

The Productivity Commission,
Locked Bag 2, Collins St East
Melbourne VIC 8003, Australia

Submission: Review of Mutual Recognition Schemes

Dear Commissioner Sloan,

‘For the first time in history we have a nation for a continent, and a continent for a nation.’^[1] – Sir Edmund Barton

I believe it is vital that mutual recognition extend far beyond goods and occupations, but to the provision of services generally, for without it we will never achieve administratively what was achieved constitutionally in 1901. In many respects, if politics is war by other means, then federalism is civil war by other means. This is particularly noticeable in the area of government service delivery. As someone confined to a wheelchair by disability, one is highly dependent of state run or state funded services for all sorts of things, from personal care assistance to transportation.

These services are generally provided by State or Territory Governments, which is fine until a recipient seeks to move temporarily or permanently to a new jurisdiction. There is no guarantee that an entitlement to a good or service recognised in one jurisdiction will be recognised by another. This was what I found when moving temporarily to Canberra in 1996 to undertake a Parliamentary Internship with the Senate. When seeking to use my NSW taxi travel concessions in the ACT’s fleet of Wheelchair Accessible Taxis (WATs), one discovered that the travel entitlement granted in NSW was not recognised in the Territory. Calling my federal and state members of Parliament, as well as making my own written appeals, brought a much appreciated accommodation from the ACT; concession dockets equivalent to my NSW entitlement were provided, with NSW agreeing to refund the ACT for costs incurred during my stay.

At the time, each State and Territory had its own arrangements for concessional travel and none of these systems had any reciprocal arrangements with their equivalents in other Australian jurisdictions. I wanted to achieve a level of reciprocity which would allow people with disabilities to take travel entitlements across borders without impediment. This was the argument I put to the House of Representatives Standing Committee on Family and Community Affairs, during their 1997 inquiry: *Concessions: Who Benefits?*. It was an argument enthusiastically accepted by the Committee, who wrote in the final report that:

“...7.48 Mr. Johnston has raised this issue (the lack of reciprocity) with the Commonwealth Government and many State governments and agencies over a number of years. The Committee commends his persistence in lobbying for a change in the current taxi subsidy scheme.

^[1] Statement of Sir Edmund Barton, Australia’s inaugural Prime Minister. Quote cited in Geoffrey Blainey, *The Centenary of Australia’s Federation: What Should We Celebrate?*, A paper was presented as a lecture in the Department of the Senate Occasional Lecture Series at Parliament House on 26 October 2000, p.8, available at <http://wopared.parl.net/Senate/pubs/pops/pop37/c04.pdf>

7.49 Recommendations for a taxi reciprocity scheme for disabled people must be viewed in the wider context of current Commonwealth/State agreements on provision of services and care for disabled people. However, this is an area of great importance to disabled people and substantially affects their capacity to travel and participate in Australia's social and economic life..."[2]

And while it was true that I (and many others) had done a lot of lobbying to that point, it took many more letters and submissions^[3] to have national reciprocity implemented about four years later. This was the point I was trying to make, when responding to media reports that claimed 'nothing much came out of parliamentary committee reports.'^[4] It is indeed true that nothing will come from a recommendation of a parliamentary committee unless you campaign for its implementation.

As such, this review of mutual recognition or reciprocal arrangements is welcome. However, I would urge that there be a whole-of-government approach in Australia (and possibly in New Zealand), because particularly when it comes to a range of publicly funded services, reciprocity/mutual recognition can at best be described as piecemeal (if not non-existent). In my experience, similar anomalies exist in the States' provision of housing (and probably many other services), where borders and current residency play a key factor in determining eligibility. While one can understand this more in a 19th or early 20th century construct, the 21st century sees all people, including those with disabilities, as far more mobile. We need funding and support services to move with us, as we attempt to move across borders in pursuit of work opportunities (as in my case) or to be closer to loved ones, or for a myriad of other reasons.

Over the last several years, I have attempted to move back to Canberra to pursue Graduate placements with a number of departments. When arguing just to get on a waiting list for accessible housing was a process in and of itself, on the basis of my current location (as a non-resident, which I in part accept), the whole process underlined the impact of the vertical fiscal imbalance where the Commonwealth collects most of the revenue, but the States and Territories are left to provide the services. States (and Territories) need to reasonably protect their revenue for the benefit of their residents. However, is it reasonable to see Australia as a federation in anything but name only these days? The march towards pseudo-unitary Government began with the *Engineers case* and was again confirmed most recently by the *WorkChoices case*, with Callinan J expressing the view in dissent that the case had the potential to "reduce the Parliament of each State to 'an impotent debating society'".^[5] Other writers have expressed similar views, with Nethercote arguing that:

[2] House of Representatives Standing Committee on Family & Community Affairs, *Concessions: Who Benefits?*, October 1997, p.90, available at <http://www.aph.gov.au/HOUSE/committee/fca/Concard/Chap07.pdf>

[3] For example, see www.pdcnsw.org.au/archive/98/dcnswtaxireport.doc and www.hreoc.gov.au/disability_rights/inquiries/taxi/johnston.htm and www.hreoc.gov.au/disability_rights/inquiries/taxi/johnston2.htm

[4] See www.smh.com.au/news/letters/a-long-and-winding-road-to-get-an-inquiry-result/2005/06/20/1119250924749.html

[5] *Work Choices: The High Court Challenge*, p.4, available from [http://www.federationpress.com.au/pdf/HighCourtChallenge%20\(21Nov\).pdf](http://www.federationpress.com.au/pdf/HighCourtChallenge%20(21Nov).pdf)

"...(For) both practical and ideological reasons, arguing for the virtues of federalism has been a position which, for much of the past century, has not been popular in Australia even though, as an institutional structure, the federal system has proved extremely resilient. As a consequence, federalism in Australia has created a paradox. The structure of government is clearly federal; there is a strong national government with involvement in many areas of policy-making, but most government services are delivered by powerful State governments reflecting the views of six widely dispersed State political communities ... Yet the legitimization of this system through the acceptance of the desirability of federalism as a way of dispersing power between different spheres of government is largely absent from public debate. Federation has been a great success, but federalism remains an idea with limited public acceptance..."^[6]

I agree with Nethercote that State (and Territory) governments can be overwhelmingly powerful when dealing with individual citizens; my own situation was a case in point – having lobbied to get on a place on the housing waiting list, I ultimately had to forgo the original position because (quite reasonably) my Canberra-based employer could only wait so long.^[7]

However, unlike their Canadian Provincial counterparts, States are Commonwealth dependants financially. Therefore, one jurisdiction is reluctant to take on another's residents either temporarily or permanently, because of the potential costs involved. As such, entitlements which were held in one jurisdiction may not be maintained in another, and if you seek to have them (or something close to them) restored, a new application to an equivalent agency in a new jurisdiction is needed. Why, I ask? Australia's population, forms of government and history of settlement by a single Imperial Power make us more homogenous than dissimilar. The question of my access to the taxi concession scheme underlined this; both the ACT and NSW concessions were equivalent (in 1996) to about half a taxi fare. All dockets came in books issued to the passenger, while the only real difference I could see was that the colour of the paper and the fact that you entered trip details in different places on the slip which you signed and gave to the driver.

Again, while I was ultimately thrilled to help achieve national reciprocity, it was a long hard road of letters, submissions, and more letters.^[8] It was nonetheless a very worthwhile experience personally, but the man hours it must have cost in all governments would have been considerable; and that was to achieve reciprocity in one discrete concession program.

I have previously advocated use of a body like the Interstate Commission to try and harmonise and standardise State housing policy^[9] and think a similar strategy should be used in relation to many other areas. For example, if you want to run a raffle or

^[6] Nethercote, JR (ed), *Liberalism and the Australian Federation*, The Federation Press, 2001, p. 287-288

^[7] I continue to make applications where I can, and do not hold any bitterness or resentment towards any of the agencies involved. All parties compromised, which ultimately shows that inter-jurisdictional cooperation does occur, but it is often gained on a case-by-case basis, by the applicant who can match effective persistence with a willingness to compromise when you have an agency's attention

^[8] I am happy to provide this documentation, if the Commission would find it useful.

^[9] See my submission to your inquiry into first home ownership, available at http://www.pc.gov.au/_data/assets/file/0008/56654/sub018.rtf (p. 1-2)

lottery in more than one jurisdiction, why seek multiple licences? Should one not be recognised as an equivalent of another? The same should be true of any other of the myriad of state-based licenses, concessions or eligibility criteria. Indeed, I have often wondered whether there could be any way to leave my disability in NSW along with the range of State-based services which don't easily cross a border. Sadly, in 35 years, this has never once occurred.

Therefore, the moment any State Government launches a new program in the social services, business regulation or some other area of activity which has the potential to impact on an equivalent interstate initiative, the relevant legislation, explanatory memorandum, regulations or guidelines should specify how reciprocity or mutual recognition arrangements will work. These points should be considered *before* a measure is introduced, in an attempt to avoid costly amendment or duplication of regulations post facto^[10]. This should not necessarily mean that all jurisdictions act uniformly in all matters, but that there are mechanisms in every Act, Regulation or Guideline, to ensure they can deal with the interstate applicant, client, or recipient and, with their home jurisdiction. This should be possible regardless of whether an individual, group or business are going to be in a new jurisdiction for a short period (or discrete project), or are seeking transitional arrangements for a permanent relocation

It may be useful to reflect on the operation of the Law Merchant, as a template for how mutual recognition/reciprocity should work in contemporary Australia. Kelly has written that in the development of 'the law of nations':

“...When Vitoria wrote of the right...to travel, to trade peacefully, to settle, as part of the *ius gentium*, he evidently meant that these basic activities were lawful in the eyes of all mankind...”^[11]

Again, it might not amount to the law of nations, but as I reminded the House of Representatives in 1997, section 92 of the Constitution provides for free 'trade, commerce and intercourse' among the States. Federalism is also underpinned by comity between the constituent parties. Expanding mutual recognition arrangements will make these principles a reality in Australian federalism. Such reform is a century overdue.

Yours faithfully,

Adam Johnston

24 November 2008

^[10] This could be a process perhaps overseen by the Interstate Commission, in an attempt to separate the partisan and inter-jurisdictional politics of the Council of Australian Governments (COAG) from the practical, administrative questions of “how to make policies work in practice”.

^[11] Kelly, J. M., *A Short History of Western Legal Theory*, Clarendon Press – Oxford, 1992, p.200