

Federalism for the Second Century

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It should be borne in mind that there is nothing more difficult to handle, more doubtful of success, and more dangerous to carry through than initiating changes in a state's constitution.¹

Reform consists in taking a bone from a dog. Philosophy will not do it.²

It is not for you to finish the work, but neither are you free to desist from it.³

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¹ Niccolo Machiavelli, *The Prince*, George Bull (trans.), (Penguin Books Ltd., 1961), 5.

² John Jay Chapman, *Practical Agitation*, (David Nutt, 1900) Chp.7, 140.

³ Rabbi Tarfon, Aboth, (The Fathers), 2.2.16 in Herbert Danby (transl.), *The Mishna*, (Oxford University Press, 1933), 449.

I. Introduction.

*Among the essential characteristics of any **genuine** federal system the first and perhaps the most indispensable is **dualism of sovereignty**.⁴*

The government of Australia is a dual system based upon a separation of organs and powers. The maintenance of the States and their powers is as much an object of the Constitution as the maintenance of the Commonwealth and its powers. Therefore it is beyond the power of either to abolish or destroy the other. The limited grant of powers to the Commonwealth cannot be exercised for ends inconsistent with the separate existence and the self – government of the States, nor for ends inconsistent with its limited grants.⁵

(T)he federal nature of the Commonwealth has been held to limit the capacity of the Federal Parliament to legislate in a manner inconsistent with the role of the States.⁶

Since the creation of the Commonwealth of Australia, there has been a relentless expansion of its powers at the expense of the States. Slowly at first, but now one of ascendancy.

Today, the Commonwealth is engaged in many activities which cannot be identified from a reading of the powers conferred upon it, in paragraphs s 51(i)-(xxxix) of the *Constitution*.⁷ For example;- education, local government, natural resource management and sport. This expansion of power has been primarily through the use of s 96 of the *Constitution*⁸ under which *the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit*. It has also been increased by the ratification and adoption of international treaties under the external affairs power in s 51(xxix) of the *Constitution*⁹, as shown by the *Tasmanian Dam* case.¹⁰ Audaciously, the Commonwealth has more recently sought to rely upon the appropriations power in s 81 of the *Constitution* to directly finance the construction of roads for local councils and to support the regional partnerships programme.¹¹

⁴ Sir J A R Marriott, *Federalism and the Problem of the Small State*, (George Allen & Unwin Ltd., 1943), 86-87.

⁵ *South Australia v. The Commonwealth of Australia*, (1942) 65 CLR 373 per Starke J, dissenting at 442.

⁶ *Austin & Anor. v. The Commonwealth of Australia*, (2003) 195 ALR 321 per Gleeson C.J. at para [17].

⁷ *Commonwealth of Australia Constitution*, s 51(i)-(xxxix).

⁸ *Commonwealth of Australia Constitution*, s 96.

⁹ *Commonwealth of Australia Constitution*, s 51(xxix).

¹⁰ *The Commonwealth v. Tasmania* (1983) 158 CLR 1.

¹¹ *Roads to Recovery Act 2000* (Cth), Part 8 of the *Auslink (National Land Transport) Act 2005* (Cth) and ss 6 and 15 of the *Appropriation Act No 1 2005* (Cth).

The invasion by the Commonwealth into the residuary powers of the States has resulted in a weakening of the union. Sir Robert Garran defined the federal system as:

*A form of government in which sovereignty or political power is divided between the central and local governments, so that each of them within its own sphere is independent of the other. The distribution of powers between the local and central governments may vary to any extent; but the fundamental idea is of twofold sovereignty and the independence of each government within its own sphere.*¹²

The Gladstone Professor of Government and Public Administration in the University of Oxford, the Australian Kenneth Wheare, dismissed the idea that in a federation the residuary powers must lie with the regional governments.

*The essential point is not that the division of powers is made in such a way that the regional governments are the residuary legatees under the Constitution, but that the division is made in such a way that, whoever has the residue, neither general nor regional government is subordinate to the other.*¹³

In 2001, some 1264 Queenslanders were questioned on their attitudes to regionalism in the Australian federal system and constitutional change.

*Despite satisfaction with the political system, a majority of the population (62 per cent) look forward to a change in the federal system in the next 100 years. A substantial proportion around 40 per cent may be interested in more than a minor change including options such as a complete replacement of the current States. This higher than expected interest in change challenges assumptions that Australians are inherently conservative in their views about their constitutional system and opens new lines of inquiry about the problematic relationship between Australian federalism and regionalism.*¹⁴

Moving on from the centenary of federation, it is now timely to inquire, whether there is any scope to rectify any departure from the principle of dualism of sovereignty. In particular, such an inquiry should be charged with making recommendations as to whether the creation of new States under Chapter VI of the *Constitution*¹⁵ would improve the working of democracy in the Australian federal union.

¹² Sir John Peden et al, *Report of the Royal Commission on the Constitution*, (Government Printer, 1929), 230.

¹³ Kenneth C. Wheare, *Federal Government*, (3rd ed, Oxford University Press 1953, 2nd impression, 1956), 13.

¹⁴ A. J. Brown, 'After the Party: Public Attitudes to Australian Federalism, Regionalism and Reform in the 21st Century', *Public Law Review* 13 (2002): 171.

¹⁵ *Commonwealth of Australia Constitution*, Chapter VI, New States, ss 121-124.

II. The Working of the Federation.

*A country may have a federal constitution, but in practice it may work that constitution in such a way that its government is not federal.*¹⁶

*.....(I)n the case of Australia... tendencies are at work which may make it necessary soon to describe its constitution and its government as **quasi-federal**.*¹⁷

At federation, the Australian population was nearly 4 million.¹⁸ It is now 20 million. The rise of the Commonwealth has been inextricably linked to the development of Canberra as the National Capital. At first the seat of government was in Melbourne. It was not until twenty-six years later, in May 1927, that the Parliament sat in Canberra. And it was only in about 1948 that Government Departments began to be significantly transferred from Melbourne to Canberra. Then Canberra's population was about 17,000; it is now 322,000.¹⁹ Six years on in 1954, fourteen government departments still had their headquarters in Melbourne compared with eleven in Canberra.²⁰ In the five years to 30 June 1963 about 2,400 public servant positions were moved from Melbourne.²¹ In the mid 1960s, transfers of public servants from Melbourne with their families were still taking place at the rate of some 350 a year.²²

Since 1 January 1901, there have been several inquiries and conventions which have recommended improvements to the working of the *Constitution*. The first such inquiry was the 1927-1929 Peden Royal Commission. The most recent being the 1998 Constitutional Convention on an Australian Republic. Where the question of New States has been considered, the resulting recommendations have dealt with altering Chapter VI of the *Constitution* to clarify and improve its effectiveness (e.g. 1929²³, 1959²⁴, 1988²⁵).

¹⁶ Wheare, 21.

¹⁷ Ibid, 22.

¹⁸ Neil O'Sullivan et al, "New States" in Joint Committee on Constitutional Review, Second Report, *Parliamentary Papers, 23rd. Parliament – First Session, Vol. III*, (25 Nov., 1959), at p 36:- N.S.W. 1.4 million; Vic. 1.2; Qld. 0.5; S.A., 0.4; W.A. 0.2 and Tas. 0.2.

¹⁹ This represent an average annual population increase of 5.5% which was more than **three times** the national average of 1.7 % for the corresponding period.

²⁰ Alan Martin, *Robert Menzies – A Life*, Vol 2 1944 -1978, (Melbourne University Press, 1999), 382. See generally Eric Sparke, 'Not Siberia', in *Canberra 1954-1980*, (Australian Government Publishing Service, 1988), 81- 101; P. W. E. Curtin, 'The Seat of Government' in H. L. White (ed), *Canberra, A Nation's Capital*, (The Australian and New Zealand Association for the Advancement of Science, 1954), 66-80.

²¹ The Sixth Annual Report for the Year Ended 30 June 1962-63 of the National Capital Development Commission, *Parliamentary Papers Vol III*, 24th Parliament, First Session at p 831. [The National Capital Development Commission Act (Cth) which commenced on 10 October 1957, established a Commission for the Development of the City of Canberra as the National Capital of Australia.]

²² Lord Holford, 'The Growth of Canberra, 1958-1965 and 1965-1972', *Parliamentary Papers Vol VIII*, 25th Parliament, 534.

²³ Peden et al, 256-259.

²⁴ O'Sullivan et al, Chp 21, 158-169.

The ‘*Father of Federation*’, Sir Henry Parkes said:

*As a matter of reason and logical forecast, it cannot be doubted that if the Union were inaugurated with **double** the number of present colonies, the growth and prosperity of all would be absolutely assured. It would add immeasurably to the national importance of the new Commonwealth, and would be of immense advantage to Western Australia, South Australia and Queensland themselves, if four or five new colonies were cut out of their vast and unmanageable territories.*²⁶

Mr Bernhard Wise, speaking apprehensively to the Constitutional Convention said:

*The colonies of Victoria and New South Wales are large because we have two great concentrated city populations of Melbourne and Sydney. I for one, think it would be a misfortune to put the control of the destinies of Australia completely in the hands of the city populations of Melbourne and Sydney.*²⁷

In a letter published, as the then anonymous Australian correspondent for the *London Morning Post* in April 1902, Alfred Deakin wrote:

*The rights of self-government of the States have been fondly supposed to be safeguarded by the Constitution. **It left them legally free, but financially bound to the chariot wheels of the central Government.** Their need will be its opportunity. The less populous will first succumb; those smitten by drought or similar misfortunes will follow; and, finally, even the greatest and most prosperous will, however reluctantly, be brought to heel. **Our Constitution may remain unaltered but a vital change will have taken place in the relations between the States and the Commonwealth. The Commonwealth will have acquired a general control over the States,** while every extension of political power will be made by its means and go to increase its relative superiority.*²⁸

²⁵ Sir Maurice Byers et al, *Final Report of the Constitutional Commission, Vol. 1*, (Australian Government Publishing Service, 1988), para 7.1

²⁶ Sir Henry Parkes, *Fifty Years in the Making of Australian History*, Vol 2, (Longmans, Green and Co., 1892), 366. [See too Appendix VII, Sir Samuel Griffith introduced the Queensland Separation Bill to divide Queensland into three provinces, South, Central and North Queensland, to be called the United Provinces of Queensland, June 25, 1894]

²⁷ *Official Record of the Debates of the Australasian Federal Convention*, Second Session, Sydney, 2nd and 24th September, 1897, 317.

²⁸ Alfred Deakin, *Federated Australia, Selections From Letters to the Morning Post, 1900-1910*, ed. J A La Nauze, (Melbourne University Press, 1968), 97.

Professor Greenwood claimed in the 1940s that:

...(T)he evidence points decisively to the conclusion that the federal system has outlived its usefulness, that the conditions which made federation a necessary stage in the evolution of Australia's nationhood have largely passed away, and the retention of the system now operates only as an obstacle to effective government and to a further advance. The problems which are today of greatest urgency are those which can be best solved either by a unified government or by a central government possessed of vastly expanded powers. It is time to recognise that the federation should be replaced by a unified state.²⁹

Speaking in Armidale in 1955, Mr Whitlam presciently remarked:

*Alderman Davis Hughes was the first to mention **uniform taxation, which he correctly declares has made a farce of our Federal system.** The Commonwealth Parliament has always had, **but has only realized in the last dozen years that it has, complete financial predominance and hegemony.** No government, Labor or Liberal, socialist or capitalist, will surrender one of the Commonwealth's few weapons of economic control. Whatever Prime Ministers and Premiers may say from time to time, the system is here to stay and it is futile to repine.³⁰ (emphasis added)*

Sir Robert Menzies summed all this up in some lectures he gave at the University of Virginia when he said;

*The practical effect of all this, of course has been that in the revenue field, the Commonwealth has established an **overlordship.**(T)his was a **major revolution** without any formal constitutional amendment at all.³¹ (emphasis added)*

S. 96 of the *Constitution* has been the Commonwealth's **card of entry**³² into activities, which would otherwise have been closed to it. University education is a good illustration.

In 1969, the then Premier of Victoria, Sir Henry Bolte³³, quipped that, *the Commonwealth is now poking its bib into everything.*³⁴ Ten years earlier he had told

²⁹ Gordon Greenwood, *The Future of Australian Federalism, A Commentary on the Working of the Constitution*, (2nd ed., University of Queensland Press, 1976), xii.

³⁰ E. Gough Whitlam, Discussion, *Proceedings of a Forum on New States for Australia- Armidale*, (The Australian Institute of Political Science, 1955), 86.

³¹ Sir Robert Menzies, *Central Power in the Australian Commonwealth – An examination of the growth of Commonwealth power in the Australian Federation*, (Cassell, 1967), 91-92.

³² Sir Robert Menzies, *The Measure of the Years*, (Cassell, 1970), 85.

³³ Victoria was a plaintiff in the *Second Uniform Tax Case* decided on 23 August 1957, *The State of Victoria v. The Commonwealth* (1957) 99 CLR 575; (1957) 31 ALJ 369.

the Chief Justice of the High Court, Sir Owen Dixon, *that the States would sooner be governed from London than Canberra*. As Ayres notes, *a wild exaggeration from a minuscule grain of truth*.³⁵ Ayres goes on to tell of an interesting, if not instructive, conversation between Dixon and Bolte:

*Dixon had always enjoyed the company of medical men, far more than politicians with one or two exceptions. Victorian Premier Henry Bolte was not one of these. At the Queen's Birthday dinner at Government House in Melbourne Dixon sat next to him and tried to talk to him about federal constitutions being the products of effete and rigid eighteenth century concepts of the demarcation of powers. As a comment on enlightened political thought this had some validity, but Bolte knew nothing of such things: 'failed to get him to understand I was not aiming at unification. ... Very lacking in knowledge of the machinery of govt: mind energetic but stupid & uninformed'.*³⁶

Where's view that the Australian federation was quasi, may have provoked the following observation from Professor Geoffrey Sawer.

*Australia...shows no sign of adopting a unitary system, though outside observers keep expressing incredulity that the country should still bother with federalism and habitually exaggerate the power and importance of the Australian centre.*³⁷

Sawer went on to say:

*The evidence suggests that once a basically federal structure is established and stabilized and becomes part of the political habit of the people concerned, the strains which may push it in the centralizing or in the disintegrating direction are apt to set up counter-pressures and the system as a whole will then move ponderously one way or another in the federal spectrum but not off it.*³⁸

If this 'equilibrium theory of federalism' works then it would seem that the centralizing direction has long been over stretched and now awaits a phase of disintegration. Under present arrangements this restoration to equilibrium is most unlikely.

³⁴ Peter Blazey, *Bolte: a political biography*, (The Jacaranda Press, 1972), 207.

³⁵ Philip Ayres, *Owen Dixon*, (The Miegunyah Press, 2003), 270.

³⁶ *Ibid*, 275.

³⁷ Geoffrey Sawer, *Modern Federalism*, (C.A. Watts & Co. Ltd., 1969), 179-180.

³⁸ *Ibid*, 181.

Thirty years on, Greenwood appeared to have moderated his earlier remarks:

*The postwar period has confirmed the tendencies emphasized in the book of 1946, but equally it has shown, especially if the Commonwealth behaves intemperately or inflexibly in its dealing with the states, that there are strong latent forces which can be aroused in support of regional identity, local initiative, and state powers.*³⁹

Contrary to the apparent acceptance of this defacto unitary system, the Fraser government unsuccessfully attempted to encourage the States to re-enter the income tax field.

*The attempt was unsuccessful mainly because the Commonwealth did not make tax room available to the States. If it had reduced both its own rates of tax and the level of general revenue grants to the States, as it could have done unilaterally **if it had been determined to carry through this reform**, the States would have had no option but to impose personal income tax surcharges on the Commonwealth rates to make up their lost revenue.*⁴⁰

A former Chief Justice of the High Court of Australia, Sir Harry Gibbs has said that:

*It is essential to the nature of a true federation that the States should have under their independent control, financial resources sufficient to perform their function.*⁴¹

The enabling *Income Tax (Arrangements With The States) Act 1978* (Cth) was never used and after eleven years dormancy was repealed by the *Income Tax (Arrangements with the States) Repeal Act 1989* (Cth). The States feign indignation of their claimed stingy treatment by the Commonwealth. In truth, their position is as suggested by the following stanza:

*We thank you for the offer of the cow,
But we can't milk, and so we answer now-
We answer with a loud resounding chorus:
Please keep the cow, and do the milking for us.*⁴²

³⁹ Greenwood, x.

⁴⁰ Russell Mathews and Bhajan Grewal, *The Public Sector in Jeopardy – Australian Fiscal Federalism from Whitlam to Keating*, (Centre for Strategic Economic Studies, Victoria University, 1997), 747.

⁴¹ The Rt. Hon. Sir Harry Gibbs, "A Hateful Tax"?, *Section 90 of the Constitution*, (Sir Samuel Griffith Society), <http://www.samuelgriffith.org.au/papers/html/volume5/v5chap6.htm>,

⁴² Sir Robert Garran, *Prosper the Commonwealth*, (Angus & Robertson, 1958), p. 208.

Although the Commonwealth transfers to the States an amount by reference to the Goods and Services Tax (GST),⁴³ after an adjustment for *horizontal fiscal equalization*, this fails to remedy their lack of financial independence. It is a scheme to get around s. 90 of the *Constitution*⁴⁴, (which gives the Commonwealth exclusive power to tax goods), and to provide for a uniform value-added tax. For 2007, the estimated GST collected by the Commonwealth and for which *equivalent grants*⁴⁵ to the States will be made is \$40.0 billion⁴⁶. When other grants to the States of \$29.4⁴⁷ billion are added, the total expense will be \$69.4 billion. This long standing failure of fiscal independence stems from:

*(T)he fundamental problem of vertical fiscal imbalance and the ruthless exercise of Commonwealth financial power..... to prevent the Australian federal system from functioning effectively, and indeed threatens its very existence.*⁴⁸

*Vertical fiscal imbalance may be defined as one tier of government having more revenue capacity than it needs for its own expenditure purposes, while governments in another tier have less for theirs.*⁴⁹

Sawer, pithily explained the result of *vertical fiscal imbalance* as, *those who tax, do not have to justify the expenditure and those who spend, do not have to justify the taxation.*⁵⁰ All of which accords with the view that, *finance is government and government is finance.*⁵¹

For 2007, the Commonwealth now estimates, that it will raise taxes and spend the following amounts (\$ billion)⁵²:

⁴³ *A New Tax System (Commonwealth-State Financial Arrangements) Act 1999* (Cth).

⁴⁴ *Commonwealth of Australia Constitution Act 1900*, s 90.

⁴⁵ Paras 7 & 8, Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations; *A New Tax System (Commonwealth-State Financial Arrangements) Act 1999* (Cth), Schedule 2.

⁴⁶ Note 4 of Statement 10, Australian Accounting Standards Financial Statements: Indirect taxation revenue;

http://www.aph.gov.au/budget/2006-07/bp1/html/bp1_bst10-01.htm

⁴⁷ *Ibid*, Note 11: Grants expenses; State, Territory and Local Governments

⁴⁸ Mathews and Grewal, xix.

⁴⁹ *Ibid*, 766.

⁵⁰ Geoffrey Sawer, "New Federalism", in Dean Jaensch (ed), *The Politics of New Federalism*, (Australasian Political Studies Association, Flinders University, 1977), 17.

⁵¹ Sir Earle Page, *Truant Surgeon*, Ann Mozley (ed), (Angus and Robertson, 1963), 126.

⁵² Table 1 of Statement 10, Australian Accounting Standards Financial Statements, of Budget Paper No.1

http://www.aph.gov.au/budget/2006-07/bp1/html/bp1_bst10-01.htm

<u>Revenue</u>	
Income tax	181.6
Indirect taxes	29.4
Other taxes	<u>5.6</u>
	216.6
Non-tax	16.4
Other Gains	<u>0.6</u>
	233.6
<u>Less: Expenses</u>	
General	<u>221.1</u>
<u>Operating Surplus</u>	<u>12.5</u>

Note 1: External reporting standards to Table 1 referred to in n. 46 above states inter alia:

AAS would suggest the gross amount of goods and services tax (GST) be included in the Australian Government's financial statements. However, under the Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations, GST is collected by the Australian Taxation Office as an agent for the states and territories (the States), and appropriated to the States. Therefore, accrued GST revenues and associated payments to the States are not recorded in the financial statements. (emphasis added)

With respect to the above view, that GST should not be included in the financial statements, there is nothing expressed nor implied in the *Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations* (the agreement) which warrants such a conclusion. It is an agreement filled with statements of 'best endeavours'; see s. 10(2) and para 4 of Sch. 2.

Relevantly s. 81 of the *Constitution* provides:

*All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution.*⁵³ (emphasis added).

On the expenditure side, s. 83 of the *Constitution* relevantly provides:

*No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.*⁵⁴

⁵³ *Commonwealth of Australia Constitution*, s 81.

⁵⁴ *Commonwealth of Australia Constitution*, s 83.

S. 20 of *A New Tax System (Commonwealth-State Financial Arrangements) Act 1999* (Cth)⁵⁵ works in accordance with the principles established in ss. 81 and 83 of the *Constitution*. It provides that:

Payments under this Act are to be made out of the Consolidated Revenue Fund, which is appropriated accordingly.

Further s.7-15 of *A New Tax System (Goods and Services Tax) Act 1999* (Cth.)⁵⁶, provides that; *the net amount for a tax period is the amount that the entity must pay to the Commonwealth, or the Commonwealth must refund to the entity in respect of the period.*

In summary, the net amount of GST paid to the Commonwealth is required to be recorded as an item of Consolidated Revenue. Under *A New Tax System (Commonwealth-State Financial Arrangements) Act 1999* (Cth)⁵⁷, what is appropriated to the respective States is an amount determined by reference to the formula in s. 13, including an adjustment for hospital grants as well as recognizing the relativities factor in s. 9 to provide for *horizontal fiscal equalisation*. It is wrong to assert that the Australian Taxation Office collects GST as an agent for the States and Territories. For good measure the Australian Bureau of Statistics treats the GST as a Commonwealth tax for government finance statistic purposes⁵⁸.

To illustrate the vertical fiscal imbalance between the Commonwealth and the States, the above revenue and expenses (\$ billion) have been recast as set out below:

<u>Revenue</u>			
Income tax		181.6	
Indirect tax - GST	40.0		
- Other	<u>29.4</u>	69.4	
Other taxes		<u>5.6</u>	
Total taxes		256.6	
Non-tax		16.4	
Other Gains		<u>0.6</u>	
			273.6
<u>Less: Expenses</u>			
General		221.1	
<u>Less: Specific Purpose Grants to States</u>	<u>29.4</u>	<u>191.7</u>	70%
<u>Operating Surplus before Grants to States</u>			81.9
<u>Less: Appropriations to States:</u>			

⁵⁵ *A New Tax System (Commonwealth-State Financial Arrangements) Act 1999* (Cth), s 20.

⁵⁶ *A New Tax System (Goods and Services Tax) Act 1999* (Cth.), s 7-15.

⁵⁷ *A New Tax System (Commonwealth-State Financial Arrangements) Act 1999* (Cth).

⁵⁸ "Treatment of Goods and Services Tax Revenues in Government Finance Statistics", in *Accruals-based Government Finance Statistics*, (Australian Bureau of Statistics Information Paper, Cat. No. 5517.0, 2000), Appendix I at para 20,

[http://www.ausstats.abs.gov.au/ausstats/free.nsf/Lookup/6BCC9D405919C741CA256ADA002BFC64/\\$File/55170%5F2000.pdf](http://www.ausstats.abs.gov.au/ausstats/free.nsf/Lookup/6BCC9D405919C741CA256ADA002BFC64/$File/55170%5F2000.pdf) ,

GST grants	40.0		
Specific purpose grants	<u>29.4</u>	<u>69.4</u>	<u>25%</u>
<u>Operating Surplus</u>		<u>12.5</u>	<u>5%</u>

The above figures show that the Commonwealth collects far more than it needs. For every dollar of revenue the Commonwealth gains it spends 70 cents to pay for its functions and gives 25 cents to the States and puts 5 cents away to savings.⁵⁹

The Commonwealth raises more than 80 % of all taxation revenue in Australia, leaving the States and Territories to raise something less than 20 %.⁶⁰

*The Commonwealth has used its dominating fiscal power to move into functional areas for which the States have constitutional responsibility, by making specific purpose payments by means of which they have determined how, what, how much and where services are to be delivered, without having either the information needed to make informed decisions or the need to account for its actions. **It has built up large duplicate bureaucracies** which are more concerned with controlling State decisions than with ensuring that services are provided in adequate quantities and in appropriate ways.*⁶¹

Arguably, vertical fiscal imbalance has worked to discourage the growth of additional States. It has led to the deterioration in the efficiency of resource allocation.⁶² As shown by the above analysis, the federal system is spent. Its restoration or reconstruction will in truth require its rebirth. What is required, is a reformation.

*Those who would stay free must stand eternal watch against the excessive concentration of power in government.*⁶³

⁵⁹ This does not appear to take into account the cost of public servants (including superannuation*) and supporting services employed in administering the special grants programmes, e.g. Higher Education.
* As at 30 June 2007, the unfunded superannuation liability for the Commonwealth is estimated to be \$99 bn. See Table 2 and Note 14 and of Statement 10 Australian Accounting Standards Financial Statements of Budget Paper No.1

http://www.aph.gov.au/budget/2006-07/bp1/html/bp1_bst10-01.htm, 14 May 2006.

⁶⁰ Australian Bureau of Statistics, *National Income, Expenditure and Product*, 5206.0 March 2005 for Table 39 Taxes at current prices. For the year ended 30 June 2004, State taxation of \$ 48.335 bn as a percentage of total taxation of \$253.353bn = 19%. Therefore the Australian Government collected 81% including the GST.

⁶¹ Mathews and Grewal, 767.

⁶² David Collins, *The Impact of the GST Package on Commonwealth-State Financial Relations*, (Australian Tax Research Foundation Research Study No 34, 2000), 41.

⁶³ Dwight D Eisenhower, US President (1953-1961), *Address to Conference of Governors, Joint-Federal State Action Committee Progress Report, No. 1*, (US Government Printing Office, 1957), 17-22.

III. Why More States and Territories?

*The most efficient government is not the most orderly looking government but the government that comes closest to carrying out the wishes of its masters.*⁶⁴

*Federalism is, moreover, the only constitutional protection of liberty that is neutral.(F)ederalism is the constitutional guarantee most protective of the individual's freedom to make his own choices. There is much to be said, therefore, for a Court that attempted to preserve federalism, which is a real constitutional principle, by setting limits to national powers.*⁶⁵

There are several reasons why new States and Territories should be established. The first is to promote economic and population growth outside the State capitals. Roughly half of all Australians now either live in the Newcastle – Sydney – Wollongong axis or in the Geelong – Melbourne – Dandenong axis. Australia's population has just passed 20 million, with nearly 10 million living in these "city enclaves". This is a significant population imbalance. Strikingly also is that 84 per cent live within fifty kilometres of the coast.⁶⁶

Second, a reversal of this imbalance might reduce the running costs of capital cities, where there is significant subsidization of train and bus fares. For the year ended 30 June 2002, Grants and Subsidies made by the N.S.W. Department of Transport were \$1.9 billion (excluding capital grants of \$305.8 million).⁶⁷ The question which demands an answer is whether these concessions are excessive or sustainable. Restoring Sydney's urban rail net work could involve spending over \$30 billion in the next twenty years.⁶⁸ Capital city residents will also be burdened with higher water, sewerage and power rates to finance the high cost of constructing new dams to

⁶⁴ Gordon Tullock, 'Federalism: Problems of Scale', in Bhajan S. Grewal, Geoffrey Brennan and Russell L. Mathews (eds.), *The Economics of Federalism* (Australian National University Press, 1980), 49.

⁶⁵ Robert H Bork, *The Tempting of America – The Political Seduction of the Law*, (First Touchstone ed. Simon & Schuster Inc., 1991), 53.

⁶⁶ Graeme Hugo, 'Changing patterns of population distribution', in Siew Ean Khoo and Peter McDonald (ed), *The Transformation of Australia's Population: 1970-2003*, (University of NSW Press, 2003), 186.

⁶⁷ N.S.W. Department of Transport, 'Annual Report, Year Ended 30 June 2002', *Parliamentary Paper* No. 371/2002, at pp 74-75. [*City Rail's cost recovery fell to 62% in 2001... Sydney Buses cost recovery was expected to be 86% in 2003.... Sydney Ferries cost recovery in 2003 is expected to be 51% in 2003* per Report of the Independent Pricing and Regulatory Tribunal of NSW, 'CityRail and STA Buses and Ferries – Public Transport Fares from 1 July 2002', *Parliamentary Paper* 148 of 2002. at p 3.]

⁶⁸ Dennis O'Neill, *The Future for Australia Infrastructure*, paper delivered to the National Infrastructure Summit, The Australian Council for Infrastructure Development, 14 August 2002, [cited 21 March 2004], <http://www.auscid.org.au/auscid/>

overcome shortages, particularly for Sydney and Melbourne and to replace worn out or obsolescent gas, water and sewerage lines.

Third, the way in which the powers of government were distributed in 1901, now have little relevance to effective public administration. The way in which the State corporations powers were referred under s 51(xxxvii)⁶⁹ to the Commonwealth to enact the *Corporations Act 2001* (Cth) is a good example. Significantly too, is the duplication of effort in bringing about measures to provide for the sustainable management and protection of natural resources.⁷⁰ The rehabilitation of land destroyed through excessive salinity is a prime example. These measures could be more effectively delivered on a regional basis.

*The division of power which exists in a true federalism is, while it lasts, almost a guarantee of democracy. At least it provides an effective check on governmental power. In the case of a nation which extends over a vast area as Australia does, the States are more likely to understand local problems and to respond to local needs than the more remote central government.*⁷¹

Fourth, the community has become more cynical of government through excessive centralization of administration. Decentralization of government invites more participation in the political process. It will improve the understanding and working of the machinery of government. Many of today's social problems are likely to be better solved at the local level. For example issues in primary and secondary education, health and social security programmes.

*On the basis of democratic values alone, therefore, we should not allow the elitists to talk us out of federalism. Its greater opportunities for popular participation are a major political end in themselves. They foster a sense of responsibility and self reliance. They lead to better-informed public debate. And as Lord Acton said, they "provide against the servility which flourishes under the shadow of a single authority".*⁷²

⁶⁹ *Commonwealth of Australia Constitution*.

⁷⁰ The enactment of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) is claimed to provide a framework for Commonwealth involvement in matters of 'national environmental significance'; per Productivity Commission, Issues Paper, *Impacts of Native Vegetation and Biodiversity Regulations*, May 2003 at p 6.

⁷¹ The Rt. Hon. Sir Harry Gibbs, "Federalism in Australia", (1993), in Alan Gregory (ed), *The Menzies Lectures*, (The Sir Robert Menzies Lecture Trust, 1999), 268.

⁷² Geoffrey de Q Walker, 'Participation in government and the countering of elitism' in *Ten Advantages of a Federal Constitution*, Vol 10, Chp.11, and notes 65 and 66, (Samuel Griffith Society), <http://www.samuelgriffith.org.au/papers/html/volume10/v10chap11.htm>, And at point 5. 'The federal division of power protects liberty'. See too Roger Wilkins below at n.76 where he considers the idea of "subsidiarity", that it is best to push decision making down to the most local level possible in Siedentop's book, *Democracy in Europe*, (2001).

Unfortunately experience tells us that decentralization is simply a myth. It is no more than folklore. Malcolm Fraser in a speech nearly thirty years ago before the 1975 federal election said:

*As our society becomes larger and more complex, it is imperative that local levels of government should be revitalised. Increasing the centralisation of government power in Canberra is positively dangerous. The more power is centralised the less it is subject to popular influence and control.*⁷³

Fifth, more states would promote the idea of competitive federalism which is seen as an effective constraint on the ability of government to abuse its powers.⁷⁴ Brennan and Buchanan take the view *that tax competition among separate units rather than tax collusion* (eg the way in which the GST is administered) *is an objective to be sought in its own right.*⁷⁵ The Director- General Cabinet Office of the Government of New South Wales recently made the telling observation on the administrative side that:

*States really try to do things better than their counterparts. Why? A range of reasons. Most obviously, they get compared in performance by the public and the media. Less obviously, they are competing for business and employment – which may or may not be true. Nor should you underestimate the motivation and incentives to try new policies, to innovate, to subsequently adopt and copy the successful, to eschew the unsuccessful.*⁷⁶

Sixth, at least since the 1970s both State and Commonwealth Governments have abandoned any pretence of implementing policies of balanced development.⁷⁷ Additional States and Territories offer a way of reversing this state of affairs.

Finally, during World War I (1914-1918) it was claimed⁷⁸ that Government was only possible by a virtual dictatorship under *The War Precautions Act 1914-1918 (Cth)*⁷⁹

⁷³ The Hon. Malcolm Fraser, Address to the National Press Club on 8 December 1975, Tom Maniaty (ed), *The Power of Speech; 25 Years of the National Press Club*, Bantam Books, 1989, pp 22-23.

⁷⁴ Jeffrey Petchey et al, 'An Economists View of Section 90 of the Australian Constitution', in Neil A Warren (ed), *Reshaping Fiscal Federalism in Australia*, (Australian Tax Research Foundation, Conference Series No 20, 1997), 52.

⁷⁵ Geoffrey Brennan and James M. Buchanan., *The Power to Tax – analytical foundations of a fiscal constitution*, (Cambridge University Press, 1980), 186; See too Cliff Walsh, 'Federalism Australian-Style: Towards Some New Perspectives' in Geoffrey Brennan et al (ed), *Taxation and Fiscal Federalism – Essays in Honour of Russell Mathews*, (Australian National University Press, 1988)

⁷⁶ Roger B. Wilkins, 'Federalism: Distance and Devolution', *Australian Journal of Politics and History* Vol 50, No. 1, (2004): 97.

⁷⁷ Paul G. Collits, *A Question of Balance ?, The Fate of Balanced Development as a Regional Policy Objective in New South Wales*, Ph.D. Thesis (unpublished), (The University of New England, March 2002).

⁷⁸ Earle Page et al, (ed), *Australian Subdivision – Effect on Development; The Case for Northern New South Wales*, (Northern New State League 1920), 69.

which was to be read as one with the *Defence Act 1903* (Cth)⁸⁰. Regulations made to fix the price of bread were held to be a valid exercise of Commonwealth power.⁸¹ So too in World War II (1939-1945) was a scheme made under the *National Security (Apple and Pear Acquisition) Regulations*⁸² for the Commonwealth to compulsorily acquire and market apples and pears.⁸³

*In time of war the Commonwealth Parliament may pass any law, or may give the Executive any authority to make any regulation, which it considers necessary for the safety of the country. The Commonwealth in time of war was, for practical purposes, a unified government.*⁸⁴

In his 1979 Boyer Lectures, Mr Hawke asked rhetorically:

*If tomorrow Australia became involved in war, we would effectively abandon the present structure for the simple reason that it is a less efficient method of conducting our affairs as a nation. Why, at the time of greatest crisis in our peace-time history as a nation, does the logic of this escape us?*⁸⁵

What was the then crisis? So called, it was claimed to be due to *the elements of growing unemployment, high inflation, depressed levels of economic activity, dramatic changes in technology and the pressures of developing countries for greater access to our markets*. Hawke's solution was to *have one government with the unquestioned powers to match the dimension of those elements.*⁸⁶

He went on to suggest that:

Australians would be better served by the elimination of the second tier of government – that is the States – which no longer serve their original purpose and act as a positive impediment to achieving good government in our current community. This would give us, like the great majority of other countries, one Parliament with powers available to the government to match the responsibilities upon it of protecting and advancing the interests of Australian citizens.

It would be desirable in these circumstances to strengthen what is now the third tier, local government, so that in relevantly demarked geographical

⁷⁹ *The War Precautions Act 1914-1918* (Cth).

⁸⁰ *Defence Act 1903* (Cth).

⁸¹ *Farey v. Burvett* (1916) 21 C.L.R. 433.

⁸² *National Security (Apple and Pear Acquisition) Regulations* (Cth).

⁸³ *Andrews v. Howell* (1941) 65 C.L.R. 255.

⁸⁴ Peden et al, 120.

⁸⁵ Robert J. L. Hawke, *The Resolution of Conflict*, (The Australian Broadcasting Commission, 1979), 20.

⁸⁶ *Ibid*, 18.

*areas people could participate in the decision – making process on issues appropriate to be decided at that level.*⁸⁷

Other than for the war on international terrorism, Australia is at peace, and this is precisely why such a centralist proposal should be rejected. It is a fallacy because the circumstances of war and peace are so materially distinguishable on the grounds that the former is concerned with the survival of the nation. The analogy is unwarranted. Advocates of command and control centralism are beguiled by superficial ideas of efficiency in preference to the wishes of local citizens.

IV. How Might They Be Governed?

The single chamber Parliaments of the Northern Territory and the Australian Capital Territory (ACT) could provide a suitable model for a new State Parliament. Queensland abolished its upper house over eighty years ago in 1922. New Zealand also has a unicameral parliament. Mr Whitlam in commenting on the draft constitution for the State of New England said that *one of its admirable provisions is that the legislature shall consist of the Queen and the Legislative Assembly alone.*⁸⁸

Whether the functions of local government are to be taken over by a new State, like in the ACT would be a matter to be determined by each State. Where States cover large areas, it seems probable that there would be a retention of the present local government arrangements, unless of course there is a desire for amalgamation into bigger councils.

V. What Powers Could They Have?

Should the present distribution of functions between the Commonwealth and the States continue or should they be reversed, so that the States are invested with specific powers and the Commonwealth invested with the residuary power? If the Commonwealth is to retain its fiscal powers, albeit effectively as to income tax and exclusively in respect of duties of excise, then it ought to be invested with the residuary power so that there is a matching of its expenditure responsibilities with the taxes it raises.

It is possible to conceive of a double process of centralisation and devolution with increasing powers passing to the Commonwealth and a much increased number of States exercising more limited powers of local government in their respective regions.....The powers of the

⁸⁷ Ibid, 18-19.

⁸⁸ Whitlam, 86.

*Commonwealth are bound to expand. It would be logical to create new States and reduce the powers of existing States.*⁸⁹ (emphasis added)

Legislation dealing with Water Management, Native Vegetation conservation and the preservation of Threatened or Endangered Species provides for management plans for local areas to be approved by the Minister. Here, there may be scope for better environmental management outcomes if these activities are assigned to the new States.

It is noteworthy that the Final Report of the Constitutional Commission recommended that the manner in which the legislative powers of the Commonwealth and the States are divided in the *Constitution* should not be changed.⁹⁰ Similarly no recommendation to amend the *Constitution* was made on the question of interstate river management.⁹¹

VI. Where Might They Be Found?

An Australian Labor Party scheme of 1920 proposed the subdivision of Australia into 31 provinces including New Guinea.⁹²

Where might they be found is a matter of speculation. New South Wales could be sub-divided into three areas. The first, might include Sydney, the Blue Mountains, the South Coast and Newcastle, to recognize the results of the 1967 New State Referendum; the second, would be New England being the northern part and the remainder to include, the Monaro, Riverina, Central West and the Far West.⁹³

In Queensland there could be up to three States namely a Northern, Central and Southern State.⁹⁴

There is a reasonable prospect for the Northern Territory to become a State as the 1998 referendum result was a 'No' vote of 51%. Professor MacDonald Holmes published a map which suggested a new political structure for Northern Australia, but which incorporated most of the Northern Territory in 3 sub-divisions⁹⁵ However it does raise the question of whether the Kimberley area of Western Australia could become a Territory of the Commonwealth.

⁸⁹ John B. Condliffe, *The Development of Australia*, (Australian Development Research Foundation, Ure Smith, 1964), 59.

⁹⁰ Sir Maurice Byers et al, *Final Report of the Constitutional Commission – Summary*, (Australian Government Publishing Service, 1988), 45.

⁹¹ Byers et al, *Final Report* 74.

⁹² Ulrich Ellis, *New Australian States*, (The Endeavour Press, 1933), 237.

⁹³ Victor S Barnes et al (ed), "New State Movement" in *The Modern Encyclopaedia of Australia and New Zealand*, (Horwitz Publications Pty. Ltd, 1964), 730.

⁹⁴ Ellis, 233.

⁹⁵ J. MacDonald Holmes, "The Proposed State of New England", in *Proceedings of a Forum on New States for Australia- Armidale*, (The Australian Institute of Political Science, 1955), insert after 40.

Professor Harrison Moore long ago remarked:

In every State there are spaces which demand an expenditure greater than they could themselves provide, both for their government and economic development. If separation were to throw them on their own resources as self governing units, their development would be jeopardized. But there is the alternative of making them Commonwealth territories.....(C)anadian history furnishes interesting material for the evolution of such territories by a number of stages until eventually the stage of province, with its powers and responsibilities is reached.⁹⁶

In a 1999 speech, the eminent Australian historian, Professor Geoffrey Blainey said that:

The biggest single way to encourage the North is to set up several states which can pursue their own economic and political interests rather than merely accept those policies which the southern half of the continent, through Canberra imposes on them. The Northern Territory in a few years will be a fully fledged state, and will prosper when it finally achieves independence.⁹⁷

In Western Australia there has been agitation by Mr Larry Graham, M.L.A. Member for Pilbara and others for a New State in that region.⁹⁸

The question of the siting of new state boundaries may also involve the redrawing of existing State boundaries, if doing so improved interstate river management and the rehabilitation of degraded salinity affected lands. This could lead to an adaptation of the ideas underlying so called eco-civic regionalisation.⁹⁹

Here, it is important to note the features which make good boundaries.

It comes as rather a surprise to find that a river is regarded as a bad natural boundary. And in Australia, as pointed out by Mr Brewster and Mr Morrison of the Irrigation Commission, where water supply is of extreme importance, a new boundary should not be drawn so as

⁹⁶ W Harrison Moore, "The Constitutional Aspect", in Earle Page et al, (eds.), *Australian Subdivision – Effect on Development; The Case for Northern New South Wales*, (Northern New State League, 1920), 67.

⁹⁷ Geoffrey Blainey, *The Future of Tropical Australia*, Sir Earle Page Memorial Lecture, delivered in the NSW Parliament Library, on Sydney, 8 September 1999.

⁹⁸ Larry Graham, *Slaves to the City - A Paper Outlining Some Regional Development Alternatives for the North West of Western Australia*, (November 2001), 31-32.

⁹⁹ David Brunckhorst, Phillip Coop and Ian Reeve, *An Eco-Civic Regionalisation for Rural New South Wales- Final Report to the NSW Government*,(Institute for Rural Futures and Centre for Bio-regional Resource Management in the University of New England, 2004), <http://www.ruralfutures.une.edu.au/resources/downloads/publications/ecocivic72dpi1-1.pdf>

*unnecessarily to divide catchment areas or avoidably to create inter-state conflicts between upper and lower riparian interests.*¹⁰⁰(emphasis added)

VII. Some Terms of Reference for an Inquiry.

On the presumption that Australia affirms its desire to be governed under a federal system as against a unitary one, the terms of reference for a Commonwealth Royal Commission of Inquiry, ideally with the support of the Council of Australian Governments (CoAG), ought be:-

- (a) to review the working of the federation, with reference to whether dualism of sovereignty exists; and
- (b) to examine the feasibility of redividing the Commonwealth into additional States and Territories with reference to:-
 - (i) the desirable and practicable number of States and Territories;
 - (ii) the fixing of boundaries so as to optimise the protection and sustainable management of natural resources;
 - (iii) the distribution of powers between the State Parliaments and the Commonwealth Parliament, including whether specific powers should be vested in the State Parliaments, with the residue vested in the Commonwealth Parliament together with provision for their interchange;
 - (iv) ways and means to guarantee the financial independence of the States and what kind of tax system is appropriate to the federal union?¹⁰¹;
 - (v) the establishment of single chamber new State Parliaments;
 - (vi) the number of Senators for each State and whether the House of Representatives should be composed of twice the number of Senators¹⁰²;
 - (vii) the establishment of an integrated Australian court system¹⁰³;

¹⁰⁰W J Victor Windeyer, 'New States – A Review of the Report of the Royal Commission', *The Australian Quarterly*, Vol 26, (The Australian Institute of Political Science, 1935), 36.

¹⁰¹ Bhajan S. Grewal et al (eds.), *The Economics of Federalism*, (Australian National University Press, 1980), xii.

¹⁰² O'Sullivan et al, at para 110 (1) at p 17, where it was recommended that: *(T)he number of members of the House of Representatives should no longer be taken to being as nearly as practicable twice the number of senators.*

- (viii) minimizing the cost of Government, with particular reference to the elimination of waste and the avoidance of duplication of functions;
- (ix) identifying the kind and extent of :
 - (a) subsidies granted to residents of capital cities; and
 - (b) the costs of providing and maintaining the necessary infrastructure, e.g. power, roads, transport, hospitals;
 and to determine how those subsidies and costs might be reduced.
- (x) the provision of more precise and simplified means for the creation of new States and Territories¹⁰⁴;
- (xi) whether individually or cumulatively the above matters would work to overcome the decline in population growth and to build a stronger domestic economy; and
- (xii) consequential amendments to the *Constitution*.

VIII. Conclusion.

The current Federal – State arrangements do not augur well for a doubling of our population to 40 million.¹⁰⁵ Professor Max Corden recently canvassed this possibility when he said:

A larger economy allows for utilisation of economies of scale in goods and services that are not traded internationally. This includes transport and communication services, and public administration. Furthermore it allows for more variety of products and greater choice. In addition, by allowing for more producers who produce at reasonable scale levels it makes possible a more competitive environment. All this does not apply to

¹⁰³ The Rt. Hon. Sir Owen Dixon, 'The law and the constitution', His Hon. Judge Woinarski (collected by), *Jesting Pilate and other Papers and Addresses*, (The Law Book Company Ltd, 1965), 53.

¹⁰⁴ O'Sullivan et al, at para 1262, where it was recommended that the Constitution be altered by the insertion of new section 124A to enable the use of referenda to create the new State rather than relying upon obtaining the consent of the existing Parliament of the State.

¹⁰⁵ In the 100 years since Federation in 1901, the population of Australia roughly doubled each 50 years. Projections of the Australian Bureau of Statistics (ABS) are that by 2051 the population could be 28.2 million and by 2101 could reach 31.9 million. Graph 5.10., <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/23004AA15F86A91FCA256CAE00053FA5>.

The Australian population increased at an average annual rate of 1.64% from 3.8 million in 1901 to 20 million in 2003. If it reaches 28.2 million in 2051, the annual rate of increase from 2003 will have declined to 0.72%. If it only reaches 31.9 million by 2101, the annual rate of increase will have declined to 0.48%, which is roughly less than 1/3 rd of the previous century's growth rate. If Corden's suggestion of 40 million is attained by 2050, the annual rate of increase from 2003 will still only be 1.49%. Applying from 2003, the same rate of increase from 1951 to 2001 of 1.7% p.a., the population would be 45 million by 2051. Therefore the ABS projection of 28 million would reveal **a shortfall of 17 million.**

*goods and services that are internationally traded at (close to) world prices. The net effect is, other things being equal, to raise the standard of living (per capita GDP). If all goods and services produced and consumed in Australia were fully tradeable internationally (with low transport costs) the argument would not be valid. One could think of many examples, and need just think of the choices available in the United States or Europe compared to those available in Australia. The experience of Japan, and indeed many other countries, also suggests that **a large home market can provide a platform for a take-off into quality exporting.***

*The special wrinkle is that this argument is particularly applicable to a country, such as Australia....., which is in a remote location.....It seems to me that **the relative geographic isolation of Australia provides a stronger case that a larger population and hence economy would be beneficial.***¹⁰⁶

The time has arrived for Australians to either alter the *Constitution* to a unitary system or affirm whether they wish to continue with a federal one. No States or new States? If the decision is to retain a federal system, then a choice will need to be made as to the type of federal system. Whether the States or the Commonwealth is to be invested with the residuary power? Whatever the decision, nothing useful will happen unless vertical fiscal imbalance is corrected. This is the rock on which the reformation of the federation must be built.

Justice O'Connor of the United States Supreme Court has observed, extra-judicially that:

The “dual sovereignty” of our national and state governments is a novel experiment. But like many ingenious and complex innovations, it is a fragile one. Today the forces of economic and technological modernization as well as the international climate, often suggest the expediency of the Federalist vision of a powerful national government. In the face of daunting economic and social problems, the sweep of federal power is sometimes alluring.

*We must never forget, however, that the answers to many of our deepest national dilemmas may not lie in Washington D.C. (sic. Canberra) but in the American (sic. Australian) **spirit of ingenuity embodied in lawmaking authority closest to the people themselves: our state and local legislatures.***¹⁰⁷

¹⁰⁶ W Max Corden, *40 Million Aussies? The Immigration Debate Revisited*, (Inaugural Richard Snape Lecture, Productivity Commission, 30 October 2003), 13; <http://www.pc.gov.au/lectures/snape/corden/corden.pdf>,

¹⁰⁷ Sandra Day O'Connor, *The Majesty of the Law – Reflections of a Supreme Court Justice*, (Random House, 2003), 56-57. See *Gregory v Ashcroft* 501 US 452 (1991) at 458; *New York v United States* 505 US 144 (1992); *Printz v United States* 521 US 898 (1997).

A re-establishment of the six original States and the creation of new sovereign States with single chamber Parliaments, fiscally independent and with specific powers may offer a way of rejuvenating a dying federation, afflicted with the ills of population and vertical fiscal imbalance. It may also be more appropriate for a population mix which is likely to become less homogeneous.

It is submitted that the present unsatisfactory working of the federation is in part a product of the success Australia has had in building a nation, as exemplified by the construction of the 'bush capital' into what has become the impressive national capital of Canberra. A new dynamism needs to be found to reverse the reliance upon the central government. In short, a reverse thrust needs to be applied to the accelerating *centripetal* forces¹⁰⁸ in the federation to provide an opportunity for the engagement of the *centrifugal* forces spoken of by Lord Bryce.¹⁰⁹

*The challenge is urgent,
the task is difficult,
the time is now.¹¹⁰*

14 May 2006

[8,782 Words]

¹⁰⁸ Including so called collaborative federalism as discussed by Cheryl Saunders, 'Collaborative Federalism', *Australian Journal of Public Administration*, 61 (2) (2002): 69.

[**Cooperative federalism** has been described as **marble-cake federalism**. Like a marble cake with its two distinct flavours, cooperative federalism was based predominantly on interaction between two layers of government –the national and state governments. Like a marble cake with its four to five swirls where the two flavours are mixed together, cooperative federalism had the national and state governments sharing responsibility in only four or five major policy areas. Lyndon B. Johnson's creative federalism so modified cooperative federalism that the marble-cake metaphor gave way to one based on fruitcake.

*In a fruitcake, no distinct levels or flavours are distinguishable. The different spices, nuts, fruits and candies are mixed all together. Similarly, **fruitcake federalism** implies a mixing of governmental functions and responsibilities. Complexity is one of its main traits;* Garry K. Ottosen, *Making American Government Work - A Proposal To Reinvigorate Federalism*, (University Press of America, 1992), 28]

¹⁰⁹ Menzies, *Central Power*, 2. It is, to adopt that favourite astronomical metaphor which no American panegyrist of the Constitution omits, to keep the centrifugal and centripetal forces in equilibrium, so that neither the planet States shall fly off into space, nor the sun of the central government draw them into its consuming fires, per James Bryce, *The American Commonwealth*, 3rd ed., Vol. 1 (The MacMillan Company, 1898), 356.

¹¹⁰ Victor Hugo.

A Sketch of the Agitation for New States.

The agitation for new colonies can be traced back to the Rev. Dr John Dunmore Lang who in 1852 sought to sub-divide the eastern coastline into five parts, which with Tasmania and South Australia were to form the seven United Provinces of Australia administered by a central Federal Government.¹¹¹ *Dr Lang had propounded an elaborate scheme of federation on the American plan (“Freedom and Independence for the Golden Lands of Australia”).*¹¹²

In the First Federal Convention in 1891, Queensland separationists demanded that Queensland be admitted to the Commonwealth as three separate states. Queensland is the only state in which there have been three parliamentary resolutions in favour of subdivision, (1910,1922,1948).¹¹³

On 22 December 1910 the Legislative Assembly of the Parliament of Queensland resolved:

*That in the opinion of this House, the time has arrived when Queensland should be divided into three States, and when Central and Northern Queensland should each be granted separate Constitutions subject to the Constitution Act of the Commonwealth of Australia.*¹¹⁴

Here it was contemplated that there would be a State in the tropical north centred on Townsville, a State in the semi-tropical centre based on Rockhampton and a State in the temperate South with Brisbane as the capital.

Whether there should be additional States was mentioned by the Governor of Queensland in opening Parliament, on 17 August 1948, when he said:

To have a properly balanced Commonwealth Parliament it would be advantageous to have at least three States across the northern parts of the continent, each with representation in the Federal House. It was with that end in view that the Premiers of Queensland and Western Australia waited on the Prime Minister to secure the appointment of a Northern Australia Development Committee which has been formed and is now planning for the development of the North.

*My Advisers are prepared to recommend **the establishment of additional States in Queensland** when as a result of their developmental policy, the*

¹¹¹ Barnes, 730.

¹¹² John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901 ed., reprinted Legal Books, 1976), 92.

¹¹³ Barnes, 730.

¹¹⁴ *Queensland Parliamentary Debates*, 18th Parliament – Second Session, Vol. CV, at 221-238.

*new States will have a reasonable degree of financial and economic stability.*¹¹⁵

New South Wales has held at least three Inquiries. A Royal Commission on Railway Decentralisation was established by the Wade Government in 1910 to inquire and report on rail links to coastal ports such as Port Stephens and Jervis Bay and so recommended. The Commissioners, Messrs C. N. J. Oliver (President), R. R. P. Hickson and W. H. O'Malley Wood reported¹¹⁶ but no action appears to have been taken in respect of their recommendations.

Earle Page (later Sir Earle), a Grafton surgeon launched the Northern New State Movement at a meeting on 7 January 1915 by successfully moving:

*For the appointment of a committee to examine “ the question of this northern portion of the State, either alone or in connection with the southern portion of Queensland” becoming a New State.*¹¹⁷

While the movement was unsuccessful there were useful lessons to be learned.¹¹⁸ On 19 September 1922, the Legislative Assembly of the Parliament of New South Wales passed the following motion moved by Lt Col. Michael Bruxner, who was then one of three members for Northern Tablelands:

*That, in the opinion of this House, the State of New South Wales being too large an area for effective government and administration, it is desirable that a separate State be created in Northern New South Wales and that the Government should take immediate steps as empowered to do so in Chapter VI of the Commonwealth of Australia Constitution Act to achieve that result.*¹¹⁹

The Fuller Government on 8 April 1924 appointed His Hon Judge J. J. Cohen of the District Court as Chairman of a *Royal Commission of Inquiry into Proposals for the Establishment of a New State or New States Formed Wholly or in Part out of The Present Territory of The State Of New South Wales.*

¹¹⁵ HE, Lt Gen Sir John Lavarack,, *Queensland Parliamentary Debates*, 31st Parliament – Second Session, Vol. CXCI, 1948-1949, at p 3. See history of separation agitation generally; Ross Fitzgerald, , *A History of Queensland – From the Dreaming to 1950*, (University of Queensland Press, 1982 – paperback 1986), 288-289; Ross Fitzgerald,, *A History of Queensland – From 1915 to the 1980s*, (University of Queensland Press, 1984 – paperback 1985), 62-63, 289-291.

¹¹⁶ C.N.J. Oliver, (President), *Report of the Royal Commission of Inquiry as to Decentralisation in Rail.w.ay Transit*, N.S.W. Parliamentary Papers, Vol II- pp. 31-484, (NSW Government Printer, 1911) at p xxxviii.

¹¹⁷ Page, 41.

¹¹⁸ Farrell, JJ, *Bones for the Growling Dog? The New State Movements in Northern New South Wales, 1915-1930*, (Unpublished Thesis M.A. (Hons), University of New England, 1997) at pp 7-9 and pp.25-27.

¹¹⁹ *New South Wales Parliamentary Debates*, 26th Parliament, Vol. LXXXVIII at p 1194.

*When Fuller agreed to the Royal Commission he made fairly certain that it would not return a favourable verdict. The Chairman (Judge Cohen) and two of the other four members were or had been Nationalists. The other two, C. A. Sinclair and J.A. Lorimer, were to represent the new state interests of the north and south respectively. W.A. Holman and H.S. Nicholas were appointed to assist the Commission. Holman had no love for new states or the progressives, and in the Commission's hearings he acted as a prosecutor, with the new state witnesses as defendants.*¹²⁰

On 6 April 1925, the Commissioners delivered their report recommending against the creation of new states. They said:

*We are unanimously of opinion that in its original form the proposal of the creation of a new State in the northern part of New South Wales is neither practicable or desirable. With the exception of Mr Commissioner Sinclair, we are also of the opinion that in any amended form a proposal for the creation of such a new State is neither practicable nor desirable. **Mr Commissioner Sinclair is of opinion that it would be practicable to establish a new State** bounded on the north by by the existing boundary between New South Wales and Queensland, on the east by the coast of New South Wales, on the south by the southern boundaries of the Shires of Macleay, Apsley, Upper Hunter, Warrah, Tamarang, Coonabarabran and Walgett and on the west by the Barwon River and excluding any portion of the Western Division. He is however of the opinion that under existing circumstances it is not desirable that such a State should be created.*

*We are also unanimously of opinion that the proposals for the creation of new States in the Riverina and the Monaro, in either their original or in any amended form are neither practicable or desirable.*¹²¹

Earle Page's Secretary, Ulrich Ellis published in 1933, his book on *New Australian States*.¹²²

*His book was written for use as propaganda in the 1930s for the referendum campaign which was to follow the 1934 boundary commission. The book has a lot of passion for the New State issue but lacks balance and scholarly analysis.*¹²³

¹²⁰ Don Aitkin, *The Colonel; A Political Biography of Sir Michael Bruxner*, (Australian National University Press, 1969), p79. See too Farrell, at pp 145-146. [Cohen had been a member of the Legislative Assembly from 1898-1919 and was the Speaker from 1917-1919; Holman also had been a member of the Legislative Assembly from 1898 to 1920 and was the Premier from 1913 to 1920.]

¹²¹ Cohen, JJ, His Hon. (Chairman), *Report of the Royal Commission of Inquiry into Proposals for the Establishment of a New State or New States Formed Wholly or in Part out of The Present Territory of The State Of New South Wales*, N.S.W. Parliamentary Papers, First Session of the 27th Parliament, Vol II at p 149.

¹²² U.R. Ellis, *New Australian States*, (The Endeavour Press, 1933).

¹²³ Farrell, 2.

On 25 August 1933, the Hon H. S. Nicholas, M.L.C., who had previously assisted as junior counsel in the Cohen Royal Commission and also to the Peden Royal Commission was appointed as a Royal Commissioner to Inquire into the Boundaries of New States. In a review of Mr Nicholas's Report, Mr W.J.V. Windeyer (later a Justice of the High Court) commented that:

*It was no part of the Commissioner's duty to consider whether or not a subdivision is desirable. Whether it would be wise to create new States the Commissioner was not asked to say and very carefully he does not say.*¹²⁴

This report, delivered on 2 January 1935, recommended the location of boundaries for three new States, as suitable for self government.

*A northern area which included Newcastle, a central-western/south western area, and the remainder consisting of Sydney, the Blue Mountains and the South Coast. He suggested that a referendum be taken in each area, beginning in the north.*¹²⁵

*The government did nothing. Stevens said that the report would be given serious consideration, and sat back to see what the new state movements would do. Nicholas's report had pleased none of them.....Bruxner and others were fearful that in an early referendum, without a long educational campaign, **the new states might be defeated by the voting power of Newcastle and the adjacent coalfields.***¹²⁶

The perennial question of *No States or New States* was discussed by the then Member for Armidale, D.H. Drummond, in his book on *Australia's Changing Constitution*.¹²⁷ Drummond pressed his views on the dangers of centralization. He wrote on the perils of the 'Abolition of State Parliaments and Unification' and the advantages of 'New States'. It could be surmised that the trigger for its publication was of course the enactment of the Uniform Tax Legislation and its unsuccessful challenge in *South Australia v. The Commonwealth* (1942) 65 CLR 373 which had been handed down on 23 July 1942.

Not long after, in January 1948 the Australian Institute of Political Science held a conference in Armidale to consider the issue of "*Decentralization*" in an atmosphere of post-war reconstruction and immigration.

¹²⁴ Windeyer, 33.

¹²⁵ The Hon Harold. S. Nicholas, *Report of the Royal Commission of Inquiry Respecting Areas in the State of New South Wales Suitable for Self Government as States in the Commonwealth of Australia*, New South Wales Parliamentary Papers, Session 1934-1935, Vol III at p 1266

¹²⁶ Aitkin, 162-163.

¹²⁷ David H. Drummond, *Australia's Changing Constitution: No States or New States*, (2nd ed., Angus and Robertson, 1946; 1st ed., 1942.)

This was followed by a convention convened by the New South Wales Constitutional League in July 1949 on Changing the Constitution at which Sir Earle Page delivered a paper on *Why New States?*¹²⁸

Again in October 1955, Armidale was chosen for another forum by the Australian Institute of Political Science on the topic of *New States for Australia*,¹²⁹ with papers being delivered by R.S. Parker (later Professor) on *Why New States?*, Professor J. MacDonald Homes on *The Proposed State of New England*; Professor J.P. Belshaw on the *Economics of the New States* and the then leader of the Federal Opposition The Rt Hon. Dr H.V. Evatt on *Creating New States*. Doctor Evatt was unable to be present and his paper was read by the then Member for Werriwa, Mr E. G. Whitlam, M.P., who later as Prime Minister (1972-1975) facilitated the creation of the regional development corporations of Albury-Wodonga and Bathurst-Orange. Mr Whitlam said:

I am not averse to new States but to new States in the shape of sovereign States. The more states the better from my point of view; American experience shows that it is harder for 48 States¹³⁰ to “gang up”¹³¹ on the national administration than it is for six to do so in Australia¹³².....There is no mystic value in the number 6 as applied to States; 26 would be preferable in a country the size of ours.¹³³ (emphasis added).

Mr Arthur Calwell in his autobiography said:

The Labor Party had a provision in its constitution for many years which provided that the Commonwealth Parliament should be cloaked with complete powers and with the authority to delegate some of those powers to more States or provinces. The party envisaged as many as twelve States. This is essential if we are to ever have a successful policy of decentralization. The present six States must be abolished and twelve more or less county-council like bodies exercising delegated powers only must be substituted.¹³⁴

¹²⁸ F.A. Bland, (ed), *Changing the Constitution*, (The New South Wales Constitutional League, 1950).

¹²⁹ *Proceedings of a Forum on New States for Australia*, (The Australian Institute of Political Science, 1955).

¹³⁰ Since then two more states have been added, Hawaii and Alaska, to total 50. Australia remains at 6. NSW now with 6.7 million has a population which is **greater than 39 of the 50** American States. Victoria is greater than 29 of the 50; Queensland 25 of the 50; W.A. 14 of the 50 and S.A. 12 of the 50. A comparison of the two most populous States, N.S.W. v. California (34 million) shows that 1 in 3 Australians live in N.S.W. whereas only 1 in 8 Americans live in California. See Barry Turner(ed), *The Statesman's Yearbook 2004* (140th ed, Palgrave Macmillan, 2003), 1751-53.

¹³¹ Interestingly, this is what the Federal Government has claimed the six State Labor Governments have done at some recent meetings of the Council of Australian Governments (CoAG).

¹³² Whitlam, 85.

¹³³ *Ibid*, 88.

¹³⁴ A.A. Calwell, *Be Just and Fear Not*, (Lloyd O' Neill Pty. Ltd , 1972), 255-256.

It is noteworthy that a *National Council for Balanced Development* was established in November 1962 in Wagga Wagga, N.S.W. with the eminent economist Sir Douglas Copland elected as the inaugural President. In delivering a paper on the *Need for a National Policy* he said:

*On the one hand, in the developed areas it is essential that a reasonable balance should be preserved between rural and city development. On the other hand, it is just as vital that the growth of Australia should embrace the development of resources in the North, with an expanding population in the areas of North Queensland, Western Australia and the Northern Territory. A conscious and constructive policy is essential if these two major objectives of balanced development are to be attained.*¹³⁵

In his address on *Balanced Development Through Decentralized Management*, Mr Garry Nehl, Secretary of the New England State Movement and later Member for Cowper said:

*We have ample evidence that the people of New England back the plan and support the solution provided by the Constitution. A few years ago a test poll, taken by a group of 21 local governing bodies, showed a 76 per cent vote in favour of a New State, and we have no doubt that if a democratic referendum were granted by the State Government, the question would be carried by an overwhelming majority.*¹³⁶

The referendum was eventually held on 29 April 1967 as to whether the electors wanted a New England State, although the question asked on the voting paper was “Are you in favour of the establishment of a New State in north-east N.S.W as defined...?”.¹³⁷ It was defeated by a narrow majority with 54% answering No and 46 % answering Yes. However if the Newcastle electorates (of which 72% voted No) had been excluded, there would have been a Yes vote of 56%. If the milk zone electorates were also excluded (66% voted No), on the grounds of the unfounded allegation that the milk producers would have been excluded from the Sydney market, the result showed that the northern electorates voted 67% in favour of a new state.¹³⁸ What Mr Whitlam had foreseen in 1955, had come to pass:

The arguments and statistics of all speakers and the maps by the cartographer of the new State have postulated a population and a wealth

¹³⁵ Sir Douglas Copland, “Need for a National Policy”, *Proceedings of the First Conference of the National Council for Balanced Development*, Wagga Wagga, N.S.W., 13-15 November, 1962.

¹³⁶ Garry B Nehl, “Balanced Development Through Decentralized Management”, *Proceedings of the First Conference of the National Council for Balanced Development*, Wagga Wagga, N.S.W., 13-15 November, 1962.

¹³⁷ *New State Referendum Act 1966* (NSW), s 4 and Schedule Two.

¹³⁸ Ulrich Ellis, *Self Government in the 70s – The Case For Northern N.S.W.*, (New State Movement of Northern N.S.W., Armidale, 1970), 31-36.

*and an area which included Newcastle, Maitland and the whole Hunter Valley. While no one can be dogmatic on such matters, I would myself have the gravest doubts whether Newcastle would really wish to join New England. Newcastle might be as happy in New England as Belfast would be in a united Ireland.*¹³⁹

Agitation for the Northern Territory to become the seventh State had begun within the first ten years of becoming a self-governing territory.¹⁴⁰ On 3 October 1998, a proposal for the Northern Territory to become a State was very closely defeated, with 51.3% voting against the proposal. It is likely that a new campaign will aim for admission to the Commonwealth as a State in 2008, which would mark the 30th anniversary of self-government.

Interestingly, there was also in 1948 a suggestion for the creation of a new State in the lower Southern part of Western Australia.¹⁴¹

*The sad fact is that the newest state in Australia is Queensland, created more than 140 years ago. Australia has created no new state since 1859: the United States in contrast has created close to 20. For a land of this size we do not have enough states. We thus miss one of the advantages of federalism.*¹⁴²

Appendix (B)

	Statistical Comparison	
	<u>Population</u>	<u>GDP per capita</u> ¹⁴³
	<u>Millions</u>	<u>\$US</u>
USA ¹⁴⁴	294	39,700
UK ¹⁴⁵	60	30,800
Ireland ¹⁴⁶	4	36,300
Australia ¹⁴⁷	20	32,400

¹³⁹ Whitlam, 86.

¹⁴⁰ Peter Loveday, and Peter McNab, (eds), *Conference Papers – 1986 :Australia’s Seventh State*, (The Law Society of the Northern Territory and the North Australia Research Unit -The Australian National University,1988).

¹⁴¹ *Western Australia Parliamentary Debates*, 19th Parliament-Second Session, Vol.121,1948 at pp 945-946.

¹⁴² Geoffrey Blainey,“*The Centenary of Australia’s Federation: What Should We Celebrate?*” Department of the Senate Occasional Lecture Series at Parliament House on 26 October 2000; <http://www.aph.gov.au/Senate/pubs/pops/pop37/c04.pdf> viewed 20 January, 2004.

¹⁴³ At 2004 purchasing power parity rates (ppp) <http://www.oecd.org/dataoecd/48/5/34244925.xls> , viewed 14 May 2006

¹⁴⁴ Barry Turner (ed), *The Statesman’s Yearbook 2006* (142nd ed, Palgrave Macmillan, 2005), (mid 2004 estimates), p 1765.

¹⁴⁵ Ibid,1648.

¹⁴⁶ Ibid, 918.

¹⁴⁷ Table C1, Population by State, Appendix C: Parameter Estimates and Further Information, Budget Paper No.3

http://aph.gov.au/budget/2006-07/bp3/html/bp3_appendix_c.htm, viewed 14 May 2006.

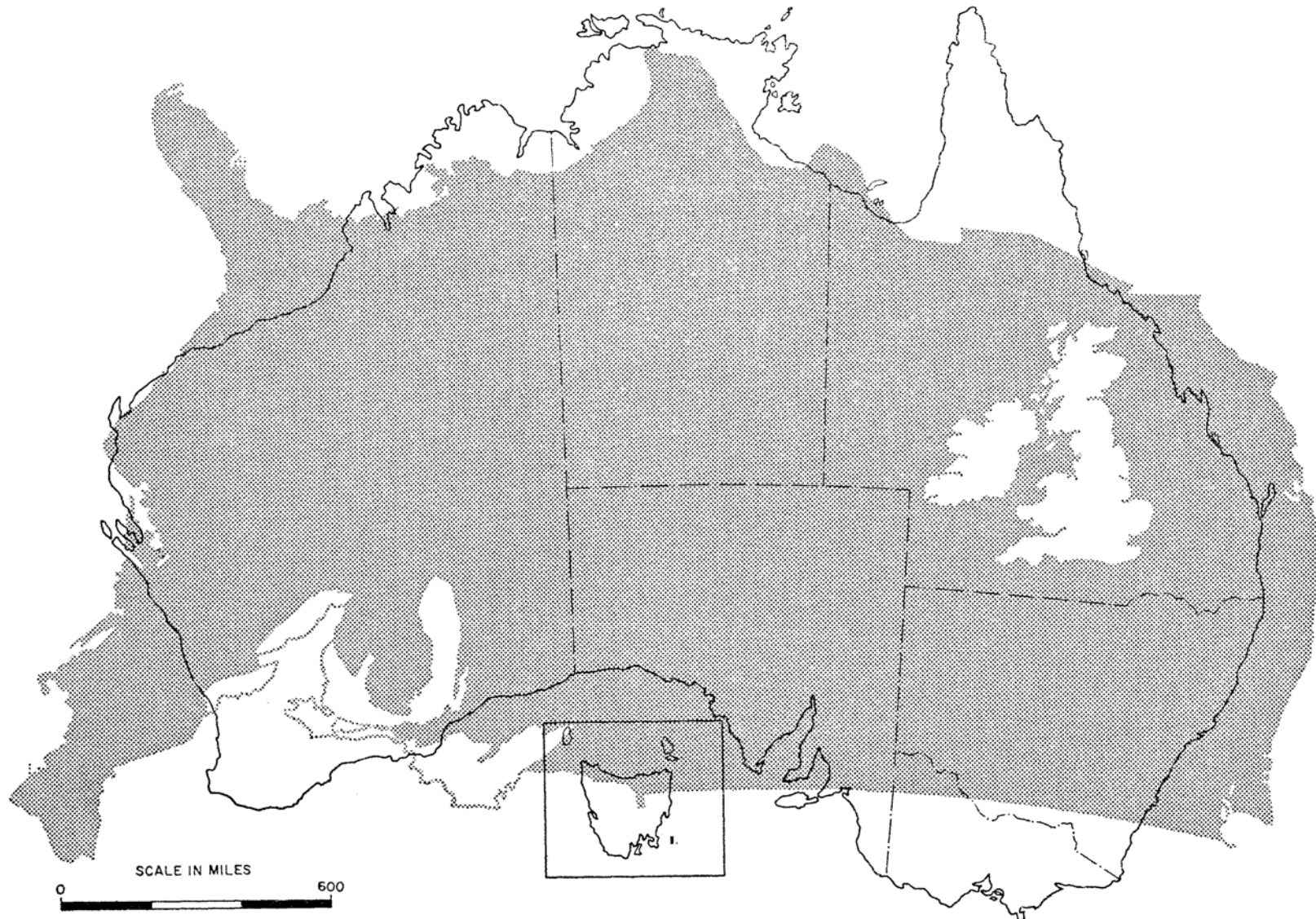


Fig. 1. Relative Size of Australia Compared with the United Kingdom and the United States

¹⁴⁸ Condliffe, n.89 at p.23