THE CHALLENGE TO FEDERALISM

By The Right Honourable Robert Gordon Menzies*

In 1958 Mrs Ethel Thorpe Southey, of Melbourne, gave a sum of money to the University of Melbourne to provide a memorial to her late husband, Allen Hope Southey, who graduated as a Master of Laws in the University in 1917. The Faculty of Law proposed, and Mrs Southey agreed, that the money be used to endow a Lectureship, to be known as the Allen Hope Southey Memorial Lectureship. The lecture or lectures are to be given annually or biennially 'on a subject of interest to lawyers'. It is intended to print the lectures, after delivery, in this Review.

The Prime Minister of Australia, the Right Honourable Robert Gordon Menzies, C.H., Q.C., M.P., who was a contemporary of Allen Hope Southey in the University of Melbourne, accepted an invitation to deliver the first Allen Hope Southey Memorial Lecture. The lecture was delivered in the Wilson Hall at the University of Melbourne on Friday, 16 September 1960.

Allen Hope Southey was my friend in the Melbourne University Law School. This school was led by William Harrison Moore and enriched by his learning, character and example. Allen had a lively mind, an inexhaustible fund of anecdotes, was the first man to introduce me to the whimsies of Stephen Leacock, was a good and constant friend, and married Ethel Thorpe McComas whom I knew and respected as a formidable rival in the class and examination room. That I should be honoured by an invitation to deliver the first Southey Memorial Lecture, therefore, gives me a special personal pleasure.

I have selected as my topic 'The Challenge to Federalism' not only because I am deeply interested in it, but also because as student, advocate, Attorney-General and Prime Minister I have enjoyed an experience of both the theory and practice of federalism which must be quite uncommon. Yet, let me say at once (and I say it all the more heartily now I see so many of my legal betters here tonight) that this is not a legal paper; it must be much simpler and shorter than that.

To define our terms, we must first ask, 'What is federalism, as we in Australia know it?' My own answer is that it is a system of government in which direct legislative and executive power is divided between the Parliaments and Executives of the constituent States, and the Parliament and Executive of the Commonwealth. The Commonwealth Parliament legislates within the limits of its assigned powers for all the people of Australia and is directly responsible to them at the ballot box. Similarly, each State, within that portion of the whole

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which comes within its own boundaries, makes laws and has political responsibility subject to the powers which have been exclusively given to the Commonwealth, or conferred upon and in fact exercised by the Commonwealth.

I have mentioned my own experience of this machinery. That experience has covered a period of over thirty years, in which my political duties have embraced both State and Commonwealth. I have therefore, in my own fashion, seen both sides of the federal medal. I have even been responsibly connected with unsuccessful efforts to amend the Commonwealth Constitution, and have learned by hard experience to understand the deep conservatism with which our people approach any proposal to alter the national charter.

There have been only three successful attempts to amend the Constitution; in 1910 and 1928 when State debts were handed over and the Financial Agreement approved, the State governments being, in each case, supporters of the proposals; and again, in 1946, when, following a High Court decision in respect of the Commonwealth's powers in respect of social services,[1] a referendum was taken on an amending constitutional Bill with the almost unanimous support of both sides of the federal Parliament, to give clear power to the Commonwealth on those matters.

It seems that the Constitution is not likely to be amended whenever there is a deep party division. This is, in my opinion, a state of affairs which arises from three main causes: first, the Commonwealth Constitution is, except for some lawyers, little read and understood. All proposals to amend it, therefore, come to the average voter in the form of legislative provisions which, because of the necessity for precise draftsmanship, occasionally seem complex and, in most cases, have a debatable meaning and effect. In the result there is doubt all round, and the slogan comes to be, 'when in doubt, "Vote No" '.

In the second place, every proposal to add some legislative power to the Commonwealth list is regarded as a proposal to subtract it from the States. This is, of course, technically, not quite true; for most Commonwealth powers are concurrent, not exclusive. But it is true enough in substance, for there is not much point in conferring a new legislative power upon the Commonwealth, unless it is intended that it should be exercised and, to the extent to which it is exercised, it will, under section 109 of the Constitution, be paramount over any competing State law.

At this point we have developed a somewhat curious attitude of mind. We speculate wildly, publicly and privately—I speak as one who knows because I've done it myself—about what extravagant and dangerous laws a Commonwealth Parliament could make under the

[1] *Attorney-General for Victoria v. The Commonwealth* (1946) 71 C.L.R. 237.

proposed power, and so we vote to leave that very power in the hands of State Parliaments. Is this because we think State Parliaments have more sense and responsibility? There is nothing in our legislative history to support such a notion. Yet the feeling is quite understandable. It is only when a legislative power is isolated and defined, as it is when there is a proposal for a constitutional change, that we begin to argue about its meaning and content, and about what could or might be done under it. So long as it lies concealed or unnoticed in the great mass of residual powers which were left with the States in 1901 we neither debate it nor fear it.

Third, there is a deep instinct in the Australian mind for a system of government which, by a division of legislative and administrative powers, limits centralization (or 'control from Canberra') and protects a measure of individual freedom by not giving us one set of rulers—even elected rulers—who have absolute power. In a great island continent with widely scattered communities, this is a healthy sentiment. It has its dangers—and I shall refer to them later on—but it is nevertheless, properly understood and sensibly applied, a good instinct, and I respect and approve of it.

But the proposition is one which has the defect of its qualities. It might be useful if I were to state some of those defects as I understand them. They are defects which we, as a nation, would do well to recognize and correct.

I will state them in the form of questions.

Are we operating our federal system with due regard to the basic need to create a nation and a national spirit; or do we tend to place undue emphasis upon local and parochial considerations?

In our chronic refusal to amend the Constitution in terms, have we lost sight of the fact that great constitutional changes can be brought about, and have been brought about, by the inexorable pressure of financial and economic events, and that other great changes may, in due course, be rendered inevitable if we adopt the wrong attitude towards the distribution of responsibilities?

Perhaps one of the things which bedevils Commonwealth-State relationships and impairs the creation of a national spirit and sense of unity is what I will call 'the fallacy of the sovereign state'. One aspect of this was referred to by Harrison Moore in these terms:

> But though the Commonwealth and State governments are separately organized, the Commonwealth and the State system must be regarded as one whole; and in the United States the disposition to treat the federal and State authorities as foreign to each other has been condemned as founded on erroneous views of the nature and relations of the State and federal Governments. 'The United States is not a foreign sovereignty as regards the several States, but is a concurrent and within

its jurisdiction a paramount sovereignty'; their respective laws 'together form one system of jurisprudence which constitutes the law of the land . . .'[2]

The same problem was looked at by Lord Bryce in his celebrated book *The American Commonwealth* which both Allen Southey and I had occasion to study, but which has now perhaps gone a little out of fashion. 'What state sovereignty means and includes was a question which incessantly engaged the most active legal and political minds of the nation, from 1789 right down to 1870. It is worth recalling,' as Bryce reminds us, 'that some thought that State sovereignty was paramount to the rights of the Union. Some,' on the other hand, 'considered it as held in suspense by the Constitution, but capable of reviving' should there be secession from the Union. 'Some', again, 'maintained that each State had in accepting the Constitution finally renounced its sovereignty, which thereafter existed only in the sense of such an undefined domestic legislative and administrative authority as had not been conferred upon the Federal Congress'.[3]

It was, among other things, the conflict of these views which produced the Civil War. It is occasionally forgotten that the Civil War was not all about Uncle Tom's Cabin. As Bryce pointed out: 'Since the defeat of the Secessionists, the last of these views may be deemed to have been established' and, he adds, 'the term "State sovereignty" is now but seldom heard'. (1911 was the last edition that contained those words. I hear the words a lot in Australia.) It will be seen at once that this is something rather different from what goes on in Australia. But, as he further adds 'much of the obscurity and perplexity arose from confounding the sovereignty of the American *nation* with the sovereignty of the federal *government*'.[4]

We must, indeed, be careful how we use words like 'sovereign'. Like most words in our language it lends itself to a variety of interpretations, usually of a highly subjective kind. If we referred to a nation anywhere in the world as a 'sovereign state' what would we mean?

We would mean that in point of law it had complete control through such agencies as it might set up, or by such methods as it might adopt, over every aspect of government. Now, in a federation, sovereign powers are divided in point of exercise: the Commonwealth Parliament itself exercises sovereign powers; so does each State Parliament. Yet, obviously, in the true sense, we cannot all be sovereign *communities* because six of the communities are integers in the seventh.

It is a great error to compare the *Parliament* of the Commonwealth

[2] Harrison Moore, *Constitution of the Commonwealth of Australia* (Students' Edition, 1910), 5.

[3] Bryce, *The American Commonwealth* (1911) i, 421, 422. [4] *Ibid.* 422.

with the *State* of Victoria. Yet it is a very common error. I hear it almost every year. Somebody says, representing say, Victoria, 'We, the State of Victoria, produce most of X and therefore we have claims on the Commonwealth'. This is most politely expressed, but that is what it amounts to. The fact is that the people of Victoria produce this commodity. But they are also people of the Commonwealth. We are not to compare the geographical area known as Victoria with the Parliament of the Commonwealth: the State of Victoria is part of the Commonwealth of Australia.

We should get it clearly in our minds that, subject to a few eccentricities like section 92 of the Constitution, a few universal restraints on our joint power, it is the Australian nation which is sovereign. And indeed, it could if it chose, though it won't, exercise its sovereignty by removing these restrictions from the Constitution. It would, indeed, be a very odd thing if I, as Prime Minister, had to say each time I attended a Prime Ministers' Conference in London that, while all my colleagues can properly say that they represent sovereign self-governing communities—Ghana, India, Canada and so on—I had to say: 'I'm sorry, Gentlemen, I do not.' I dare say that wouldn't prevent me from talking but it might be some subtraction from my position.

The Australian people when they founded that nation, caused to be enacted by the Parliament of the United Kingdom, an Act and Constitution which created (or acknowledged) the national sovereignty but divided up the powers, the legislative and executive and judicial powers: the great national legislative powers to go to the Commonwealth Parliament and the residue of very important but local powers remaining with the State Parliaments, formerly the Parliaments of the self-governing colonies.

Now we should note in the preamble to the Commonwealth of Australia Constitution Act that it was 'the people of New South Wales, Victoria' and so on who 'agreed to unite' in a Commonwealth. It is sometimes said loosely that the Commonwealth was the creation of the Parliaments of the colonies. That's not so. The *people* 'agreed to unite'. The establishment of the Commonwealth was not something done by existing colonial Parliaments: it was the product of a series of independent conventions containing the leaders of constitutional thought in Australia. Their work subsequently received popular approval, by vote, and was presented to the authorities in Great Britain for enactment.

Now I'm a great believer in the existence and authority of State Parliaments and governments. I know that there are many thoughtful people who think that we would be better off under what I have heard compendiously described as 'centralization of power and de-centraliza-

tion of function'. But I doubt it. Experience shows how difficult it is to decentralize the exercise of great power once that power has been attracted to a central point.

But I have spoken of what I have called 'the fallacy of the sovereign state' not merely to make a technical criticism of it. The point to me is that it exhibits a state of mind which is singularly disadvantageous to the national development of the country. After all, if we all begin to think of ourselves first as citizens of, say, Victoria, and regard ourselves as engaged in promoting the interests of Victoria above all others, we may very well soon find ourselves—as many people have—regarding the national government with hostility; thinking of it almost as if it were a foreign power; forgetting that it has exactly the same people to deal with inside the geographical boundaries of Victoria, as has the government of Victoria itself. What we need, most of all, is to establish a priority for national consciousness.

Once we have done this, we may very properly look at ourselves as citizens of our own State and do our best to promote its welfare. Take, by way of comparison, the United Kingdom. We find there profoundly strong national feeling—greater, I fear, than the one we have as yet achieved in Australia. But the existence of this national feeling which has brought Great Britain through so many tremendous trials, doesn't prevent a Yorkshireman from seeing the superiority of his own county to Lancashire; or the man from Devon regarding himself as somewhat less effete than the citizens of Middlesex.

All local prides and effort are admirable. That is why, in a great country like Australia, we have a federal system. But I repeat that the prime object of bringing about federation in Australia was to create a nation.

I wonder if, except in time of war, the idea of nationhood in Australia presents itself as a passionate belief in the hearts and minds of our people as much as it did in 1900.

The inadequate achievement of this splendid, united sense of nationhood is, in my opinion, one of the great challenges to federalism. Just let me explain that in a little more detail.

Ever since the establishment of uniform tax, and indeed, going back before that, the establishment of the Financial Agreement, there has been a growing tendency to believe that while the Commonwealth has only some of the powers it should accept most of the responsibilities, particularly where they sound in money.

Now this is very dangerous. The greatest danger about it is that if, chronically, the Commonwealth is called upon to accept financial responsibilities on matters beyond its effective legislative and executive control, and answers the call, the day may come when the people will say, 'Well if the national Parliament and Executive are to be

held accountable for all these things, we must support added responsibility by added power'. If the feeling grew strong enough, it could lead to unification.

Bryce analysed the movements which go on in a federal system. Those movements may be either centrifugal, so that the constituent States become stronger and the central government becomes weaker, or they may be centripetal leading towards an aggregation of power in the hands of the central administration. He recognized, in his study of the United States, that there was a dominance of the centralizing tendencies. He pointed out that those tendencies were not, in any sense, wholly or even mainly due to formal amendments made in the Constitution. He found certain matters which had enhanced the centralizing tendency, irrespective of written changes. He might indeed, have been writing prophetically about the Australian federation.

It will be recalled that the first High Court was very much disposed to interpret the constitutional powers of the Commonwealth by paying particular regard to what it understood to be the 'reserved' powers of the States. The consequence of this was that a somewhat narrow interpretation was given to Commonwealth powers, particularly insofar as those powers related to matters directly or indirectly connected with State governments.

That process was brought to a halt, though perhaps not a permanent one, by the famous *Engineers' Case*[5] the true significance of which was not so much that it exposed certain State instrumentalities to the Commonwealth industrial law (though that was significant enough) as that it represented the acceptance of the view that the powers of the Commonwealth Parliament are to be interpreted quite fully, comprehensively, subject only to express restrictions contained in the Constitution. The existence of the States was not, as a general rule, to constitute one of these restrictions.

I have a certain amount of nostalgia when I recall that I was 25 years old when I argued that case for the Amalgamated Society of Engineers. The solicitor who briefed me took a chance—but I think that at that age I was not unduly expensive. When the case came on originally in Melbourne I felt myself constrained, in view of the *Railway Servants' Case*,[6] to argue that the respondent, the Minister for Trading Concerns in Western Australia was carrying on trading and not governmental operations. This distinction had some judicial sanction in America as well as in Australia and England. But it was a

[5] *The Amalgamated Society of Engineers v. The Adelaide Steamship Co.* (1920) 28 C.L.R. 129.

[6] *The Federated Amalgamated Government Railway and Tramway Service Association v. The New South Wales Railway Traffic Employes Association* (1906) 4 C.L.R. 488.

distinction which depended so much upon political concepts that it could not give satisfaction to a judicial mind. After a brief, but rough, passage I was given permission to attack the earlier decisions and, after due notice to the Commonwealth and the States, the matter was transferred to Sydney for full, and uninhibited argument. Knox C.J., Isaacs, Higgins, Rich and Starke JJ., gave a joint judgment (with Gavan Duffy J. dissenting) which put the seal upon what I will call the full or extensive interpretation of Commonwealth powers.

Looking, therefore, at the Australian experience, one may see that there has been a strong centralizing tendency in relation to power, partly by an enlarged doctrine of interpretation of Commonwealth powers, partly by the pressures exercised by two wars in which the defence power of the Commonwealth received the most far-reaching interpretation, partly by the incorporation in the Constitution of the Financial Agreement with the control which it sets up of borrowing for public works, partly by the consequences of the uniform tax laws enacted during the war, and since carried on, and partly, of course, by the rising significance of Australia in world affairs and the obvious need for having a national government which can speak with authority on behalf of the nation.

When the Financial Agreement was constitutionally established in 1928 its declared object was to avoid competitive borrowing between the State governments. 'Let us get together', it was, in effect, said, 'have one borrowing authority, the Commonwealth, and let us have a Loan Council representing the States and the Commonwealth which will determine how much money can be borrowed for the year on reasonable terms and conditions'. By this method, it was thought, the evil results of competitive borrowing would be eliminated and the national credit backing would improve the prospects of effective loan raising.

This system worked in strict accordance with its terms for a considerable time. I can well remember, for example, that in the years immediately preceding the second World War it was the practice for the Commonwealth Bank, as it was then constituted, to underwrite the loan programme. The Prime Minister and Federal Treasurer would meet the State Treasurers; discussion would occur; there would be argument as to whether the borrowing programme (believe it or not!) should be twenty million or twenty-two million pounds; constant reference was made to the Commonwealth Bank to see how much it was prepared to underwrite. In the upshot a figure say of twenty-one million pounds would be arrived at; it became the borrowing programme; the success of the programme was assured by the underwriting; the next business, and the important business of the Loan Council, was to divide up, what Sir Thomas Playford nowadays calls 'the turkey'; whereupon each State government representative would

go away to work this into his budget proposals for the forthcoming financial year.

Though, after the war, underwriting ceased to be the rule, it still remained true that the prime business of the Loan Council was to discuss how much money could be borrowed on reasonable terms and conditions. There was no question of the Commonwealth underwriting the programme, and therefore programmes were fairly realistically arrived at. But by the time I came back into office myself, at the end of 1949, it was becoming increasingly clear that instead of the depressed circumstances which some people had anticipated the country was on the verge of a great expansionist movement.

This involved not only very high demands on private capital for private capital expansion, but equally, and no less importantly, a growing demand for public works which would provide the essential foundation for private capital expansion.

While this growing demand for capital works programmes on behalf of governments was manifesting itself, it became at the same time clear that the competing demands of enormous expansion in both the public and the private sectors limited the amount which could reasonably be expected to be borrowed by governments. The Commonwealth government therefore, without obligation, but in order to meet the realistic economic needs of the country, adopted for the first time in 1950 the practice of aiding the loan-raisings by adding to them, where they fell short of the programme, funds from Commonwealth sources. On one or two occasions this was done by what was a virtual underwriting of the programme by the Commonwealth. In more recent times there has not been a formal underwriting but when the State representatives have adopted a public works programme which, in the view of the Commonwealth, is a reasonable one under all the circumstances, the Commonwealth has made payments to the States on account of the programme at equal monthly amounts for the first six months, with an indication that the position will then be reviewed. In point of fact, however, the monthly payments have been made throughout the financial year without reduction, so that in substance the States, when the works programme has been approved of as a financial total, have had some assurance that the money will be available to them.

That this procedure alters the nature of the Financial Agreement is, of course, quite clear. No longer is the question: 'How much money can be borrowed on reasonable terms and conditions?' but 'How much money is reasonably needed for an attainable works programme?' In consequence the Commonwealth has, year by year, accepted additional liabilities out of Commonwealth funds, sometimes on a very great scale.

Though this practice has been of great advantage to State governments and was intended to be so, it has, of course, led to a state of affairs in which the States are increasingly dependent upon Commonwealth action for the carrying out of their works programmes.

I confess that I regard this as another of the centralizing, or centripetal, developments in our own federal Constitution. But I equally confess that I can see no way by which it could have been avoided, though it has involved the Commonwealth in paying for its own works programme out of revenue.

There are financial purists—by that I mean people who are looking at financial problems uninhibited by any past experience—who take pleasure in saying that it is quite unsound to carry capital works on revenue account. That may, in strict theory, be right. But 'needs must when the devil drives'. If the Commonwealth had not been prepared, at some political inconvenience, to carry its own works programmes on revenue account, there would have been two consequences: one, that the States would have received no subvention for their own works programmes out of Commonwealth revenues; and two, that the Commonwealth works programmes would have been considerably reduced. What this could have meant in terms of the non-performance of the Snowy Mountains Scheme and a considerable damping down of expansion in the postal and telegraphic services, I leave to the imagination of those who are familiar with these problems.

Another provision of the Commonwealth Constitution under which the original federal balance has been changed, is that contained in section 96 of the Constitution. That section provides that:

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

It may very well be the case, particularly having regard to what I may call its initial character, that the draftsmen of the Constitution felt that such grants by the Commonwealth of financial assistance might become necessary having regard to some purely temporary causes during the period of Federal transition. But the section has continued to operate, and nobody supposes that it will be changed.

There was in some minds a feeling that section 96 provided for the making of a grant but did not enable the Commonwealth to attach to the grant conditions which amounted to the exercise by the Commonwealth of a legislative authority not otherwise accorded to it.

In the case of *Victoria v. The Commonwealth*,[7] I myself, as counsel, made a valiant but quite futile attempt to persuade the High Court

[7] (1926) 38 C.L.R. 399.

that this was the position. In the long list of my failures I rate it number one. I remember being supported by a celebrated barrister from Sydney who was such a wit that he ended up by laughing at himself, and having got to laugh at himself, he was involved in laughing at his case, and as that was my case, I wasn't very pleased with him. The case concerned the Federal Aid Roads Act of 1926. My argument in that case, on behalf of the State of Victoria, was that the Federal Aid Roads Act was 'invalid because it was a law relating to road-making and not a law for granting financial aid to the States'. I therefore argued that it wasn't warranted by either section 96 or by the legislative powers granted by section 51 of the Constitution. I argued that one must look at the substance of the Act, and that, so regarding it, it was one to provide for the construction of roads, a matter over which the Commonwealth had no general jurisdiction.

This somewhat engaging argument was dismissed by the High Court quite unanimously. That alone makes it stand out like a beacon light in constitutional history. Instead of destroying me in twenty-five pages of well chosen words, they just wiped me out in what I can see at a glance is six and a half lines:

> The Court is of opinion that the Federal Aid Roads Act No. 46 of 1926 is a valid enactment.
>
> It is plainly warranted by the provisions of section 96 of the Constitution, and not affected by those of section 99 or any other provisions of the Constitution, so that exposition is unnecessary.[8]

This made it clear that, provided that a law is one providing for a grant to a State, the terms which may surround that grant are matters entirely within the jurisdiction of the Commonwealth Parliament. This view has subsequently been judicially confirmed.

This broad interpretation of the power has, beyond question, been of considerable practical value to the States. A very recent example is the system of State grants for universities made by the Commonwealth Parliament. This is a development which probably was not foreseen in 1901. Indeed I make well to say that it wasn't foreseen at a much later date than that. It is one which has affected what was then thought to be the federal distribution of powers between the national Parliament and the Parliaments of the States. But it undoubtedly has had the effect of saving the State universities from financial disaster. The whole matter is a very good illustration of how something which was not anticipated in the Constitution when it was first enacted can come into existence by judicial interpretation and the inexorable demands of new circumstances.

The institution and subsequent maintenance of what is called

[8] *Ibid.* 406.

uniform taxation (though it only applied to income tax on individuals and companies) also deserves special though necessarily inadequate mention. That it has profoundly affected Australian federalism is beyond question, though it turns upon no formal constitutional amendment whatever.

The scheme, which involved an Income Tax Assessment Act, an Income Tax Act, and Income Tax (War-time Arrangements) Act, and a State Grants (Income Tax Reimbursement) Act, was introduced in 1942 as a war-time measure, though in the nature of things it was bound to continue while high war-caused rates of tax continued. Its validity was challenged in the High Court, but was upheld[9] under the taxation power, the defence power, and section 96. That decision has more recently been upheld on the points of substance.

The judicial arguments made it clear that the Commonwealth's taxation power, with or without the Grants power under section 96, is legally capable of being used 'so as to make the States almost completely dependent, financially and therefore generally, upon the Commonwealth'.[10] This means that to preserve the true nature of Australian federalism certain questions became vitally important.

As the high war-time level of income taxes subsided, would it become practicable to restore to the States the use of their own income taxing powers? Could the growing Commonwealth financial power be kept in check by a public political consciousness of the need for maintaining a high degree of State autonomy for State purposes? At the same time, could we avoid carrying State-consciousness to a point at which the true essence of the necessary national spirit became weakened?

The restoration of State taxing powers had been debated several times in Premiers' Conferences, and many more times in other political circles. There has been no positive evidence that most of the State governments really want a return of taxing powers on terms which would be reasonably acceptable to the Commonwealth and still permit it to discharge its admittedly major responsibilities. Yet a return of taxing powers by unilateral Commonwealth action would be pregnant with disaster if a genuine agreement between Commonwealth and States were not arrived at. At a Premiers' Conference on this great matter, which I specially convened in 1953, there was a close discussion, which left it, if I may speak quite frankly most unlikely that uniform tax would end unless there arose a revolutionary change in the opinions of governments. I cannot in an already too long lecture describe fully the matters at issue, but I shall just briefly mention them. The advantages of one taxation return and one docu-

[9] *South Australia v. The Commonwealth* (1941) 65 C.L.R. 373.
[10] *Ibid.* 429, *per* Latham C.J.

ment of assessment were conceded. The people would not tolerate a return to duplication of machinery. But the other matters were deeply contentious. To what extent should the Commonwealth vacate the income tax field in order to confine its own raisings to an amount equal to the performance of its own Commonwealth responsibilities, and leave the rest of the field to the State? I proposed that we should reduce Commonwealth income tax by an amount equal to the next anticipated tax reimbursement. To do less would be to present the States with an inadequate field, to do more would involve the Commonwealth in increasing its own taxes to maintain its own normal expenditure.

Yet, of the Premiers, two, from Western Australia and Tasmania, declared unequivocally that they did not want their income taxing powers restored; one, New South Wales, requested that the Commonwealth should reduce its taxes by *twice* the amount of the *tax* reimbursement—an obviously fantastic proposal which was only another way of saying that uniform tax should continue; another, South Australia, was prepared to accept a reduction of over sixty million pounds more than the tax reimbursement! Queensland pointed out, which was obvious enough, that as its taxing capacity was low and its pre-war State income tax had been very high, it was better off under uniform tax, and would, should State tax be restored, *either* need to impose State tax at a much higher rate than New South Wales or Victoria, *or* would need a special annual grant from the Commonwealth under section 96—which would cut across the principle of matching power and responsibility.

There was another grave question—that of company tax. At a time when the rapid development of Australian industry is extending the operation of companies and is producing inter-state operations on the part of more and more of them, there is much to be said for a uniform company tax imposed by one authority. The position would be both chaotic and discouraging if the one company found itself taxed twice on the same earnings—once by the State of its residence, and once by the State of the source of revenue.

This great controversy does appear to have been put to rest, for six years at any rate, by the conference of Commonwealth and State ministers of June 1959, where a new tax reimbursement formula was worked out, accepted on all sides, and by agreement made to apply for six years.

You may well think that the end result of this examination is untidy, inconclusive and unsatisfying, and perhaps self contradictory.

Federalism in Australia is a good thing, and should be preserved; *but:*

(a) The centralizing forces acquire strength every year.

(b) Constitutional problems attract little public attention except during the actual currency of a campaign; and even then there tends to be rather more heat than light. This is not surprising. Federalism is in its very nature legalistic. A proper understanding of it involves a considerable intellectual exercise in both synthesis and analysis. The very notion of federal and state governments elected by and dealing with the same people, but with sovereign powers divided between them according to the terms of a legal instrument as interpreted from time to time by the judiciary, is complex. Many try to understand it, and confess failure. Many, perhaps wisely, do not even try. This is basically, the reason why constitutional amendment by popular vote has proved so difficult.

(c) The electors have voted fairly consistently against any *formal* addition to the powers of the Commonwealth Parliament, but to an overwhelming extent they accept those changes in financial power which have substantially the same effect.

(d) There is a marked and growing tendency to look to the Commonwealth government to accept financial responsibility for the performance of State powers by the State governments and even for the functions of local governing bodies created by the States for local purposes. Yet at the same time there are inadequate signs of a united national spirit.

I venture to doubt whether uniform tax will ever be changed. Except in one State, Victoria, I have seen no evidence of a real desire to re-create two independent direct taxing authorities. Most people, I think, feel that we have learned to live with uniform tax, and that to put the constitutional clock back to a time before the second World War is not feasible.

If this is true, as I fear it is, Australian federalism has already sustained a great change which affects the originally designed balance of distribution of powers. Centripetal movements are not likely suddenly to halt themselves. Except in the unlikely event that there is a wide public demand for confining financial demands upon the Commonwealth to those matters which fall within Commonwealth legislative power, and for re-establishing the independent taxing power and responsibility of State governments, the centripetal movement must be accepted. If this be the position, we are confronted by two tasks of great practical importance. One is to see that the growing financial power of the Commonwealth is exercised in such a way as to permit the States to discharge their own constitutional duties. The other is to abandon, not the principles of federalism, but that excessive emphasis upon purely local rights which is proving such an impediment to the creation of a truly national sentiment and pride.