Federalism in safe hands

By Anne Twomey

A review of Justice French’s speeches and writings shows three abiding interests – federalism, the republic and popular culture. It is his views on federalism, however, which will be of most importance in his future role as Chief Justice of the High Court of Australia.

In recent years the High Court has been rather dismissive of federalism and its role in constitutional interpretation. In 1999 the concept of cooperative federalism was famously regarded by one Justice as no more than a ‘political slogan’ and in 2006 in the Work Choices case the notion of ‘federal balance’ received short shrift from a majority of the Court. Justice French, however, when reviewing the many provisions of the Constitution which encompass federal principles and invoke the need for cooperation, remarked in 2004 that ‘the Constitution does make provision for what can properly be described as cooperative federalism in a way that takes that expression out of the scope of a mere political slogan.’

In a speech in Brisbane last month Justice French accepted that the ‘benefits of federalism are real’ and ought to be supported. At the same time, however, he acknowledged that ‘what used to be local has expanded to become national and in that sense the federation has shrunk’. Rather than concentrating on constitutional reform or the broad interpretation of Commonwealth powers as a means of adjusting federalism to meet the demands of the new global environment, Justice French has focussed on inter-governmental cooperation.

He stressed that once a subject is treated as being of national significance, requiring a cooperative approach, it is unlikely ever to return to State control. The price of cooperation is ‘greater centralisation of political authority’ which in turn ‘may ultimately involve a risk of losing some of the benefits of federation.’ Given the significance of such change, he has argued that decisions should be ‘informed by principles for determining what matters are best dealt with by cooperation or multi-government approach and which are not.’ Principles should also govern the selection of the most appropriate cooperative mechanism for dealing with the subject.

In particular, Justice French has contended that many cooperative schemes are laden with complexity, difficult to administer and lack accountability. In his view, when cooperation is justified, preference should be given to the mechanism that best achieves simplicity and accountability. This could be achieved by the Commonwealth Parliament exercising the ‘unused potential’ of its ‘broad constitutional powers’ or by the reference by the States to the Commonwealth Parliament of matters within their jurisdiction. Justice French concluded that the ‘comparatively simple remedy of referral, which locates accountability clearly but retains an underlying veto control by the states of amendments and abuse of the referred powers is to be preferred.’
What does this indicate for Justice French’s future jurisprudence? First, that he has respect for federalism and its fundamental role in our constitutional system. Secondly, that he is likely to interpret the Constitution in a manner that supports, rather than frustrates, cooperative federalism and that recognises the capacity for the States to safeguard their referrals from Commonwealth abuse. Thirdly, that he is likely to resort to principle rather than expediency in deciding matters concerning federalism. Fourthly, that his jurisprudence is likely to be informed by a keen understanding of the problems of federalism and the difficulty of maintaining federal balance. Finally, that he accepts the broad constitutional powers of the Commonwealth but is likely to view them in a federal context with a keen eye to accountability.

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