

**A COMMISSION FOR  
THE APPLICATION OF FEDERAL FUNDS  
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It is not only the High Court that has, by a series of decisions, reduced the authority and capacity of the States, but also the overwhelming financial power of the Commonwealth. Of course, even as to the latter, the Court made a contribution by deciding the *Uniform Tax case*<sup>1</sup>. I do not dispute, inevitably in wartime, in favour of the central Government. I happen to think a continuing division of power is essential to democracy. I acknowledge that where there is such a division there will always be duplication. On the other hand, it is an erroneous assumption that centralized, that is to say, command or quasi-command, economies are efficient. There may, for third world countries be a period when a high degree of central control is essential for their development, but as even to that minds differ.

When I was a young student I was a committed centralist. My first full time employment was as a Commonwealth public servant, a clerk in the Immigration Department of the Commonwealth Government in Brisbane. It was an early introduction to the inefficiencies of the bureaucracy. By that time I had had no experience of any private enterprise bureaucracies, but it seemed inconceivable to me that anyone who wished to make a profit could indulge in some of the practices of

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<sup>1</sup> (1942) 65 CLR 373, see also *State of Victoria v Commonwealth* (1957) 99 CLR 575

the office in which I worked. The first notable inefficiency was my assignment, as a callow and ignorant youth, to the public counter of the office, to answer the complicated inquiries of the very large influx of migrants at that time, understandably worried about their status in this country. I was also intrigued by the role of the “correspondence clerk”. His or her duties consisted of dictation to a shorthand stenographer, of letters, usually almost entirely of a formal kind, generally doing no more than repeating the substance of a standard form memorandum prepared by a processing clerk. An applicant would not today be called a member of the public: he or she would be a “client”. Public servants are no longer public servants: most are government executives, who do not simply do their work: they deliver services to the public<sup>2</sup>. I need not trouble you with a recitation of the other obvious inefficiencies that I encountered some half a century or so ago now.

But it would be remiss of me if I were to leave you with the impression that during the last 50 years things have necessarily improved. Indeed, I am inclined to think that they may have deteriorated. A few examples will suffice. Some ten or so years ago the Federal Government accepted a recommendation by a review committee for the privatisation of the quarantine of, as reviewers described them, “low risk” animals, including horses. It is not relevant to my discussion today that I am of a different mind, and thought that such quarantine should remain a

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<sup>2</sup> See Report of the Equine Influenza Enquiry (the “E.I.R.”) April 2008 p328

Government function. What is relevant is that the Federal public service did absolutely nothing to implement the recommendation for almost ten years, finally only then, providing the Government of the day, with an ill-considered incomplete, impractical, preliminary proposal as the election was imminent<sup>3</sup>. There was absolutely no prospect that anything effective could then be done. Throughout that decade of neglect, on a number of occasions, the bureaucracy sought to justify its failures to do highly desirable, and sometimes necessary things, on the basis that there was uncertainty about the future of the equine and other quarantine stations. At the same time the relevant Federal bureaucracy was incapable of devising a comprehensive equine operating procedure for its own quarantine stations, whilst insisting upon, and having available as an impeccable model, a fully documented procedure employed by a non-federal, that is, a Victorian statutory authority. Australian quarantine, not merely a government department, but a “service”, AQIS, as it calls itself, claims to manage itself by a system of matrix management. I thought this rather curious, and inquired as to the author of this dysfunctional arrangement. It only emerged after six months of inquiring that the arrangement had no author, and that somebody in the department had looked at what they had, and decided to call it “matrix management”. I do not know whether you have the impression that the Federal bureaucracy and the elected executive are more true to a system of responsible government than the States. You would be mistaken if

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<sup>3</sup> See pages 59 - 65 E.I.R

you did. As the report on the outbreak of equine influenza last year exemplifies, the Federal minister of the Department in question could not always safely rely upon the information with which he was provided<sup>4</sup>.

I have no reason to believe therefore that Federal bureaucracies are less extravagant, and more effective than those of the States. Indeed the more centralised a bureaucracy, the more I fear it may be unmanageable and costly.

You may ask what this reference to the past has to do with the topic upon which I have been asked to speak. The answer is that bureaucratic waste, inertia and duplication present one of the greatest threats to real, meaningful federalism, other than perhaps the High Court which since the *Engineers' Case*<sup>5</sup> seems to be beyond peer in this regard.

Nevertheless, a division of power which is a necessary concomitant of a Federal system, will always inevitably produce duplication. That is, simply the price that a federation exacts. Is the price too high? In my view, no. Referenda and polling would strongly suggest that although the public rightly deplore layered bureaucracies, they would still prefer to retain state governments. There is also this. Australia is a large country. Sometimes local conditions require different treatment. There

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<sup>4</sup> See pages 12 – 15 E.I.R

<sup>5</sup> (1920) 28 CLR 129

will always be a need for local or regional agencies to administer local or regional activities and funding. Again, be under no illusions. Federal departments are themselves divided on national and regional bases. The Inquiry that I conducted recently, soon revealed that for some important purposes, regional sections of AQIS were as remote from the national managers in Canberra, as any State body could be.

If half of what the media say about hospitals, public education and infrastructure in Australia is true, better ways have to be found to ensure that federal expenditure is properly targeted and not wasted.

Justified public dissatisfaction might be allayed, if the bureaucracy could be reduced, and more of taxpayers' funds could be guaranteed to reach the operational, as opposed to the managerial and administrative level.

My suggestion – I do not advance it as an assuredly successful one, but for consideration – is the establishment, perhaps in replacement of the Grants Commission, of a Commission for the due Application of Federal Funds, CAFF – everything has to have an acronym these days. Now is not the occasion to dissect the workings of the Grants Commission, but I do question both its necessity and utility, and see no reason why the politicians should not directly decide on the making and conditions of all grants. Elsewhere, I have written on the unfortunately excessive delegation of government to all sorts of non-elected bodies, and the

insult to responsible government that can follow from that. The elected Executive should make the decisions about, and take the full responsibility for, executive actions, including grants, whether they have been made with or without the assistance of a white board.

What should be the remit of a CAFF? It should have two objectives, to check on the proper application of Federal funds by the States and their agencies, and to reduce bureaucracies, State and Federal.

Some years ago, a person close to me headed a Queensland charity concerned with the diagnosis, prevention and treatment of a particular form of cancer. The charity had a rural inclination, because it perceived that women in the country had very limited access to post-operative nursing care. The charity had already successfully funded much of the cost of training specialist nursing sisters in rural areas. At last the State was successful in obtaining a Federal, albeit modest, grant of a modest amount to be spent in pursuant of the object of the charity. The State bureaucrats immediately managed to spend a substantial part of it, on a conference in a provincial town for the stated purpose of “finding out the needs of the people in the country”. It is with that sort of unnecessary and extravagant use of money, on both a large and small scale, that CAFF should deal.

How should it achieve its ends? It should be given all the powers, and more, of an auditor-general. It needs to be a new, enthusiastic, lean and vigorous body. The auditor-general body cannot perform its role. It, itself is too steeped in the ways of the Federal bureaucracy. I know from my own recent inquiry, that despite two examinations of AQIS, that office did not discover that the equine import and quarantine section, had never zero-budgeted its true costs, and was in truth charging far less than cost<sup>6</sup>. CAFF would focus on State bureaucracies, and would need to avoid the distractions of the duties already imposed upon the Auditor-General.

CAFF would require, for its effectiveness, the insertion in every grant to a State, of a strict condition that it is to have full access to that State's bureaucracy and documents, and the acknowledged power to insist on a different manner or direction of expenditure, and to withdraw funds not being prudently or compliantly spent. It should have the power, indeed the obligation, to hold public hearings, to compel witnesses and documents, and to publish findings about the spending of Federal grants.

These are large powers, not lightly to be conferred, I agree, and accordingly I would not suggest them if I did not think they had a chance of being useful. I am not usually an advocate of standing commissions and inquiries. Sometimes they tend to become more

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<sup>6</sup> Pages 327 – 331 E.I.R

interested in self-perpetuation and appeasement of a media, hungry for scalps and headlines, than in good regulation. Another objection, is that another Commission is just another bureaucracy.

There is some truth in that. Governments cannot however govern without them. The art, it is not a science, is in containing them. That is, why I raise the possibility of replacing the Grants Commission with CAFF. The object of the former is legislatively stated to be to make recommendations concerning the granting of financial assistance to the States and autonomous Territories, the financing of works and services in respect of the other Territories, and the financing of works and services in respect of indigenous persons, itself an exercise in bureaucratise. Why not simply have said, "... to make recommendations for grants to non-Federal bodies and persons". Make no mistake, bureaucratise is not just a linguistic curiosity: it is a real impediment to action. The Federal departments should already be able to assess State and other non-Federal needs for Ministerial decision. It is equally important, that attention be paid, by a powerful body, to the actual spending of the money.

My ideal Commission would be constituted by an experienced forensic accountant, a former senior public servant (State or Federal) and a senior barrister or judge. The reason for a forensic accountant is obvious. A person knowledgeable in the ways and evasions of the public service is

also equally obviously necessary. A lawyer as chairman is, I would have thought, similarly appropriate, in view of the need for properly conducted inquiries. CAFF will only achieve its ends, if it has the necessary skills and authority to resist capture by the non-elected Executive, and the courage and experience to dig deep and give offence if required.

I have mentioned the likely need for strong investigative powers and public hearings. The latter do not merely enable forensic testing of assertion and counter assertion. The public canvassing and revelation of compellable evidence can, by themselves, provoke an irresistible public momentum for reform and improvement.

There should not be any problem about the Federal Government's constitutional power to impose the conditions grounding CAFF's right to investigate and act. The Grants power, section 96 of the Constitution is very explicit.

“During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provide, the Commonwealth may grant assistance to any State on such terms and conditions as the Parliament thinks fit.”

It would be difficult to think of more ample words, than “on such terms and conditions as the Parliament thinks fit”. It would be easy for the Parliament to legislate that all grants (unless expressly excepted) should be subject to a condition of scrutiny, withholding redirection or restriction by CAFF.

Could CAFF in some way be deemed unconstitutional? Might it meet the same unhappy fate as the Interstate Commission? I remind you of the language of section 101 of the Constitution which made explicit provision for that body.

“There shall be an Interstate Commission with such powers of adjudication and arbitration as the Parliament deems necessary for the execution and maintenance within the Commonwealth, of the provisions of this Constitution relating to trade and commerce.”

For completeness, I need to draw your attention to section 103 of the Constitution which provides, among other things, that members of the Interstate Commission, shall be appointed, as are judges, by the Governor-General in Council, and hold office for seven years.

Could there be a clearer expression than “adjudication”. I think not. The Shorter English Oxford Dictionary relevantly defines it as the act of adjudicating: an awarding or settling by judicial decree: a judicial

sentence or award. Webster's International Dictionary defines it as: adjudging, trying and determining as a Court, settling by judicial decree.

The High Court<sup>7</sup>, sensing the rise of a powerful rival, thought, or at least concluded differently. The Interstate Commission, in 1915, had decided that the New South Wales Wheat Acquisition Act 1914 was invalid, and ordered New South Wales not to implement it.

It did not matter to the High Court, that the stated duty and power of the Commission was to adjudicate, or that section 73 of the Constitution actually said that the High Court had jurisdiction to hear and determine appeals from all judgments, decrees, orders and sentences of the Interstate Commission, on, it is important to notice, questions of law only. No, the High Court said, sections 71 and 72 of the Constitution prevailed over all else.

Section 71, you will recall vests the judicial power of the Commonwealth in the High Court and other Federal courts to be created by the Parliament, and section 72 conferred life tenure of office. Sir Samuel Griffith, the Chief Justice said, the terms of these are complete and exclusive: there cannot be a third class of courts invested with Federal jurisdiction. With all due respect that was, in my view, a rare lapse on the part of the great jurist. I need not trouble you with the

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<sup>7</sup> See *NSW v The Commonwealth* (1915) 20 CLR 54

further Alice in Wonderland reasoning of his Honour, and the other Justices in putting down the usurper.

Would, could, the High Court do the same with CAFF? It is always possible, but on balance, I doubt it. CAFF's concern is with Executive action. A withholding or reduction of money is hardly the making of a form of judicial order, any more than the compelling and the taking of evidence, as commissions regularly do, are exercising judicial power. Whether a condition has been complied with may be open to judicial review, and probably desirably so, but CAFF could live with that, as most administrators nowadays have to do.

This is, I emphasize a suggestion, not even, as Swift described his, a modest proposal. I offer it for discussion, and, if it be thought of any value, refinement. I offer it in the hope that it might help to preserve the federation, improve official administrators, and allay valid public fears that money allocated or granted for good purposes, fails to reach the mark.

