

Chapter 1

Overview of Australian federalism

Introduction

1.1 On 17 June 2010, the Senate established the Select Committee on the Reform of the Australian Federation. The committee's terms of reference required it to inquire into key issues and priorities for the reform of relations between the three levels of government within the Australian federation with a view to developing an agenda for national reform. The initial reporting date was set as the last sitting day of May 2011, but the Senate granted an extension of time until 20 June 2011. The committee was granted a further extension of time until 30 June 2011.

Conduct of the inquiry

1.2 The committee advertised the inquiry on its website and in *The Australian*, and invited submissions from interested organisations and individuals. The committee received 48 submissions, as listed in Appendix 1. Public hearings were held in Sydney on 2 December 2010, Brisbane on 1 February 2011, Perth on 9 March 2011 and Canberra on 5 May 2011. A list of witnesses who gave evidence at the public hearings is in Appendix 2.

1.3 The committee thanks the organisations and individuals that made written submissions, and those who gave evidence at the public hearings.

Notes on references

1.4 References to submissions in this report are to individual submissions received by the committee and published on the committee's website.¹ References to the committee Hansards are to the official Hansard transcripts.²

The federal model

1.5 Australia has a robust system of government that has served it well. For a hundred and ten years the country has enjoyed relative stability, prosperity and democracy, and avoided revolution, coups or civil war.

1.6 Fundamental to Australia's constitution and governance is its federal structure. Over twenty countries around the world, representing over a billion citizens, are federations. It is a system of government that recognises historical and geographical

1 Submissions for the inquiry can be accessed at
http://www.aph.gov.au/Senate/committee/reffed_ctte/reffed/submissions.htm

2 Transcripts of the committee's public hearings for the inquiry can be accessed at
http://www.aph.gov.au/Senate/committee/reffed_ctte/reffed/hearings/index.htm

differences, such as the dispersed colonies that occupied the Australian continent in the nineteenth century. At the same time, however, Australian federalism ensures unity within that diversity, and creates a nation for the continent.

1.7 Federations unite disparate states through focusing on common interests and mutual goals. In the words of Edmund Barton, federation is a 'union of the states which we believe will do so much to promote interchange and community of interests between citizens of the whole Commonwealth.'³

1.8 Delegates at the 1898 Australasian Federal Conference considered that the then draft Constitution drew on a range of models to create a new form of federalism uniquely suited to a union of Australian colonies. In explaining the new model of federalism, Sir Richard Barker commented:

There have been three types of government struggling for mastery all though our deliberations. There has been, first, the type of what I call true federation; there has been the type of federation imagined by some of my honourable friends from Victoria; and there has been the British type of government. Those three types are to a very considerable extent inconsistent with each other. But in the work which we have completed traces will be found of every one of them...

I believe, sincerely and truly, that the Bill which we have framed is a machine that will work most smoothly.⁴

1.9 Australia's federal system is a scheme of federation, not amalgamation.⁵ Australia's constitution establishes a federal system of government in which power is not centralised but divided between various levels of government. There are three levels of government within Australia's federal structure, namely, commonwealth, state/territory, and local. Of these, the Commonwealth Government and the state and territory governments are recognised in the Commonwealth of Australia Constitution Act (the Constitution).

1.10 Section 1 of the Constitution establishes a federal Parliament to exercise 'the legislative power of the Commonwealth.' Sections 51 and 52 of the Constitution

3 Sir Edmund Barton, *Official record of the debates of the Australasian federal convention. Third session. Melbourne, 20th January to 17th March 1898, 2 vols.* Melbourne, Robert S. Brain, Government Printer, [1898] 17 March 1898, pp 2471, <http://www.nla.gov.au/guides/federation/resources/conventions1890s.html> (accessed 31 May 2011).

4 Sir Richard Barker, *Official record of the debates of the Australasian federal convention. Third session. Melbourne, 20th January to 17th March 1898, 2 vols.* Melbourne, Robert S. Brain, Government Printer, [1898] 17 March 1898, pp 2481 – 2482, <http://www.nla.gov.au/guides/federation/resources/conventions1890s.html> (accessed 31 May 2011).

5 Sir Richard Barker, *Official record of the debates of the Australasian federal convention. Third session. Melbourne, 20th January to 17th March 1898, 2 vols.* Melbourne, Robert S. Brain, Government Printer, [1898] 17 March 1898, p. 2482.

define the scope of the Commonwealth's legislative power, listing the matters with respect to which the Commonwealth may legislate. Notably, the list includes matters referred to the Commonwealth by the states, matters relating to external affairs, and matters relating to corporations. The Commonwealth also has implied power over matters incidental to the matters listed in sections 51 and 52. The Commonwealth's powers are expressly defined and, therefore, expressly limited. In this way, as Dr Zimmermann and Mrs Finlay noted, the Constitution constrains the role and authority of the Commonwealth government.⁶

1.11 Chapter V of the Constitution recognises, and therefore legitimises, state constitutions, state parliaments and state laws. In contrast to the Commonwealth, the power of state governments is plenary, being unlimited save where state law contradicts validly made Commonwealth law.⁷ That state autonomy was intended to be a key feature of the Australian federation is evident in the deliberations of the 1898 Australasian Federal Conference:

[We are] dealing with matters on behalf of independent and self-reliant states. And we have dealt with those matters on which the interest of the states clashed, we have harmonized the interests of several states where they differed, and we have provided a Constitution sufficient to provide for the fullest and the most self-reliant government of a free people. We have created an instrument of partnership between us which, I believe, secures the independence of the several states, will provide for the joint control of certain matters, at the same time as it also leaves free and complete self-government on all matters not committed to the central authority.⁸

1.12 The Constitution distinguishes between the role of the Commonwealth and the role of the States. The founders of Australian federation envisaged a Commonwealth government responsible for matters of national importance and state governments responsible for matters of local significance. As Holder goes on to say:

And this, it seems to me, is what we should have done — to provide that national questions should be federalised, and that local questions should be left to local self-government. And it is this, it seems to me, that we have done; and thus we have done what we ought to have done and what our constituents expected of us.⁹

6 Dr Augusto Zimmermann and Mrs Lorraine Finlay, *Submission 17*, pp 8–9.

7 *Commonwealth of Australian Constitution Act*, s. 109.

8 Mr Holder, *Official record of the debates of the Australasian federal convention. Third session. Melbourne, 20th January to 17th March 1898*, 2 vols. Melbourne, Robert S. Brain, Government Printer, [1898] 17 March 1898, p. 2496, <http://www.nla.gov.au/guides/federation/resources/conventions1890s.html> (accessed 31 May 2011).

9 Mr Holder, *Official record of the debates of the Australasian federal convention. Third session. Melbourne, 20th January to 17th March 1898*, 2 vols. Melbourne, Robert S. Brain, Government Printer, [1898] 17 March 1898, p. 2496.

1.13 In evidence to the committee, Dr and Mrs Finlay argued that:

[t]he drafters of the Constitution thus wished to reserve to the people of each State the right to decide by themselves on the most relevant issues through their own state legislatures.¹⁰

1.14 In contrast to the state governments, territories are not automatically autonomous, self-governing members of the federal system. Section 122 of the Constitution confers on the Commonwealth government the responsibility, and the right, to make laws for the government of Commonwealth territories.¹¹ The Australian Capital Territory, the Northern Territory and Norfolk Island are self-governing. However, while self-governing, the authority of territory governments is limited rather than plenary.

1.15 As the Northern Territory Statehood Steering Committee noted, territory self-government is granted through Commonwealth legislation.¹² The legislation expressly limits the authority of territory governments. The level of restriction differs between the self-governing territories. The Northern Territory Legislative Assembly is the least restricted, being prohibited from legislating with respect to the acquisition of property, other than on just terms, and euthanasia.¹³

1.16 In contrast, the powers of the Australian Capital Territory's Legislative Assembly are more circumscribed. The Legislative Assembly may not make laws regarding the acquisition of property, otherwise than on just terms, the provision by the Australian Federal Police of police services in relation to the territory, the raising or maintaining of any naval, military or air force, coining of money, classification of materials for the purposes of censorship, and euthanasia.¹⁴

1.17 Jeffery Harwood and others have argued that, as creatures of Commonwealth law, territory governments are 'both fully revocable and subordinate.'¹⁵ This was a view shared by the Northern Territory Statehood Steering Committee:

Limited self-government was granted to the Northern Territory from July 1 1978 by an ordinary law of the Commonwealth Parliament subject to

10 Dr Augusto Zimmermann and Mrs Lorraine Finlay, *Submission 17*, p. 9.

11 There are nine territories, namely, the Australian Capital Territory, the Northern Territory, Christmas Island, Jervis Bay, Cocos (Keeling) Island, Ashmore and Cartier Islands, Coral Sea Islands, the Australian Antarctic Territory, Heard and McDonald Islands, Norfolk Island, and the Indian Ocean Territories, as listed in: Department of Regional Australia, Regional Development and Local Government, 'Territories of Australia', <http://www.regional.gov.au/territories/> (accessed 31 May 2011).

12 Northern Territory Statehood Steering Committee, *Submission 12*, p. 4.

13 *Northern Territory (Self-Government) Act 1978*, s. 50 – 50A.

14 *Australian Capital Territory (Self-Government) Act 1988*, s. 23.

15 Jeffrey Harwood, John Phillimore & Alan Fenna, 'Federal implications of Northern Territory statehood', *The Australian journal of public administration*, vol. 69, no. 1, p. 35.

change or repeal at any moment. Since then, the *Self Government Act* has been changed on numerous occasions.¹⁶

1.18 Commenting on the Northern Territory government, Harwood et al. highlighted the circumscribed position of Territory governments within Australia's federal system:

In constitutional terms, the status of the territories vis-a-vis the Commonwealth is essentially the same as that of local governments vis-a-vis their respective state government.¹⁷

1.19 Local Government is not mentioned in, and therefore is not given recognition by, the Constitution. On this point, the Hon Christian Porter MLA, Western Australian Attorney-General, submitted that 'Australia's federal system of government...is a relationship between two, not three, levels of government.'¹⁸ Local governments, also known as local councils, are established through state legislation, and are therefore responsible to state governments.¹⁹

The strengths of federation

Common Themes

1.20 Delegates at the 1898 Australasian Federation Conference, who were tasked with developing a system of government to unite the Australian colonies, considered that a federal system of government would bring innumerable benefits. As a South Australian delegate, Mr Holder, declared: 'I can conceive of no class of persons which will not benefit from the incoming of this federation.'²⁰ The extent of the expectations for the intended federal system are evident in the statement of another South Australian delegate, Mr Symon:

No man can say that, even burdened with disunion, Australia will not have great prosperity. No man can say that every state upon the continent will not share it. But, in my opinion, all that prosperity will be as nothing to the prosperity that will come from union. It will be a union with strong foundations set deep in justice, a union which will endure from age to age, a bulwark against aggression and a perpetual security for the peace, freedom,

16 Northern Territory Statehood Steering Committee, *Submission 12*, p. 4.

17 Jeffrey Harwood, John Phillimore & Alan Fenna, 'Federal implications of Northern Territory statehood', *The Australian journal of public administration*, vol. 69, no. 1, p. 35.

18 Christian Porter, MLA, Attorney-General, Western Australia Government, *Submission 44*, p. 3.

19 *Constitution Act 1902* (NSW); *Constitution Act 1975* (Vic); *Constitution of Queensland 2001* (Qld); *Constitution Act 1934* (SA); *Constitution Act 1899* (WA); *Constitution Act 1934* (Tas).

20 Mr Holder, *Official record of the debates of the Australasian federal convention. Third session. Melbourne, 20th January to 17th March 1898*, 2 vols. Melbourne, Robert S. Brain, Government Printer, [1898] 17 March 1898, p. 2497, <http://www.nla.gov.au/guides/federation/resources/conventions1890s.html> (accessed 31 May 2011).

and progress of the people of Australia, giving to them and to their children and to their children's children through all generations the priceless heritage of a happy and united land.²¹

1.21 Reflecting on over a century of Australian federation, Wanna et al. have concluded that 'Australia's large land-mass, remote locations, disparate regional areas and localised preferences mean that a federal system of government is suited to the Australian context.'²² The Council of the Australian Federation shared this view, arguing that federation 'enables a geographically large and diverse country such as Australia to maintain national unity and meet the pressures of globalisation while at the same time accommodating regional difference.'²³

1.22 Dr Zimmermann and Mrs Finlay also submitted that a federal system is an appropriate form of government in an increasingly global society, commenting that:

some of the largest and most internationally competitive economies in the world are federations. A federal system is clearly not itself an impediment to economic success in a globalised world, or to the delivery of competitive and efficient services.²⁴

1.23 On this point, Dr Anne Twomey and Dr Glenn Withers have noted that internationally federation is promoted as a strong and viable model of government:

In the rest of the world, the prevailing trend is towards decentralisation and federalism. Indeed, federalism is regarded as one of the best governmental systems for dealing with the twin pressures produced by globalisation – the upward pressure to deal with some matters at the supra-national level and the downwards pressure to bring government closer to the people.²⁵

1.24 Several submissions drew the committee's attention to the benefits of a federal system.²⁶ The following advantages listed by CAF are indicative of the those benefits:

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- 21 Mr Symon, *Official record of the debates of the Australasian federal convention. Third session. Melbourne, 20th January to 17th March 1898, 2 vols.* Melbourne, Robert S. Brain, Government Printer, [1898] 17 March 1898, p. 2509, <http://www.nla.gov.au/guides/federation/resources/conventions1890s.html> (accessed 31 May 2011).
 - 22 Professor John Wanna, Professor John Phillimore, Professor Alan Fenna with Dr Jeffrey Harwood, *Common cause: Strengthening Australia's cooperative federalism*. Final report to the Council for the Australian Federation, p. 6.
 - 23 CAF, *Submission 38*, p. 3.
 - 24 Dr Augusto Zimmermann and Mrs Lorraine Finlay, *Submission 17*, p. 37.
 - 25 Dr Anne Twomey & Dr Glenn Withers, *Federalist Paper 1: Australia's federal future. Delivering growth and prosperity*. A Report for the Council of the Australian Federation, April, 2007, p. 8.
 - 26 For example, ACCI, *Submission 10*, p. 2; CAF, *Submission 38*, p. 2 & Attachment A, Dr Anne Twomey & Dr Glenn Withers, *Federalist Paper 1: Australia's federal future. Delivering growth and prosperity*. A Report for the Council of the Australian Federation, p. 8; Pearce Division Liberal Party of Australia, *Submission 14*, p. 1.

Australia's federal structure provides for a number of significant benefits that in fact outweigh [the] perceived costs:

- The customisation of policies to meet local needs
- Incentives to innovate and experiment in policy and service delivery
- Supporting choice and diversity
- Competition and comparison that supports continuous improvement
- Greater scrutiny of national policies as a result of the need to achieve cooperation
- Protection for the individual by checking the concentration of power.

Importantly, the benefits of federalism do not preclude the development of national approaches to common problems. In addition, the federal structure allows for new ideas to be pioneered by one jurisdiction and, if successful, to be adopted by others.²⁷

Customisation of policies to meet local needs

1.25 CAF submitted that the consideration of the roles and responsibilities of the levels of government in the Australian federation should include 'the principle of subsidiarity'.²⁸ According to CAF, the principle 'holds that the most effective and efficient allocation of roles is achieved where policy and service delivery responsibilities rest with the lowest sphere of government practicable.'²⁹ The principle is concerned with ensuring that decision-making remains close to citizens and enables the system to be judged for whether it remains responsive to the needs of citizens.

1.26 The principle is notable within the European context. The principle informs the activity of the European Union, with the terms of the Treaty on the European Union directing that, other than in matters within its exclusive competence, the Union will act 'only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States...but can rather...be better achieved at Union level.'³⁰

1.27 In relation to the Australian Federation, CAF argued that:

[t]his principle is especially important in Australia's federal system, as we increasingly move towards a system of concurrent federalism – where

27 CAF, *Submission 38*, p. 2 & Attachment A, Dr Anne Twomey & Dr Glenn Withers, *Federalist Paper 1: Australia's federal future. Delivering growth and prosperity*. A Report for the Council of the Australian Federation, p. 8.

28 CAF, *Submission 38*, p. 3.

29 CAF, *Submission 38*, p. 3.

30 Article 5, *Treaty of the European Union*, Consolidated version, C 115/18, 9 May 2008, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0013:0045:EN:PDF> (accessed 28 June 2011).

multiple levels of government will have a role to play in key areas, such as health and education.³¹

1.28 State and territory governments, it is argued, are in the best position to make decisions about the types of services and regulations that suit their communities. As Twomey and Withers have concluded:

Federalism accommodates the vast differences across Australia by allowing policies that affect local communities to be tailored to meet the needs of those communities by people who live there and understand those needs.³²

1.29 This view was reflected in evidence put to the committee. The Northern Territory Statehood Steering Committee for example, noted that:

Federalism works and works well when it is allowed to promote regional and local solutions for local and regional problems and allows policy innovation to flourish within a unified but diverse structure.³³

1.30 Dr Zimmermann also noted the potential benefits of local decision-making to social governance:

[A]t federal level you might have more people dissatisfied with a federal law because you are actually taking into account the view of the nation as a whole. Certainly, if you think about the local level you can actually satisfy the will of a group that is located in a certain area of the Territory far more than having their view counted in a territory such as a country as a whole. So an advantage of federalism is to make more people more content with the kind of laws they have.³⁴

1.31 The capacity for local decision making is one of the principles that underpins the Australian Local Government Association's advocacy for recognition of local government in the Constitution.

The fact that it is elected by the community and responsible for a broad range of services in a clearly defined geographic area means that local government is well placed to understand and meet local needs and respond to those needs in ways that are most appropriate to local conditions.³⁵

1.32 Ascribing responsibility to the appropriate level of government, however, does tend to assume a world where the appropriate level of decision-making is clear cut and unambiguous. This is not necessarily the case. Professor Galligan argues that

31 CAF, *Submission 38*, p. 3.

32 Dr Anne Twomey & Dr Glenn Withers, *Federalist Paper 1: Australia's federal future. Delivering growth and prosperity*. A Report for the Council of the Australian Federation, p. 10.

33 Northern Territory Statehood Steering Committee, *Submission 12*, p. 7.

34 Dr Augusto Zimmermann, *Committee Hansard*, 9 March 2011, p. 61.

35 The Australian Local Government Association, *Submission 24*, p. 6.

there are two dominant modes for conceptualising federalism and intergovernmental relations: coordinate and competitive. He holds that:

[C]oordinate – separate and distinct roles and responsibilities – is not the paradigm of Australian federalism, nor do I think it could be of any sophisticated modern federal system...The Commonwealth and states share roles and responsibilities within most major policy areas: that is a fact of life, and occurs for good reasons of governance matching policy and political needs.³⁶

Competition, innovation, choice and diversity

1.33 Federalism also encourages innovation, competition, choice and diversity. A federal structure improves policy development and innovation by facilitating the exchange of ideas across jurisdictions working on similar policy problems. Wanna et al. see this as a product of horizontal cooperation across jurisdictions at the same level.³⁷ Galligan submitted that the innovation comes through the inevitable competition that occurs between citizens of different governments wanting or seeing better programs and demanding the same from their own government.³⁸ According to Galligan, '[c]ompetitive federalism is much more potent and important for understanding how federalism works and the processes for its reform, and is the preferred paradigm for economists.'³⁹

1.34 The broad thrust of Professor Galligan's position is supported by Walsh who sounds a cautionary note against cooperative federalism when he argues that:

[c]ooperative federalism also can be dangerous because, if it succeeds in establishing itself as the way that governments organise their interrelationships, it would free governments and their bureaucracies from the forces of political competition, enabling them to behave, in effect, like cartels in the private sector.⁴⁰

1.35 However, Walsh does go on to note that there is a risk of overstating the case for regarding competition in inter-jurisdictional relationships as resulting in 'efficient' rather than 'wasteful' outcomes.⁴¹ His central point is that:

36 Professor Brian Galligan, *Submission 46*, p. 13.

37 Professor John Wanna et al., *Common cause: Strengthening Australia's cooperative federalism*. Final report to the Council for the Australian Federation, May 2009, p. 14.

38 Professor Brian Galligan, *Submission 46*, p. 13.

39 Professor Brian Galligan, *Submission 46*, p. 13.

40 Professor Cliff Walsh, 'Competitive Federalism—or Welfare Enhancing?' in Productivity Commission, *Productive reform in a Federal System*, Roundtable Proceedings, 28 October 2005 (2006), p. 83.

41 Professor Cliff Walsh, 'Competitive Federalism—or Welfare Enhancing?' in Productivity Commission, *Productive reform in a Federal System*, Roundtable Proceedings, 28 October 2005 (2006), p. 84.

[m]any outcomes of federal relationships that are seen as indicators or sources of inefficiency may, in fact, be *desirable* outcomes of political competition — which, as we see around us, is capable of resulting in mutually beneficial cooperation.⁴²

1.36 Linked to the notions of innovation and competition is the idea of choice and diversity. Twomey and Withers state that:

Federalism gives people greater choices. People can, and often do, choose to support a government of one political party at the State level and another at the Commonwealth level, because they prefer different approaches to different policy issues.⁴³

1.37 This choice and diversity extends to diversity in institutions as federalism requires the development of multiple capital cities, each with its own range of public institutions.

1.38 It was put to the committee that diversity should not be regarded as a weakness but rather a key strength of federalism. Mrs Finlay cautioned against viewing jurisdictional differences as a flaw in the federal system:

And there is a real underlying perception that any disagreement, different policies or lack of unification between the states is a problem, when in actual fact it is one of the benefits of federalism...there are clear benefits to allowing the states to do things a little bit differently, to reflect the fact that people in different parts of the country have different needs. It is complicated, and there are some disadvantages to it, but, in my view, on balance the benefits clearly outweigh the disadvantages. The idea of competitive federalism can really be a driver to achieving greater results rather than simply being a delaying or a destructive type of disunity.⁴⁴

Cooperation – greater scrutiny of national policies

1.39 Where matters cross jurisdictional boundaries, a federal system requires inter-jurisdictional cooperation. Dr Zimmermann and Mrs Finlay argued that such cooperation can benefit the federal system as it 'should...result in better decision-making by building a heightened level of debate and scrutiny into the system.'⁴⁵ The view that joint endeavour leads to more informed policy is evident in the position of Twomey and Withers:

42 Professor Cliff Walsh, 'Competitive Federalism—or Welfare Enhancing?' in Productivity Commission, *Productive reform in a Federal System*, Roundtable Proceedings, 28 October 2005 (2006), p. 84.

43 Dr Anne Twomey & Dr Glenn Withers, *Federalist Paper 1: Australia's federal future. Delivering growth and prosperity*. A Report for the Council of the Australian Federation, p. 9.

44 Mrs Lorraine Finlay, *Committee Hansard*, 9 March 2011, p. 60.

45 Dr Augusto Zimmermann and Mrs Lorraine Finlay, *Submission 17*, p. 36.

The involvement of more than one government means that a proposal will receive a great deal more scrutiny than if it were the work of one government alone. Problems with implementing the proposal in different parts of the country are more likely to be identified. Where there is conflict between governments on the nature and detail of the proposal, there is more likely to be a public debate, as different governments are forced to put their positions and justify them in the public domain. While this has the disadvantage of sometimes slowing down reform, the need for co-operation has the corresponding advantage of ensuring that reform, when implemented, is better considered and more moderate in its nature.⁴⁶

1.40 It has, however, been asserted that cooperation may be linked to increased centralism. Speaking as part of the Senate Occasional Lecture series, Professor Geoff Gallop has argued that what may begin 'as an inspiration for a "national" solution involving all levels of government...more often than not finishes up as a Commonwealth controlled program'.⁴⁷ In evidence to the committee, Dr Twomey reported similar concerns:

I am told by former colleagues in various states that the Commonwealth is back to its old tricks and basically says, 'You just do what we say or else.' So the veneer of cooperation over the top has not actually been so much reflected in reality underneath⁴⁸

Protection for the individual

1.41 Perhaps the most fundamental democratic benefit of a federal system is that it provides protection for individuals by dividing power across a range of players. Speaking of the Constitution, in 2006 Justice Kirby of the High Court underlined this benefit stating that:

[t]his Court and the Australian Commonwealth need to rediscover the federal character of the Constitution. It is a feature that tends to protect liberty and to restrain the over-concentration of power which modern government, global forces, technology, and now the modern corporation, tend to encourage. In this sense, the federal balance has the potential to be an important restraint on the deployment of power⁴⁹

1.42 The tendency of federal structures to disperse power is supported by international comparisons.

46 Dr Anne Twomey & Dr Glenn Withers, *Federalist Paper 1: Australia's federal future. Delivering growth and prosperity*. A Report for the Council of the Australian Federation, p. 15.

47 Professor Geoff Gallop, 'How healthy is Australian Federalism?', *Senate Occasional Lecture*, 25 February 2011, http://www.aph.gov.au/senate/pubs/occa_lect/transcripts/250211/index.htm (accessed 14 June 2011).

48 Dr Anne Twomey, *Committee Hansard*, 2 December 2010, p. 10.

49 *NSW v Commonwealth* (2006) 81 ALJR 34, per Kirby J (dissenting) at [558], as quoted in Dr Anne Twomey & Dr Glenn Withers, *Federalist Paper 1: Australia's federal future. Delivering growth and prosperity*. A Report for the Council of the Australian Federation, p. 8.

There is also evidence that federations fare better in terms of governmental integrity than do unitary states. Transparency International survey data supports this view, with OECD federations having a 5.4 per cent higher integrity rating on average than OECD unitary states. Under federalism, power is more dispersed and is more open to scrutiny and to comparison by other jurisdictions.⁵⁰

1.43 It was put to the committee that the distribution of power is a key and deliberate feature in the design of the Constitution. The Pearce Division of the Liberal Party stated that '[i]t was the specific intention of the framers of the Constitution that no level of government would become overly powerful, or indeed all powerful.'⁵¹ FamilyVoice Australia put forward a similar view, stating that:

Federalism is one of several aspects of the Australian polity that avoids the concentration of power because of the inherent tendency of power to corrupt. Other aspects of the polity giving effect to this notion include the separation of the executive, legislative and judicial powers; bicameral legislatures and regular elections.⁵²

1.44 The importance of a federal structure as a barrier to centralised power was underlined by the submission from the Western Australian Attorney-General Commenting on the effect of High Court decisions such as the *Engineers Case*, the *Tasmanian Dams Case* and the *Work Choices Case* to widen the scope of Commonwealth legislative powers, it argued that such a tendency:

is inappropriate firstly because this centralisation of power is not warranted by the Constitution's text and structure. Secondly, it is inappropriate because it destroys the benefits of federalism. These benefits, in stark contrast to centralised power, include diversity, limitations on power and dispersal of power. It is important to note that in a country as geographically large as Australia, this latter benefit enables both localised exercise of power by political decision-makers and the corresponding direct responsibility and accountability to the people who elected them.⁵³

Evolution of the Australian federation and its limitations

1.45 While the Australian model of federalism has the capacity to deliver significant benefits, a recurring theme across the evidence presented to the committee was the potential for Australia's federation to be strengthened and its effectiveness improved. For example, the Gilbert and Tobin Centre of Public Law stated that '[t]he

50 Dr Anne Twomey & Dr Glenn Withers, *Federalist Paper 1: Australia's federal future. Delivering growth and prosperity*. A Report for the Council of the Australian Federation, p. 8.

51 Pearce Division Liberal Party of Australia, *Submission 14*, p. 1.

52 FamilyVoice Australia, *Submission 8*, p. 1.

53 Christian Porter, MLA, Attorney-General, Western Australian Government, *Submission 44*, p. 2.

federal system, while having many strengths, is not working as well as it should be.⁵⁴ Rethink Australia commented:

The Australian Constitution is noted for its comprehensive and generally robust Commonwealth/State provisions, however, there is considerable room for improvement.⁵⁵

1.45 On this theme Professor Williams submitted that Australia's federal system, rather than meeting its potential, is currently dysfunctional. According to Professor Williams, this stems from the system's failure to adapt to address issues that have arisen as the federation has evolved.

Australia's Federation is internationally regarded as one of the most dysfunctional, and there are a few reasons for that. One is that it is so old and has undergone so little change. If you look at most of the federations around the world, they have been created in recent decades and have learnt from many of our lessons. They have a better division of powers, they deal with financial matters more effectively and they deal with democratic accountability more effectively. So they have learnt from our mistakes and we have then failed to learn from our own mistakes and make those changes...Other systems that are old, like Germany, have gone through major changes. We are simply an old, intransigent system that should be a Federation but simply works nowhere near as well as it should.⁵⁶

1.46 Three of the most significant areas of concern raised during the inquiry are fiscal and policy centralisation; enduring vertical fiscal imbalance; and the marginalisation of local and regional governance. Other issues that place limitations on Australian federalism are the high degree of shared responsibility for policy issues across all levels of government and the difficulty of changing the constitution.

Fiscal and policy centralisation

1.47 Despite the intention behind Australia's federal structure to disperse power, there has been a clear trend towards fiscal and policy centralisation over the last century. A wide range of submitters were critical of this centralising trend, including individuals, a local council and state governments.⁵⁷

1.48 The Tasmanian government was critical of 'opportunistic federalism or "aspirational nationalism"', arguing that it undermines the federation and is 'counterproductive to efforts of the Commonwealth and state and territory governments to work together on challenges facing the nation'. It singled out the

54 Gilbert and Tobin Centre of Public Law, Faculty of Law, University of New South Wales, *Submission 7*, p. 1.

55 Rethink Australia, *Submission 9*, p. 2.

56 Professor George Williams, *Committee Hansard*, 2 December 2011, p. 13.

57 Naracoorte Lucindale Council, *Submission 5*; Christian Porter, MLA, Attorney-General, Western Australian Government, *Submission 44*.

federal government's unilateral announcement of its intention to take over a Tasmanian Hospital as an example of actions that work against a smoothly operating federation.⁵⁸

1.49 The submission from the Western Australian Attorney-General highlighted the impact of this centralising trend on the distribution of judicial powers across the Australian federation.

Of course, the Commonwealth Constitution also effects a federal division of executive and judicial powers. Again, the distribution of these powers between the Commonwealth and the States has increasingly moved away from the balanced federal division towards greater Commonwealth power. In the executive sphere this is obvious from the control which the Prime Minister and Commonwealth Ministers exercise in Ministerial meetings, as well as resulting intergovernmental arrangements...

In the judicial field, the same tendency is obvious, especially since the creation in 1976 of the federal court, of increased federal jurisdiction, which combined with accrued or associated jurisdiction, has meant that the role and importance of State courts exercising State (and federal) jurisdiction has correspondingly diminished.⁵⁹

1.50 As chapter three will explore further, Dr Zimmermann and Mrs Finlay argued that the beginnings of this centralising trend are evident in decisions of the High Court from 1906.⁶⁰ It was then, they argued, that the High Court began to adopt a more centralist reading of the Constitution. Dr Zimmermann and Mrs Finlay submitted that the centralising tendency, evident in such cases as the *Engineers Case* and most recently the *Work Choices Case*, has affected financial relations between the Commonwealth and the States. It was argued that through cases such as *Victoria v Commonwealth (Second Uniform Tax Case)* and *Paton v Milk Board (Vic)*, the High Court has limited the states' capacity to generate income, while permitting the Commonwealth to provide conditional financial grants to the states and thereby exercise authority over matters not expressly granted to the Commonwealth in the Constitution.⁶¹ Dr Zimmermann and Mrs Finlay conclude that 'all the advantages of federalism sought by the Australian founders have actually diminished over time, in no small part due to the actions of the High Court of Australia.'⁶²

1.51 The policy centralisation represented by the increasing activity of the Council of Australian Governments (COAG) and other ministerial councils has also become a source of criticism. Increased coordination of government policy is often supported,

58 Tasmanian government, *Submission 40*, pp 3–4.

59 Christian Porter, MLA, Attorney-General, Western Australian Government, *Submission 44*, p. 2.

60 Dr Augusto Zimmermann and Mrs Lorraine Finlay, *Submission 17*, p. 14.

61 Dr Augusto Zimmermann and Mrs Lorraine Finlay, *Submission 17*, pp 26–30.

62 Dr Augusto Zimmermann and Mrs Lorraine Finlay, *Submission 17*, p. 31.

but in COAG and ministerial councils, many have argued it is done without transparency. Civil Liberties Australia made the argument in very strong terms:

CLA believes that the growth and out-of-the-limelight development of COAG, SCAG (Standing Committee of Attorneys-General) and the 41 other Ministerial Councils has been the most detrimental development to Australian democracy since federation. We have been writing, speaking and lobbying parliamentarians on our opinion on this topic for more than two years.

What Executive government – that is, the elite-with-the-elite of the ruling political party federally, and in each State/Territory – sees as ‘efficiency’ of the COAG, SCAG and Ministerial Council process is in fact a way of denying parliamentarians their traditional role.

COAG, SCAG and Ministerial Councils are emasculating the power of parliaments, and the proper role and responsibility of parliamentarians, particularly backbenchers from all parties.⁶³

Vertical fiscal imbalance

1.52 Another concern about the Australian model of federalism is the strong mismatch between the revenue raising capacity of governments and their expenditure. Such discrepancies in revenue raising and expenditure between state and national levels of government are referred to as vertical fiscal imbalance (VFI). VFI is a systemic feature of federations: in Shah's major study of federal systems, all countries showed national governments raising more revenue than they expended (though Spain and India came close to being vertically fiscally neutral). However, Australia has one of the most severe vertical fiscal imbalances. With Australia's imbalance measured at 18.7 percent of total revenue in 2006, only Belgium, Spain and South Africa were in the same league.⁶⁴

1.53 The result of this vertical fiscal imbalance is a 'breakdown in accountability for cost-effective service delivery as different levels of government seek to attribute poor service delivery to each other's failings.'⁶⁵ This is discussed in more detail in chapter four of the report.

63 Civil Liberties Australia, *Submission 22*, pp 3–4.

64 Anwar Shah (ed.), 'Introduction, Principles of Fiscal Federalism' in Anwar Shah (ed), *The Practice of Fiscal Federalism: Comparative Perspectives* (Vol IV), 2007, London: McGill-Queen's University Press; IMF Yearbooks; Australian Government, Budget Paper No. 3, 2007–08, GST revenue to the States, http://www.budget.gov.au/2007-08/bp3/html/bp3_main-03.htm (accessed 22 Sep 2010).

65 Business Council of Australia, *Modernising the Australian federation, A discussion paper*, 2006, p. 11, <http://www.bca.com.au/Content/101346.aspx> (accessed 1 June 2011).

Local government – bit player or key player?

1.54 The role of local government in the Australian federation is another area of concern. The Australian colonies have had local government structures in some cases as far back as the 1840s. Despite this, recognition of its role – and the money to match – has been uneven. In particular, the highly variable funding situation is widely conceded, such as by the House of Representatives Standing Committee on Economic, Finance and Public Administration in 2003,⁶⁶ and by the Productivity Commission in 2008.⁶⁷

1.55 In almost no other federation is local government such a minor player in government finances as a whole. Only India and Malaysia have local government funded at the same proportion of GDP as in Australia (around five or six percent). Data from Shah indicate that amongst OECD federations Australia stands alone, with local government in other countries receiving at least twice the amount of GDP as in Australia.⁶⁸ The role of local government in the Australian federation is explored in more detail in chapter six of the report.

A time for review

1.56 A common theme across the submissions is that it is timely to review and reform some of the structures of Australia's federation. Professor A J Brown's research project studying Australian citizens' attitudes to federalism found that:

a substantial majority of Australian adults (up to 86 per cent) believe that the current system does not work well, either in general or in terms of key desirable attributes, or that a federal system is undesirable in principle... This perception increases rather than decreases with respondents' level of direct experience with the operations of government.⁶⁹

1.57 More broadly across all layers of government, there has been increased interest in collaboration to tackle cross-jurisdictional and cross-governmental policy issues. Writing in 2009, Professor Wanna et al. said:

[t]here appears to be a shared commitment to move away from the negative 'blame game' politics that has hampered good policymaking in the past. In place of rivalry, there appears to be a growing awareness that real policy

66 House of Representatives Standing Committee on Economics, Finance and Public Administration, *Rates and taxes: A fair share for responsible local government*, October, 2003, Chapter 6, <http://www.aph.gov.au/house/committee/efpa/localgovt/report/fullreport.pdf> (accessed 1 June 2011).

67 Productivity Commission, *Assessing local government revenue raising capacity*, April 2008. <http://www.pc.gov.au/projects/study/localgovernment/docs/finalreport>, (accessed 1 June 2011).

68 Anwar Shah (ed.) , 'Introduction, Principles of Fiscal Federalism' in Anwar Shah (ed), *The Practice of Fiscal Federalism: Comparative Perspectives* (Vol IV), 2007, London: McGill-Queen's University Press, p. 5.

69 Professor A. J. Brown, 'Thinking Big: Public opinion and options for reform of Australia's federal system', *Public Policy*, Vol. 4, No. 1, pp 33, 36.

outcomes are enhanced most effectively when governments work together to achieve common objectives.⁷⁰

1.58 The 2020 Summit's final report in 2008 included as one of its themes 'creating a modern federation':

9.4 Reinvigorate the federation to enhance Australian democracy and make it work for all Australians by reviewing the roles, responsibilities, functions, structures and financial arrangements at all levels of governance (including courts and the non-profit sector) by 2020.

A three-stage process was proposed with:

- an expert commission to propose a new mix of responsibilities
- a convention of the people, informed by the commission and by a process of deliberative democracy
- implementation by intergovernmental cooperation or referendum.

9.5 Drive effective intergovernmental collaboration by establishing a national cooperation commission to register, monitor and resolve disputes concerning intergovernmental agreements.

9.6 Engage the Australian community in the development of an ambitious long-term national strategic plan that delivers results.⁷¹

1.59 Support for reform was also reflected throughout the evidence presented to the committee. For example, the Tasmanian Government contended:

It is now more important than ever that we revitalise it [Australia's federal system] so that Australia can fully realise the democratic, social and economic benefits that a well functioning federal system can bring.⁷²

1.60 Similarly, CAF submitted that there is a 'growing consensus across politics, business and the community of the need for a clarification of the roles in the federal system.'⁷³

1.61 A number of court cases have given impetus to the calls for change. Local government has been particularly concerned by the effects of *Pape v Commissioner of Taxation*⁷⁴ (the Pape case) in 2009.⁷⁵ Others have criticised the centralising tendency,

70 Professor John Wanna, Professor John Phillimore, Professor Alan Fenna with Dr Jeffrey Harwood, *Common cause: Strengthening Australia's cooperative federalism*. Final report to the Council for the Australian Federation, May 2009, p 2.

71 Australia 2020 Summit Final Report, 2008, p. 308, http://www.australia2020.gov.au/docs/final_report/2020_summit_report_full.pdf (accessed 28 June 2011)

72 Tasmanian Government, *Submission 40*, p. 2.

73 CAF, *Submission 38*, p. 3.

74 *Pape v Commissioner of Taxation* (2009) 257 ALR1.

75 ALGA, *Submission 24*, p. 13.

and seemingly limitless reach of the corporations power, implicit in the Work Choices legislation and the 2006 High Court case against it,⁷⁶ which was lost by the states.⁷⁷

Committee view

1.62 The committee considers that federalism is the right model for dealing with issues relating to Australia's population, culture and economic development. However, this model needs renewal. The Australian federation should be dynamic, and open to carefully considered reform. A willingness to reform will ensure that the principles of federation remain central to governance structures and process. It will also ensure that we reap the benefits of federalism for communities, while not allowing outdated governance arrangements to prevent those benefits being delivered.

1.63 As has been outlined above, and as will be explored in further detail, participants in the inquiry identified a number of areas for reform, and also provided insights on what processes might be used to implement change. In the 110 years since its inception, federalism in Australia has come under growing pressure. Increasingly complex policy issues, an entrenched imbalance between the Commonwealth, the states and the territories in their capacity to raise revenue, and a high degree of overlapping responsibilities has presented challenges for all levels of government to work together effectively. The willingness to cooperate across the three levels of government has waxed and waned in response to political and financial pressures. At times there has been a strong tendency for Commonwealth governments to invoke the need for "cooperative federalism" when often it is less a reflection of a desire for cooperation, than a determination to assume greater Commonwealth control. Perhaps not surprisingly, this has created tensions in federal state relations and been a factor in undermining the power and authority of the states and territories to be true partners in the federation.

1.64 The Senate has asked the committee to 'explore a possible agenda for national reform' on a limited range of issues, and not to determine what the outcome in any area necessarily should be. While the committee is conscious of other constitutional debates taking place at the present time, including discussions of Australia becoming a republic, amending the preamble and recognition of Australia's indigenous people, such matters are not within the inquiry's terms of reference and are therefore debates for another time.

1.65 The report will explore and outline a reform agenda to build and formalise the institutions that support the Australian model of federalism. It is the committee's belief that the agenda for national reform should aim squarely at building and formalising an 'architecture of cooperation'⁷⁸ and in so doing preserve the benefits of federalism.

76 *New South Wales v Commonwealth* (2006) HCA 52.

77 Dr Augusto Zimmermann and Mrs Lorraine Finlay, *Submission 17*, p. 22.

78 Professor John Wanna, Professor John Phillimore, Professor Alan Fenna and Dr Jeffrey Harwood, *Common cause: Strengthening Australia's cooperative federalism*, p. 3.

1.66 The following chapters outline the most important areas in which changes could be made to help maintain the effectiveness of Australia's federal system. Chapter 2 looks at the institutions of Australia's intergovernmental relations, and in particular COAG. Chapter 3 examines constitutional questions. This primarily concerns cooperative legislative schemes and the referral of powers, but also incorporates a broader discussion about the distribution of powers in the federation.

1.67 Australia's vertical fiscal arrangements, including the vertical fiscal imbalance, are considered in Chapter 4. Chapter 5 looks at horizontal fiscal equalisation. Chapter 6 discusses the role and funding of local government. Effective regional governance and service delivery are taken up in Chapter 7. The final chapter discusses mechanisms for advancing the agenda of federal reform, other than those already recommended in previous chapters.