The Ten Worst Constitutional Mistakes

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The Commonwealth of Australia Constitution Act was passed into law by the British parliament in 1900, received royal assent, and became the Constitution of the Commonwealth of Australia in 1901. While the Constitution has served Australia well on the whole, several sections—either by their drafting or through the expansive interpretations of the High Court—have undermined the sovereignty of the states, facilitated the centralisation of power in Canberra, and increased the size of government. From the appointment of judges to tied grants, here are ten of the worst provisions.

1.

LISTING HEADS OF POWER

Section 51 prescribes the various policy areas—or heads of power— that the Commonwealth is

permitted to make laws for, such as foreign relations, immigration, and national defence. While many of the heads of power are problematic in and of themselves, the overall structure of section 51 has contributed to a federal-state power imbalance and our broken Federation. At first glance this appears counterintuitive. The idea of listing a finite number of legislative powers to the Commonwealth would by implication leave the residue—an infinite number of responsibilities— to the states. However, the doctrine of reserved state power did not survive even two decades of Federation, when the High Court binned them in the Engineers Case of 1920. Conversely, the High Court has had little difficulty with adapting the enumerated heads of power to justify most federal legislative interventions.

Some of the problems with centralisation and judicial whim are highlighted below.

As the Australian Constitution was designed to be a federalist document, the drafters did not emulate Canada's centralist Constitution. But they should have. The Canadian method, which enumerated legislative powers to the provinces instead of the national parliament under the assumption that doing so would be more limiting, has resulted in a system with more decentralised decision making than the federalist-intended Australian Constitution.

2.

THE TAXATION POWER

Aside from enabling the Commonwealth to extract wealth from the productive activities of Australians, the taxation power has also been used to fundamentally cripple the financial viability of the states.

This was the outcome of what has become known as the Uniform Tax Cases in 1942 and 1957. During World War II, the federal government believed it needed more money for the war effort, and introduced legislation to centralise all income taxation in Australia. The states had previously levied their own income tax, but the federal government's new laws raised central income tax to match state rates.

Further, separate amendments also required taxpayers to meet their tax obligation to the federal government before the states, it was politically impossible for states to effectively levy tax on top of the federal income tax. The High Court permitted this in 1942 under the taxation power, as well as the Commonwealth's defence power. Any hopes that, after the War, the High Court would reassess its earlier decision were dashed when challenges to some of the 1942 laws were dismissed in 1957.

Therefore, while the responsibility for delivering services has remained in state hands, the capacity of those states to raise revenue to fund those services falls grossly short. Instead, the Commonwealth is expected to fund the activities of the states through grants. Controlling the purse strings, the Commonwealth could then dictate how the money should be spent, limiting the autonomy of the states.

A fundamental requirement of a federal system of government is that the constituent parts can pull their own weight as autonomous units. The taxation power has been abused to neuter the states and debilitate the Federation.

3.

JUDGES' APPOINTMENT

The process for Commonwealth judicial appointments has had an understated, but vastly negative, impact on the nature of governance in Australia. Section 72 of the Australian Constitution provides that the justices of the High Court, as well as the other federal courts, 'shall be appointed by the Governor- General in Council'.

This effectively means that the Attorney-General has discretion to appoint nearly anyone they like, with no oversight, to the positions where they can reinterpret the Constitution and radically reshape the Federation. And this is exactly what has happened. Since the 1920's the High Court has progressively expanded the power of the Commonwealth to legislate in almost any area they like, with no regard for the federalist intent of the Constitution.

There are logical problems with section 72. Commonwealth governments, regardless of their political orientation, have an interest in their legislative agenda being deemed constitutionally valid. The incentive for an Attorney-General is to appoint judges who would defer to the central legislature on contentious policy questions.

At the very least, the shroud of mystery that surrounds this process should be lifted by subjecting these important appointment decisions to parliamentary inquiry and approval and public debate. To correct the underlying structural incentive would require the choice being taken out of the federal Attorney-General's hands and giving the power to each of the state governments. Under this scenario the incentives would remain, but in reverse: The Court would be more likely to be occupied by judges that are sympathetic to states' rights.

4.

SEAT OF GOVERNMENT

Section 125 of the Constitution permitted the Commonwealth to commit one of Australia's biggest mistakes—our capital city, Canberra. This section provides that the Commonwealth shall determine the seat of national government, which is to be in federal territory located in the state of New South Wales but no less than 100 miles from Sydney.

Section 125 is the product of compromise between NSW, and non-NSW (particularly Victorian) interests on the road to Federation, who feared the former would become politically dominant if the largest colonial city was to be the headquarters of the new nation. What was created instead

was much worse: a territorial entity that is singularly devoted to justifying its existence and reliant on the perpetuity and expansion of the Commonwealth.

The signs of the Commonwealth's lust for expansion were evident early on. Although the Constitution only envisaged that such a territory 'shall contain an area of not less than one hundred square miles,' the Seat of Government Act 1908 requested such territory 'contain an area not less than nine hundred square miles, and have access to the sea.'

The consequences of this bureaucratic bloat are self-perpetuating. As Canberra grows— not because it is productive but because the federal government has decided it must—so too will the calls for greater political representation. Already, population growth in the Australian Capital Territory means it will gain a new seat in parliament after the next federal election, and with a population approaching that of Tasmania, calls for more representation, and even statehood, are inevitable. More ACT representation would likely be pro-government and pro-bureaucracy, leading to larger government and even greater ACT representation. The cycle continues.

5.

THE CORPORATIONS POWER

The Corporations power has been responsible for much of the Commonwealth's economic regulation in recent decades. Section 51(xx) provides that the central government has power to make laws relating to 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'. Early decisions in the High Court interpreted the power narrowly, as a broader interpretation would have fundamentally undermined the reserved powers of the states.

As with most instances of constitutional interpretation since then, the Corporations power has been significantly expanded. Beginning in 1971, the High Court has subsequently widened the scope of the power by permitting the Commonwealth to regulate almost any activity of a corporation operating in Australia.

Perhaps the most significant consequence of this interpretation is the centralisation of industrial relations regulation. The High Court, in validating the Howard government's WorkChoices regime in 2006 set the precedent for the Rudd government to later introduce the archaic Fair Work Act, a regulatory nightmare that is locking Australians out of the workforce.

6.

THE TIED GRANTS POWER

Section 96 of the Constitution grants the Commonwealth the power to give financial assistance to the states. Even if one accepts the idea that the Commonwealth ought to be granted the power to provide assistance in limited circumstances (that's debatable), this provision has allowed the Commonwealth to impose itself in areas that do not fall within the constitutionally prescribed limits

of section 51, such as healthcare and education services.

A key weakness of section 96 is the phrase ‘on such terms and conditions as the Parliament thinks fit.’ This phrase has given the Commonwealth the power to impose its own preferences in hospitals, schools and roads policy. More than any other section in the Australian Constitution, section 96 has allowed for the centralisation of power in Canberra.

The tied grants power has also been supercharged by vertical fiscal imbalance. This occurs when the states are unable to raise sufficient revenue to cover the cost of their spending programs, while the Commonwealth raises more revenue than it requires to cover the costs of its constitutionally prescribed areas of responsibility. This has given the Commonwealth enormous leverage over the states.

The damage wrought by section 96 over the past 116 years could have been limited substantially if the words ‘and thereafter until the parliament otherwise provides’ was excluded. Had these words not been included, the ability of the Commonwealth to insert itself into state policy areas would have expired in 1911. It’s quite likely that if the tied grants power had effectively ended at that time the states would have become more self-reliant and more efficient in the delivery of programs such as health and education.

7.

THE INCONSISTENCY RULE

There are a number of provisions in the Constitution which mischaracterise the relationship between the states and the Commonwealth. The Commonwealth has only the authority granted to it by the states. In a healthy federal system of government, the central government is subservient to the states.

Section 109 reverses this natural order of sovereignty by placing the Commonwealth above the states. This goes beyond direct inconsistency of laws—in 1926 the High Court developed the far reaching test of indirect inconsistencies, where the Commonwealth is able to ‘cover the field’ in a legislative area. This raises the possibility that the Commonwealth may in bad faith legislate manufactured inconsistencies in order to disempower the states.

An inconsistency provision that better respected the history and nature of the federation would have declared that state laws prevail in the case of any inconsistency.

8.

THE EXTERNAL AFFAIRS POWER

The external affairs power has also been used to concentrate power in Canberra. The key way in which this has occurred is through international agreements. Treaties entered into by the

Australian government do not have domestic effect until the operative provisions of the treaty have been passed by the parliament in the form of legislation.

For instance, external affairs power enables the Commonwealth to give effect to several environmental treaties through the Environment Protection and Biodiversity Conservation Act 1999. Section 18C of the Racial Discrimination Act 1975 is justified through the Commonwealth being a signatory to the Convention on the Elimination of All Forms of Racial Discrimination.

Due to the increasingly broad areas of policy covered by treaties made within international bodies such as the United Nations, and Australia's willingness to agree to these treaties, the Commonwealth has increased its power by passing laws to give effect to its 'international obligations.'

Like so many constitutional problems this phenomenon has been amplified by a series of High Court decisions, which have effectively endorsed the Commonwealth government's centralisation strategy of signing agreements and subsequently passing them into domestic law.

9.

NUMBER OF MINISTERS

It's quite likely that Australia's size of government problem could be partially addressed if there were significantly fewer ministers.

In fact, the Australian Constitution provided for just seven ministers in 1901. This figure has gradually grown to an unwieldy total of 28 today.

The problem is that the constitution built in a mechanism that allowed for unlimited growth in the number of ministers, so long as the number was prescribed by the parliament.

Again, the problem of this section is that by including the words 'until the Parliament otherwise provides' it places no enforceable constitutional limit on the number of ministers, merely the method by which that number increases (or decreases).

10.

THE RACE POWER

In the context of recent debates over proposed amendments to the constitution which are intended to have the purpose of recognising Aboriginal and Torres Straight Islanders, it has been recommended that section 51(xxvi) be repealed.

The argument for such a move is straightforward—as the Institute of Public Affairs has argued the Australian Constitution should be free from references to race. This head of power was included at a time when human understanding about race was very different to what it is today. We now know

that race is an unscientific, arbitrary concept, and as such it is arguably impractical to make any laws under this head of power.

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