Australia’s Federal System

Is there a need for reform?

Maritsa Samios
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EXECUTIVE SUMMARY

The purpose of this report was to analyse the history and development of the federal relationship between the Commonwealth and the Australian States. Reference has been made to the State of Queensland to illustrate the effects of evolving federal relationship. The report focussed on the effect this relationship has had on accountability and responsibility among the Commonwealth and the Australian States. In doing so, it will compare and contrast the gradual decline of the powers of the Australian States with the experiences of devolution in the United Kingdom and federalism in Canada.

It is important to gain a better understanding of Australia's federal relationship from a State perspective. Such an understanding can aid in determining whether and how Australia's federal relationship can be reformed to best provide for the evolving nature and responsibilities of Australian States. In order to answer these questions, a comprehensive analysis of the available constitutional, political, and comparative literature was undertaken with figures and data drawn from government reports.

The results showed that there are a number of advantages evident in federal governmental systems. Federal systems, unlike unitary systems of government, promote regional diversity and competition between sub-national governments. However, the dynamics of Australia's federal relationship have changed considerably since Federation, with the States gradually becoming marginalised by growing Commonwealth authority.

Owing to the High Court's interpretation of the Constitution, the States have gradually lost power to the Commonwealth. A number of High Court decisions have limited the States' financial powers, contributing to a growing vertical fiscal imbalance between the Commonwealth and State governments. The vertical fiscal imbalance has impacted upon the States' abilities to undertake their traditional areas of responsibility, such as health care and education without financial assistance from the Commonwealth. The growing prevalence of Specific Purpose Payments (or tied grants) have allowed Commonwealth incursion into traditional spheres of State expertise, without accompanying accountability mechanisms. Moreover, the proliferation of executive-dominated intergovernmental bodies such as the Council of Australian Governments, whilst providing a forum for collaboration, ultimately serve to further reduce the level of scrutiny and accountability over concluded policy agreements.

These findings suggest that reform is necessary in order for Australia to achieve the benefits generated by a federal system of government. Reforms aimed improving the levels of accountability and transparency span the constitutional, financial and political realms, will enhance the operation of Australia's federal system. The challenges facing the Commonwealth of Australia in the 21st century are inevitably different to those encountered in the 20th century, and an understanding and greater clarity over the roles of each government can only aid in the evolution of Australia's federation.
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GLOSSARY

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
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<tr>
<td>ALGA</td>
<td>Australian Local Government Association</td>
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<tr>
<td>CAF</td>
<td>Council for the Australian Federation</td>
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<tr>
<td>CGC</td>
<td>Commonwealth Grants Commission</td>
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<tr>
<td>COAG</td>
<td>Council of Australian Governments</td>
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<tr>
<td>GST</td>
<td>Goods and Services Tax</td>
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<tr>
<td>OECD</td>
<td>Organisation for Economic Co-operation and Development</td>
</tr>
<tr>
<td>SPP</td>
<td>Specific Purpose Payments</td>
</tr>
<tr>
<td>VFI</td>
<td>Vertical Fiscal Imbalance</td>
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1.0 INTRODUCTION

Even before Federation in 1901, Australia’s federal politics has always been characterised by a debate between those who advocate for greater centralisation and control to be directed to the Federal Government, and those who argue for a balance to be maintained with the States. The Founders of the Australian Constitution settled on a system of coordinate federalism, with Commonwealth and State authorities individually responsible for their own functions without a great degree of overlap between the authorities.¹

The dynamics of the Australian federal system have changed considerably in the last 110 years, despite the fact the Constitution has not been altered significantly throughout this time.² Through a combination of State referrals of power to the Commonwealth, decision by the High Court as to the interpretation of heads of power, and the limited number of successful referenda, the balance of power has gradually shifted towards the Commonwealth.³ Today, the system is more aptly characterised as one of co-operative or collaborative federalism.⁴

Amongst politicians and ordinary Australians alike, there is a general dissatisfaction with the Australian federal system.⁵ While it has become quite common for Prime Ministers during election campaigns to promise to fix or re-invigorate Australia’s federal system, the States have often been willing to allow the Commonwealth to take the lead. While the dominant feature of many countries today tends to be towards decentralisation, Australia is notable for suggestions proposing the exact opposite.⁶ The dissatisfaction with Australia’s federal system of government has at times been such that there have been calls to abolish the States, so as to bestow greater power on the central government.⁷

Problems of accountability, the vertical fiscal imbalance and executive-dominance of intergovernmental relations have all characterised the Australian federal system. In order to improve the federal relationship for the next 100 years, lessons can be drawn from Australia’s past experiences and comparative experiences with federalism in Canada and devolution in the United Kingdom.

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¹ C.P. Harris, ‘Relationship Between Federal and State Governments in Australia,’ (Canberra: AGPS, 1979), 27.
³ Ibid 300.
2.0 FEDERALISM AND THE AUSTRALIAN STATES

2.1 What is Federalism?

A federation is a system of government where there are at least two entrenched levels of government. In this way they differ from the single central authority in unitary systems of government which delegate to multiple regional authorities. Federations are generally formed from the union of existing states, or in the case of Australia, colonies, which transfer a number of their existing powers to the federal government. Powers transferred to the federal government typically constitute those best dealt with on a national level, such as defence, currency and foreign relations. The federal government is also responsible for creating and maintaining a single economic market characterised by the absence of taxes or custom duties on trade within the nation. As a result, federal systems provide citizens with multiple levels of services and recourse to government.

2.2 What are the advantages of Federalism?

While federalism is one of the rarer forms of government found worldwide, federal systems are said to benefit from a number of features not found in unitary systems. A federal system of government is well suited to geographically large countries, allowing the diverse and unique requirements of regions to be accommodated under a system of regional representation. Unlike a unitary system, a federation provides greater regional autonomy to citizens. A federal system of government provides people with the ability to choose their governments at both the State and national level, and ensures power is not concentrated in one central authority far removed from the majority of the population. This guarantee of regional representation was a significant factor influencing the decision of Western Australia to become part of the Commonwealth. Additionally, multiple levels of government allow decisions to be made by the principle of subsidiarity, which provides decisions should be undertaken by the least centralised authority. Federal systems of government are better placed than unitary systems to take into account regional community preferences. Federal systems also allow for the possibility of horizontal competition between States. Comparisons between States as to the effectiveness of policy encourage reform, as States

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8 C.P. Harris, 'Relationship Between Federal and State Governments in Australia', 3.
10 C.P. Harris, 'Relationship Between Federal and State Governments in Australia', 3.
11 Rolf Gerritsen, 'A Comment on the Appropriate Assignment of Powers in the Australian Federation,' (Graduate Program in Public Policy: Australian National University), 3.
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are in competition with each other to sustain their population and investment. The multiple jurisdictions within federations allow for a useful reference to compare results of reforms in each State. Such competition has fostered the creation of a number of successful policies that have subsequently been adopted by other States and Territories. For example, anti-discrimination laws, road safety campaigns and the development of regional migration schemes are all reforms led by sub-national governments. This incentive would be unavailable in a unitary system, as the central government is not subjected to the same kind of competitive pressures that States in a federation experience. Where competition in fields is not beneficial to the federation, these competencies are generally allocated to one level of government. Recent research by Twomey and Withers suggests, contrary to popularly espoused opinion, "in the last 50 years, federations have consistently outperformed unitary states in economic terms." Federalism thus increases efficiency and removes the incentive for complacency on the part of governmental authorities, promoting overall economic wellbeing.

2.3 Federalism and the Australian Constitution

The Australian Constitution embodies a mix of the Westminster system of parliamentary responsible government, and the American and Swiss federal systems of government. When drafting the Constitution, the Founders intended to create a system of co-ordinate federalism, with the States and Commonwealth each responsible for their own competencies. The Commonwealth was only granted specific and limited exclusive powers, with the States retaining plenary powers over traditional colonial areas of responsibility. However, over time a combination of decisions of the High Court, referrals of power to the Commonwealth by the States and limited successful referenda have combined to alter the initial balance in favour of the States.

2.3.1 Constitutional Provisions

Following the design of the American Constitution, the Australian Constitution grants the Commonwealth Parliament a number of enumerated powers in section 51 to make laws for the peace, order and good government of the Commonwealth. The residual powers not

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22 Ibid.
23 Ibid 4.
27 C.P. Harris, 'Relationship Between Federal and State Governments In Australia', 27.
29 Constitution of the Commonwealth of Australia Act, s 51.
explicitly specified in the Constitution were intentionally left with the States. A number of
powers were granted exclusively to the Commonwealth such as defence, \(^{31}\) quarantine, \(^{32}\) and
weights and measures, \(^{33}\) while others were to be shared concurrently with the States, such
as the taxation power. \(^{34}\) The Constitution explicitly provides for powers originally vested in
Colonial Parliaments before Federation to, unless granted to the Commonwealth Parliament,
to continue as powers of the States. \(^{35}\)

In the event of an inconsistency between Commonwealth and State legislation, section 109
of the Constitution operates to render the State law invalid to the extent of the
inconsistency. \(^{36}\) Thus, whilst acknowledging the existence and continuance of State laws, as
in most federal constitutions, supremacy is granted to Commonwealth legislation.

The Constitution also grants the Commonwealth the power to provide Specific Purpose
Payments (SPPs), or tied grants, under section 96. \(^{37}\) SPPs have played a significant role in
the development of Australia’s intergovernmental financial relations.

2.3.2 Decisions of the High Court of Australia

The High Court of Australia has played an integral role in defining Australia’s federal balance
through its role as the safeguard of the Constitution. \(^{38}\) Immediately after Federation, the High
Court’s "immunity of instrumentalities" doctrine upheld the conception of a co-ordinate
federal system. \(^{39}\) Powers not expressly granted to the Commonwealth were interpreted as
being reserved to the States, and as the name of the doctrine implies, were immune from
legislative interference or incursion by the Commonwealth. \(^{40}\)

A number of High Court decisions have significantly altered this balance. The Engineers
case \(^{41}\) in 1920 overthrew the immunity of instrumentalities doctrine and ushered in a new
interpretative doctrine. Commonwealth legislative powers were to be interpreted in light of
their ordinary and natural meaning, without limitations other than those expressed in the text
of the Constitution. \(^{42}\) This prevented the Constitution from being interpreted in such a way
that powers could be reserved to the States. \(^{43}\) As a result the Constitution is now interpreted
as a British statute, that is, the normal rules of statutory interpretation apply, and implications
which are not present in the text cannot be relied upon in interpretation.

\(^{31}\) Constitution of the Commonwealth of Australia Act, s 51(vi).
\(^{32}\) Ibid s 51(ix).
\(^{33}\) Ibid s 51(xv).
\(^{34}\) Ibid s 51(i).
\(^{35}\) Ibid s 107.
\(^{36}\) Ibid s 109.
\(^{37}\) Ibid s 96.
\(^{38}\) Alan Podger, ‘Federalism Reform (Speech)’, 2008,
\(^{39}\) Federal-State Relations Committee, ‘Report on Australian Federalism: The Role of the States’, 28. See also
\(^{40}\) Ibid.
\(^{41}\) Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129.
The ultimate effect of the *Engineers* doctrine has been to greatly expand the scope of Commonwealth powers at the expense of the powers of the States.\(^{44}\) This is the inevitable result of only the Commonwealth's powers being enumerated in the Constitution.\(^{45}\) A Commonwealth law now need only fall under one of the legislative powers for it to be characterised as constitutional.\(^{46}\) As a result, the Commonwealth has greater legislative ability to encroach upon areas which were traditionally conceived as falling within the purview of the States.\(^{47}\)

The High Court has also been willing to apply a broad interpretation to the tied grants power in section 96.\(^{48}\) This has further diminished the power of the States by removing the independence and authority States would otherwise have in deciding how grants are best spent.

Having greatly altered the balance of power between the Commonwealth and States through the method employed to interpret the Constitution, the forum for delineating and confirming State and Commonwealth competencies has shifted to the political process.\(^{49}\) There have been a number of critical High Court decisions since *Engineers* which have served to greater skew the federal balance against the States. The outcome of three key cases will be discussed below.

### 2.3.2.1 The Uniform Tax Cases

The *Uniform Tax Cases* were significant in altering the financial balance between the States and the Commonwealth. During the Second World War, the Commonwealth took control of income tax by passing four through the Commonwealth Parliament.\(^{50}\) These Acts were to continue until one year following the end of the War.\(^{51}\) In the interim, the States were to be given grants to replace their loss of income tax revenue, and were subject to penalties if they continued to impose their own income tax.\(^{52}\) The High Court upheld the Acts as a valid exercise of Commonwealth legislative power. Following the War, the Commonwealth never fully vacated the income tax field, leaving the States politically unable to raise their own income taxes.

In the Second Uniform Tax Case,\(^{53}\) the High Court held that the Commonwealth may rely on section 96 of the Constitution to impose conditions which enabled the Commonwealth to force the States out of the field of income tax. While Justice Dixon believed that section 96 should have a limited interpretation, so as to not allow the Commonwealth to legislate

\(^{44}\) Ibid 13.
\(^{47}\) Ibid 18.
\(^{48}\) Ann Twomey and Glenn Withers, 'Federalist Paper I: Australia's Federal Future', 34.
\(^{49}\) Brian Galligan, 'Processes for Reforming Australian Federalism', 634.
\(^{51}\) Ibid.
\(^{52}\) Brian Galligan, 'Processes for Reforming Australian Federalism', 638.
\(^{53}\) *Victoria v Commonwealth* (1957) 99 CLR 575.
generally, His Honour felt bound to follow earlier precedent. Thus, financial assistance granted as a result of the States' forced removal from the income tax field was held to be a valid exercise of Commonwealth power, despite the fact it restricted State legislative authority.

2.3.2.2 Tasmanian Dams

In *Commonwealth v Tasmania*, the main question involved whether the building of a dam in an area excised from a national park listed on the World Heritage List under the Convention for the Protection of the World Cultural and Natural Heritage. The Commonwealth passed legislation to give effect to treaty obligations arising under the Convention, and listed the dam site as an area where construction of a dam was only permitted with the consent of the federal Minister. The High Court held the Act was a valid exercise of Commonwealth legislative power under the external affairs power section 51(xxix) to give effect to Australia's obligations under the Convention. Moreover, the Commonwealth was entitled to rely on the corporations power section 51(xx) to regulate the activities of the Hydro-Electric Commission of Tasmania (the company building the dam) as a trading corporation.

2.3.2.3 Workchoices

The decision in *NSW v Commonwealth*, involved a challenge to the *Workplace Relations Act* 1996 (Cth) which effectively precluded the operation of State and Territory industrial relations legislation. In enacting the legislation, the Commonwealth relied upon the corporations power s 51(xx) to provide for an industrial relations scheme broader than the Commonwealth's grant of power in s 51(3xxv). Under s 51(3xxv), the Commonwealth is granted power with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State". The High Court held that the legislation was valid under the corporations power, and that the corporations power was not limited by the inter-State requirement of the industrial arbitration power. Thus, the industrial arbitration power could not be used to read down the corporations power. This decision has attracted significant criticism in relation to current method of constitutional interpretation.

2.3.3 Referrals of Power to the Commonwealth

The Constitution, under section 51(3xxvii), provides for the States to refer certain of their powers to the Commonwealth. The referral power provides the States with the option to refer
to the Commonwealth power over a specific issue. Traditionally, powers referred by the States have reflected areas of national importance such as corporations law or competition law. The Corporations Act 2001 (Cth) and the Competition and Consumer Law Act 2011 (Cth) are both examples of Commonwealth legislation establishing national schemes which rely upon referrals of power. Referrals are formalised through an Act of Parliament of the respective State Legislative Assembly, and typically specify the purpose for which the power is to be referred. In certain instances, power may be referred for a specified period of time, or referrals may be permanent.

2.3.4 Commonwealth Referenda

Section 128 of the Commonwealth Constitution provides the only means by which the Constitution can be amended. Amendments can only be proposed in the Commonwealth Parliament, and must pass both houses before being put to a popular vote. In order for a proposed amendment to succeed at referendum, it must be approved by a majority of the voting population, as well as majorities in four out of the six States. Although there have been forty-four amendments proposed since Federation in 1901, only eight have successful, the last of which occurred in 1977. A list of referendum topics and outcomes has been reproduced from the Australian Electoral Commission in Appendix A.

2.4 Federal Financial Relations

Australia's federal financial relationship is characterised by an extensive vertical fiscal imbalance (VFI) when compared to other federations. The gradual loss of financial autonomy and independence of the States is evident through the limited taxation powers of the States vis-à-vis the Commonwealth, and the increasing dependence of States on Commonwealth funding and grants.

2.4.1 Vertical Fiscal Imbalance

A VFI describes the situation where the revenue received by both the federal and state levels of government does not align with each government's expenditure responsibilities. As a result, the level of government receiving surplus revenue (the federal government) must transfer their excess revenue to the state governments. The methods employed in transferring surplus revenue may impact upon transparency and accountability, severing the connection between revenue raising and the funding of programmes. All federations

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62 ibid s 128 paragraph 1.
63 ibid s 128 paragraph 4.
67 Ibid.
68 Ibid.
experience a form of VFI. Although the extent of the VFI varies across federal systems, the VFI is more severe in Australia than in any other federation.

Within Australia, the Commonwealth collects approximately 80 per cent of all tax revenue, however it is only responsible for approximately 60 per cent of public expenditure. As a result, the States have been unable to fund many of the policy programmes which fall under State responsibility, such as health care, education and housing. The subordinate financial power of the States has limited the States' ability to "resist Commonwealth encroachment".

Queensland Budget Estimates for the 2011 – 2012, reproduced in Figure 1, financial year predict that approximately 47.2 per cent of State government revenue will be sourced from the Commonwealth. In Queensland, the total revenue sourced from the Commonwealth is estimated at 43.2 per cent for the 2011 – 2012 financial year.

Revenue sources, all states, 1999-2000 and 2011-12

<table>
<thead>
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<th>Year</th>
<th>Australian Government funding</th>
<th>State tax revenue</th>
<th>Other state revenue</th>
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<tr>
<td>1999-2000</td>
<td>35.0%</td>
<td>39.8%</td>
<td>25.2%</td>
</tr>
<tr>
<td>2011-12</td>
<td>29.4%</td>
<td>47.2%</td>
<td>23.4%</td>
</tr>
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Notes:
1. 2011-12 data are estimates.
2. Includes user charges, Interest earnings, contributions from trading enterprises and mining revenue.

Sources: ABS Government Finance Statistics Cat No. 5512.0 and state and Australian Government Budget papers.

Figure 1: Revenue Sources, all states, 1999 – 2000 and 2011 – 2012

2.4.2 Taxation and the States

Before Federation, the Colonies received the majority of their revenue from customs and excise duties. Upon uniting to form the Commonwealth of Australia, the Colonies agreed to transfer the power to levy customs and excise duties to the Commonwealth with all other

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70 Kenneth Willshire, 'Reforming Australian Governance: Old States, No States or New States?', 190.
72 Ariadne Vroman, Katharine Gelber and Anika Guaja, Contemporary Australian Politics, 304.
75 Ibid 136.
forms of taxation available to both levels of government. Thus, the imbalance against the States was apparent from 1901 and has only been exacerbated in the years that have followed.

The States’ taxation powers have been limited in a number of areas since Federation. While the States initially held a monopoly over income tax, the Commonwealth’s increasing expenditure pressures during in particular, World War II resulted, through the decision in *First Uniform Tax Case*, in the Commonwealth’s exclusion of the States from this revenue stream. The High Court permitted the Commonwealth to levy income taxes at a rate which essentially excluded the States from the field.

Figure 2, from the 2011 – 2012 Queensland State Budget Papers illustrate the decreasing taxation powers of the States. During the 1999 – 2000 fiscal year, Queensland’s State tax revenue amounted to 29 per cent of State revenue sources. However, 2011 – 2012 figures from the Australian Bureau of Statistics estimate that 24.5 per cent of Queensland’s revenue will be collected from State taxes. This decline has been mirrored across the remainder of the States.

Under section 90 of the Constitution, the States are prohibited from levying bounties, customs and excise duties. As the Constitution does not define the term ‘excise duty’, this task has been left to the High Court. The general definition of excise duty espoused by economists covers taxes on the production of goods. However, the High Court’s interpretation on the section 90 prohibition on customs and excise duties has been extended

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77 Commonwealth of Australia Constitution Act, s 90. See also Ariadne Vromen, Katharine Geiber and Anika Gusia, Contemporary Australian Politics 304.
78 South Australia v Commonwealth (1942) 65 CLR 373.
82 Ibid.
84 Ibid.
to prevent States from levying a sales tax, such as the Goods and Services Tax (GST). Business franchise fees on tobacco, alcohol and petroleum were also held by the High Court to be unconstitutional State-imposed excise taxes under section 90.

The main own-source revenue sources for States are:

- Employers' payroll taxes;
- Land or property taxes;
- Gambling taxes; and
- Taxes on the use of goods or performance of activities, including motor vehicle registration and fines.

These taxes are often criticised as being inefficient and overly regulatory or bureaucratic. Moreover, they are also more likely to be "inflationary and regressive", increasing living costs and disproportionately affecting those with lower incomes. Consequently, it is unlikely that the States will be able to rectify their subordinate financial positions through reforms to their own taxes. With regard to at least the High Court's interpretation of the Constitution's taxation powers, it does not seem that this has been done with much reference to the effect on States.

2.4.2.1 Goods and Services Tax

The most significant reform from the perspective of States to taxation has been the introduction of the GST in 2000. GST payments are distributed to the States in the form of untied grants. With the introduction of the GST, the States were finally granted access to a growth tax, albeit one collected and distributed by the Commonwealth. GST payments are made to the States by the Commonwealth Grants Commission (CGC) which operates on the principal of Horizontal Fiscal Equalisation (HFE).

As part of the agreement, the Commonwealth and the States agreed to the abolishment of nine indirect State taxes, "mainly financial institutions taxes and stamp duties on the financial and capital transactions of businesses", relinquished the right to Financial Assistance grants and "accepted responsibility for funding local government".

The GST has arguably been responsible for exacerbating the VFI in Australia. This is so because the GST is a tax collected centrally and introduced on the proviso of the elimination
of a number of State taxes, while not respectively decreasing the spending responsibilities of States.\footnote{Ibid.}

Dissatisfaction with the amount of GST distribution is likely to continue in the future. The resource States of Queensland and Western Australia, whilst contributing a significant portion of national GST revenue, receive less than non-resource States after distribution because of the assessment of royalties.\footnote{Andrew Fraser, ‘Queensland Fights for Fairer Share of GST Pie,’ Queensland Government, http://statements.cabinet.qld.gov.au/MMS/StatementDisplaySingle.aspx?id=77080.} In Queensland’s submission to the Federal Review into GST Distribution, Treasurer Andrew Fraser, has called for a fairer balance to ensure that royalty income does not adversely affect the level of GST funding a State receives.\footnote{Andrew Fraser, ‘Queensland Fights for Fairer Share of GST Pie,’ Queensland Government, http://statements.cabinet.qld.gov.au/MMS/StatementDisplaySingle.aspx?id=77080.}

2.4.3 Commonwealth Grants

The Commonwealth has the power to make financial grants to the States on a tied (SPPs) or untied basis. Under section 96 of the Constitution, the Commonwealth Parliament has the authority to make payments to States “on such terms and conditions as the Parliament thinks fit”.\footnote{Commonwealth of Australia Constitution Act, s 96.} Section 96 is unique amongst the world’s federations, and has been instrumental in the gradual decline of State financial and political power.\footnote{Alan Fenna, ‘Commonwealth Fiscal Power and Australian Federalism’, 511.}

The original intent of this section was to allow the federal government to make one-off payments to States in unforeseen financial difficulties, however this use has since been expanded.\footnote{Ariadne Vromen, Katharine Gelber and Anika Gmeja, Contemporary Australian Politics 306. See also 28c, 187.} The High Court has interpreted this provision liberally, holding that the Commonwealth can make tied grants in areas in which it does not have authority.\footnote{Alan Fenna, ‘Commonwealth Fiscal Power and Australian Federalism, 509.} This further limits the autonomy States would have had to determine policy outcomes in what would otherwise be a sub-national area of responsibility.

2.4.4 Commonwealth Grants Commission

The Commonwealth Grants Commission (CGC) is an independent authority established in 1933 in order to assess and manage financial distributions to the States. The CGC only has the authority to make recommendations as to the best distribution of grants to the Treasurer; as such it is merely an advisory body. The methodology under which the CGC decides the level of funds to be distributed to each State and Territory is reviewed every five years, with the latest review completed in 2010.

Since 1974, the CGC operates on the principle of horizontal fiscal equalisation (HFE) with respect to the distribution of GST funds. Horizontal fiscal equalisation refers to the process of distributing grants to States in a manner which seeks to equalise the capacity by which States can deliver services of the same standard. Queensland receives the third largest share of GST revenue, following New South Wales and Victoria. However, these figures are calculated after the process of equalisation, meaning they do not necessarily reflect the level of GST revenue raised by each State. For instance, the Budget Forecast indicates Queensland will receive $692 million less than its population share of GST revenue. While all federations attempt some form of horizontal equalisation, Australia's is by far the most extensive, likely due to greater VFI and unique nature of the CGC.

2.4.5 Accountability, Transparency, and the Vertical Fiscal Imbalance

Both accountability and transparency are hindered by the VFI. The ability of States to rely on competition with respect to their taxes is also limited by the VFI. Further the significant level of Commonwealth grants to the States acts to dislodge the responsibility for raising revenue, and the responsibility for the expenditure of that revenue. This dislodgement then plays out through blame-shifting and ultimately undermines accountability. Expenditure through Commonwealth grants additionally circumvent the "ordinary processes of parliamentary appropriation", and are not subject to the same scrutiny as other State appropriations which pass through a State's Consolidated Revenue Fund.

As is evident through the Commonwealth's increasing use of SPPs to achieve its policy agenda, the possession of greater financial resources has inevitably led to a corresponding

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105 John Madden, 'Australia: Central Fiscal Dominance, Collaborative Federalism, and Economic Reform', 105.
107 Commonwealth Grants Commission, 'About CGC'. See also Ariadne Vromen, Katharine Gelber and Anika Guaja, Contemporary Australian Politics, 306.
109 Queensland Treasury, 'Queensland State Budget: Budget Strategy and Outlook (Budget Paper No 2), 139.
111 John Madden, Australia: Central Fiscal Dominance, Collaborative Federalism, and Economic Reform', 119.
113 John Madden, 'Australia: Central Fiscal Dominance, Collaborative Federalism, and Economic Reform', 119.
loss of independence and autonomy on the part of the States. As a result, the preferences of State citizens become subservient to the national goals of the Commonwealth.

Moreover, as nearly half of all State funds are not collected by the States themselves, the responsibility for scrutiny is split between the national and sub-national levels of government. The current federal financial relationship in Australia is not supportive of accountability, as State government are unable their expenditure through taxes without financial assistance from the Commonwealth.

2.5 Intergovernmental Relations

Intergovernmental relations are important in all federations. Within Australia, intergovernmental relations have arguably played a vital role in determining the division of responsibilities and national policy initiatives.

2.5.1 Division of Responsibilities between the States and the Commonwealth

The concurrent nature of the enumerated powers in the Constitution means there is no clear delineation between Commonwealth and State responsibilities. Thus, in areas such as taxation, health, and education, the States have been subject to increasing Commonwealth involvement commensurate to the financial power accumulated by the Commonwealth. Neither the States nor the Commonwealth are able to truly act autonomously; Duplication of responsibilities in itself is not necessarily a negative; it can encourage competition and facilitate reform of inefficient programmes. However, in Australia, duplication arises as a result of the VFI, and rather than untied funds being transferred to the States to pursue their own policy objectives, the Commonwealth has instead used SPPs to influence policy outcomes.

In stark contrast to the ideas espoused by the subsidiarity principle, the concurrent nature of Australia's federation has been altered, with States now acting as "agents" to implement policy determined by the Commonwealth. As explained in the previous section, the principal means by which the Commonwealth has been able to extend its power has been

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118 Federal-State Relations Committee, 'Report on Australian Federalism: The Role of the States', 111.
120 Ben Davies, 'The Politics of Federalism', 57.
124 Roger Wilkins, 'Federalism: Distance and Devolution', 99.
through the use of SPPs, and these have been prevalent in the areas of health care and education.125

2.5.2 Council of Australian Governments

The Council of Australian Governments (COAG) is an intergovernmental forum which provides for the representation of State Premiers, Territory Chief Ministers, the Prime Minister and local governments (through the Australian Local Government Association). Established in 1992 by an intergovernmental agreement, COAG does not hold separate legal status.126 COAG’s role is to “initiate, develop and monitor the implementation of policy reforms that are of national significance and which require cooperative action by Australian governments”.127

COAG depends extensively on the commitment of the Commonwealth in order to provide a beneficial collaborative forum. The Prime Minister controls the frequency of meetings, and its agenda, granting the Commonwealth the advantage of determining when and what issues will be discussed without regard to the States.128 This largely means that policy discussions relate to further centralisation, through achieving uniformity, at the expense of the diversity of the States.129 Areas in which agreements have been reached include competition and environmental policy, road transport and non-bank financial institutions.130

2.5.3 Council for the Australian Federation

Founded in 2006, the Council for the Australian Federation is a co-operative forum composed of the State Premiers and Territory Chief Ministers designed to provide the State and Territories.131 CAF allows the States and Territories to discuss initiatives without the presence of the Commonwealth, and to develop a common position prior to COAG meetings.132 Unlike COAG, where the Prime Minister is the permanent Chair, CAF meetings are chaired on a rotational basis.133 As a relatively new body, CAF is still determining its place in Australia’s intergovernmental framework.134 However, it has so far proven useful in improving inter-State and Territory co-operation on a number of issues.135

129 Ibid 12.
130 Ibid 29.
134 Ibid 133.
135 Ibid 127.
2.5.4 Accountability and Australia’s Intergovernmental Framework

The proliferation of COAG and CAF in intergovernmental relations have expanded the role of the executive managing and concluding agreements.136 This “executive federalism” has marginalised parliaments, undermining a key tenet of the Westminster system of government – parliamentary sovereignty.137 As a result, agreements can be reached without any scrutiny outside of the executive branch, and by the time they reach a State parliament, it is often politically impossible for an Opposition to overturn a proposal.138 As the only State without a bicameral parliament, the phenomenon of executive federalism arguably has a greater impact on Queensland, without the benefit of a Legislative Council to scrutinise proposals.139

The lack of a clear division between Commonwealth and State powers has also made it difficult to apportion blame in the event of policy failures. Without the ability to hold one level of government ultimately responsible for policy failures, it has also become less likely that responsibility will be properly distributed. This is evident in the Commonwealth’s treatment of the States as “agents” or “service providers” of the Commonwealth’s agenda.

3.0 DEVOLUTION IN THE UNITED KINGDOM

Although the United Kingdom (UK) is a unitary state, a comparison to the Australian federal system is beneficial because of the UK’s movement towards decentralisation. The UK’s devolution reflects an international shift against the centralisation of power in one authority. Devolution in the UK has occurred through a combination of Acts of Parliament, intergovernmental agreements, and funding proposals from HM Treasury.140 Today, Scotland, Wales and Northern Ireland all have a regional Parliament or Assembly and Executive.141

3.1 Division of Powers and Intergovernmental Relations

The Westminster Parliament has transferred a varying range of power to the Scottish, Welsh and Northern Irish assemblies in referendums in 1997 – 1998. There are varying arrangements for devolution in Scotland, Northern Ireland and Wales.142 In contrast, the Australian States are all equally treated under the Constitution. Devolution differs from federalism in that while power is being devolved from the central government to sub-national authorities, it is not entrenched and thus subject to reversal by the Westminster Parliament.143 However, Westminster is only able to legislate in devolved areas with the

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137 ibid.
138 ibid 16.
139 ibid 16.
141 http://www.clrcp.ed.ac.uk/publications/briefings/briefing01.pdf
consent of the devolved governments. This provides a degree of protection from central government intervention, and is, in a sense, similar to the current concurrent division of powers between the Australian States and the Commonwealth.

The devolutionary process in the UK is reflective of what is known of as administrative devolution. That is, the authorities created by devolution are directly accountable to local legislatures rather than the Westminster Parliament.

Similar to Australia, devolution in the UK has led to the establishment of concurrent intergovernmental relationship. Moreover, the areas devolved are similar to those which are the responsibility of the Australian States. Powers devolved to Scotland, Wales and Northern Ireland include education, health, local government, public transport, and notably criminal law in the case of Scotland. Significantly, devolution has created the impetus for policy innovation amongst the devolved authorities.

Devolution has invariably raised issues of ultra vires decisions or enactments of devolved authorities. That is, as powers are expressly delegated by the Westminster Parliament, an Assembly is unable to act outside those powers which have been delegated to it.

3.2 Financial Relations

More than half of the finances of the devolved authorities are determined by the application of the Barnett Formula. This formula essentially provides that "changes to programmes in England...result in equivalent changes in the budgets of the territorial department calculated on the basis of population shares." The Formula is not linked to level of expenditure "needed" by a devolved authority, but decides the increase in the expenditure assigned to a devolved authority. A recent inquiry by the Select Committee on the Barnett Formula in the House of Lords has recommended a transition to an independent body such as the CGC to make recommendations on the distribution of expenditure. Unlike in Australia, HM Treasury presently holds the responsibility for determining the distribution of funds, and is not subject to independent external advice. The financial relationship between Westminster and the devolved authorities in the United Kingdom are likely to continue to evolve as devolution progresses.

145 Ibid.
147 Ibid 47.
153 Ibid. See also House of Lords, 'The Barnett Formula: Report With Evidence', 1.
155 Ibid 33.
4.0 FEDERALISM IN CANADA

4.1 Division of Powers between the Federal and Provincial Governments

The Canadian Constitution grants the Federal government the general authority to make laws for "the peace, order and good government of Canada", in addition to a number of enumerated powers.\(^{156}\) The Constitution also specifically lists the powers which are granted to the Provincial legislatures.\(^{157}\) Finally, residual powers are bestowed upon the federal legislature, whereas in Australia they are left to the States.\(^{158}\) On a cursory examination, it would appear that the federal design of the Canadian system favours the federal government at the expense of the Provinces.\(^{159}\) However, the practical effect of specifically enumerating powers of the Provinces has been to prevent incursion from the federal government in Provincial affairs.\(^{160}\) This differs from the Australian Constitution where only the Commonwealth Parliament's powers are specifically enumerated. The Canadian Supreme Court has also been more willing than its Australian counterpart to interpret the Constitution in light of the federal system of government.\(^{161}\) This is a result of numerous factors, including the difference in structure of the Constitution, an interpretative doctrine that takes account the effect of a law in addition to its purpose, and the greater emphasis the Supreme Court of Canada places on maintaining a federal balance.\(^{162}\)

4.2 Intergovernmental Relations

Similar to Australia, there are a number of intergovernmental forums in Canada. The Council of the Australian Federation was modelled from The Council of the Federation, which was also formed in order to provide a more co-operative federal system.\(^{163}\) The central government and provinces are able to collaborate during First Ministers Conferences, however, like COAG these occur at the convenience of the federal government.\(^{164}\) Unlike COAG, First Ministers' Conferences provide an opportunity for provincial and national collaboration with transparent and accountable agreements.\(^{165}\)

4.3 Financial Relations

The Canadian Provinces are not subject to restrictive interpretations of Constitutional provisions which have impacted their ability to raise revenue. While there is still a VFI, the

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\(^{159}\) Ibid 3.
\(^{160}\) Ibid 3.
\(^{161}\) Ibid 6. See also Greg Taylor, *Characterisation in Federation: Six Countries Compared*, 7.
\(^{162}\) Greg Taylor, *Characterisation in Federation: Six Countries Compared*, 27, 41.
Provinces are better equipped to address the imbalance than the Australian States, as they possess a greater taxation powers. For instance, the Provinces are able to levy income and sales taxes. This has been arguably aided by a cultural environment conducive to varying levels of taxation, which may not exist in Australia. While the dual tax system in Canada arguably requires greater co-operation, and ultimately enhances overall accountability. Tellingly, 2004 figures show that the Provinces were responsible for over 90 per cent of health and education funding. This not only accords with the principle of subsidiarity, but also avoids the Australian problem of disparity between the government responsible for raising the funds and that responsible for delivering and overseeing the services.

Source: IMF Government Finance Statistics Yearbook, 2004
Figure 3: Health Expenditure – Central Government v State Government

167 Ibid.
169 Ibid.
Australia's Federal System

Is there a need for reform?

Canada does not have an independent body comparable to the CGC. Instead equalisation grants are distributed through the Federal Provincial Relations Officer which is a subsidiary branch of the federal Department of Finance.

5.0 REFORM OF AUSTRALIAN FEDERALISM

5.1 Why is Reform Necessary?

A study by the Australian National University in 2008 indicated that since the 1970s, support for the Commonwealth has grown significantly, with 40 per cent of respondents agreeing the federal government should take more powers from the States, compared to 17 per cent in 1979. It is understandable that the needs of Australian society have evolved since Federation in 1901, and Australia's federal structure does need to match this evolution in order to take Australia into the 21st century. There is scope within the original text of the Constitution to allow for such a gradual evolution. Beginning with the High Court's unfavourable interpretation of the powers of the States, the Commonwealth has, over time

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Source: IMF Government Finance Statistics Yearbook, 2004

Figure 4: Education Expenditure – Central Government v State Government

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170 Ibid.
172 Ibid.
175 This has arisen from a number of High Court constitutional decisions, including, but not limited to Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 26 CLR 129; South Australia v Commonwealth (1942) 65 CLR 373; Commonwealth v Tasmania (1983) 151 CLR 1; New South Wales v Commonwealth (2008) 229 CLR 1.
Australia's Federal System
Is there a need for reform?

been able to amass greater financial power. This has come at the expense of the States, and has manifested itself in greater centralisation, or Commonwealth control over what was traditionally seen as State areas of policy.\textsuperscript{176}

The shift of the balance of power away from the States has meant that the benefits of federalism are no longer evident in Australia's federal system. Rather than continue with the current trend towards concurrent federalism, reforms must ensure that Australia benefits from a co-operative scheme of federal relations. Regional representation has been replaced by a greater centralised-agenda, and the shift towards national policies in all instances means the benefits of competitive federalism are neglected.\textsuperscript{177} As one of the most centralised federations, the continuance of this path will lead to the further "withering away" of the States,\textsuperscript{178} exacerbating the inefficiencies already present.

5.2 What are the Options for Reform?

5.2.1 Constitutional Reform

There are a number of constitutional changes that can be made to improve Australia's federal balance. A Canadian-style enumerated list of State powers would place a limit on the Commonwealth's powers, and prevent the High Court from interpreting federal powers so widely.\textsuperscript{179} However, this is a not a practical solution, and there are many others which could achieve similar results without such broad constitutional change.

An additional avenue of constitutional reform could amend section 90 to provide for the States to levy their own sales taxes.\textsuperscript{180} This would alleviate much of the VFI. As GST grants are distributed to the States and Territories, they would be responsible for both levying and appropriating the tax revenue. The current accountability split between the State and federal governments would consequently improve, and States could then pursue their own policy objectives in line with competitive federalism.

The referendum initiation process is also weighed against the States.\textsuperscript{181} As only the Commonwealth can propose referenda, those proposed generally favour an expansion of Commonwealth powers. Allowing the States to initiate the referendum process would shift this balance back towards the States. For example, if a majority of States were in favour of a proposal, this could then be put to the people at a referendum. Having a minimum number of States that need to support an initiative would also safeguard against proposals which do not benefit the majority of Australians.

\textsuperscript{176} Federal-State Relations Committee, 'Report on Australian Federalism: The Role of the States', 114.
\textsuperscript{177} ibid.
\textsuperscript{178} Ann Twomey and Glenn Withers, 'Federalist Paper I: Australia's Federal Future, 45.
\textsuperscript{179} Singleton et. al., \textit{Australian Political Institutions}, 131.
\textsuperscript{180} Chris Merritt, \textit{Fiscal Federalism Up for Judgment}, \textit{Australian Financial Review}, June 12th, 1997 as cited in Federal-State Relations Committee, 'Report on Australian Federalism: The Role of the States', 126. Presently, States are unable to raise their own sales taxes owing to the High Court's interpretation of the prohibition on excise and customs duties in s 90 of the Constitution.
\textsuperscript{181} As opposed to the majorities required to carry a referendum proposal, which requires a majority of States (in addition to a majority of total electors) in order to be carried.
5.2.2 New Interpretation of the Constitution

The High Court’s approach to constitutional interpretation has had a profound impact on the federal balance. While a return to the doctrine of reserved powers would inevitably conflict with the decision in the Engineers case, there is a greater scope to accommodate the federal nature of the Constitution in judicial practice. In *NSW v Commonwealth (Workchoices)*, Justice Kirby noted the importance of constitutional interpretation reflecting the federal Constitution. In dissent, His Honour noted that interpreting the Commonwealth’s enumerated powers individually without regard to constitutional limitations would limit the effectiveness of federal protections preventing power from accruing in one central government. In the future, the States should be less willing to accept the limitations on their power generated by previous High Court decisions. The Commonwealth’s powers should not be exercised without regard to the effect this would have on the States.

The Canadian Supreme Court has notably interpreted the Canadian Constitution with greater regard to federalism than its Australian counterpart. This has safeguarded the Provinces from a loss of power to the federal government, as has occurred in Australia. Similarly, the Supreme Court of the United Kingdom has the authority to determine cases relating to devolutionary issues. Having only been established in 2009, the number of cases which have come before the UK Supreme Court are limited. As the court continues to develop its jurisprudence, the approach it takes on devolutionary matters could prove to be central to the evolving relationships between the UK jurisdictions.

5.2.3 Financial Reforms

Many of the federal issues within Australia can be traced to the financial marginalisation of the States. Reform of Australia’s current federal financial relationship could not only reduce the VFI, but also improve accountability and transparency within the system.

5.2.3.1 Income Tax

While the establishment of the GST was intended to grant the States and Territories access to a growth tax, the 2011 – 2012 Queensland Budget Papers note that the predicted growth of GST is likely to wane over time. However, the responsibilities of the States are unlikely to follow a similar trajectory, instead continuing to grow. The States have, for many years, been supportive of a plan to be allocated a proportion of the income tax collected by the Commonwealth. Unsurprisingly, successive Commonwealth governments have been resistant to such plans. The progressive nature of income tax “results in revenue increasing

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183 *NSW v Commonwealth* [2006] 229 CLR 1 at 470, 612 per Kirby J.
184 *NSW v Commonwealth* [2006] 229 CLR 1 at 555 per Kirby J.
185 In his judgement in *Workchoices*, Justice Kirby noted that none of the States sought to rely on the doctrine of reserved powers or that a broad interpretation of section 51(xx) of the Constitution would infringe upon States’ powers at 462 – 465.
186 C.P. Harris, ‘Relationship Between Federal and State Governments in Australia,’ 155.
187 Queensland Treasury, ‘Queensland State Budget: Budget Strategy and Outlook (Budget Paper No 2).’
faster than the rate of increase in the base". In contrast, the base of GST has remained unchanged since its introduction in 2000. The recent review on Australia’s Future Tax System (the Henry Review) noted there were overall benefits in allowing the States to share a percentage of income tax from a financial and accountability perspective.

5.2.3.2 Goods and Services Tax

In comparable federations such as Canada, the Provinces exercise greater control over sales taxes, and additionally are permitted to levy their own at the provincial level. This is not the case in Australia, as the High Court has ruled State sales taxes to be unconstitutional. If a GST rate similar to other OECD countries were to be introduced, Warren argues this could replace up to 65 per cent of State taxes. The monopoly of Commonwealth control over the rate and base of GST within Australia arguably separates the discretion for raising a necessary amount of revenue from the knowledge of the funding necessary to cover a State’s policy objectives. As the GST is a tax intended for the States and Territories, if a constitutional amendment to permit the States to levy a sales tax is not adopted, then a greater degree of control should be granted to the States in determining the rate and use of the funding.

5.2.3.3 Commonwealth Grants

The increasing Commonwealth reliance on SPPs has limited the accountability, transparency and scrutiny of State government policy and functions. Reducing the use of SPPs in favour of general grants, especially for areas of policy that are entirely controlled by the States, will allow the States to maintain autonomy over the scope of policy and prevent Commonwealth encroachment into areas of State expertise. This would allow greater diversity in policy and usher in the benefits of competitive federalism. Moreover, there should be a greater emphasis on ensuring that Commonwealth grants are subject to the same degree of parliamentary scrutiny as State own-source revenue, which pass through a State’s Consolidated Revenue Fund. This would also serve to improve the tension between parliamentary responsibility and the executive federalism that has come to dominate the Australian political landscape, by placing greater responsibility in the hands of State Parliaments. Where SPPs are indispensable, they should be granted within a greater framework for accountability and allow the States more scope to design policy outcomes.

189 Ibid.
192 Alan Fenna, 'The Malaise of Federalism: Comparative Reflections on Commonwealth-State Relations', 299.
5.2.3.4 Responsibility for Raising Revenue

Finally, any financial reforms should have regard to the principle of subsidiarity, that is, ensuring the level of government responsible for policy is also responsible for raising revenue to fund policy initiatives.\(^\text{197}\) This would also serve to alter the relationship between the Commonwealth and States from one of principal and agent, to a greater partnership, and reduce the VFI that currently affects the federal balance. For example, in Canada, the Provinces retain primary control over health policy and are also responsible for raising approximately 95 per cent of expenditure.\(^\text{198}\) In contrast, while the Australian States retain responsibility for providing health services, the responsibility for funding is almost evenly split between the States and the Commonwealth.\(^\text{199}\) Moreover, the Commonwealth's use of SPPs has further split the responsibility for raising revenue against delivering services. As financial control is one of the key means through which the States gradually lost power to the Commonwealth, reforms made in this area could have a dramatic impact on the course of intergovernmental relations.

5.2.4 Reallocation of Responsibilities

Reallocation of policy responsibilities between the States and the Commonwealth would also improve the federal relationship. There needs to be a greater recognition that not every problem can be solved by greater centralisation, especially if this is not the underlying cause. Presently, there is a tendency to assume that centralisation will solve problems, or merely a cursory examination without necessarily examining the underlying causes, such as the VFI.

Where practicable, one level of government should be responsible for administering a particular area of policy to improve accountability and certainty and limit the amount of blame shifting between governments.\(^\text{200}\) Responsibilities should be allocated between the governments according to the principle of subsidiarity, so that State, Territory and local governments are primarily responsible.\(^\text{201}\) For example, in many federal countries, health care is generally within the ambit of one level of government.\(^\text{202}\) Rather than the Commonwealth continuing to gradually gain more control over health, as far as practicable this should be left to the realm of State responsibility.

Any change in roles and responsibilities should have regard to other factors, including whether there are benefits that can be gained through harmonisation or economies of scale.\(^\text{203}\) Further, altering the allocation of responsibilities between the States and the Commonwealth without increasing the VFI illustrates that reform in this area is inextricably linked with financial reform. A reallocation of responsibilities could be accomplished through constitutional amendments, a referral of power from the States to the Commonwealth or by the Commonwealth vacating a field of legislative power it currently occupies.\(^\text{204}\) However, as

\(^{197}\) Geoff Gallop, 'How Healthy is Australian Federalism?', 5.
\(^{199}\) Ibid.
\(^{201}\) Ibid.
\(^{202}\) Ibid.
\(^{203}\) Ibid.
\(^{204}\) Ibid. When the Commonwealth Parliament "covers a field" this would indirectly affect any State law on such a matter by rendering it inconsistent through section 109 of the Constitution.
most of Australia’s federal relationship today plays out in political processes, it is conceivable that a reallocation of responsibilities can also occur via this medium without the need for constitutional reform.\(^{205}\)

### 5.2.5 Reform of Intergovernmental Bodies

Intergovernmental bodies such as COAG and CAF have provided an important forum for the Commonwealth, States, Territories and Local Government representatives to develop and discuss policy initiatives. However, as executive-dominated bodies, they inevitably reduce the accountability of the agreements reached, as there is no opportunity for parliaments to scrutinise proposals until after they have been adopted by COAG.\(^{206}\) Reforms can be made to COAG to improve its functions and operations.

Constitutional recognition would entrench COAG as a fixture in intergovernmental relations, granting legal status and greater legitimacy than it enjoys presently.\(^{207}\) Moreover, recognition would prevent COAG from being sidelined by the Commonwealth in the political process, ensuring there remains a legitimate forum through which the Commonwealth, States, Territories and Local Government can meet. However, Kildea and Lynch warn that recognising an executive-dominated body would further erode the place of parliamentary responsible government within Australia’s political system.\(^{208}\) Alternatively, statutory recognition of COAG would provide the benefits of greater legal certainty while avoiding the rigidity of constitutional enactment.\(^{209}\) Either pathway to recognition would open the possibility of judicial review of either the statutory instruments or constitutional provisions.

The representation of the States, Territories and Local Government within COAG could be improved through greater control of the agenda and holding meetings at a time which better suits all parties.\(^{210}\) All members of COAG should be able to bring items on the agenda, rather than the Commonwealth dominating the process.\(^{211}\) COAG should not be utilised by the Commonwealth in a way which makes the States subordinate, and instead should favour a co-operative approach between all levels of government.\(^{212}\) Finally, an independent COAG Secretariat not within the Commonwealth Department of Prime Minister and Cabinet would secure COAG’s role as a co-operative federal forum.\(^{213}\)

### 5.2.6 Local Government

Improving Australia’s federal system of government cannot be achieved without ensuring all levels of government, including local government, are properly able to manage and

\(^{205}\) Brian Galligan, ‘Processes for Reforming Australian Federalism’, 634.

\(^{206}\) Paul Kildea and Andrew Lynch, ‘Entrenching ‘Co-operative Federalism’: Is it Time to Formalise COAG’s Place in the Australian Federation’, 16.

\(^{207}\) Ibid 19.


\(^{209}\) Ibid 16.

\(^{210}\) Peter Beattie, ‘The Immediate Challenge Regarding COAG Reform’, 59.

\(^{211}\) Ibid.

\(^{212}\) Ibid.

\(^{213}\) Ibid.
implement their respective responsibilities. However, the role of local government is often overlooked in discussions about federal reform. There are approximately 650 local government authorities in Australia, which exist as a result of State legislation. In recent times, local government has tended to assume responsibility for public transport town planning, local public works and waste disposal, and these have only increased over the past few decades. A number of local governments are now also taking on responsibilities in community safety issues, arts and culture, and environmental management.

As a creature of State governments, local governments do not have the same degree of independence and autonomy as other levels of government. This has left local governments vulnerable to cost-shifting, with ever-increasing responsibilities and limited sources of revenue. Only one-third of local government revenue is own-source revenue, with the remainder comprising grants from either the State or Commonwealth governments, many of which have conditions attached. An Intergovernmental Agreement Establishing Principles Guiding Intergovernmental Relations on Local Government Matters was signed in 2006 by the Australian, State and Territory and local governments to minimise the cost-shifting that occurs when responsibilities are transferred to local governments. Properly financed and resourced local governments will be better able to provide for their evolving responsibilities in the future.

Local government is represented by the Australian Local Government Association (ALGA) on COAG. This representation is important in allowing local governments the opportunity to partake in deliberations which affect Australia's federal structure. The place of local government in Australia's federation has also been mooted through a potential constitutional referendum proposed by the current Gillard government. Two proposals recognising local government have been put to referendum in 1974 and 1988, however neither were successfully adopted. The Gillard government has committed to holding a referendum on local government constitutional recognition at or before the next federal election. While the form of the proposal is still being determined by an independent government-appointed Panel, recognition could have the potential of improving accountability in local government and recognise the invaluable role they play in the Australian federal system. This would further impart the principle of subsidiarity into the Australian federal system.

216 John Madden, 'Australia: Central Fiscal Dominance, Collaborative Federalism, and Economic Reform', 89.
219 Singleton et. al., Australian Political Institutions, 109. See also Paul Bell, 'How Local Government Can Save Australia’s Federal System', 179.
220 Kenneth Willshire, 'Reforming Australian Governance: Old States, No States or New States?', 188.
223 Simon Crean, 'Panel Appointed on Constitutional Recognition of Local Government'.
6.0 CONCLUSION

2011 marks 110 years since Federation, and there is no more suitable a time to re-examine the dynamics and operation of Australia's federal system. While there have only been limited changes to the text of the Constitution, the federal relationship has changed considerably, with the States becoming increasingly marginalised by the authority which has amassed in the Commonwealth.

A culmination of High Court decision-making, an increasing VFI and Commonwealth intervention in traditional areas of State policy have all contributed to the States' loss of power since Federation. Moreover, policies are increasingly concluded in executive-dominated intergovernmental bodies, such as COAG and CAF. Accountability, scrutiny and transparency of government decisions and policies have been consequently been adversely affected by this trend. The current operation of Australia's federal system, with its emphasis on 'executive federalism' is inconsistent with the notion of parliamentary responsible government which is a central component of Australia's system of government.

Reforms are necessary in order to ensure that accountability and responsibility in government decision-making are better protected, and to guarantee that States can continue to fulfil their responsibilities. A number of reforms have been suggested, including constitutional amendments, financial arrangements and political responsibilities. Chief among these are reforms to minimise the VFI and improve the scrutiny of Commonwealth grants by limiting the use of SPPs.

The debate surrounding the future of Australia's federal relationship will undoubtedly continue into the future. This could manifest itself in yet another State constitutional challenge, this time to the Commonwealth's Mineral Resources Rent Tax (MRRT) led by the resource States of Western Australia and Queensland. The outcome will have a significant impact on the future direction of Australia's federal balance. A win for the Commonwealth will transfer an even greater amount of financial power from the States to the Commonwealth.

In Workchoices, Justice Kirby stressed the importance of federal systems in maintaining fundamental freedoms by preventing power from being concentrated in one central government. Rather than continuing down the path to further centralisation, greater emphasis should be placed on maintaining regional policy preferences and diversity. Research has shown that citizens living in federal systems are financially better off than those in other systems of government. However, this will not be the case in Australia unless the federal balance is restored. Co-operation from all levels of government is necessary to ensure that Australia's federal system is able to face the challenges of the 21st century.

224 Ainslie van Onselen, 'Mineral Resources Rent Tax Calls for Fresh Advice,' The Australian, 16 September, 2011, Business section.
225 NSW v Commonwealth (2006) 229 CLR 1 at 555 per Kirby J.
APPENDIX A: Referendum Dates and Results 1906 - Present\textsuperscript{227}

<table>
<thead>
<tr>
<th>Subject/Proposal</th>
<th>Issue of Writ</th>
<th>Polling Day</th>
<th>Result</th>
<th>States that Voted in Favour</th>
<th>% of Votes in Favour</th>
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</thead>
<tbody>
<tr>
<td>Senate Elections</td>
<td>8 November 1906</td>
<td>12 December 1906</td>
<td>Carried</td>
<td>All</td>
<td>82.65</td>
</tr>
<tr>
<td>To enable elections for both Houses to be held concurrently</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Finance</td>
<td>28 February 1910</td>
<td>13 April 1910</td>
<td>Not Carried</td>
<td>Qld, WA, Tas</td>
<td>49.04</td>
</tr>
<tr>
<td>To implement the agreement to allow the Commonwealth to make a fixed payment out of surplus revenue to the States according to population. This was to replace the arrangement where the Commonwealth returned three-quarters of net revenue to the States</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>State Debts</td>
<td>28 February 1910</td>
<td>13 April 1910</td>
<td>Carried</td>
<td>All except NSW</td>
<td>54.95</td>
</tr>
<tr>
<td>To give the Commonwealth unrestricted power to take over State debts</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>*Legislative Powers</td>
<td>15 March 1911</td>
<td>26 April 1911</td>
<td>Not Carried</td>
<td>WA</td>
<td>39.42</td>
</tr>
<tr>
<td>To extend the Commonwealth's powers over trade, commerce, the control of corporations, labour and employment, including wages and conditions; and the settling of disputes; and combinations and monopolies</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>*Monopolies</td>
<td>15 March 1911</td>
<td>26 April 1911</td>
<td>Not Carried</td>
<td>WA</td>
<td>39.89</td>
</tr>
<tr>
<td>To give power to the Commonwealth to</td>
<td></td>
<td></td>
<td></td>
<td></td>
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</table>

<table>
<thead>
<tr>
<th>Issue</th>
<th>Date Proposed</th>
<th>Date Carried</th>
<th>Result</th>
<th>States Affected</th>
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</thead>
<tbody>
<tr>
<td>Nationalise monopolies.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Trade and Commerce</td>
<td>24 April 1913</td>
<td>31 May 1913</td>
<td>Not Carried</td>
<td>Qld, WA, SA</td>
</tr>
<tr>
<td>Corporations</td>
<td>24 April 1913</td>
<td>31 May 1913</td>
<td>Not Carried</td>
<td>Qld, WA, SA</td>
</tr>
<tr>
<td>Industrial Matters</td>
<td>24 April 1913</td>
<td>31 May 1913</td>
<td>Not Carried</td>
<td>Qld, WA, SA</td>
</tr>
<tr>
<td>Railway Disputes</td>
<td>24 April 1913</td>
<td>31 May 1913</td>
<td>Not Carried</td>
<td>Qld, WA, SA</td>
</tr>
<tr>
<td>Trusts</td>
<td>24 April 1913</td>
<td>31 May 1913</td>
<td>Not Carried</td>
<td>Qld, WA, SA</td>
</tr>
<tr>
<td>Nationalisation of Monopolies</td>
<td>24 April 1913</td>
<td>31 May 1913</td>
<td>Not Carried</td>
<td>Qld, WA, SA</td>
</tr>
<tr>
<td>Legislative Powers</td>
<td>3 November 1919</td>
<td>13 December 1919</td>
<td>Not Carried</td>
<td>Vic, Qld, WA</td>
</tr>
<tr>
<td>Nationalisation of Monopolies</td>
<td>3 November 1919</td>
<td>13 December 1919</td>
<td>Not Carried</td>
<td>Vic, Qld, WA</td>
</tr>
<tr>
<td>*Industry and Commerce</td>
<td>26 July 1926</td>
<td>4 September 1926</td>
<td>Not Carried</td>
<td>NSW, Qld</td>
</tr>
<tr>
<td>*Essential Services</td>
<td>26 July 1926</td>
<td>4 September 1926</td>
<td>Carried</td>
<td>NSW, Qld</td>
</tr>
</tbody>
</table>
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<table>
<thead>
<tr>
<th>the public against interruption of essential services</th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>State Debts</strong></td>
<td>9 October 1928</td>
<td>17 November 1928</td>
<td>Carried</td>
<td>All</td>
</tr>
<tr>
<td>to end the system of per capita payments which have been made by the Commonwealth to the States since 1910, and to restrict the right of each State to borrow for its own development by subjecting that borrowing to control by a loan council</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Aviation</strong></td>
<td>4 February 1937</td>
<td>6 March 1937</td>
<td>Not Carried</td>
<td>Vic, Qld</td>
</tr>
<tr>
<td>to give the Commonwealth power to legislate on air navigation and aircraft</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Marketing</strong></td>
<td>4 February 1937</td>
<td>6 March 1937</td>
<td>Not Carried</td>
<td>None</td>
</tr>
<tr>
<td>to give the Commonwealth power to legislate on marketing</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Post-war Reconstruction and Democratic Rights</strong></td>
<td>4 July 1944</td>
<td>19 August 1944</td>
<td>Not Carried</td>
<td>WA, SA</td>
</tr>
<tr>
<td>to give the Commonwealth power, for a period of five years, to legislate on 14 specific matters, including the rehabilitation of ex-servicemen, national health, family allowances and 'the people of the Aboriginal race'</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Social Services</strong></td>
<td>21 August 1946</td>
<td>28 September 1946</td>
<td>Carried</td>
<td>All</td>
</tr>
<tr>
<td>to give the Commonwealth power to legislate on a wide range of social services</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Organised Marketing of Primary Products</strong></td>
<td>21 August 1946</td>
<td>28 September 1946</td>
<td>Not Carried</td>
<td>NSW, Vic, WA</td>
</tr>
<tr>
<td>to allow the Commonwealth to make laws for the organised marketing of</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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**Is there a need for reform?**

<table>
<thead>
<tr>
<th>Measure</th>
<th>Date</th>
<th>Date</th>
<th>Result</th>
<th>States</th>
<th>Index</th>
</tr>
</thead>
<tbody>
<tr>
<td>Industrial Employment to give the Commonwealth power to legislate on terms and conditions of industrial employment</td>
<td>21 August 1946</td>
<td>28 September 1946</td>
<td>Not Carried</td>
<td>NSW, Vic, WA</td>
<td>50.30</td>
</tr>
<tr>
<td><em>Rent and Prices</em> to give the Commonwealth permanent power to control rents and prices</td>
<td>12 April 1948</td>
<td>29 May 1948</td>
<td>Not Carried</td>
<td>None</td>
<td>40.66</td>
</tr>
<tr>
<td><em>Powers to Deal with Communists and Communism</em> to give the Commonwealth powers to make laws in respect of communists and communism</td>
<td>10 August 1951</td>
<td>22 September 1951</td>
<td>Not Carried</td>
<td>Qld, WA, Tas</td>
<td>49.44</td>
</tr>
<tr>
<td><em>Parliament</em> to increase the number of Members of the House of Representatives without necessarily increasing the number of Senators</td>
<td>28 April 1967</td>
<td>27 May 1967</td>
<td>Not Carried</td>
<td>NSW</td>
<td>40.25</td>
</tr>
<tr>
<td><em>Aboriginals</em> to enable the Commonwealth to enact laws for Aborigines. To remove the prohibition against counting aboriginal people in population counts in the Commonwealth or a State.</td>
<td>28 April 1967</td>
<td>27 May 1967</td>
<td>Carried</td>
<td>All</td>
<td>90.77</td>
</tr>
<tr>
<td><em>Prices</em> to give powers to the Commonwealth to control prices</td>
<td>12 November 1973</td>
<td>8 December 1973</td>
<td>Not Carried</td>
<td>None</td>
<td>43.81</td>
</tr>
<tr>
<td><em>Incomes</em> to give powers to the Commonwealth to legislate on incomes</td>
<td>12 November 1973</td>
<td>8 December 1973</td>
<td>Not Carried</td>
<td>None</td>
<td>34.42</td>
</tr>
<tr>
<td>Simultaneous Elections to hold elections for the</td>
<td>20 April 1974</td>
<td>18 May 1974</td>
<td>Not Carried</td>
<td>NSW</td>
<td>48.30</td>
</tr>
</tbody>
</table>
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<p>| Senate and the House of Representatives on the same day | 20 April 1974 | 18 May 1974 | Not Carried | NSW | 47.99 |
| Mode of Altering the Constitution to give a vote in referendums to electors in the ACT and the Northern Territory, and to enable amendments to be made to the Constitution if approved by a majority of voters and a majority of voters in half the States | 20 April 1974 | 18 May 1974 | Not Carried | NSW | 47.20 |
| Democratic Elections to make population instead of electors, as at present, the basis of determining the average size of electorates in each State | 20 April 1974 | 18 May 1974 | Not Carried | NSW | 46.85 |
| Local Government Bodies to give the Commonwealth powers to borrow money for, and to make financial assistance grants directly to, any local government body | 20 April 1974 | 18 May 1974 | Not Carried | NSW | 47.99 |
| *Simultaneous Elections to ensure that Senate elections are held at the same time as House of Representatives elections | 20 April 1974 | 18 May 1974 | Not Carried | NSW | 47.20 |
| *Senate Casual Vacancies to ensure, as far as practicable, that a casual vacancy in the Senate is filled by a person of the same political party as the Senator chosen by the people, and that the | 20 April 1974 | 18 May 1974 | Not Carried | NSW | 46.85 |</p>
<table>
<thead>
<tr>
<th>Proposal</th>
<th>Date</th>
<th>Date</th>
<th>Result</th>
<th>States</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Person shall hold the seat for the balance of the term</td>
<td></td>
<td></td>
<td></td>
<td>27 April 1977</td>
<td>21 May 1977</td>
</tr>
<tr>
<td>*Referendums - Territories</td>
<td></td>
<td></td>
<td></td>
<td>27 April 1977</td>
<td>21 May 1977</td>
</tr>
<tr>
<td>to allow electors in Territories, as well as in the States, to vote in constitutional <em>(sic)</em> referendums</td>
<td></td>
<td></td>
<td></td>
<td>27 April 1977</td>
<td>21 May 1977</td>
</tr>
<tr>
<td>*Retirement of Judges</td>
<td></td>
<td></td>
<td></td>
<td>26 October 1984</td>
<td>1 December 1984</td>
</tr>
<tr>
<td>to provide for retiring ages for judges of Federal courts</td>
<td></td>
<td></td>
<td></td>
<td>26 October 1984</td>
<td>1 December 1984</td>
</tr>
<tr>
<td>*Terms of Senators</td>
<td></td>
<td></td>
<td></td>
<td>26 October 1984</td>
<td>1 December 1984</td>
</tr>
<tr>
<td>to change the terms of Senators so that they are no longer fixed, and to provide that the election for both Houses are always on the same day</td>
<td></td>
<td></td>
<td></td>
<td>26 October 1984</td>
<td>1 December 1984</td>
</tr>
<tr>
<td>*Interchange of Powers</td>
<td></td>
<td></td>
<td></td>
<td>26 October 1984</td>
<td>1 December 1984</td>
</tr>
<tr>
<td>to enable the Commonwealth and the States voluntarily to refer powers to each other</td>
<td></td>
<td></td>
<td></td>
<td>26 October 1984</td>
<td>1 December 1984</td>
</tr>
<tr>
<td>*Parliamentary Terms</td>
<td></td>
<td></td>
<td></td>
<td>25 July 1988</td>
<td>3 September 1988</td>
</tr>
<tr>
<td>to provide for 4 year maximum terms for members of both Houses of the Commonwealth Parliament</td>
<td></td>
<td></td>
<td></td>
<td>25 July 1988</td>
<td>3 September 1988</td>
</tr>
<tr>
<td>*Fair Elections</td>
<td></td>
<td></td>
<td></td>
<td>25 July 1988</td>
<td>3 September 1988</td>
</tr>
<tr>
<td>to provide for fair and democratic parliamentary elections throughout Australia</td>
<td></td>
<td></td>
<td></td>
<td>25 July 1988</td>
<td>3 September 1988</td>
</tr>
<tr>
<td>*Local Government</td>
<td></td>
<td></td>
<td></td>
<td>25 July 1988</td>
<td>3 September 1988</td>
</tr>
<tr>
<td>to recognise local government in the Constitution</td>
<td></td>
<td></td>
<td></td>
<td>25 July 1988</td>
<td>3 September 1988</td>
</tr>
<tr>
<td>*Rights and Freedoms</td>
<td></td>
<td></td>
<td></td>
<td>25 July 1988</td>
<td>3 September 1988</td>
</tr>
<tr>
<td>to extend the right to trial by jury, to extend freedom of religion,</td>
<td></td>
<td></td>
<td></td>
<td>25 July 1988</td>
<td>3 September 1988</td>
</tr>
</tbody>
</table>
and to ensure fair terms for persons whose property is acquired by any government

<table>
<thead>
<tr>
<th><em>Republic</em></th>
<th>1 October 1999</th>
<th>6 November 1999</th>
<th>Not Carried</th>
<th>None</th>
<th>45.13</th>
</tr>
</thead>
<tbody>
<tr>
<td>To alter the Constitution to establish the Commonwealth of Australia as a republic with the Queen and Governor-General being replaced by a President appointed by a two-thirds majority of the members of the Commonwealth Parliament</td>
<td></td>
<td></td>
<td></td>
<td></td>
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</table>

<table>
<thead>
<tr>
<th><em>Preamble</em></th>
<th>1 October 1999</th>
<th>6 November 1999</th>
<th>Not Carried</th>
<th>None</th>
<th>39.34</th>
</tr>
</thead>
<tbody>
<tr>
<td>To alter the Constitution to insert a preamble</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
REFERENCE LIST


Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129.


Commonwealth of Australia Constitution Act.


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South Australia v Commonwealth (1942) 65 CLR 373.


The Supreme Court of the United Kingdom. 2011.


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