

Federalism in Australia: A Concept in Search of Understanding

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Abstract

This article examines an issue of fundamental importance to both business and government: the nature of Australian federalism. Federalism in Australia is a concept under attack with pejorative labels such as 'dysfunctional', 'inefficient', 'coercive' and 'opportunistic' increasingly being used to describe its practical operation. Language games amidst political debates are part of a healthy democratic polity. However, such labels may also betray a deeper malaise – an inadequate understanding or appreciation of the concept of federalism. This article examines the nature and operation of Australian federalism and builds a useful framework through which the concept can be better understood and its practical operation analysed. This framework reinforces that one of Australian federalism's key strengths is its flexibility – that there are a number of different modes of federalism from which governments can choose to address a particular policy issue – and that reform initiatives should be designed to leverage this strength, and not proceed on the assumption that there is one optimal or best approach.

Introduction

Federalism in Australia is a concept under attack, both with respect to its fundamental utility and manner of operation. Recent research by Griffith University (2010) revealed that in March 2010, 90 per cent of citizens had a negative view of the present federal system (in practice or principle) and 75 per cent would prefer a different system to that which exists today. This is matched in political, academic and business circles where there is a growing consensus on the need to reform our federal system of government, although views diverge widely on the diagnosis of the problem and the prescription for its cure (see for example the final report of the Australia 2020 Summit, 2008; submissions to and the report of the Senate Select Committee on the Reform of the Australian Federation, 2011; and discussion papers from the Business Council of Australia (BCA 2006; 2007)).

For some the problems are structural: that Australia is over-governed (Fitzgibbon, 2008; Twomey, 2008a: n35); that the roles and responsibilities of

Commonwealth and State¹ governments are not clearly delineated (BCA, 2006; Twomey & Withers, 2007); and that the 19th Century constitutional division of powers is not capable of meeting the challenges presented by increasing globalisation, international economic competition and rapid advances in technology and communication (BCA, 2006; Twomey & Withers, 2007; Australia 2020 Summit, 2008). For others, the problem lies in the manner of federalism's practical operation – in the failure of existing intergovernmental institutions to facilitate effective cooperation between governments such that in some areas there is too much centralisation and in other areas not enough (Fenna, 2007a: 183); in unnecessary overlapping, duplicative and inconsistent regulation (BCA, 2006); and in a federation characterised by rancour, disagreement, blame shifting and a lack of accountability (Rudd, 2005; BCA, 2006), a significant vertical fiscal imbalance (BCA, 2006; Senate Select Committee, 2011) and an increased centralisation of power (Parkin & Anderson, 2007; Twomey, 2008b; Anderson 2008; 2010).

There also is no shortage of reform ideas. The Business Council of Australia (2006) for example argues that the roles and responsibilities of the Commonwealth and States need to be clarified and our intergovernmental institutions reformed to institutionalise better cooperation between the Commonwealth and States. Other reform suggestions include reallocating powers and responsibilities between the Commonwealth and State governments to reflect 21st Century realities, reforming federal fiscal arrangements to restore a greater level of State autonomy, and Constitutional amendments to entrench cooperation as a federal value (see for example the Australia 2020 Summit Final Report, 2008; and the submissions received by and the final report of the Australian Senate Select Committee on the Reform of the Australian Federation, 2011).

Essential to any discussion about reform of our federal system of government is a strong understanding of its theoretical underpinnings and practical operation. Without these foundations in place, intelligent debate and good decisions about how the Australian federation should operate in practice is difficult. This article contributes to this goal by mapping the terrain and developing a useful framework through which to understand and examine the operation of Australian federalism. Following this introduction, section 2 provides an overview of federalism's theoretical underpinnings with its emphasis on independent (or coordinate) Commonwealth and State governments competing with each other as relative equals. The next sections then examine how the practice of federalism in Australia has departed from the theory, moving from coordinate to concurrent federalism (section 3); from competition to cooperation (section 4); and from relative equals to a system characterised by a constitutionally and fiscally dominant Commonwealth (section 5). Section 6 then draws this analysis together into a useful framework through which to better understand the operation of Australian federalism. The framework reinforces that one of Australian federalism's key strengths is its flexibility – that there are a number of different modes of federalism from which governments can choose to address a particular policy issue – and that reform initiatives should be designed to leverage this strength, and not proceed on the assumption that there is one optimal or best approach.

What is Federalism?

Former Governor-General and High Court Justice Sir Ninian Stephen (1989, xi) described federalism as 'the foundation upon which rests our whole Australian polity, our system of government'. Yet for such an important and fundamental concept, it is not easily defined (Galligan, 2008: 620; Sawyer, 1976: 2). At its core, federalism is a system of government in which sovereign legislative power is shared between two or more territorially defined levels of government (a central, national government and a number of regional (state and/or local) governments), and where the distribution of power is effected by a written constitution and policed by an independent arbiter (in Australia's case, the High Court) (Sawyer, 1976: 1; Aroney, 2009: 17). As such it is distinguishable from a confederation (which is generally used to refer to an association of member states that delegate specific, limited power to a federal body but in which sovereignty remains with the states and a separate sovereign federal state is not created) (Aroney, 2009: 28-32) and a unitary system of government (in which all power is vested in one, central government).

The theoretical underpinnings of Australian federalism can be traced to James Bryce's *The American Commonwealth* (1890), which has been described as "the most prominent of the influences on the Australian framers" (Aroney, 2009: 78) and "the bible of the Australian federal fathers" (Sawyer, 1976: 18). According to Bryce (1890: 342-349), federalism has a number of key attributes, which are supported and reinforced by the economic theories in support of federalism (see generally Walsh 2005; 2008; Pincus 2005). First, federalism provides for popular participation at both a national and state level thereby creating a stable mechanism for extending democracy across a large territory and population – one which gives citizens a say in how national issues are addressed at the national level, and local issues are addressed at the local level.

Second, federalism divides and disperses power across a number of governments thereby preventing a single government from being able to impose its will on the people. This enshrines a non-majoritarian model of democracy designed to protect the minority from the 'tyranny of the majority' – a benefit that is often overlooked or downplayed in the modern quest for economic efficiency. However, as Justice Kirby noted in the *Work Choices* case, it "is a feature that tends to protect liberty and to restrain the over-concentration of power which modern governments, global forces, technology, and now the modern corporation, tend to encourage."²

Third, federalism provides citizens with choice and diversity thereby strengthening government responsiveness to local interests. Federalism decentralises local issues to State governments which are closer to the people and better able to reflect their preferences in their policy and service delivery decisions (Walsh, 2008: 558; Galligan & Walsh, 1991: 10; Twomey & Withers, 2007: 10-11). People and businesses are able to compare the policies and performance of States and to move to those States that best meet their preferences or, alternatively, to express their comparative judgement through the ballot box (Fenna, 2007a: 186; Breton, 1996). This results in States competing with each other to attract workers, investment and political support. This political competition disciplines governments to be efficient,

effective and responsive in the delivery of public goods and services in the same way that price competition disciplines private suppliers of goods and services (Breton, 1996; Twomey & Withers, 2007: 12-13; Walsh 2008).

Fourth, federalism creates opportunities for experimentation and inter-jurisdictional learning in public administration. Commonwealth and State governments are constantly compared with each other (see for example the performance benchmarking of Australian business regulation conducted by the Productivity Commission; the Business Council of Australia's Scorecard of Red Tape Reform (2010) and CommSec's State of the States Reports³). As Twomey and Withers (2007: 12) note, this places governments under "real political pressure to improve their performance, through innovation or through learning from the successes and failures of other jurisdictions." The result is a cycle of experimentation, observation, review and improvement in which successful policy innovations are diffused across jurisdictions to the benefit of all citizens, and unsuccessful innovations are either avoided or improved upon by other States (Walsh, 2005; Twomey & Withers, 2007: 13-15).

And fifth, by retaining State governments with significant functions, federalism provides for more efficient government. It guards against the national government being overwhelmed by its responsibilities, and contains the consequence of policy failure. As Banks (2006: 9) notes: "a bad regulation in one State will generally be less costly than a uniformly bad regulation everywhere."

A number of concepts are central to the realisation of these benefits. Bryce, in *The American Commonwealth*, emphasises the importance of national and state governments each occupying a discrete sphere of activity in which they would be independent, distinct and separate from each other (known generally as 'coordinate federalism'), and equality in the sense that no level of government is subordinate to another. Also important is competition between these distinct, separate and equal governments. The practice of federalism in Australia has departed from the theory however, moving from coordinate to concurrent federalism; from competition to cooperation; and from relative equality to a system characterised by a constitutionally and fiscally dominant Commonwealth. These departures are examined in the next sections.

From Coordinate to Concurrent Federalism

While coordinate federalism in which national and state governments operate independently of one another within their own spheres of responsibility was central to the theory of federalism espoused in Bryce's *The American Commonwealth*, commentators disagree as to whether it or 'concurrency' (in which Commonwealth and State governments can both exercise powers in most important policy areas) became the key organising principle of the Australian federation. Support for both views can be found in the history and text of the Constitution. Proponents of coordinate federalism refer to the Convention debates and their heavy reliance on Bryce, as well as to section 51 of the Constitution which enumerates a limited number

of Commonwealth powers, as support for their position (Wheare, 1963: Warden, 1992; Fenna, 2007a: 177; 2007b: 304); whereas proponents of concurrency juxtapose section 51 with section 52, which contains the Commonwealth's exclusive powers to argue that section 51 is in effect a list of concurrent powers, as well as section 96 (which enables the Commonwealth to provide 'tied' grants to the States), section 109 (which renders States laws invalid if inconsistent with Commonwealth laws) and the history and practice of cooperation among the Colonies at the time of federation, as support for their position (Wiltshire, 1992; Galligan, 1995; 2008).

Whatever may have been the intent of the framers of the Australian Constitution however, today it is clear that concurrency has become "the defining character of the Australian division of powers" (Galligan, 2008: 637; 1995: 192-203; Hollander & Patapan, 2007: 280). Since federation, a series of national crises requiring national responses, Australia's increasing international obligations, concerns over service delivery at the State level, and a growing belief that a more seamless national economy is required to ensure Australia's competitiveness in a global economy, have combined to encourage the Commonwealth to intervene in areas once thought of as traditional State responsibilities. Such Commonwealth interventions have generally been upheld by a High Court that has interpreted the Constitution in a manner supportive of this expanded Commonwealth role. For example, the High Court has upheld the Commonwealth's ability to provide tied grants to States on the condition the States do not raise their own income tax or that they spend it consistent with Commonwealth policy;⁴ broadly interpreted the Commonwealth's monopoly on excise;⁵ and applied a literal and expansive interpretation to Commonwealth powers such as the external affairs⁶ and corporations powers.⁷ This has resulted in a situation in which the Commonwealth is able to involve itself in many areas traditionally thought of as State responsibilities – either through direct action (in reliance on its expanded Constitutional powers) or indirectly (through its ability to provide 'tied grants' to the States) – and an Australian Constitution that provides for significant overlap and interdependence in the exercise by the Commonwealth and States of their powers.

The advantage of concurrency is that it "allows flexibility and fluidity, rather than packaging up and boxing respective roles and responsibilities" (Galligan, 2008: 637). It allows for a range of approaches to suit the issues at hand – from competition to cooperation, and everything in between. It is to these approaches that the paper now turns.

From Competition to Cooperation (and everything in between)

Competitive Federalism

As already discussed, federal theory posits competition as the central mechanism of intergovernmental relations, emphasising its role in restraining governments in the exercise of their coercive powers, and encouraging responsiveness, experimentation and innovation in public administration. However, notwithstanding its strong theoretical underpinnings, 'competitive federalism' has come to be used pejoratively,

as a synonym for disagreements, conflict and tension, and as an argument against federalism itself. The major criticisms directed against competitive federalism are that: (1) having multiple governments operating in the same policy arena generates disagreement, conflict, tension, and cost and blame shifting; (2) it produces unnecessary and wasteful overlapping, duplicative and inconsistent regulatory regimes, which increase the costs of doing business and impede economic activity; (3) it produces unhealthy competition that encourages a 'race to the bottom' in safety, environmental and other social standards, or distorting tax concessions or subsidies to attract investment; and (4) its benefits are theoretical and illusory given Australia's relative homogeneity with few regional differences warranting significantly different policy approaches (BCA, 2006; Pincus, 2005).

Proponents of competitive federalism argue that what others see as deficiencies in the system are actually fundamental and essential for the proper workings of a true federation. They argue that disagreement, conflict and tension are "not a sign of the system's deficiencies but, rather, a reflection of its vigor and health" (Elazar, 1991: 68), "the system's energy-reflecting lifeblood" (Grodzins, 1966: 385-6). With respect to arguments that competitive federalism results in duplicative, overlapping and inconsistent regulation, proponents of competitive federalism argue that estimates of the cost of that duplication and overlap are either exaggerated (Callinan, 2008: 829; Windholz, 2011: 445-447), or fail to account for their welfare-enhancing effects – that they are the necessary costs of a system that operates as a check on the coercive powers of government, provides citizens with choice and diversity, and encourages the creativity and innovation that produces better policy and service delivery decisions (Walsh 2005; Pincus, 2008; Hollander, 2010).⁸

Proponents of competitive federalism also argue that Australia's relative homogeneity is one of the main arguments for (not against) federalism. They argue that the absence of significant regional differences (economic, ethnic or cultural) is a source of stability that has enabled Australia to avoid secession tendencies that have destroyed or weakened other federations; that Australia's relative homogeneity makes meaningful comparisons between jurisdictions possible – the more differences between jurisdictions, the more difficult it is to learn from the comparisons (Ergas, 2008: 47); and that even if the preferences in different States produce the same choices, federalism is to be preferred because it enhances democratic participation and choice and controls the degree of discretionary behaviour politicians can exercise independent of voter preferences (Galligan, 1989: 13; Walsh, 2008: 560).

And while there is evidence of competition resulting in the provision of subsidies to attract or retain investment (e.g. to the car industry) and the reduction or elimination of certain taxes (e.g. death duties), evidence of such competition resulting in lower social standards is less compelling. If anything the evidence supports the opposite – federalism's strength in diffusing standard-raising innovations across jurisdictions. Examples include restrictions on the advertising, sale and use of tobacco products, seat belts and other road safety initiatives, environmental standards, and the enactment of various equal opportunity and anti-discrimination laws.⁹

Notwithstanding these arguments, numerous politicians, academics, and business and community leaders, advocate for a more 'cooperative federalism' – one in which Commonwealth and State (and sometimes local) governments work cooperatively to "manage the conflict, duplication, costs and inefficiencies that can arise from the operation of a Federation" (French, 2005: 7), and to develop and implement common policies designed to solve common problems (see for example BCA 2006; 2007; Australia 2020 Summit, 2008; and the submissions to and report of the Senate Select Committee, 2011). While there are some who argue that 'cooperation' is "an elemental feature of the federal system of government which the [Australian] *Constitution* establishes"¹⁰, cooperative federalism is largely a matter of pragmatism – a reflection that most important policy areas are not within the exclusive domain of any one level of government, and that governments are required to cooperate to solve problems which cannot be adequately addressed by one government (or level of government) acting alone (Painter, 1998; Hollander & Patapan, 2007).

Cooperative federalism has some obvious advantages. First, cooperation can take many forms and can vary in scope, breadth and depth.¹¹ This provides governments with a rich tool kit from which to choose to tailor responses to different policy challenges. The wide variety of regulatory reform initiatives under the COAG National Reform Agenda illustrates this well (COAG Reform Council, 2010). Second, cooperation enables policies to be developed and implemented in a more efficient and effective manner across jurisdictions. It does so by leveraging synergies that exist across jurisdictions (combining a greater pool of expertise and resources more efficiently, effectively and economically), reducing duplication and delivering greater consistency in outputs and outcomes, and providing for greater flexibility (by enabling the Federal and State governments to divide responsibilities on a more pragmatic basis). Third, cooperation enables government to guard against the costs of unrestrained competition (in which governments lower standards or taxes, or provide subsidies, to attract investment) by developing rules and/or setting minimum standards; to address externalities that may arise from one State making decisions unconcerned about their impacts on other States (as may be the case with water policy and environmental approvals); and to take advantage of economies of scale that may make a single government provider the more efficient outcome (as in the case of complex, costly and time consuming therapeutic goods approvals) (Banks, 2006). And fourth, the debate, discussion and enhanced scrutiny that comes from having two or more governments involved in the policy development process should produce better policy outcomes and minimise the risk of error, especially in complex policy areas (Twomey & Withers, 2007: 15; Saunders, 2008: 396; Hollander, 2010).

Cooperative federalism is not without its critics, however. The obvious criticisms are the opposite of the advantages of competitive federalism: that by removing the competitive dynamic, cooperative federalism stifles innovation and experimentation resulting in stagnation and lack of choice, and removes the discipline which competition imposes on governments to be efficient and effective in the

delivery of services, and responsive to their constituents' needs. Other common criticisms include that the process of cooperation can be time consuming and costly, produces 'lowest common denominator' outcomes (compromise being the price of cooperation), and undermines parliamentary sovereignty and responsible government. Sawyer (1976: 119) described 'co-operative federalism as the DDT of responsible government'. Others refer to cooperative federalism's 'democratic deficit' of blurred lines of political and legal accountability, complexity, and lack of transparency and consultation involved in the processes used to form intergovernmental agreements. They point to the reduction of parliaments to rubber stamps of decisions made at intergovernmental forums, and Ministers avoiding responsibility by shifting it to the cooperative institution or other governments (Saunders, 1991: 48-51; Wiltshire, 2008: 78). Others still argue that cooperation is often used by the Commonwealth as a disguise for gaining control of a policy area (Gallop, 2011), or as a vehicle through which governments collude to blur the lines of accountability, making it hard for communities to hold their elected representatives to account (Walsh, 2005: 83; Ergas, 2008: 50-51).

But as with competitive federalism, many of these criticisms are a matter of perception and degree. For example, proponents of a more cooperative federal system argue that the risk of a loss of innovation can be mitigated by strong policy review mechanisms (Banks, 2006), and that any resultant loss is the price to be paid to reap the economic benefits that flow from a more efficient national economy (BCA, 2006). And as for the 'democratic deficit', this is arguably no greater than exists under a unitary system of government or any government in Australia where the executive controls both houses of parliament (or in Queensland which has only one house). Moreover, many of the concerns about the manner with which governments cooperate can be mitigated by the proper design of intergovernmental mechanisms. In this regard, COAG has made significant efforts recently to streamline and improve the efficiency, effectiveness and accountability of its intergovernmental processes across financial, policy setting and administrative dimensions (COAG 2007, 2011).

Co-opetition (everything in between)

Of course, the diversity and complexity of many issues do not lend themselves to either a solely competitive or a solely cooperative approach but to a combination of both competition and cooperation, which some call 'co-opetition'.¹² As Galligan (2008: 640) points out: "We should not pose competition and cooperation as binary opposites, but rather accept that they can co-exist and adjust in dynamic combinations." Co-opetition represents such a middle ground – one that seeks a flexible mix of both competition and cooperation, maintaining the advantages of both while minimising their disadvantages. It seeks to leverage the benefits that flow from Commonwealth–State cooperation at a national level to develop consistent strategies and goals, while preserving the responsiveness, innovation and experimentation that flow from the States competing at the jurisdictional level. 'Co-opetition' is not a new or radical concept. It has been practiced successfully in Australia with National Competition Policy probably the best known and one of the most successful examples (Hollander, 2006; Productivity Commission, 2005).

From Relative Equality to Federal Centralism

Earlier in this article it was noted that a series of High Court decisions confirmed concurrency as the defining character of the Australian division of powers. Another consequence of these decisions is that they placed the Commonwealth in a constitutionally and fiscally dominant position vis-à-vis the States, which position successive Commonwealth governments have leveraged to place themselves at the centre of policy development on a range of issues traditionally thought of as State responsibilities. Sometimes the Commonwealth has done this by directly legislating for an issue against the wishes of the States involved (e.g., environment (Tasmanian Dams); industrial relations (Work Choices)). In the main, however, the Commonwealth has leveraged the States' dependence on it for the revenue they need to discharge their core policy and service delivery responsibilities to make the provision of financial grants to the States conditional on the States implementing the Commonwealth's policy preferences in key areas such as education, health and urban planning, to name but a few.

A variety of mainly pejorative labels have been coined to describe the manner in which the Commonwealth exercises its constitutionally and fiscally dominant position. They include: 'coercive federalism' where the Commonwealth uses its constitutional and fiscal supremacy to coerce the States to do what it wants (Twomey, 2008b; Kelly, 2010); 'conditional federalism' to describe a federation operating according to conditions imposed by the national government (Anderson, 2008); 'cooperative centralism' in which the Commonwealth regulates the policy agenda, program delivery and performance of the States (Anderson, 2010); 'managerial federalism' to describe a regulatory, conditional and prescriptive system in which the States are primarily service providers whose performance is subject to the scrutiny and oversight of the financially dominant Commonwealth (Griffith, 2009)); 'regulatory federalism' to describe a system in which the Commonwealth seeks to regulate the behaviour of the States, and the States "resemble regulated agencies operating ... within Commonwealth-dominated clusters of regulatory regimes" (Parkin & Anderson, 2007); and 'opportunistic federalism' to describe the Commonwealth's selective intervention in State affairs for ideological or political purposes rather than to satisfy a national need or objective (see for example Twomey, 2007: 41; Twomey & Withers, 2007: 5; Conlan, 2006).¹³

Hollander and Patapan (2007), on the other hand, have been more charitable, choosing to coin the term 'pragmatic federalism' to characterise the operation of Australian federalism – one in which the manner of Commonwealth–State interaction is shaped by the nature and immediacy of the problem, specific policy agendas and the prevailing political dynamic, rather than by overriding conceptions of federalism derived from political and economic theory (see also Fenna, 2007b: 303). But even Hollander and Patapan concede that "without a theoretical compass, prevailing powerful winds have directed the course of federalism" (281), and those winds have been centralising in direction.

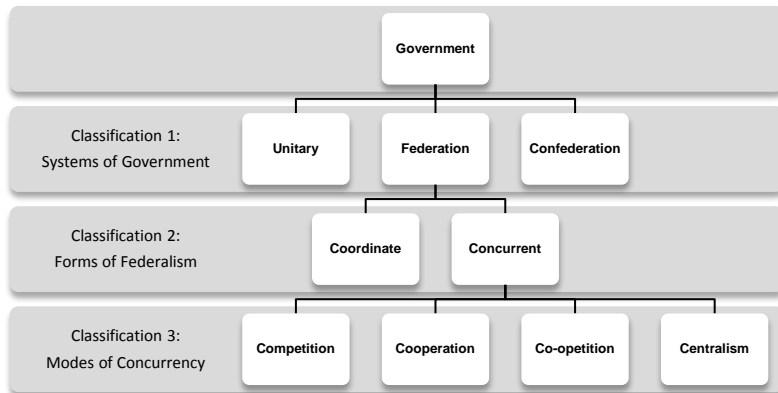
Each of these labels describe a federal system in which the Commonwealth is able to dictate policy in important areas traditionally the responsibility of the States. I

call this 'federal centralism', although it should be noted that many commentators would hesitate to describe as federal, a system with such a significant power imbalance (Wheare, 1963: 12; Sawyer, 1976: 104; Elazar, 1991: 72; Wiltshire, 2008: 76). Such a system has significant implications for the operation of Australian federalism. It undermines the benefits of both competitive and cooperative federalism, each of which depend for much of their strength on the 'competing' and 'cooperating' governments having some basic bargaining capacity with respect to each other.

Discussion

Australia has developed into a prosperous nation with a strong economy and high standard of living (although it must be acknowledged that these benefits are not shared equally across the populace, and in particular by indigenous Australians). Federalism (as a foundational element of our system of government) has played an important role in this progress. It has proven itself a stable and resilient system of government capable of withstanding the shocks and challenges that have presented themselves over the past 110 years, while being adaptive to the changing needs of the people. Much of this is attributable to federalism's flexibility – to there being a number of different modes of federalism from which the Commonwealth and States can choose to guide them in the exercise of their concurrent powers. These modes have been examined in this article and are summarised in Figure 1.

Figure 1: Taxonomy of Federalism



Each of these modes has its advantages and disadvantages, its strengths and weaknesses. Competitive federalism is particularly valuable as a generator of creativity, innovation and experimentation in policy areas where the nature of the problem or its solution is not well understood. Cooperative federalism, on the other hand, is valuable for issues that cannot be adequately addressed by one government (or level of government) acting alone, or where the existence of significant externalities or transaction costs renders independent State action clearly inefficient. There even is a

place for federal centralism in the rare instances when States cannot overcome parochial local concerns or otherwise need to be incentivised to act in the national interest. Therefore, discussions about reforming our federal system should not take place on the assumption that there is an optimal approach capable of broad application. There is no single "best" method (Pincus, 2005: 29). There are likely to be different answers for different policies and even for different aspects of the one policy – from planning, to management, finance, delivery and evaluation.

In this regard, three aspects of the current debate about reform of the Australian federation are of concern. First, much of the debate is taking place in the context of improving the competitiveness of Australian business by creating a seamless national economy. Not surprisingly, this debate is increasingly being dominated by economists, economic theory and economic values of efficiency, productivity and competitiveness. For example, in prioritising areas for regulatory harmonisation, COAG's Business Regulation and Competition Working Group confined itself to assessing the likely benefits to productivity growth and workforce mobility (COAG, 2008). Such a narrow perspective of the national interest did not seem out of place when the debate centred on competition reform within particular industries and professions. However, the debate is increasingly being extended to areas of 'social regulation', such as health, safety and the environment, where it is important that social (non-economic) values such as equity, fairness and justice also are taken into account.

Second, as Saunders (2008: 388) points out: "The current debate on federalism ... attaches no value to federalism itself as an attribute of a system of government ... Rather, the effectiveness of federalism is viewed only through the lens of the extent to which it serves a national market through policy uniformity." As already noted, federalism's strengths are many: it encourages creativity and innovation, facilitates choice and diversity, creates greater opportunities for citizen involvement in policy making, and provides a platform from which governments can customise policies to the needs and preferences of their citizens. Care needs to be taken to ensure these important benefits are not sacrificed on the altar of economic efficiency.

And third, the debate appears to be proceeding on the assumptions that what is required is a clearer and more rigid delineation of the respective roles and responsibilities of the Commonwealth and States, that cooperation is to be preferred to competition, and that the focus should be on developing and entrenching what Wanna *et al.* (2009: 3) describe as the "architecture of cooperation" (see for example House of Representatives, 2005; BCA, 2006; Australia 2020 Summit, 2008; Senate Select Committee, 2011). Reforms such as these risk reducing the flexibility that has proven central to the stability, resilience and responsiveness of our system of government, and should be approached with caution.

The focus of federal reform should be to leverage (not reduce) the flexibility inherent in Australian federalism: to maximise the advantages while seeking to eliminate or minimise its disadvantages. A start in this direction would be better and more transparent intergovernmental mechanisms, processes and principles for analysing the needs of different policy areas and matching them with the mode of federalism best able to satisfy those needs. At a minimum, such principles should

include – in addition to economic values of efficiency, productivity and competitiveness – broader societal values such as equity, justice and fairness, as well as the values underpinning Australia's federal system of government: protection of the individual from the abuse of government power, citizen participation, choice and diversity, and responsiveness, creativity and innovation in government.

Conclusion

This article commenced with the statement that federalism in Australia is a concept under attack. That this is the case is somewhat paradoxical given the important role federalism has played in securing Australia's economic and social prosperity, and that internationally federal systems are regarded as "modern, flexible and efficient structures ideal for meeting the needs of local communities while responding to the pressures of globalisation" (Twomey & Withers, 2007: 2).

To defend against these attacks (and to solve the paradox), the article argued that a better appreciation of Australian federalism's theoretical underpinnings and practical operation is required. This article has sought to contribute to this goal by providing a useful framework through which to understand and examine the operation of Australian federalism.

This article also has demonstrated that while Australian federalism has departed from the purity of classical federal theory in a number of important respects, this in and of itself is not a cause for concern. Some of the departures have their advantages. Concurrency, cooperation and co-opetition, for example, have given federalism an added degree of flexibility that has assisted it in evolving and adapting to meet new challenges and changing preferences. More concerning has been the emergence of a constitutionally and fiscally dominant Commonwealth and the significant power imbalance it introduces into intergovernmental negotiations.

Much of federalism's strength lies in there being a number of different modes of federalism from which the Commonwealth and States can choose to guide them in the exercise of their concurrent powers. As a result, a dogmatic or ideological attachment to any one particular mode of federalism is unwise. The focus should be on identifying and implementing the mode of federalism best suited to addressing the particular policy issue under consideration – of finding the right balance between efficiency and consistency on the one hand, and competition, experimentation, responsiveness and innovation on the other.

The extent to which our current intergovernmental institutions and processes are achieving this is a matter of conjecture. While recent COAG reforms indicate a desire on the part of the Commonwealth and States to improve those institutions and processes, the continued use of pejorative labels such as 'coercive' and 'opportunistic' to describe how federalism operates in Australia, together with recent survey results, indicates there is much work to be done.

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Notes

- 1 In this article, unless stated otherwise, references to 'States' includes 'Territories'
- 2 *NSW v Commonwealth* (2006) 229 CLR 1, 245.
- 3 For copies of these reports go to www.commbank.com.au.
- 4 *South Australia v Commonwealth* (1942) 65 CLR 373 (First Uniform Tax case); *Victoria v Commonwealth* (1957) 99 CLR 575 (Second Uniform Tax case).
- 5 *Ngo Ngo Ha v NSW* (1997) 189 CLR 465.
- 6 *Tasmania v Commonwealth* (1983) 158 CLR 1 (Tasmanian Dams case).
- 7 *New South Wales v Commonwealth* (2006) 229 CLR 1 (Work Choices case).
- 8 The duplication and coordination costs of Australia's federal system have been estimated to be more than \$20 billion per annum (Drummond, 2002). The costs to government of weaknesses and inefficiencies in Australia's federal system have been estimated at approximately \$9 billion per annum (Access Economics, 2006). However, these estimates have been criticised for methodological reasons and their failure to include the benefits of federalism in their calculations. Other research suggests that federal systems out-perform unitary systems in economic terms, and in 2006 increased Australia's prosperity by \$4507 per head (Twomey & Withers, 2007: 21 and Appendix 1 for a critical analysis of the Drummond and Access Economics' estimates).
- 9 For a list of state generated innovations, see Twomey & Withers, 2007: 15; Gallop, 2011.
- 10 Justice Kirby in *R v Hughes* (2000) 202 CLR 535, 560-1. See also Justice Mason in *R v Duncan* (1982) 158 CLR 535, 563 who states that the Constitution 'necessarily contemplates' cooperation; Justice Deane in *R v Duncan* (1982) 158 CLR 535, 589 who states that co-operation 'is a positive objective of the Constitution'; now Chief Justice French who in 2008 stated that 'the Constitution, while marking out the boundaries of legislative power between the components of the Federation, rests upon an assumption of cooperation between them' (French, 2008: 260).
- 11 For a description of some of the more common forms of intergovernmental cooperation see Saunders (2002); Wanna, et al. (2009); Senate Select Committee (2011).
- 12 The term is borrowed from business management literature that contends that optimal business strategies involve a mix of cooperation and competition - Barry J. Nalebuff and Adam M. Brandenburger, *Co-opetition* (London, 1996). The term also has been used by Geradin and McCahery (2004) to describe a flexible regulatory approach between government actors, and between government and non-government actors.
- 13 It should be noted that not everyone is pessimistic about the status of the States with a number of commentators noting the ability of the States to leverage their intellectual, administrative and infrastructure resources to 'lead from below' to maintain their role and

influence (Keddie & Smith, 2009; Parkin, 2003; Hollander, 2010). The recent health care reforms debates illustrate this point well with the States successfully renegotiating key elements of the Commonwealth's plan to retain control of their GST revenue (Anderson, 2010: 18).