant 'whole' of which the states are 'parts'. The risk is that the principle of subsidiarity will be combined with this second view, with the result that questions of optimal allocation of responsibilities are assessed from a point of view that is virtually identified with that of the Commonwealth as the 'higher' body most competent to make such judgements.

Now, these two theories of the nature of the federation are not necessarily incompatible. There is much to be said for the proposition that the federation is best regarded as tripartite when the governing institutions of the federal system are being considered (ie, the federal government, the state governments and the federal system within which they both operate), whereas when the constituent people of the federation are considered the system is best conceived as bipartite (ie, the people of the Commonwealth and the peoples of the states). The formation of the federation was a decision of the governments and peoples of the states. The result of their agreement was the merger of the peoples of the states into the people of the Commonwealth in a manner that preserved the continuing identity of the peoples of the states. This process also involved the formation of the governing institutions of Commonwealth while preserving the continuing existence of the governing institutions of the states. But while the peoples of the states are themselves constitutive of the people of the Commonwealth,[46] the governing institutions of the states are not constitutive of the governing institutions of the Commonwealth. While the Commonwealth Parliament represents both sets of peoples it does not represent the governments or parliaments of the states and it does not legislate for the people of each state as such; the parliaments of the states continue to perform

[44] See Daniel Halberstam, 'Federalism: Theory, Policy, Law' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 576, 593-594.

[45] Max Frenkel, *Federal Theory* (Centre for Research on Federal Financial Relations, Australian National University, 1986) [294]-[301]. This analysis puts aside, for the time being, the place of the territories and local government within the system.

[46] The people of the Commonwealth are nothing more than an aggregation of the people of the states. The peoples of the two mainland territories were also formerly parts of the peoples of the states.

that function. While the Commonwealth Parliament legislates for the people of the Commonwealth, the legislative powers of the Commonwealth are limited to particular topics.

In this context, any reallocation of powers between the Commonwealth and the states is not a matter for the Commonwealth or the states deciding unilaterally. The determination of such questions is allocated by the Constitution to particular institutional decision-making processes that involve *both* the Commonwealth and the states: referral of legislative powers (s 51(xxxvii)), the exercise of British powers (s 51(xxxviii)), formal amendment (s 128), agreements between the Commonwealth and the states, co-operative legislation, and so on. Although the Commonwealth has a vital role to play in all of these processes, the agreement of the states or the people of the states is constitutionally essential as well. Accordingly, when questions of reallocation of powers are being considered, the proper standpoint from which such matters should be assessed, pursuant to the principle of subsidiarity, is neither that of the Commonwealth, nor that of the states, but of the Commonwealth and the states operating within the federal system as a whole. Unless reform of the federation is negotiated from this perspective, it is unlikely that real reform will be achieved.

Within this framework, exactly how the principle of subsidiarity is applied must depend on the particular constitutional change that is being considered and the legal decision-making process by which that particular change has to be introduced. Who will decide for whom? For each type of proposed reform, we need to be clear about the respective roles of the states and the Commonwealth in the process. We also need to be clear about the particular roles within the Commonwealth and the states of government ministers, government departments, parliaments, conventions and referendums. Moreover, we need to consider whether determinations will need be made within these institutions and through decision-making process that require unanimity, special majority, absolute majority or simple majority. How we go about deliberating about federalism reform needs to be tailored to the variety of legal processes that will need to be followed in order to implement the reform.

The principle of subsidiarity does not tell us exactly what combination of these elements is appropriate or necessary for any particular constitutional change. But, provided that we interpret it appropriately, it does support the conclusion that the standpoint from which allocations of responsibility should be assessed ought to incorporate the perspectives of both the Commonwealth and the states as equal partners.[47] Federal systems are too

[47] The principle of subsidiarity suggests that fundamental constitutional design decisions should be determined by the lowest level capable of making such decisions. When it is the design of an entire federal system that is in question, it seems clear that each individual state will not be capable of doing so because it will consider the

complex for responsibility for their reform to be controlled by the Commonwealth alone or the States alone. Only the states understand adequately well the performance of their many and varied governing functions under their respective constitutions; and only the Commonwealth understands adequately well the problems of coordinating its own operations with those of the states in the context of the federal system as a whole.[48] Both the Commonwealth and the states need to be recall what F A Hayek called the 'synoptic delusion'.[49] This occurs, he argued, when we fall into the trap of thinking that we are able to attain sufficient knowledge and understanding of highly complex systems in order to enable us to redesign them so that they achieve what we want them to achieve. The Commonwealth and the states need to proceed with caution. Although there can be no guarantees, reforming the federal system in a way that secures the agreement of both the Commonwealth and the states seems likely to minimise the prospect that 'unknown unknowns' will intervene, sabotaging the outcome.[50]

This raises a fundamental question. Do the White Paper processes envisage sufficiently inclusive and well-structured deliberation, debate and negotiation between the Commonwealth and the states as equal partners? The publicly available documents indicate a process involving four very broad elements. First, the terms of reference were developed by the Commonwealth in collaboration with the states and the territories. Second, the process is being overseen by a steering committee comprising the secretaries and chief executives of the Prime Minister's Department, the Premiers' and First Ministers' departments and the Australian Local Government Association. Third, the White Paper is being developed by a task force established by the Department of Prime Minister and Cabinet and will present the

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system from its own perspective and not from the perspective of the whole. However, it also seems clear that the Commonwealth government will likewise consider the question from a limited perspective, for it cannot understand the system from the perspective of the states. A decision-making process that involves both the Commonwealth and the states (and, where necessary, the people of the Commonwealth and the people of the states) is therefore more likely to satisfy the principle of subsidiarity as applied to fundamental constitutional reform within a federal system.

[48] Similar considerations apply to the people of the Commonwealth and the peoples of the states; that is why s 128 involves both sets of peoples in the referendum process.

[49] Friedrich Hayek, *Law, Legislation and Liberty, Vol 1: Rules and Order* (Chicago: University of Chicago Press, 1973) 14.

[50] There is some recognition of this in the Issues Papers. Gary Sturgess is quoted as saying: 'Many people, including many academic economists, think of government as a single organisation, managed by a chief executive or a board with a single set of policy objectives. If government were such an organisation, then the coordination of policy-making and implementation, of regulation and service delivery would be largely a matter of command and control. Overlap and duplication could be eliminated through fiat, and programs could be coordinated simply by relocating authority upwards to an official higher in the chain of command. In reality, the governance of large-scale societies is much more complicated than this.' *Issues Paper 1*, 6, citing Gary Sturgess, *The Great Barrier Reef Partnership: Cooperation in the Management of a World Heritage Area* (Queensland Government, Brisbane, 1999) 25. See, generally, James C Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (Yale University Press, 1998).

Commonwealth's position on the issues raised by the terms of reference. Fourth, the White Paper will be developed with extensive consultation with business, non-government experts, and the community, with the Prime Minister's Business Advisory Council playing a key advisory role. So far, five Issues Papers have been prepared and submissions invited. In addition, stakeholder consultations have been held across the capital cities and some regional centres. A draft Discussion Paper has also been issued, and a Green Paper is said to be forthcoming; further submissions and discussions are to take place, and the White Paper will eventually be published.

Is this a recipe for success? Will it produce recommendations that have reasonable prospects of implementation? Is it a recipe for good outcomes? Much will depend, not only on the principles, but also on the processes that that shape the deliberation, discussion and debate.

III. INTERNATIONAL LESSONS

The challenges facing Australian federalism are not unique. Much the same problems and much the same obstacles to reform are observed in other federations, although their severity differs from one country to another. A recent OECD study of reforms to intergovernmental fiscal relations in ten countries described the general goals of the reforms as follows:

- increasing efficiency of public service delivery;
- reducing cyclical fluctuations in intergovernmental grants;
- providing fiscal equalisation without compromising incentives to fiscal responsibility;
- clarifying the allocation of responsibilities;
- simplifying administration of intergovernmental grants.[51]

Australia was one of the ten countries considered in the study, and it is apparent that all five of these goals are prominent in current discussion about the reform of the Australian federal system. The OECD report also identified, however, several obstacles to intergovernmental fiscal reform that were evident in the ten countries considered. First, fiscal reform tends to be a zero-sum game over the short term, with benefits accruing usually only in the long-term, but political actors have incentives to focus on short-term outcomes. Second, benefits of fiscal reform are often thinly spread over large and dispersed groups of beneficiaries while costs of fiscal reform are often well identified and focused on particular individuals and

[51] Hansjörg Blöchliger and Camila Vammalle, *Reforming Fiscal Federalism and Local Government: Beyond the Zero-Sum Game* (OECD Publishing, 2012), 18.

groups. Third, the interests of states vary: efficient and wealthy states tend to favour tax autonomy and tight fiscal rules, while less efficient and less wealthy states usually favour equalising grants and subsidies and less control over state government debt. Fourth, fiscal reform in federations faces numerous formal and informal veto points and areas of resistance to change. These include the vested interests of particular jurisdictions, particular political actors, particular government departments, particular groups in the community, and so on.[52]

Despite these obstacles, several federations have embarked upon ambitious federalism reform projects, some more successfully than others. The factors that contribute to success are various. Some are beyond the control of policy makers and political leaders. For example, successful reform of fiscal federalism is strongly correlated with good economic and fiscal conditions in a country.[53] Putting factors such as these aside, however, the literature suggests that some reform processes are more conducive to success than others. This is because successful intergovernmental reforms need to negotiate tensions that exist between:

- providing effective political leadership and achieving necessary consensus among all relevant parties;
- drawing on technical expertise while leaving room for political pragmatism;
- engaging in reform that is sufficiently comprehensive yet adequately attentive to problems of detailed implementation;
- securing agreement on general principles in a way that minimises the impact of disagreement over specific redistributive implications;
- negotiating special financial deals and transitional arrangements which provide necessary monetary compensation without undermining the general benefits and efficiency gains of the reform as a whole;
- working within a time horizon that is sufficiently long to enable the necessary deliberation and agreement to occur but not so long that it cannot be sustained through changing political and economic circumstances.

The available studies offer slightly different accounts of what combination of processes and approaches is best able to negotiate these sometimes competing requirements. Moreover, each federation is unique, and methods used in one place may not be successful in another. The studies also differ somewhat in their explanations for why reforms in particular countries were successful or not. Without seeking to adjudicate between these differences, the studies

[52] Ibid 14, 17.
[53] Ibid 16.

suggest that the following features seem generally to be associated with successful federalism reform:

- federal leadership focused in a particular department of government which ensures the reform process is well designed, effectively administered and brought to a successful conclusion;
- adequate engagement of all relevant parties (ie, all relevant levels of government) bearing in mind their respective roles in agreeing to, enacting and implementing the reform;
- maintenance of a distinction between the general principles, overarching goals and underlying theories intended to guide and shape the reform and the specific features of the reform in terms of the redistribution of fiscal resources and the reallocation of government powers and responsibilities;
- sufficient time and appropriate processes to enable thorough deliberation and genuine consensus to develop about the general direction and specific features of the reform;
- measured engagement of technical experts in a manner that contributes constructively and effectively to the achievement of these objectives.

In 2008 Switzerland implemented a comprehensive reform of its federal system involving major readjustment of intergovernmental fiscal relations and extensive reallocation of responsibilities between the federation and the cantons. The issues addressed were similar to those encountered in Australia, as was the scope and ambition of the reform.[54] Switzerland has a similarly structured referendum requirement for formal amendment of the Constitution, so its experience is especially relevant to Australia. The reform involved 27 formal amendments to the Swiss Constitution (approved at a referendum by 65% of the population and rejected by only three of the twenty-six cantons), enactment of 37 federal laws, and a large number of executive decrees and other administrative arrangements required to

[54] One study described them as: 'inefficiency and intransparency of fiscal equalisation schemes, the struggle for definition of autonomous rights, competencies and resources of the subnational units … and the quest for more effective modes of vertical and horizontal coordination and cooperation: Nathalie Behnke, 'Towards a New Organization of Federal States? - Lessons from the Processes of Constitutional Reform in Germany, Austria, and Switzerland', *Polis Nr. 66/2009* (Institut für Politikwissenschaft, FernUniversität in Hagen, 2009). The reforms in Switzerland and Germany have been characterised as seeking to increase the degree of local 'self rule' enjoyed by the constituent governments, unlike past reforms in Canada and Australia that have been characterised as increasing ostensibly cooperative 'shared rule': Jörg Broschek, 'Pathways of Federal Reform: Australia, Canada, Germany, and Switzerland' (2014) 45 *Publius: The Journal of Federalism* 51. The accent of the current White Paper process appears to be more in the direction of self rule.

implement the new scheme.[55] The four pillars of the reform package were (a) disentanglement of financial, legislative and administrative responsibilities previously shared by the federation and the states; (b) a new fiscal equalisation system consisting of three elements: (i) horizontal equalisation financed by cantons with above-average tax raising capacity; (ii) vertical equalisation financed by the federation for cantons with below-average tax raising capacity and for cantons with special geographic-topographic or socio-demographic conditions; (c) a capacity of the federation and the cantons to coerce particular cantons into engaging in horizontal collaboration and joint funding of projects; (d) a new system of fiscal management involving standardised accounting practices and performance contracting.[56] Around the same time, Germany and Austria also engaged in ambitious reform processes but these, especially the Austrian attempt, are widely regarded as having been much less successful in terms of their own aspirations and ambitions than the Swiss reform.[57] Studies have analysed the reasons for the difference.

Dietmar Braun has examined the Swiss case in detail.[58] He identifies several factors that contributed to the success of the reform. These were:

- procedural separation of the determination of general principles and bargaining over specific outcomes and structuring the deliberative process so that prior decisions controlled subsequent debate;
- early agreement that the allocation of responsibilities and financial powers should be based on the principle of *subsidiarity*, that the goal of the reform should be *efficiency* in the administration of government programs, and that reform proposals should be developed and assessed in the light of prevailing *fiscal federalism theory* as propounded by a group of respected economic experts;
- effective guidance of the process by the federation (through the Department of Finance) together with active engagement of the cantons as equal partners in the

[55] Blöchliger and Vammalle, above n , 124.
[56] Ibid 125.
[57] Behnke, above n . On Austria, compare Peter Bußäger, 'The "Austrian Convention": Failure of an Ambitious Reform' and Christoph Konrath, 'Austria after the Austrian Convention' in Arthur Benz and Felix Knüpling (eds), *Changing Federal Constitutions: Lessons from International Comparison* (Barbara Budrich Publishers, 2012).
[58] Dietmar Braun, 'Constitutional Change in Switzerland' (2009) 39(2) *Publius: The Journal of Federalism* 314. A more detailed chronology appears in Dieter Freiburghaus, 'Swiss Federalism, Fiscal Equalisation Reform and the Reallocation of Powers' in Arthur Benz and Felix Knüpling (eds), *Changing Federal Constitutions: Lessons from International Comparison* (Barbara Budrich Publishers, 2012) 53. See also Gérard Wettstein, 'Why Federal Reform Suceeded in Switzerland' in above n , (81; Manuel Fischer, Pascal Sciarini and Denise Traber, 'The Silent Reform of Swiss Federalism: The New Constitutional Articles on Education' (2010) 16 *Swiss Political Science Review* 747, and compare Fabio Cappelletti, Manuel Fischer and Pascal Sciarini, ''Let's Talk Cash': Cantons' Interests and the Reform of Swiss Federalism' (2013) 24(1) *Regional & Federal Studies* 1.

deliberations (through the Conference of Cantonal Governments and the Conference of Cantonal Finance Ministers);

- willingness in the final stages to negotiate compensation payments and transitional arrangements to secure the agreement of cantons that would otherwise be detrimentally affected by the reform.

Braun notes that 'negotiated solutions will reproduce the existing distribution of advantages and disadvantages'[59] unless the parties can be induced to transcend their particular interests by focusing on common goods and shared goals. Following Vanberg and Buchanan, however, he argues that constitutional negotiations are a 'mixed-motive" game.[60] On this view, each actor has long-term interest in the establishment of stable frameworks of action in the future. Constitutional negotiations necessarily occur behind a 'veil of ignorance' because actors are not able to predict the precise distribution of advantages and disadvantages that will result from the adoption of a particular set of constitutional rules.[61] Particular interests are still at play in negotiations, but deliberation has to occur by reference to general rules the future application of which remains unpredictable. Better outcomes are likely when deliberative processes are structured in a way that encourages participants to deliberate in a principled manner.

For this reason, Braun argues, ideas and beliefs are significant. Participants in the negotiations operate not only by reference to what they want to achieve but also by reference to what they believe. Here, Braun points out that shared belief systems can enable the parties to overcome narrowly self-interested perspectives.[62] In Switzerland, the separation of the determination of general principles from consideration of specific distributional consequences enabled the participants to debate proposed reforms in terms of shared values and not only in terms of self-interest. Effective leadership in the deliberative process helped ensure that the agreed general principles of subsidiarity and efficiency remained the criteria by reference to which arguments were advanced and proposals evaluated. The principle of subsidiarity offered a rationale and justification for the irreducibly important roles to be played by both the federal and cantonal governments and the shared goal of maximising efficiency offered a principled basis upon which to deliberate about the distribution of powers and resources. Economic theories of fiscal federalism offered a shared theoretical framework

[59] Braun, above n , 317, quoting Fritz Scharpf, *Games real actors play: Actor-centered institutionalism in policy research*. (Boulder, CO: Westview Press, 1997) 123.
[60] Ibid, 318, citing Viktor Vanberg and James Buchanan, 'Interests and theories in constitutional choice' (1989) 1(1) *Journal of Theoretical Politics* 49.
[61] Blöchliger and Vammalle, above n , 14.
[62] Braun, above n , 319.

according to which the effects of particular changes could be assessed. Indeed, the principle of subsidiarity and the goal of efficiency reinforced each other because the fiscal federalism literature suggested that allocation of responsibility to the lowest level possible tends to be efficiency-maximising.

In all of this, Braun observes, horizontal fiscal equalisation remained an important goal. It was recognised that a measure of equalisation was necessary to ensure that all cantons would have sufficient resources to operate effectively as self-governing political communities. However it was also recognised that democratic self-governance would not be secured unless vertical fiscal imbalance was minimised. Through a structured process of deliberation, the federal executive, particularly through the federal finance department, in close collaboration with its cantonal counter-parts, provided leadership, but it was a 'principled' leadership in the sense that it focused on implementing the principles of subsidiarity and efficiency against excessive jurisdictional entanglement and creeping centralisation. Because the distribution of governing powers and financial resources were both on the table, a comprehensive and integrated set of reform measures calculated to secure these goals could be formulated and implemented. Toward the end of the process, when the financial implications started to come clear, side payments had to be negotiated to secure final agreement by the effected cantons.[63] However, while this reduced the efficiency of the outcome, Braun argues that it did not jeopardise the general direction of the reform in terms of improving efficiency, clarifying responsibilities, and ensuring adequate resources would be available to enable the cantons to operate as autonomous, self-governing political communities.[64]

In another study which compares the reform experience in Switzerland with that which occurred in Germany and Austria, Nathalie Behnke largely agrees with Braun's description and assessment of the Swiss process and draws attention to several respects in which the German and Austrian processes lacked these features.[65] In Germany, constitutional reforms directed to disentangling federal and Länder legislative competencies and reducing the tendency towards deadlocks between the Bundestag and Bundesrat were successfully

[63] See, also, Blöchliger and Vammalle, above n , 23.
[64] Other commentators have observed that the success of the Swiss reform depended upon the bundling of several features into one comprehensive reform program, each feature involving key benefits to specific actors and interests, and that it was this bundling of inducements that overcame the many formal and informal veto points embedded in the Swiss system of consensual democracy: ibid 19. However, it is also important to notice that bundling can imperceptibly slip into log-rolling, where special interests join forces at the expense of other less well-organised groups: ibid 20.
[65] Behnke, above n .

introduced in 2006 and rules setting stringent public debt limitations that bind the federation and the Länder were passed in 2009. While these were important achievements, many commentators observed that several significant problems were not addressed, particularly those concerning the distribution of tax powers and revenues and the complex equalisation arrangements between the federation and the Länder.[66] Focusing on the first set of reforms, Behnke argues that the federal government and the Länder had different goals: the federation wanted to reduce the power of the Länder in the Bundesrat, while the Länder wanted more fiscal and legislative autonomy. She considers that it was difficult for the federal government and the Länder to come to agreement concerning their points of difference because deliberation about the general principles of the reform was not separated from bargaining about specific distributive implications. This lack of consensus about goals was, on her analysis, crucial. Because no agreement could be reached about the issues that caused the greatest concern, all that was left, she says, was the 'empty' idea of 'disentangling responsibilities'.[67] Constitutional reforms which readjusted several of the legislative powers of the federal government and Länder and which reduced the capacity of the Bundesrat to veto legislative proposals were passed by the requisite majorities in the Bundestag and the Bundesrat. But the extent of these changes was arguably limited, and the more controversial issue of fiscal equalisation was avoided altogether.

In Austria, Behnke argues, the problem was that, although the overall goal was to secure fundamental and systematic change, and while the method proposed (a constitutional convention) was all-encompassing, the time frame allowed was very short (18 months) and the process separated consideration of fiscal distributions and governmental powers to different working groups. In practice, this made it difficult to consider repercussions across the two domains and to create the 'necessary connection between the two strands of discussion'. She observes:

> One of the most difficult problems in the organization of a reform process thus seems to be the question of how to deal with the complexity and interrelatedness of topics. On the one hand, the problem solving capacity of any reform commission is clearly overstretched when the reform encompasses many different topics which are to be dealt with in great detail, as it

[66] Eg, Arthur Gunlicks, 'Reforming German Federalism' in Gabrielle Appleby, Nicholas Aroney and Thomas John (eds), *The Future of Australian Federalism: International and Comparative Perspectives* (Cambridge University Press, 2012) 115, 137-40 and Nathalie Behnke and Arthur Benz, 'The Politics of Constitutional Change between Reform and Evolution' (2009) 39(2) *Publius: The Journal of Federalism* 213, 223-5, citing several studies. For a more sanguine account, see Anton Hofmann, 'Constitutional Negotiations in Cooperative Federalism – the Case of Germany' in Arthur Benz and Felix Knüpling (eds), *Changing Federal Constitutions: Lessons from International Comparison* (Barbara Budrich Publishers, 2012) 120. See also the measured assessment in Wolfgang Renzsch, 'German Federalism after Two Reforms' in above n , (375.

[67] Behnke, above n , 8.

> happened in the Austrian Constitutional Convention. On the other hand, there can be no satisfactory solutions when a relevant interrelated topic is excluded altogether.[68]

The time horizon of the reform process is also critical. The Swiss reform took almost fourteen years to be brought to fruition. Behnke observes:

> It is certainly no coincidence that the Swiss reform process took nearly fourteen years to come to a successful end, while the German and Austrian processes failed after little more than two years. In the [Swiss] process, decisions were taken in three stages of increasing specificity. Each stage was accompanied by an intense effort at communicating the objectives and rationales of the reform, at building consensus and – if necessary – at negotiating package deals and pacifying unwilling actors. The German and Austrian commissions, in contrast, worked under an enormous time pressure and had hardly any time to get familiar with the technical and legal details of the topics on which they had to decide. Much less was there time to deliberate, to argue and convince, to build up consensus within the commission and to appeal for approval in the population.[69]

Like Braun, Behnke considers that federal leadership combined with equal participation of the cantons, was crucial in Switzerland:

> The federal financial department knew very well that the reform had only a chance of acceptance if the Cantons were closely included in the process from the very beginning and if the public was convinced. Interestingly, however, even though the Swiss political system establishes a particularly high number of veto players, they rarely threaten to block political decisions … . Potential veto players are included early in decision-making processes through the principle of concordance at the federal level and a close co-operation between the corresponding executive institutions at cantonal and federal levels. Even a referendum is no real threat when the elites of the cantons can be won. This is because the cantonal population tends to follow its political leaders if they communicate that they fully support a particular solution.[70]

The Swiss example shows that the necessary leadership can come from within the federal bureaucracy. However, Behnke argues that critical to the success of federalism reform is effective cooperation between and coordination of the states:

> the conference of cantonal directors and of the heads of financial departments in Switzerland were an important factor during the [Swiss] process in co-ordinating the interests of the Cantons and taking a single position vis-à-vis federal interests. … the conferences helped to communicate the objectives and compromises of the reform to the Cantons and to build consensus and support … .[71]

According to Behnke, the reform in Germany was less successful because party political differences prevented effective deliberation between the federal government and the Länder over the reform of the federal system:

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[68] Behnke, above n , 8-9.

[69] Behnke, above n , 11. Swiss federalism is more than 700 years old. This time-horizon enables Swiss politics to progress at 'deliberate speed': more slowly than Australian politics, but with more progress as well. In both countries, the Constitution can only be amended by dual referendum, and yet the Swiss constitution was amended 117 times between 1874 and 1991 with a success rate of 47 per cent: Philip L Dubois and Floyd Feeny, *Lawmaking by Initiative: Issues, Options and Comparisons* (Agathon Press, 1998) 49. One important reason for this is federal government in Switzerland does not have a monopoly over the initiation of constitutional amendments; but this difference is itself a reflection of Swiss political culture, where the cantons and the people are treated as partners in government.

[70] Behnke, above n , 11. See, similarly, Blöchliger and Vammalle, above n , 23-4.

[71] Behnke, above n , 14.

> In situations of opposite majorities in the two chambers, which occur ever more often in recent years, this means that de facto a grand coalition must approve of the reform laws. This may be positive from the viewpoint of democratic theory. If, however, such a grand coalition cannot be formed on a relevant issue, then the discussion is easily flawed by the typical structural rupture between party competition and Bund-Länder-competition … . That was exactly what happened in the commission on federalism reform. The party political conflict interfered with the Bund-Länder cleavage and made a mutually benefical solution nearly impossible.[72]

Behnke points out that in Switzerland politics is largely consensual in character, whereas German and Austrian politics are more oppositional: 'While the system of concordance employed in Switzerland regularly incorporates all political parties into government, grand coalitions are rare exceptions in Germany and Austria'.[73] In addition, there are fundamentally different attitudes to federalism in the three countries: 'Swiss federalism is generally understood to protect regional differences, whereas in Germany and Austria federalism has been regarded as a tool to harmonize and standardize regulations and conditions'.

IV. APPLICATION

How much of this can or should be reproduced in Australia? It is striking how much the broad principles and goals of the Swiss reform are echoed in the Australian debate. But Switzerland is a very different place to Australia, particularly in relation to its political culture. Switzerland is well-known for its consensus-oriented democracy in which the political and territorial diversity of the country is thoroughly accommodated.[74] Our own politics is much more majoritarian, executive-dominated and centralist.[75] Moreover, the Swiss cantons have considerably more autonomy than the Australian states. Creeping centralisation and vertical fiscal imbalance are much more pronounced in Australia than in Switzerland, not least because Swiss tolerance for them is much lower. The time horizon of Swiss politics is also much longer. Switzerland has been a federation of one kind or another for more than 700 years and the recent reform process in that country took almost 14 years. In Switzerland, the scope of the reform was systematic and comprehensive, all parties were actively involved, the reform process was adequately long, and agreement on questions of principle was secured prior to negotiating specific distributional outcomes. Given all this, is

[72] Behnke, above n , 11.
[73] Behnke, above n , 12. Notably, it was a (rare) Grand Coalition government that in 2005 passed the first set of constitution reforms in Germany.
[74] Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (Yale University Press, 1999) ch 3; Adrian Vatter, 'Swiss Consensus Democracy in Transition. A Re-Analysis of Lijphart's Concept of Democracy for Switzerland from 1997 to 2007' (2008) 4(2) *World Political Science Review* 1.
[75] Lijphart, above n , 313.

Australia capable of the kind of fundamental federalism reform that was achieved in Switzerland? There are several difficult questions that need to be asked about the White Paper process in the light of the Swiss example.

First, is the time-horizon adequate? Has enough time been allowed, in the thinking and planning of those involved, to undertake a thorough review of the situation, to secure agreement of basic values and objectives and to negotiate specific allocations of responsibility and resources to secure those objectives? There is a real question about whether the Australian political system is able to maintain a continuing process of sustained deliberation about federalism reform. In Switzerland, there was a persistent commitment to the reform process, effectively led by the federal government, engaged in by the cantons as equal partners in the deliberations, and held together by Switzerland's consensus-oriented politics, where the overall balance of party-political power at each level of government is relatively stable. Here, in Australia, politics is much more oppositional and polarised, alternating periodically from one government to another. Is it realistic to expect that in Australia we can reform the federation within a relatively short period of time, ie, within the life of a particular government? If, as is likely, more time is necessary, will successive governments (at a state and federal level) be willing to continue a process begun and shaped by their political opponents? Will successive governments be able to build on what occurred before, or will they always want to 'start anew'? Inter-country comparisons suggest that the basic interests of particular jurisdictions within a federation often transcend party political differences and persist despite changes in government.[76] This suggests that, in principle, cleavages between political parties need not be a barrier to federalism reform. Indeed, this was the case in Canada, where a far-reaching reform of the fiscal equalisation scheme developed by one government was implemented by a successor government of different political persuasion.[77] However, the oppositional political environment in Australia raises the question whether successive governments, in particular federal governments, are too reluctant to build constructively upon the efforts of their predecessors. Each new prime minister promises to 'fix federalism', making this a point of difference with his or her predecessor, thereby undermining the reform process viewed from a long-term perspective.

Second, is the process structured in a way that encourages consensus and agreement? Happily, the Issues Papers suggest an engagement of the Commonwealth and the states in the project of reforming the federation in a manner that is comprehensive. There also appears to

[76] Blöchliger and Vammalle, above n , 18.
[77] Ibid 21, 63-72.

be a willingness of the Commonwealth to recognise that it has dominated the states in various ways and that this is not necessarily a good thing. As an outside observer, however, it is difficult to be sure about how much the states are actively shaping the process.[78] In the Swiss reform, while the federation provided essential leadership, the cantons participated as equal partners, the Conference of Cantonal Governments (CCG) playing a crucial role. Here in Australia, much the same role is being performed by COAG. However, there are two important differences between COAG and the CCG. Firstly, there is a great deal more horizontal cooperation in Switzerland than in Australia, organised by the cantons themselves, through the CCG and similar intergovernmental arrangements. The Swiss cantons are accustomed to negotiating arrangements with each other independently of the federation. In this way, they take active responsibility for inter-cantonal relationships without always relying on the federal government to provide leadership. Secondly, the CCG, like the Council for the Australian Federation (CAF),[79] is a body composed of and controlled by the cantons alone. This is not the case with COAG, which is a body in which the Commonwealth plays a central, sometimes dominating role. COAG has the potential to be a venue within which genuine deliberation and negotiation occurs, but this will only be the case if the Commonwealth resists the temptation to overbear the states by threatening them with financial consequences.[80] It is worth pondering whether COAG offers a structure (as well as an institutional culture) well suited to enabling the states to engage in federalism reform deliberations as equal partners with the federal government. Should a reinvigorated CAF be playing a more prominent role?[81]

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[78] Former NSW Premier Nick Greiner has expressed concern that the federalism reform process 'is being run by the federal bureaucracy', principally through the Prime Minister's department: Jacob Greber and Katie Walsh, 'State funding chaos', *Australian Financial Review*, 11 September 2014, <http://www.afr.com/news/policy/tax/state-funding-chaos-20140911-jep3w> (accessed 24 April 2015). See also Nick Greiner, 'Reforming the Federation: Perspectives of a Practitioner' in *Sovereignty, Blame Games and Tony Abbott's New Federalism* (Centre for Independent Studies, 2014) 3, 3.

[79] On the Council for the Australian Federation, see Jennifer Menzies, 'The Council for the Australian Federation and the Ties That Bind' in Paul Kildea, Andrew Lynch and George Williams (eds), *Tomorrow's Federation: Reforming Australian Government* (Federation Press, 2012) 53.

[80] Geoff Anderson and Andrew Parkin, 'Federalism: A Fork in the Road?' in Chris Aulich and Mark Evans (eds), *The Rudd Government: Australian Commonwealth Administration 2007-2010* (ANU E Press, 2010) 292, 337-8, have described COAG as 'an instrument of cooperative centralism'. See, similarly, Philip O'meara and Anna Faithful, 'Increasing Accountability at the Heart of the Federation' in Paul Kildea, Andrew Lynch and George Williams (eds), *Tomorrow's Federation: Reforming Australian Government* (Federation Press, 2012) 92; Alan Fenna, 'Commonwealth Fiscal Power and Australian Federalism' (2008) 31(2) *University of New South Wales Law Journal* 50; Nicholas Aroney, 'Reinvigorating Australian Federalism' in Michael White and Aladin Rahemtula (eds), *Supreme Court History Program Yearbook 2009* (Supreme Court Library Queensland, 2010) 75.

[81] However, see Shipra Chordia and Andrew Lynch, 'Constitutional Incongruence: Explaining the Failure of the Council of the Australian Federation' (2015) 43 *Federal Law Review* 339.

Third, is the deliberation structured to encourage parties to ground their arguments on agreed general principles and shared theoretical frameworks rather than in terms of their own political interests? Behnke and Benz have observed that 'if constitutional and normal politics are differentiated but not separated in the negotiation process, actors are compelled to ground their argument in general principles rather than to bargain for individual interests'.[82] In Switzerland, the process first secured agreement on principles and theories, and then turned to debating specific allocations in terms of those principles and theories.[83] Can the same be said of the White Paper process? While the Issues Papers appropriately open up discussion about the principles and values and theories that should shape and guide the reform, they also very quickly turn to questions of specific implementation. This is seen in the way that, even when the principles, values and goals of reform are discussed, the questions for further discussion ask questions about how the principles can be applied. The questions raised in the Issues Papers are overwhelmingly mechanical questions in the sense that they seek practical suggestions for how the principles, values and goals on the reform can specifically be implemented. Now, these questions of specifics cannot be avoided, but is it premature to move so quickly into considering practical 'solutions' without first bedding down the principles and theories that are meant to guide the deliberations? Or have the Commonwealth and the states already agreed on the principles (they are stated fairly clearly in the Issues Papers), so that we have now moved to the practical stage of the deliberations? The difficulty is that verbal commitments can be made to particular abstract concepts, but unless this is supported up by shared theoretical perspectives, the deliberations can quickly become mired in disputes about the application of the principles which reflect deeper disagreements driven by divergent interests. The Issues Papers are not clear about the role of principles, theories and expertise in the process of negotiating federalism reform. Greater clarity about these matters would be desirable.

Australians are sometimes said to be more pragmatic and less theoretical than Europeans. The focus in the Issues Papers on asking mechanical 'how' questions is perhaps a reflection of this. Certainly, much of the reported intergovernmental discussion seems to move very quickly to practical questions about service delivery, reporting processes, systems of accountability and the distribution of money. Again, none of these questions can be avoided. But if federal reform is going to 'fix' our federal system, we need the intellectual tools to enable the Commonwealth and the states to overcome the obstacles that stand in the

[82] Behnke and Benz, above n , 218.
[83] To an extent, this also occurred in Canada: Blöchliger and Vammalle, above n , 69.

way. The continuing public debate between Commonwealth and state political leaders about the distribution of GST revenues is a case in point.[84] When the states argue over their respective shares of the GST the debate is occurring within a fixed framework: it is presupposed that the Commonwealth will continue to impose the tax and distribute it to the states. Moreover, unless the GST rate is increased or the base broadened, it is also a zero-sum game: an increase for one state is a loss for another.

Changes to distributions of federal largesse will always result in winners and losers. The hierarchical nature of our politics, which focusses authority in each jurisdiction on the executive leadership of the particular party that has power at any particular point in time, enables premiers and prime ministers to scuttle agreement on general principles by drawing attention to the specific implications for their particular jurisdiction. It is the structure of the system, not the quality of the individuals, that is the problem here. Just think about the very constructive roles that former premiers, such as Bannon, Gallop, Greiner and Brumby, have made to the principled reform of the federation *after they left politics*.[85] While these premiers did also contribute significantly to federalism reform when in office, one only has to compare this with standoffs between the current premiers, the federal treasurer and the prime minister over the carve-up of the GST to recognise how rapidly debate about the federation can degenerate. Is the White Paper process likely to engender the degree of mutual trust and common commitment to reform that is necessary? Nick Greiner is surely correct to say that one of the essential starting points for successful federalism reform must be an agreed statement of principles.[86] The Swiss experience suggests that this needs to involve a common *commitment* to those principles, and must be supported by agreed theoretical frameworks within which the meaning and application of those principles can be debated.

Finally, is the necessary political will available to secure lasting fundamental reform of the federal system? A 'mismatch' between state taxation revenue and expenditure is one of the premises of the White Paper reform process.[87] It is widely acknowledged that Australia suffers from exceptionally high vertical fiscal imbalance and it is argued by many—although not all—that this contributes to an excessive entanglement of responsibilities which in turn

[84] Scott Brenton, 'Time for States to Change the Script over GST Gains', *The Conversation*, 20 April 2015, <https://theconversation.com/time-for-states-to-change-the-script-over-gst-gains-40309> (accessed 27 May 2015).
[85] Eg, John Brumby, Bruce Carter and Nick Greiner, *GST Distribution Review: Final Report* (Commonwealth of Australia, October 2012); John Brumby, 'A Federation for the Future' (2014 Hamer Oration, University of Melbourne, 2014).
[86] Greiner, above n , 4.
[87] *Issues Paper 5*, 26-31.

contributes to a loss of proper political accountability of each level of government to its constituent voters.[88] The basic cause of the problem is the extreme reliance of the states on federal funding and a creeping centralisation which has resulted in more and more overlap between the Commonwealth and the states. Having taken over many of the most efficient and effective taxes and made the states dependent upon Commonwealth generosity, federal governments now seek to reduce their financial outlays by limiting the funds that they provide the states. They justify this on efficiency grounds. Having declined to accept offers by the Commonwealth to re-enter the field of income tax, the states complain that they are not able to provide adequate levels of services with reduced funding. The basic nature of the solution to this problem *seems* obvious: the Commonwealth should relinquish its monopoly over the most important and efficient taxes and the states should use their taxation powers to secure sufficient revenue to provide adequate services within their areas of responsibility.[89] Fiscal equalisation should be limited to assisting those states with insufficient capacity to raise revenue in proportion to the costs of providing adequate services to meet the needs of residents. It should not be used to provide middle or upper class welfare to states that have sufficient capacity to raise revenue from their own resources. If this was done, vertical fiscal imbalance would be reduced to an unavoidable minimum while still addressing the need for horizontal fiscal equalisation.[90] But although this solution may seem obvious, the Commonwealth and the states have not been able to progress very far in that direction. The Commonwealth doesn't want to relinquish its fiscal dominance because it would lose capacity to influence and shape state policy. The states don't want to take over taxing responsibility because imposing taxes is politically unpopular. And yet, almost everyone agrees that the result is dysfunctional.

Previous reforms in Australia have, within constraints, achieved measures of federalism reform. The Intergovernmental Agreement on Federal Financial Relations (2008), which came into effect on 1 January 2009, is an example. The agreement was brought about through strong leadership by the federal government combined with a degree of consensus about the general nature of the problems and the general goals of the reform (efficiency, equity,

[88] See *Issues Paper 5*, 32-34.
[89] A tax-base sharing arrangement could be an efficient way of achieving this: assessment and collection of income would continue to be administered by the Commonwealth, but the states would have a capacity to set an additional percentage of their own income tax. Negotiation of such a scheme would probably have to include a reduction of Commonwealth taxes to ensure that the overall tax burden is not increased. See Intergovernmental Relations Division, Western Australian Treasury, *Directions for Financial Reform of Australia's Federation: Discussion Paper* (June 1998).
[90] Ibid.

simplicity and transparency). Issues of principle were separated, to an extent, from questions of redistribution. The reform package bundled the relevant matters together and included compensation to address the redistributional effects of the reform. And there was a concerted effort by the Commonwealth and the states to communicate the benefits of the reform.[91] And yet, the achievement was limited. The same political party was in power in all of the Australian jurisdictions,[92] enabling the Commonwealth and the states to focus on federal problems, not party-political differences. But that context does not exist today. The ambition of the reform, though significant, excluded from serious consideration the fundamental problem of vertical fiscal imbalance and the associated entanglement of responsibilities. There was a lot in the reform documents about improving accountability, but confusion remained, not only about which government was responsible for what, but about to whom the responsibility would be owed. Intended to enhance accountability to 'the community', the procedures have tended to make the states accountable to the Commonwealth, for it remains the Commonwealth that provides the funds upon which the states continue to rely. It therefore came as no surprise that when the COAG Reform Council was disbanded[93] monitoring of state performance was transferred to the Department of Prime Minister and Cabinet.[94] The goal was to 'stop the blame game', but the fact that the game continues with just about as much vigour as before suggests that the reforms of 2008/2009 did not go nearly far enough. Even with respect to the limited objectives of those reforms, numerous shortcomings still exist.[95]

Yet Australians are capable of more. When the Australian Constitution was negotiated in the 1890s, the governments and parliaments of the colonies committed themselves to a process over which they had input but not control. The constitution was drafted by a convention delegates chosen by the voters in each colony, referred to the colonial parliaments for comment, revised again by the convention, and submitted to voters in a referendum before being transmitted to the British Parliament for enactment.[96] If fundamental and effective federalism reform is to occur today, it is necessary for the Commonwealth and state governments to commit themselves to an open-ended process of deliberation the ultimate

[91] Blöchliger and Vammalle, above n , 31-6.
[92] Until the election of the Barnett government in Western Australia in September 2008.
[93] Australian Government, *Budget Paper No. 2: 2014-15* (Commonwealth of Australia, 2014) 187.
[94] Australian Government, *Portfolio Budget Statements 2014-15: Prime Minister and Cabinet Portfolio* (Commonwealth of Australia, 2014) 25, n 1: 'The Productivity Commission will receive funding for one year to develop transitional reporting arrangements, with PM&C continuing to monitor State and Territory performance on an ongoing basis.'
[95] *Issues Paper 5*, 19-25.
[96] Aroney, above n , ch 6.

results of which they cannot predict or control with certainty.[97] Their deliberations need to be directed, first, to agreement on guiding principles and general objectives, and only secondly to specific allocations and distributions of powers and resources. The deliberation will work best if the parties are constrained to debate the distributional questions in terms of those agreed principles and objectives, and not in terms of particular outcomes and immediate interests. It may be necessary for compensation payments and transitional arrangements to be included in the final package of reforms, but if the application of the principle of subsidiarity really does result in efficiency gains for all concerned, then the prospect is that all parties can gain from the reform because it is not entirely a zero-sum game anymore.

Australian politics needs to transcend the game, at least enough to rewrite the rules to achieve better outcomes for all concerned. The Swiss experience suggests a way that can be done. The question is whether our politics can overcome its tendency to polarising partisanship in order to secure long-term benefits for the federation as a whole.

[97] Ron Levy, 'Deliberative Constitutional Change in a Polarised Federation' in Paul Kildea, Andrew Lynch and George Williams (eds), *Tomorrow's Federation: Reforming Australian Government* (Federation Press, 2012) 350, argues, on the basis of survey evidence, that Australians are generally very supportive of constitutional reform processes that are genuinely deliberative in the sense of being fair and impartial, well-informed and in accord with majority opinion.