



AP PHOTO/SUNDAY ALAMBIA

Australian Premier Kevin Rudd, left, joins a planning and brainstorming session in April 2008.

Australia's Commonwealth government ends blame game

Window of opportunity opens for co-operative federalism

BY ANNE TWOMEY

“IF IT WERE A HORSE, YOU’D PUT IT down.”

This was Queensland Labor Premier Peter Beattie’s view of the Australian federal system in August 2007.

Like many other state premiers, he was in despair over the expansion of legislative power of the central or Commonwealth government and the erosion of state powers allowed by the High Court of Australia, which rules on constitutional matters.

Beattie and his counterparts were also

concerned about the increasing federal incursions into state areas of responsibility and the centralist philosophy of the John Howard Liberal Government at that time. Howard was defeated in December 2007 after 11 years in power.

But instead of giving up on federalism, the state premiers united and performed reconstructive surgery. They formed the Council for the Australian Federation in October 2006 creating a structure for the states to negotiate with the federal government, and also achieve harmonization of laws where needed.

In 2007 all the state premiers, through the council, called for a constitutional convention to be held in 2008. They wanted to reform the operation of the federation by reconsidering the allocation of powers and responsibilities between the different tiers of government and revising federal-state financial relations.

Under the Australian Constitution, 40 specific powers are given to the federal Parliament, with residual powers left to the states. The expectation was that, by creating a federal government with apparently limited powers, state governments would be left with the lion’s share of powers. The flaw was that the

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AUSTRALIAN GOVERNMENT, DEPARTMENT OF THE PRIME MINISTER AND CABINET

Aboriginal leader Patrick Dodson (centre) participates in Australia's 2020 Summit in Canberra on April 20, 2008. He is flanked by two other participants of the Australian thinkfest.

Constitution did not reserve any specific powers for the states.

The consequence of having no specified powers for the states has been that the High Court of Australia has interpreted the defined federal powers increasingly widely, allowing them to expand into the areas that were traditionally left to the states.

Diminishing states' powers

In 2006, the High Court expanded its interpretation of the federal "corporations power," effectively giving the federal Parliament power to enact laws that not only control the actions of trading and financial corporations but also their relations with employees, suppliers and consumers. Justice Michael Kirby, dissenting, pointed out that the effect of this judgment would be "radically to reduce the application of state laws in many fields that, for more than a century, have been the subject of the states' principal governmental activities."

As most bodies such as universities, hospitals, schools and even local councils are incorporated, the federal government's power to intervene in state areas such as health and education using the "corporations power" is now exten-

sive. Professor Greg Craven called the 2006 High Court decision the "constitutional equivalent of a dirty bomb."

Emboldened by its wide legislative powers and its even greater financial ascendancy over the states, the federal government shifted from a model of co-operative federalism to one of opportunistic federalism, which it called "aspirational nationalism." It picked and chose the state areas in which it intervened on political or ideological grounds, without any systematic approach. For example, it took control of a single Tasmanian hospital, while the rest continued to be run by the state. The economic inefficiency of such action and the resulting degradation of the federal system caused widespread alarm.

The Business Council of Australia called for the holding of a constitutional convention and federalism reform. Its president, Michael Chaney, said the "gradual, arbitrary decay of the federal system" was costly to business. The Business Council estimated that inefficiencies in the operation of the federal system cost Australians at least \$9 billion Australian (\$8.52 billion Canadian) a year.

Local government bodies were also concerned. The president of the Local

Government Association of Queensland, Councillor Paul Bell, made this argument:

"Local government does not want to make a claim for more responsibilities – we have more than enough now. Nor do we want to abolish the states. What councils do want is greater certainty and clarity on who does what to whom, where and when. What we have now is a moving feast, subject to political whims of the governments of the day..."

Rudd aims to end 'blame game'

But, in November 2007, the political landscape changed in Australia with the election of a new federal government after 11 years of conservative rule.

Kevin Rudd's Labor Government was elected on a policy of restoring co-operative federalism and "ending the blame game." While the Rudd Government obtained a comfortable majority in the House of Representatives, it did not gain control of the Senate and will need the support of the Greens Party and independents to pass legislation. At the inter-governmental level, however, it was more fortunate.

For the first time, Labor governments held office nationally and in all states and



territories. This opened up a window of opportunity for real reform on a co-operative basis. It also changed the dynamic between federal and state governments. The proposal for a constitutional convention had been a state reaction to incursions by a hostile federal government. Whether the states continue to pursue this proposal after the recent federal election of a Labor government remains to be seen.

The Rudd Government called a “2020 Summit” on April 19-20, 2008, at which 1,002 Australians, chosen for their expertise, were asked to develop ideas and strategies for Australia’s long-term development in 10 different fields, including the future of Australia’s governance. The Governance Group at the summit recommended holding a plebiscite on whether Australia should become a republic, adopting a bill of rights or a charter of rights, including recognition of indigenous Australians in the preamble to the Constitution and increasing civic participation in government.

Fixing Australian federalism

The Governance Group also made two major recommendations concerning the federal system. First, it recommended a review of the allocation of powers and functions across all levels of governance. This was to be achieved by a three-stage process: an expert commission which would conduct the necessary research and analysis and prepare proposals; a constitutional convention involving the broader public which would deliberate on those proposals; and implementation of the convention’s recommendations through inter-governmental co-operation or a referendum. Its second recommendation was to establish an ongoing commission that would register intergovernmental agreements, monitor their implementation and assist in resolving intergovernmental disputes.

The Economy Group at the Summit also recommended the establishment of a Federation Commission, although it was to have a stronger policy role than the governance group recommended. This commission would also be the vehicle for revising the allocation of powers and functions between the three tiers of government.

When the Prime Minister received the summit’s interim report, he stated on

national television that “Australian federalism must be fixed.” He has not yet responded in detail to the summit’s recommendations.

Since the election of the Rudd Government, the main forum for federalism reform has been the Council of Australian Governments (comprising the prime minister and all state premiers). The Council has identified seven areas requiring reform: health and aging, productivity, climate change and water, infrastructure, business regulation and competition, housing, and indigenous affairs. It has established working groups of officials, overseen by federal and state ministers, in each of these areas, and required them to deliver implementation plans. The Council will meet more often than previously and will actively push reforms.

Council plays key role

In March 2008, the Council agreed on reforms to “close the gap on indigenous disadvantage.” These will focus on halving indigenous disadvantage in the field of employment. It also announced actions to improve the lives of indigenous Australians in terms of health, dental services, housing and water supply. The Council’s Indigenous Reform Working Group has been instructed to prepare sustainable reform proposals on early childhood development, remote service delivery, economic participation, active welfare – where the receipt of benefits is conditional on the participation in assistance programs – and security from violence for indigenous parents and children. One of the problems faced by indigenous Australians has been the lack of co-ordination of federal and state programs and an absence of long-term planning.

The Council also agreed on revised federal-state funding arrangements. One of the main causes of duplication and inefficiency in the Australian federal system has been the use of tied grants by the federal government. States were given funding for schools or hospitals only if they met specific policy and accountability conditions. This not only allowed the federal government to intervene in areas of state policy, but frequently resulted in the over-funding of some areas and under-funding of others, excessive levels of administration and perverse incen-

tives for inefficiency. The federal government has agreed to change the way these grants operate, focusing on outcomes rather than inputs, and providing incentives for efficiency.

An intergovernmental agreement on federal-state financial relations is being negotiated and is expected to come into effect at the end of 2008.

Achieving reform

Much can be achieved in federalism reform in Australia without undertaking formal constitutional amendment. Where the federal government is lacking in power, states can refer matters within their jurisdiction to it under an existing constitutional mechanism. Where matters should be returned to state control, the federal government could simply vacate the field by choosing not to legislate on the subject and not placing policy conditions on its funding. Federal-state financial arrangements could also be readjusted in a manner that ensures the states have adequate sources of funding, but must also take full responsibility for the manner in which they spend those funds.

The benefit of constitutional reform, however, is that it will last beyond any short-term political consensus. The problem is that it is difficult to achieve. Constitutional amendments in Australia must be approved in a referendum by a majority of voters overall, and a majority of voters in a majority of states. Only eight out of 44 referenda to amend the Australian Constitution have succeeded. While many reasons have been given for this failure, one is that only the federal Parliament can initiate a referendum, leading to public suspicions that referendum proposals are about aggrandizing federal power at the expense of the states and the people.

Reforming federalism in Australia is no easy task, but at least there now is a will to set about doing this. Whether the means chosen is a constitutional convention or co-operative reform of specific areas of overlapping jurisdiction, the improvement of the operation of the federal system will be beneficial for all Australians. 