

**REFORMING AUSTRALIAN FEDERALISM:
THE WHITE PAPER PROCESS IN COMPARATIVE PERSPECTIVE**

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ABSTRACT

The White Paper on the Reform of the Federation promised an inclusive and effective pathway to a strengthened federal system. It offered a path to increasing efficiency, reduction in cyclical policy fluctuations, better balancing of fiscal equalisation and fiscal responsibility, clarification and untangling of responsibilities, and simplification of the administration of federal grants. But after less than two years effort, the project was shelved.

When compared to federalism reform processes adopted in other countries, serious questions arise about the Australian White Paper process. These include whether the time horizon was adequate, whether the process was genuinely collaborative, whether Australian governments would be able to overcome barriers to reform caused by oppositional politics, and whether principle or pragmatic self-interest would, ultimately, determine the outcome. The failure of the White Paper process offers an opportunity to ask whether Australian federalism can ever be reformed, and what would need to happen for this to occur.

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It is the plurality of actors negotiating in distinct but loosely linked arenas and a sequential process that increases the probability of effective constitutional change and paves the way out of the quandary of federalism, requiring flexibility and rigidity. Not a simplified structure but complexity promises to avoid the constitutional joint-decision trap looming in every federal system In the long run, deliberation on basic principles of a constitution—or even the clarification of disagreements—may solve the flexibility–rigidity dilemma, while incrementalism of constitutional bargaining may lead further into this trap.¹

I. INTRODUCTION

In an influential article published in 1985, Hugh Collins argued that the ‘central features of the Australian political system—federalism and cabinet government—exhibit a utilitarian character’.² He argued that, unlike places like Canada or Switzerland, federalism in Australia was not an attempt to accommodate cultural diversity or sub-state nationalism, and unlike the United States, it was not an attempt to divide power in order to protect individual liberty. Rather, he argued, federalism in Australia was a ‘practical adjustment to circumstance’. The Australian federal system, he said, was ‘expedient’. It was a practical solution to the fact that the Australian colonies were on one hand separated by vast distances and, on the other hand, wished to secure ‘a limited range of cooperative action in matters like defence, trade, and immigration’.³ In Collins’ assessment, Australian federalism is ‘focussed upon the *practical* working-out of fiscal, constitutional, and administrative arrangements between the states and the Commonwealth’.⁴

Collins’ assessment is widely shared. There are many observers today who consider that Australian federalism is essentially pragmatic.

I don’t think Collins accurately captures the attitude and outlook that characterised the framers of the Australian Constitution. Certainly, it reflects the attitude and outlook of many in our day. However, it is arguable, I think, that Collins was reading into the founding generation the prejudices of his own time and place. There are too many statements of principle, too many arguments about the value of local self-government, too many arguments from first principles in the record of the federal conventions of the 1890s to enable us safely to conclude that the work of the framers was *merely* a series of compromises negotiated by pragmatic politicians. Compromise is inevitable in the making of *every* constitution, and it is unsafe to generalise from the existence of compromises to the conclusion that the Australian Constitution is nothing but a compromise.⁵

¹ Arthur Benz, ‘Balancing Rigidity and Flexibility: Constitutional Dynamics in Federal Systems’ (2013) 36(4) *West European Politics* 726, 745-6.

² Hugh Collins, ‘Political Ideology in Australia: The Distinctiveness of a Benthamite Society’ in S Graubard (ed), *Australia: The Daedalus Symposium* (Angus & Robertson, 1985) 152.

³ *Ibid* 152.

⁴ *Ibid* 152 (emphasis added).

⁵ Indeed, despite undeniable differences in context, one can see certain very *similar* dynamics in the founding debates underlying the American, Canadian and Australian Constitutions. After all, each Constitution was created to unite several very independent-minded, self-governing political communities into some form of federal union. While it was clearly the

But even if Collins read more pragmatism into the founding generation than is warranted, he was surely correct to put his finger on an underlying *governmentality* that has characterised much of Australian politics ever since. Although the framers of the Constitution did not want or foresee this, the practical working of Australian federalism is, in reality, a species of executive federalism, increasingly dominated—but not absolutely controlled—by the Commonwealth government. As John Winthrop Hackett so acutely observed, ‘there will be one of two alternatives, either responsible government will kill federation, or federation in the form in which we shall, I hope, be prepared to accept it, will kill responsible government’.⁶ While federalism did not quite kill responsible government at the Federal Convention of 1891, it did prolong its hesitating adoption until the second Federal Convention of 1897-8.⁷ However, by making room for responsible government in 1897-8, the framers of the Constitution made it possible for later generations of politicians to develop party systems that require such strict discipline of their members that effective political power has become concentrated into the hands of our Prime Ministers and Premiers. The result has been a species of executive federalism in which attempts to reform Australian federalism are easily politicised, side-tracked and resisted.

My thesis in this paper is that if we are looking for the reasons for the demise of the White Paper on the Reform of the Federation, we need look no further than this Australian penchant for executive federalism.

II. COMPARATIVE LESSONS

In a paper I first presented at the Commonwealth Attorney-General Department’s annual conference last year, I reported the results of research that examined federalism reform processes in Switzerland, Germany and Austria, and compared these experiences with the reform process adopted by the White

intention of John A Macdonald, for example, to establish a federal system in Canada that was significantly more centralised than the American union, the terms of the Canadian union had to be worked out through hard-bargaining between representatives of the Canadian colonies just as had occurred in Philadelphia in 1787 and would happen again in Adelaide, Sydney and Melbourne in 1897-8. While the values of liberty and rights motivated the framers of the US Constitution very profoundly, these values also motivated the Canadians and the Australians. The original design of all three constitutions did not include a Bill of Rights. And even though the Canadian federation had to accommodate the special claims of French-speaking Quebec, and did so by reserving power over cultural matters to the provinces, the federal negotiations in America and Australia also had to work through problems of accommodating the special demands of particular states or particular groups of states. As a consequence, all three sets of debates display concerns for cultural autonomy, for individual liberty and for pragmatic solutions to practical problems of governance. Yes, the weight placed on these elements was undoubtedly different in each country, but all three elements had an influence.

⁶ *Convention Debates, Sydney* (1891), 280.

⁷ Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009) 200-206, 237-39.

Paper on the Reform of the Federation.⁸ What I found, somewhat to my surprise, was that there has been a remarkable degree of consensus among academic commentators concerning, not only which of the Swiss, German and Austrian reform efforts was most successful, but also about the underlying causes of success and failure.⁹ The studies are unanimous that the Swiss reform was clearly the most successful, while the German approach secured only limited reforms and the Austrian efforts were a complete failure. Moreover, the studies suggest that there were several important features of the Swiss reform process that especially contributed to its success. Bearing in mind certain important similarities between Switzerland and Australia—not least of which is the same formal process for the amendment of the Constitution—the Swiss experience is especially instructive.

The studies suggest several reasons why the Swiss reform was so successful.¹⁰ First of all, the Swiss reform struck an appropriate balance between providing effective political leadership and achieving the necessary consensus among all relevant parties. On one hand, the reform process was led by a particular department of the federal government which worked to ensure that the reform process was well-designed, effectively administered and brought to a successful conclusion. On the other hand, the process involved active and effective participation of all orders of government bearing in mind their respective roles in agreeing to, enacting and implementing the reform. Secondly, the Swiss reform process drew an effective distinction between the general principles, overarching goals and underlying theories that would 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. The process required the parties to agree upon the relevant principles, goals and theories before negotiating the unavoidable practical details. Thirdly, the Swiss reform allowed sufficient time, adequate resources and appropriate processes to facilitate thorough deliberation, genuine consensus and effective decision-making. The reform process was sustained over several years notwithstanding changes in the political complexion of governments and the economic circumstances of the country. These three features of the Swiss reform combined to

⁸ The paper has since been published as Nicholas Aroney, 'Federalism and Subsidiarity: Principles and Processes in the Reform of the Australian Federation' (2016) 44(1) *Federal Law Review* 1. An earlier version is available at: <ssrn.com/abstract=2604783>.

⁹ These studies include: Nathalie Behnke, 'Towards a New Organization of Federal States? - Lessons from the Processes of Constitutional Reform in Germany, Austria, and Switzerland' in *Polis Nr. 66/2009* (Institut für Politikwissenschaft, FernUniversität in Hagen, 2009) ; Dietmar Braun, 'Constitutional Change in Switzerland' (2009) 39(2) *Publius: The Journal of Federalism* 314; 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; Arthur Benz and Felix Knüpling (eds), *Changing Federal Constitutions: Lessons from International Comparison* (Barbara Budrich Publishers, 2012). Note also the accounts in: 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; Johanne Poirer, Cheryl Saunders and John Kincaid (eds), *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (Oxford University Press, 2015).

¹⁰ See Aroney, above n , 12-18.

overcome the sorts of difficulties that typically beset efforts to reform federal systems across the world.

In the light of these experiences, in my paper last year I asked three questions of the Australian White Paper process.

First, was the time-horizon adequate? Was enough time allowed, in the thinking and planning of those involved to undertake a thorough review of the situation, to secure consensus on the basic values and objectives that should guide the reform and to negotiate specific allocations of responsibility and resources to secure those objectives? I proposed that there was a real question about whether the Australian political system would be able to maintain a sufficiently prolonged process of sustained deliberation about federalism reform.

Looking back on the White Paper process, now that it has essentially failed, certain further questions arise. Was it realistic to expect that in Australia we could reform the federation within a relatively short period of time—that is, within the life of a particular government? Moreover, if the failed process demonstrates that more time was necessary, can we reasonably expect successive governments at both a state and federal level to be willing to continue a process begun and shaped by their political opponents? Will successive governments be willing and able to build on what occurred before, or will they always want to ‘start anew’? As I observed at the time:

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.¹¹

Something of this concern was acknowledged in the *draft* Green Paper, issued as a ‘Discussion Paper’ on 23 June 2015, after chapters of it had been leaked to the press.¹² The Discussion Paper adroitly acknowledged that reforms of the magnitude being contemplated could not be rushed and might take ‘many years to fully develop and implement’ and that it would require a ‘sustained commitment from all levels government and all sides of politics’.¹³ The Prime Minister’s decision to close down the White Paper process after only two years illustrates, alas, that the necessary commitment could not in this case even be sustained for the life of single parliament.

The second question I asked concerned *whether the reform process was structured in a way that would encourage consensus and agreement*. Happily, the Issues Papers suggested a joint engagement of the Commonwealth and the States in the project of reforming the federation in a

¹¹ Ibid 19.

¹² *Reform of the Federation: Discussion Paper* (Commonwealth of Australia, 2015). For the issue of the report, see <<https://federation.dPMC.gov.au/publications>> (accessed 8 June 2016). See Michelle Grattan, ‘Abbott releases federalism paper after Labor ramps up scare attack’, *The Conversation*, 23 June 2015.

¹³ Ibid 17.

manner that appeared to be comprehensive. There also appeared to be a willingness on the part of the Commonwealth to acknowledge that it has dominated the states in various ways and that this was not necessarily a good thing.

As an outside observer, however, I observed that it was difficult to be sure about how much the States were actively shaping the process. The White Paper process was driven by a task force established within the Department of Prime Minister and Cabinet, and the federal government had settled upon COAG as the body through which the reforms would be negotiated.¹⁴ However, COAG is a body in which the Commonwealth has long played a central, sometimes dominating role. As one of the Issues Papers recognised, COAG has the potential to be a venue within which genuine deliberation and negotiation occurs,¹⁵ but this will only be the case if the Commonwealth resists the temptation to overbear the states by threatening them with financial consequences.

And, indeed, looking back at the last two years, this was one of the key points at which the process kept breaking down. In the 2014 budget, the Abbott government announced that it would withdraw \$A80 billion in long-term health and education funding that had been pledged to the states by the previous Labor government.¹⁶ While this was an election promise that the Coalition government had made, it resulted in predictable responses from the States, including those led by Coalition governments. Moreover, the objections of the States were not only about the loss of projected revenue that they would suffer. They were about that, but it was also observed that the supposed budget cuts were pre-empting the White Paper process itself. Thus, the NSW Treasurer, Andrew Constance, was reported as saying that the Commonwealth was ‘putting the cart before the horse’—the Commonwealth should reinstate the funding, he said, ‘until we reform the federation and tax system’ as a whole.¹⁷

In March 2016, Prime Minister Turnbull announced a proposal, which he put to COAG for consideration, that the federal government would reduce its income tax by an agreed percentage and allow state governments to levy an income tax equal to that amount.¹⁸ The idea seems to have been that the overall income tax burden would not increase during a fixed interim period, but after that the States would be free to raise or lower their income taxes within a certain fixed range. However, when the proposal was put to the states, the response was predictable. As the COAG Communiqué

¹⁴ See Department of Prime Minister and Cabinet, *Reform of the Federation White Paper: A Federation for Our Future: Issues Paper 1* (Commonwealth of Australia, September 2014) vi.

¹⁵ *Issues Paper 1*, 38.

¹⁶ See 'Fact check: Does the federal budget cut \$80 billion from hospitals and schools?', *ABC News*, 3 July 2014.

¹⁷ Kirsty Needham, 'States want hospital, school cuts delayed', *Sydney Morning Herald*, 18 May 2014.

¹⁸ Malcolm Turnbull MP, 'Doorstop Interview', Penrith, 30 March 2016 <www.pm.gov.au/media/2016-03-30/doorstop-penrith>. See also Malcolm Turnbull MP, 'Statement on Federation', 30 March 2016, <www.pm.gov.au/media/2016-03-30/statement-federation>.

delicately put it, there was ‘not a consensus among states and territories’ to support further consideration of the idea. Rather, the ‘leaders’ agreed to consider proposals to *share* the Commonwealth’s personal income tax revenue with the States in order to provide the States with a broad revenue base, to reduce the number of tied grants, and to create more flexibility for the States to meet their ongoing expenditure needs.¹⁹ Weighing into the debate, the federal Leader of the Opposition ruled out any possibility of ‘giving’ income tax powers to the States²⁰ and a Senate committee controlled by Labor and the Greens concluded that the idea was a ‘thought bubble’ dreamed up in the Prime Minister’s office with very little consultation.²¹ It was not really a thought bubble, as the idea had been discussed at some length in the Reform of the Federation Discussion Paper. There it was proposed as one option among others as a means of combating vertical fiscal imbalance and making the states accountable to their own electorates for raising required funds from their own revenue sources.²² But there was a real question about how much consultation had actually occurred.

The Discussion Paper issued the year before had explained that the options canvassed therein had been developed on the basis of the key principles that had been set out in the White Paper’s Terms of Reference as well as the particular goals that were agreed at a COAG meeting in April 2015.²³ The key principles were listed as those of ‘accountability; subsidiarity; national interest considerations; equity, efficiency and effectiveness of service delivery; durability; and fiscal sustainability’, and the particular goals agreed at COAG were to ‘deliver better services’; ‘drive economic growth’; ‘be fair’, in sense that all Australians should be able receive, choose and access high quality services regardless of location; ‘provide clear responsibility’ so that people could be aware of which level of government is responsible for services; and ‘be durable’ in the sense that the arrangements would stand the test of time and be adaptable and flexible to accommodate required changes over time.²⁴ In explaining how the reform options had been developed, the Discussion Paper maintained that all governments with a stake in the policy area ‘should be genuine co-designers’ of

¹⁹ COAG Communiqué, 1 April 2016, 1-2.

²⁰ Anna Henderson and Stephanie Anderson, ‘Tax reforms: Turnbull confirms radical proposal to allow states, territories to levy income taxes’, *ABC News*, 30 March 2016.

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²² *Discussion Paper*, 91-98. See also *Issues Paper 5*, 4, 35. The State income tax idea was widely discussed at the time: eg, Michelle Grattan, ‘Abbott releases federalism paper after Labor ramps up scare attack’, *The Conversation*, 23 June 2015. It had also been discussed in several opinion pieces written by leading scholars in the field: eg, Brian Galligan, ‘Renewing federalism: what are the solutions to Vertical Fiscal Imbalance?’, *The Conversation*, 16 September 2014; Alan Fenna, ‘Taxation, the states, and redrawing our fiscal constitution’, *The Conversation*, 17 September 2014. The idea was also proposed by the National Commission of Audit: Tony Shepherd et al, *Towards Responsible Government: The Report of the National Commission of Audit, Phase One* (Commonwealth of Australia, 2014) Recommendation 8; Cheryl Saunders and Michael Crommelin, ‘Reforming Australian Federal Democracy’ (2015) 74(3) *Meanjin*.

²³ above n 14.

²⁴ *Ibid* 14.

the reform and stated that the reform options had been ‘identified by the Commonwealth, in close consultation with the States and Territories, the Prime Minister’s Expert Advisory Panel and a range of stakeholders’.²⁵ It was also made clear, however, that while a range of reform options were presented, not all of them were necessarily agreed by all levels of government.²⁶

It is not entirely clear what happened between the issue of the Discussion Paper and the Prime Minister’s proposal that the States be given room to impose their own income taxes. The Senate Finance and Public Administration References Committee undertook an inquiry into the COAG meeting of 1 April 2016 and during that inquiry concerted efforts were made by Opposition senators to discern exactly how much preparation and consultation had occurred.²⁷ The Committee produced a majority report that found that the proposal had been developed by the Department of Prime Minister and Cabinet between January and April 2016 with relatively little consultation with the federal departments of Treasury, Health and Education and even less with their state and territory counterparts.²⁸ The dissenting report by Coalition members of the committee emphasised that the Prime Minister’s proposal was to initiate a discussion, rather than conclude an agreement.²⁹ But while the Prime Minister had indeed been at pains to say that he was merely raising the idea for discussion with the Premiers, taking the matter to COAG in this way was to step outside the White Paper process, particularly after the Discussion Paper had canvassed several possible options concerning which it anticipated further consideration and discussion. However, the Prime Minister chose, rather, to isolate State income taxes as the particular option to be considered at COAG, effectively sidelining the other options. A more methodical approach would have been to continue with the White Paper process, which would have continued to involve the States and Territories in systematic deliberation about the various options.

Even though the reactions to and assessments of the Prime Minister’s proposal were politically-exaggerated, the whole affair illustrates the fundamental problem with executive-led reform efforts: they are too prone to politicisation.³⁰

This problem gives rise to the third question I asked last year. *Is the deliberation structured to encourage parties to ground their arguments on agreed general principles and shared theoretical*

²⁵ Ibid 15-16.

²⁶ Ibid 16.

²⁷ Australian Senate, *Official Committee Hansard* (Finance and Public Administration References Committee), ‘Outcomes of the 42nd meeting of the Council of Australian Governments’, 27 April 2016.

²⁸ Australian Senate, Finance and Public Administration References Committee, *Outcomes of the 42nd meeting of the Council of Australian Governments held on 1 April 2016* (Canberra: Commonwealth of Australia, May 2016) 23-7.

²⁹ Australian Senate, Finance and Public Administration References Committee, *Outcomes of the 42nd meeting of the Council of Australian Governments held on 1 April 2016* (Canberra: Commonwealth of Australia, May 2016) 29.

³⁰ The same politicisation beset the Taxation White Paper, as more and more kinds of taxes were said to be excluded from consideration, only to re-enter political debate in other ways: Peter Martin, ‘Turnbull government’s tax white paper: why we need a reset’, *The Sydney Morning Herald*, 24 September 2015.

frameworks rather than in terms of their own political interests? Here I noted that while the Issues Papers appropriately opened up discussion about the principles, values and theories that ought to shape and guide the reform of the federation, they also very quickly turned to questions of specific implementation. This could be seen in the way that, even when the principles, values and goals of reform were discussed, the questions for further discussion were about how the principles could best be applied in practice. The questions raised in the Issues Papers were overwhelmingly mechanical questions in the sense that they called for practical suggestions about how the principles, values and goals of the reform might specifically be implemented.

Now, these questions of specifics cannot be avoided, but I suggested last year that it would be premature to move so quickly into considering practical solutions without first bedding down the principles and theories that are meant to guide the deliberations. Looking back on the process now, it seems that this has indeed proved to be a major problem. Broad consensus about practical solutions is unlikely to be achieved while there remain deep-seated disagreements about the exact nature of the problems that beset our federal system and about the features of an idealised federal system to which we might aspire.

This was especially on display in the debate over the Prime Minister's suggestion that the States be allowed to impose their own income taxes. The Coalition government said that it saw this as a means of securing one of the central goals of the White Paper process, which was to clarify the powers and responsibilities of the Commonwealth and the States. And its goal in doing so, it was quite clear, was to move the Australian federal system in a more competitive direction. Some of the State and Territory leaders appeared to be open to the idea, but others were resistant.³¹ Colin Barnett (WA) strongly supported the proposition that the States' revenue-raising powers be aligned with their responsibilities. Mike Beard (NSW) indicated a willingness to consider it, along with other options that might be raised. Jay Weatherill (SA) said it was a 'positive thing' to give the States access to income tax, but saw it as only a 'small contribution to a big challenge', and also expressed concern that it could 'create confusion'. Adam Giles (NT) welcomed the implication that the heavy bureaucracy and red tape associated with the national partnerships would be ended and the States and Territories would enjoy greater freedom to make decisions, but he also worried that the proposal would impact most harshly on poorer regions and jurisdictions, and that it might encourage a 'race to the bottom'. Will Hodgman (Tas) similarly worried that that his State would suffer because its taxpayers earn below the national average. Daniel Andrews (Vic) denounced the proposal as a 'tax

³¹ See 'Turnbull reveals radical income tax plan', *SBS News*, 30 March 2016; Michael Koziol, 'States could collect income tax under radical plan backed by Malcolm Turnbull', *The Age*, 30 March 2016; Jared Owens and Andrew Burrell, 'COAG: Premiers split on Turnbull's state income tax plan', *The Australian*, 1 April 2016;

policy thought bubble’, and expressed concern that it would enable the Commonwealth to disclaim responsibility for funding important services provided by the States. Anastacia Palaszczuk (Qld) said that insufficient detail had been provided. Bill Shorten (federal Leader of the Opposition) responded politically by casting the proposal as involving an increase in taxes.³²

Both pragmatic and principled reasons lay behind these differing responses to the Prime Minister’s proposal.³³ But because the issue was being discussed among First Ministers rather than within the White Paper process, the distinction between principle and pragmatism became immediately blurred and the whole issue was politicised. The Premiers were able to scuttle the proposal before a careful and measured debate over its implementation could occur.

This is precisely the problem with our executive-led federalism. As I argued last year:

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.³⁴

III. CONSTITUTIONAL LESSONS

Ours is a federalism that has been undermined by a system of parliamentary responsible government that concentrates power in the hands of our prime ministers, premiers and first ministers, and which discourages the kind of long-term, well-structured, inclusive deliberation that the experience of other countries—Switzerland in particular—suggests is necessary to secure effective, fundamental, federalism reform.

It need not have been like this. The framers of the Australian federal Constitution went so very close to designing a system in which power would not have been concentrated in the hands of a single prime minister. In Switzerland, the executive power of the federation is vested in a council, not an individual. The council consists of seven members, the president of which is only the chair of meetings and the spokesperson of the council, not a chief executive officer or general manager, and certainly not an executive president or prime minister. Moreover, the council is chosen by both houses of the federal legislature, and in practice reflects the views and values of a wide variety of political points of view. Political decision-making is therefore by consensus, and while some Swiss

³² Essentially the same problem appears to have bedevilled that Commonwealth’s Taxation White Paper. In December 2015, the Commonwealth Treasurer, Scott Morrison, observed that there were differences between the Commonwealth and the States that might prove to be ‘irreconcilable’. As he put it, the Coalition federal government wanted a ‘growth-friendly’ tax system, whereas the States wanted a ‘spending-friendly’ one. See Michelle Grattan, ‘Differences with states on tax reform could be “irreconcilable”’, *The Conversation*, 9 December 2015.

³³ See, eg, Michael Pascoe, ‘Turnbull proposal to stoke competitive federalism is politics not economic reform’, *The Sydney Morning Herald*, 31 March 2016.

³⁴ Aroney, above n , 21.

people feel that things move too slowly in Switzerland, they move with deliberate speed, and no one could claim that Swiss governance is ineffective or inconsequential.

The framers of the Australian Constitution took Switzerland seriously. They adopted its use of the referendum as the means by which the constitution would be both ratified and amended. They also pondered long and hard over whether its system of government by executive council should be adopted in Australia. The idea was attractive because, unlike cabinet government, which concentrates power, a conciliar executive preserves a distribution of power—both federally and democratically.

Andrew Inglis Clark, a liberal-republican from Tasmania, Richard Baker, a conservative from South Australia, John Hackett, a self-described ‘advanced liberal’ from Western Australia, and Samuel Griffith, a liberal-conservative from Queensland, each recognised this.³⁵ Baker, in particular, proposed that something along the lines of the Swiss system—an executive council chosen for a fixed period by both houses—be adopted in Australia. And a significant minority of the framers were inclined to agree.

Baker’s concern was that federalism and cabinet government were inconsistent with each other.³⁶ Federalism tends to distribute power, while cabinet government tends to concentrate it. Federalism in particular depends on a distribution of legislative power between the federal and state parliaments, and treats that distribution as a suitable means of maintaining an effective distribution of powers, both legislative and executive. Federalism is therefore premised, not only on the primacy of the constitution, but on a certain priority of legislative power over executive power. Cabinet government, on the other hand, depends on a fusion of legislative and executive power in the hands of the prime minister and cabinet. As a result, the legislature tends to become an instrument of the executive, at both a federal and state level. The federal and state legislatures are sidelined in importance, and what really matters are inter-governmental relations between the executive governments of the federation and the states. Executive federalism is the result.

But executive federalism is not consistent with two of the most fundamental features of the Constitution: the manner in which it came into being and the ways in which it can be amended in the future. These two features of the Constitution, although executive-led, are not executive-determined. Thus, while the making of the Constitution was necessarily initiated by the premiers of the Australian colonies when they agreed to hold federal conventions in 1891 and 1897-8 for the drafting of a

³⁵ Andrew Inglis Clark, ‘Australian Federation (Confidential)’ (1891) 5-7; Richard Chaffey Baker, *A Manual of Reference to Authorities* (Adelaide: E.A. Petherick and Co, 1891), Preface of May 1, 1891; Richard Chaffey Baker, *The Executive in a Federation* (Adelaide: C.E. Bristow, Government Printer, 1897) 3, 11; Lyall Hunt, ‘Sir John Winthrop Hackett (1848-1916)’, *Australian Dictionary of Biography* (Melbourne: Melbourne University Press, 1983), vol 9. Two influential English-language writers on the Swiss system, Francis Ottiwell Adams, and C. D. Cunningham, also held the Swiss conciliar executive in high regard: *The Swiss Confederation* (London: Macmillan, 1889), 273-4.

³⁶ *Convention Debates, Sydney* (1891), 439-40, 465-6; *Convention Debates, Adelaide* (1897), 28-31.

proposed federal constitution, it was the colonial legislatures that enacted the *Enabling Acts* which established the two conventions at which the Constitution was drafted. According to the *Enabling Acts*, the conventions consisted of delegates chosen, in 1891 by both houses of the colonial legislatures, and in 1897-8 by the voters of four of the five colonies that participated. Both the government and opposition leaders of each colony were represented at the conventions. The draft constitution produced by the 1897-8 was submitted to the colonial legislatures for comment, and was not forwarded to the Imperial Parliament for enactment until it had been ratified in referendums held in each colony.³⁷ Consistent with the constitutive role played by the legislatures and voters in the colonies, the Constitution provides for its own amendment by referendum initiated by an absolute majority of both houses of the federal Parliament, or by only one house in the case of a sustained deadlock (s 128), and facilitates the referral of additional legislative powers to the federal Parliament by the Parliament of any State (s 51(xxxvii)).

The expectation of the framers was that these would be the two mechanisms by which substantial reforms to the federal system might be made. But they overlooked one thing. In rejecting Baker's proposal for conciliar executive, they created a system in which the influence and control of the Prime Minister could wax very large. Thus, in the first place, even if the Senate or House of Representatives might initiate a proposal for the amendment of the Constitution, the Governor-General—acting on the advice of the Prime Minister—has to refer the proposal to the voters, and on four occasions, one of them involving a proposal passed only by the Senate, the Government of the day has decided not to allow the proposal to be submitted to the voters.³⁸ In practice, all constitutional amendment proposals have proceeded only with the support of the Prime Minister and Cabinet. Much of the reason why so many of them have failed is because the Commonwealth government has an effective monopoly over the initiation of such proposals, and most of them have proposed an increase in Commonwealth power. None of them have involved a rebalancing of power between the Commonwealth and the States.³⁹

The same applies to the practical working of the reference power (s 51(xxxvii)). Certainly, the reference of powers by the States and the exercise by the Commonwealth of the power referred must be undertaken by the State and Commonwealth Parliaments. But references of power are negotiated

³⁷ Even though after the first set of referendums in 1898 (carried in South Australia, Tasmania and Victoria, but not by the required statutory minimum of 80,000 voters in New South Wales) small changes to the constitution were made at a premiers conference held in early 1899, these changes were submitted to and approved by a second set of referendums held in each colony in 1899 and 1900.

³⁸ Harry Evans and Rosemary Laing, *Odgers' Australian Senate Practice* (Department of the Senate, 13th ed, 2012) 330-31; B C Wright and P E Fowler, *House of Representatives Practice* (Department of the House of Representatives, 6th ed, 2012) 26-7. See also *Referendum (Machinery Provisions) Act 1984*, s 7.

³⁹ House of Representatives Standing Committee on Legal and Constitutional Affairs, *Constitutional Change: Select Sources on Constitutional Change in Australia 1901-1997* (Commonwealth of Australia, 1997), Part 2.

between the governments of the Commonwealth and the States. Moreover, as Andrew Lynch has argued, in order to enable Commonwealth legislation on referred matters to be amended in a controlled manner the States have often depended on the ‘underpinning governance arrangements of cooperative schemes, rather than any legislative attempt to contain the scope of [such] amendment[s]’.⁴⁰ These governance arrangements depend on the agreement of a sufficient number of the referring States to any proposed amendment to the legislative scheme—agreement that is made, not by the legislatures of the States, but by their respective governments.⁴¹ In this way, executive federalism has colonised the reference of legislative powers from the States to the Commonwealth.

However, there have been problems. Members of the High Court have indicated that this substitution of executive power for legislative power in the practical working of such arrangements may be unconstitutional.⁴² In *Thomas v Mowbray*, Kirby J observed:

It is critical to the constitutional design apparent in s 51(xxxvii) that the referral of power there envisaged is made by the Parliament of the State concerned, not merely by the Executive Government. Parliament represents all the electors in the State. The fact that the Government of a State might be willing to accept a wider reference of power to the Federal Parliament than the State Parliament has enacted is not determinative of what that Parliament has done.⁴³

... s 51(xxxvii) refers to “matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States” and not to matters referred by the Executive Governments “of any State or States”. The modern tendency of governments in Australia to identify themselves with the Parliaments, at the cost of the respect owed to those Parliaments, is of no effect when a matter comes before this Court. Our obligation is to give effect to the Constitution. As the language of the Constitution makes clear, the reference power belongs to the Parliaments of the States and only to those Parliaments.⁴⁴

Both Kirby J and Callinan J pointed out that, apart from the process envisaged by s 51(xxxvii), the proper means by which the Constitution is to be changed is through the referendum in s 128.⁴⁵ Kirby J put it this way:

I decline to interpret the provisions of s 51(xxxvii) of the Constitution to permit the parliamentary reference of constitutional power to be achieved without any relevant parliamentary involvement, as by the use of communiqués by heads of government alone.

Approval of a proposed text by COAG, by State Premiers and Territory Chief Ministers (or, as ultimately occurred in the case of Victoria, the Secretary of the Victorian Department of Premier and Cabinet), was apparently intended to convey the consent of the State or Territory concerned. These government officials must be reminded that constitutional power in Australia is derived ultimately from the people who elect Parliaments. The alteration of the allocation of constitutional powers must therefore either involve the people as electors directly (under s 128 of the Constitution) or, exceptionally, it must involve their representatives in the several Parliaments (as provided by s 51(xxxvii) and (xxxviii)). It cannot be achieved merely by the actions of governments and governmental officials.⁴⁶

⁴⁰ Andrew Lynch, 'The Reference Power: The Rise and Rise of a Placitum?' in Paul Kildea, Andrew Lynch and George Williams (eds), *Tomorrow's Federation: Reforming Australian Government* (Federation Press, 2012) 193, 203.

⁴¹ *Ibid* 204-5.

⁴² See *Thomas v Mowbray* (2007) 233 CLR 307, 381-3 (Kirby J), 462 (Hayne J), 509-10 (Callinan J).

⁴³ *Thomas v Mowbray* (2007) 233 CLR 307, 381.

⁴⁴ *Thomas v Mowbray* (2007) 233 CLR 307, 382.

⁴⁵ *Thomas v Mowbray* (2007) 233 CLR 307, 381-3 (Kirby J), 510 (Callinan J).

⁴⁶ *Thomas v Mowbray* (2007) 233 CLR 307, 383.

These passages underscore a developing rift between the practice of executive federalism in Australia and the constitutional fundamentals of the system. It is not only the technicalities of the process by which references of power can be made that is the issue.⁴⁷ These passages point to an insistence by members of the Court on the maintenance of the federal and democratic foundations of the Constitution. It is precisely this rift between the practices of executive federalism and the Constitution that has contributed to the demise of the White Paper process. As noted earlier, the Constitution was drafted, the design of the system was discussed by representatives of the colonies appointed not by their respective governments, but chosen for the first Federal Convention by both houses of the colonial legislatures and chosen for the second Federal Convention by the voters in each participating colony (except Western Australia, whose legislature appointed the delegates, and Queensland, which did not participate). Both the Governments and the Oppositions in the colonies were represented and had an equal say in the design of the Constitution. How poorly our attempts to reform the federation today compare with the extraordinary statesmanship exhibited by the framers of the Constitution. While it is true that then, as now, the premiers of the colonies were able to scuttle the federation project (as occurred temporarily after the first Federal Convention in 1891) it was realised that the establishment of a federation between the colonies would require a commitment on the part of the governments of the colonies to a more democratically-accountable process that would actively involve the State legislatures in the deliberative process. This idea was developed in 1895 by Dr John Quick and was the basis on which the colonies were able to negotiate their way to federation.⁴⁸

IV. CONCLUSIONS

Australia's problems are no different in kind from those of other federations. Federations all over the world face challenges in striking appropriate balances between:

- enabling the people of each state to participate in their own local, self-government *while* enabling the federal government to pursue federation-wide objectives;
- enabling healthy competition between jurisdictions *while* facilitating necessary cooperation between them;
- providing fiscal equalisation for poorer states *without* undermining incentives for fiscal responsibility;

⁴⁷ The Commonwealth and the States will have to be careful to ensure that in any references of power it is the State legislatures, and not the governments, that do the referring. The existence of upper houses in five of the six States means that the State governments will not necessarily be in a position simply to insist upon any particular reference that they might wish to make to the Commonwealth.

⁴⁸ Aroney, above n , 161-171.

- increasing efficiency of public service delivery *while* ensuring adequate supply of quality services;
- reducing fluctuations in intergovernmental grants in order to provide financial certainty for state and local governments *while* preserving the capacity of the federal government to respond to unanticipated developments.⁴⁹

The collapse of the White Paper process was, in the scheme of things, very predictable. Notably the collapse occurred when the Prime Minister took the matter in hand and proposed to the State Premiers a radical proposal which gave rise to a whole host of objections from the States, and from the federal Opposition. The end result, however, was executive federalism taken to the nth degree, for it didn't take a different political party, only a different Prime Minister of the same party, to abandon a project that had reportedly consumed almost \$5M in public money.⁵⁰

It is true that attempts to reform Australian federalism need sufficiently unified political leadership at a Commonwealth level to ensure that reform processes are driven through to a successful conclusion. However, just as importantly, the reform process needs to be sufficiently inclusive to ensure that the plurality of peoples, governments, parties and interest groups are active participants in the deliberations. Changes to the constitutional, political and economic fundamentals of the federal system have to be negotiated and designed in a way that the long-term, systemic benefits of the reform can be seen to outweigh the short-term, particularised costs. And the reform process has to be sustained through a period of sufficient length to enable all of this to happen.

It is difficult to see how this might happen in Australia under the conditions of our executive federalism. However, the Swiss reform suggests a way forward. Remarkably, it 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.⁵¹ Can a change of such magnitude be possible in Australia? Only if we recover something of the wisdom of the founding generation of our federation. They realised that fundamental reform requires a sustained commitment to a process that is federally and democratically inclusive, by respecting the essential roles of the executive governments, elected legislatures and peoples of the States and Territories in the processes of federalism reform.

⁴⁹ Compare Hansjörg Blöchliger and Camila Vammalle, *Reforming Fiscal Federalism and Local Government: Beyond the Zero-Sum Game* (OECD Publishing, 2012) 18.

⁵⁰ As at April 2016, the Federation White Paper process had cost \$4,449,687 and the Taxation White Paper had cost \$5.4 million: Australian Senate, Finance and Public Administration References Committee, *Outcomes of the 42nd meeting of the Council of Australian Governments held on 1 April 2016* (Canberra: Commonwealth of Australia, May 2016) 23.

⁵¹ Blöchliger and Vammalle, above n 53, 124. It also involved enactment of 37 federal laws, and a large number of executive decrees and other administrative arrangements required to implement the new scheme.