

Chapter Eleven

Chariot Wheels Federalism

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“As the power of the purse in Great Britain established by degrees the authority of the Commons, it will ultimately establish in Australia the authority of the Commonwealth. 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 misfortune 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”¹

Chariot wheels and lions may seem to belong more to the ancient world of the Colosseum than the late 19th Century milieu of the Australian continent. However, federal financial relationships (particularly Deakin’s prophecy), and the so-called “Lion in the Path” of federation, i.e., the elimination of intercolonial tariffs, would become the two issues which would dominate the evolution of Australian federalism. Indeed, the achievement of appropriate tax sharing and the creation of a true common market remain the most glaring examples of unfinished business in the Australian federation.

The two issues were related of course. The main sources of revenue for the colonies had been customs and excise duties and, to a lesser extent, land taxes. Once the colonies would hand over their customs and excise powers to the new national government, as had to be done because a “nation” must constitute an internal common market, then the Commonwealth government would have more revenue than it needed for its prescribed functions, and the States would have less than they needed for theirs. Thus began VFI, Vertical Finance Imbalance, which has plagued the Australian federation ever since. Since the founders also recognized that certain States might need special assistance from time to time, they also created Section 96 of the Constitution, which is the foundation of the means for addressing HFI, Horizontal Fiscal Imbalance. This became ever more important as the philosophy took root that all Australians were entitled to the same standard of government services no matter where they lived, a noble though expensive sentiment for a new nation that pursued unity in diversity.

The foundation principles

It is too often the case that discussion of federalism begins from pragmatics and expediencies rather than principles, especially when proposals for reform are being considered. Therefore it is worth reflecting on the original basis of federation as enunciated by Henry Parkes.

Parkes, at Tenterfield, had already appealed to Australia’s new sense of national identity with the memorable phrase, “the crimson thread of kinship runs through us all”. His genius at the National Australasian Convention in 1891 was to seek agreement first on a set of principles before any detailed consideration of the Constitution could begin. The principles that Parkes proposed (which were readily accepted) were:

- Powers of colonies to remain intact, subject to whatever surrender of power is necessary and incidental to the power of the federal government.
- Trade between the colonies to be absolutely free.

- The federal body to have exclusive power to levy customs duties, subject to agreement on their disposal.
- Defence to be entrusted to the federal force under one command.
- A system of responsible government comprising the Senate (a States' House with no power to originate or amend money bills), the House of Representatives, State Supreme Courts, and the Executive (led by the Governor-General with advisers drawn from Parliament).²

At Federation in 1901 there were no income taxes; the main colonial revenue measures had been customs and excise duties, and to a lesser extent land taxes. As mentioned, since customs and excise would have to be national taxes, the Founders realised that this would leave the States with a revenue deficit. Arrangements were therefore made in the constitutional design for transfers of this revenue (originally three-quarters of it) to occur from the national government to the State governments – the beginning of Vertical Fiscal Imbalance in the federation. This was done through the so-called Braddon Clause, the first and only sunset clause in the Constitution, which was set to expire after ten years unless renewed; in the event it was replaced by a system of per capita grants from the Commonwealth to the States which was simply VFI in a different package. Section 96, the solution devised by the founders to address HFI, contained the ominous words that the Commonwealth could make grants to the States “on such terms and conditions as the Parliament thinks fit”. This of course involved conditional funding, but the Founders considered that it would only be used for emergency or isolated circumstances. Clearly they did not all possess Deakin’s foresight.

Other clauses in the Constitution were included as part of the attempt to create a common market, particularly s. 92, guaranteeing freedom of interstate trade, and the creation of an Interstate Commission to police this (based on American experience).³ Section 92 has prevented many a Commonwealth and State Labor government from nationalizing industry, and so it has oft been said that in the Australian Constitution s. 92 is to private enterprise what s. 96 is to public enterprise. There were also various clauses preventing the Commonwealth from discriminating against particular States in the exercise of its powers, e.g., in taxation, customs, bounties, and trade and commerce. They also served indirectly to protect the smaller States from predatory behaviour by the larger States, something the small States had demanded as the price of joining the federation, along with the creation of the Senate as a States’ House with all States having equal representation.

The arrival of Federation in 1901 fell in the middle of Australia’s original era of major economic infrastructure construction, including railways, tramways, electricity generation, postal and telecommunications services, roads and bridges, harbours, and dams. The provision of this infrastructure fell almost entirely to the public sector, unlike the situation in other federations, because Australia’s small population, scattered across such a vast continent, made it unprofitable for private enterprise to undertake these tasks. The States had primary responsibility for infrastructure and its financing, which, given their narrow revenue base, meant recourse to significant borrowing on international as well as domestic loan markets. Construction of far flung rail lines was particularly expensive, and dominated many State budgets for a long while. Thus the whole federal design set up the States for the fiscal stress that would dominate their lives in the 20th Century.

Testing the federalism concept

It was not long after Federation that the different priorities of the States began to show. This was particularly so after 1915, when income taxes were introduced and quickly grew to become a major revenue source for both State and Commonwealth governments. The bases and progressive rates of State income taxes began to vary considerably, reflecting the ideology and needs of each jurisdiction. This was only natural, given the States’ differing geography and topography, population dispersal, industrial structure, and socio-cultural diversity.

The founders had anticipated this. Indeed it is the key reason why they had chosen to form a federal rather than a unitary system of government. For the theory of federalism posits that one of its great advantages is the provision it makes for differences in public policy arrangements to suit particular regions, while at the same time encouraging local innovation and experimentation, as well as community participation. In so doing it also encourages competitive federalism among the States, with the potential for lower taxation, greater efficiency and effectiveness in service delivery, and client responsiveness owing to the closer proximity of decision-makers to key areas.

The fundamental defining feature of federalism, which distinguishes it from other forms of government, is that States are *sovereign entities* each with its own Constitution. This is reflected in Wheare's classic definition of "layer cake" federalism, which has been the foundation of many of the world's modern federal systems and which the Australian Founders took to heart:

"By the federal principle I mean the method of dividing powers so that the general and regional governments are each, within a sphere, coordinate and independent".⁴

Looking across all of the key theories of federalism and the practice of the concept in ancient and modern civilizations, the key agreed characteristics of federalism would appear to be :

- Some degree of *heterogeneity* of the population, whether characterized by cultural differences or large distances separating communities within the nation, i.e., spatial differences.
- *Divided Sovereignty*, leading to the
- *Delineation of areas of jurisdiction* for national and sub-national governments, requiring the existence of
- An *umpire* to resolve questions of sovereignty and jurisdiction, supplemented by
- Mechanisms for the *political allocation of powers* and resources, which play a crucial role in the
- Maintenance of a *sustainable balance of power* between the units of the federation.⁵

This was the sort of federation which the Australian founders thought they had created; one where the States would be equal partners with the new national government. Indeed, according to the federation debates they expected the States to be the more powerful, and in the eventual Constitution, the national government held only a narrow list of exclusive powers (defined mainly in ss 51 and 52). Moreover, it was envisaged that the Commonwealth would be kept in check by the States through the Senate, which was granted very strong powers by the standards of comparative federal systems.⁶ Technically, the Constitution also created a wide scope for concurrent powers; nevertheless, the Founders clung to the belief that it would be the States that would drive the nation, as appeared to them to be the case in other modern federations such as the United States, Switzerland and Germany.

By and large, in 1901 Australia was seen as six separate economies and polities. It was envisaged that any interconnections between them could be handled by the few national economic powers the Commonwealth had been given (for example, powers over trade, immigration and banking), through joint exercises of power in areas of constitutional concurrency, through State referrals of power pursuant to s. 51(xxxvii), or through bail-outs of troubled States through the Commonwealth's use of the s. 96 grants power. Possibly the best example of the perception of a fragmented economy and society is to be found in the industrial relations power in the Constitution (s. 51(xxxv)), which grants to the Commonwealth power in respect of *interstate* industrial disputes, something which was considered to be an unlikely occurrence. Menzies was later to comment that the Founders must have seen industrial action as something akin to a bushfire which would only occasionally cross State borders.

The centralisation bushfire begins

The history of Australian federalism throughout the 20th Century is one of a gradual centralisation of power in favour of the Commonwealth, through the following means.

Referendums

The emergence of "people power" in the 1890s ensured a popular vote to create the Australian federation, and the inclusion of the Swiss style referendum approach to constitutional amendment, as finally contained in s. 128 of the Constitution. There have been only eight successful referendums since Federation, and three of them have resulted in profound changes to the Commonwealth-State balance in favour of the Commonwealth Government: (a) the establishment in 1927 of coordinated government borrowing and the creation of the Australian Loan Council; (b) the introduction of significant social welfare powers for the national government in 1946; and (c) the formal power given to the national government with respect to Indigenous affairs in 1967

(the largest “Yes” vote ever recorded, at almost 91 per cent).

Judicial review

The oscillation of the High Court in different periods of its history between favouring State and national governments has also been well documented.⁷ However, following the seminal decision in *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd*, and particularly in the period since the Commonwealth takeover of the States’ income tax powers through the introduction of the Uniform Tax scheme in World War II, the trend has been unmistakably towards the national government. This trend has had a particular impact regarding taxation and regulation, and especially as successive Court decisions squeezed the States out of wholesale taxes (for example, over petrol and tobacco), forcing them to resort to retail or “nuisance” taxes, or seek Commonwealth compensation or a referral of taxation power, as in the case of payroll tax, now the States’ largest “own source” of direct revenue.

While it used to be fashionable to blame the ideological disposition of High Court Justices and the governments that appointed them for this centralising trend, it is now evident that many High Court decisions involved the bench basically recognising Australia’s increasingly national economy and its operation in a globalised, treaty-saturated, environment. However, the willingness of the Court to rule that some sections of the Constitution, for instance the external affairs and corporation powers, could be used by the Commonwealth to intervene in areas previously thought to be the domain of the States, is less easy to explain. This pattern is rare in other federations.

Fiscal federalism

Australia has progressively become the most fiscally centralised federation in the democratic world. This is mainly due to the dominance of the Commonwealth government in the field of income tax, surrendered by the States during World War II and, despite all of their bleating about it, their failure to resume these taxation powers. ***The States could at any time re-enter the field of income tax***, although they would have to do so unanimously.

The situation is also exacerbated by the fact that the main indirect taxes are also national ones, thanks to High Court interpretations; for example, the former sales tax, excise duties, and the Goods and Services Tax (GST) (which is a Commonwealth tax despite being hypothecated to the States). The States are left with payroll tax as their main current “own” source of revenue, although this is also courtesy of the Commonwealth, and it is a regressive and punitive tax.

For most of the past 50 years, measures of VFI have generally seen the national government collecting over three-quarters of all public revenue but responsible for only about half of all public expenditure. The States have, on average, received about half of all their income from transfers from the national government, and half of that again has had conditions attached. The smaller the State or Territory the greater the dependence on national transfers.

The situation is far worse for local governments, which have become increasingly dependent on transfers, particularly from State governments. This creates significant issues for local governments, because State governments routinely attach their own conditions to the bulk of their transfers whilst hypocritically complaining that the Commonwealth is doing the same thing to them. Local government has been very poorly treated by State governments, particularly through the continual abolition, creation and amalgamation of local councils, and the devolution of State powers to them without accompanying fiscal compensation. Local government has also been the victim of cost-shifting by the States and, as a consequence, has become ever more reliant on property taxes. VFI is chronic in the State-local interface. Whereas in most nations local government has been the cradle of democracy, in Australia it has usually been the graveyard.

Australia’s VFI has seriously distorted accountability in the federation, with each level of government often blaming the others for poor service delivery or fiscal mismanagement. When the government that spends is not the same as the government that taxes, a significant break occurs in sound public policy-making and accountability. A further consequence has been the proliferation of taxes: a 2007 study identified 56 taxes across the three levels of government, a figure which is now a target of lobbying by peak business groups.⁸

Executive federalism

Since the first conference in 1920 of interstate police ministers to plan a Royal Visit, and the first specific purpose grant for roads from the Commonwealth government to the States in 1923, the intermingling of the levels of government has proliferated. It received a significant boost during and after the Great Depression, when the so-called era of “Co-operative Federalism” saw the establishment of many Ministerial Councils (“Minco(s)”) based on the Australian Agricultural Council prototype. Each Minco comprised Ministers with the same portfolios from the Commonwealth and all State and Territory governments, and occasionally New Zealand for good measure.

By the 1980s there were 43 such Mincos, presiding over approximately 350 intergovernmental agreements, and comprising about one-third of all Australian public expenditure. Many of these agreements had conditional grants attached, of which there came to be some 110 in total, though by 2008 this was reduced somewhat to 98. At the pinnacle of this pyramid stood the annual Premiers’ Conference (not mentioned in the Australian Constitution), which later morphed into the Council of Australian Governments (COAG).

The pattern was much the same in all these bodies – an annual charade was played out with the Commonwealth pretending to engage in consultation, but at the end of the conference laying down its law because it controlled the purse strings. The Commonwealth could enforce its will because of the High Court’s liberal interpretation of s. 96 of the Constitution, no matter that this was never the use of the clause envisioned by the Founders. The most significant example is the Court’s upholding of uniform taxation arrangements after World War II on the grounds that the Commonwealth could continue to give Taxation Reimbursement Grants (later termed Financial Assistance Grants) to the States on condition that they refrained from levying income taxes.

This was centralisation by stealth, as the deliberations of all Mincos were usually secret. Indeed, for a very long period there was no central repository of all the Australian intergovernmental agreements kept by any government – national, State or Territory. Once again accountability was severely distorted; indeed, it is still unclear whether the Commonwealth Auditor-General and Ombudsman can investigate the policy-making decisions and behaviour of State government public servants, who are also not obliged to appear before committees of the Commonwealth Parliament.

Executive federalism and its proliferation of bureaucracy has produced a mess of unaccountability, known in the literature as “marble cake federalism”, where nobody can tell who had baked the cake or where the recipe was kept.⁹

Interestingly, some studies of executive federalism (sometimes called “administrative federalism” given its 40 year evolution) have revealed the main purposes of these intergovernmental agreements, including:

- the achievement of national approaches to attain national priorities;
- the desire for uniformity;
- avoidance of overlapping and duplication in service provision;
- catering for mobility and portability;
- ensuring access to and equitable treatment by government programs;
- standardisation and complementarity;
- dissemination of information;
- promotion of research;
- pooling of resources, especially to cope with national emergencies and disasters; and
- addressing the implications of globalisation.¹⁰

The irony was that these agreements took the nation in the direction of uniformity and homogeneity when, as we have seen, the main advantage of having a federal system of government is its purported diversity.

New Federalism chariots

From World War II until the early 1970s, the period dominated by the Menzies governments, there were only mild incursions into State functions powers (e.g., in education), but there was aggrandizement of the Commonwealth’s financial clout through its control of the major taxes. The concept of “New Federalisms” begins with Gorton’s mild centralizing tendencies¹¹ and has been applied to every regime since then.

Whitlam's Centralist Federalism

The Whitlam Government's (1972-75) centralist incursions included forays into arenas formerly considered the preserve of the States, including urban and regional policies, housing, transport and communications, sewage, environment, Indigenous affairs, education and health, and resources. Significant national funding in this period involved a sizeable infrastructure component from a Labor government ideologically somewhat hostile to the private sector. Being very sympathetic to international treaties, the Whitlam Government posed a threat to the States on this score as well. Many of the Whitlam Government's national policy objectives were achieved through an escalation in the use of conditional funding to the States, the total of which quickly came to represent half of all transfers, compared with approximately one-third in earlier periods. The chariot wheels had spawned blades. Whitlam also engaged in direct funding to local government by circumventing the Constitution (hitherto unknown), mainly by having local governments register as entities under the relevant legislation for the program. He also often imposed a requirement that the allocation of certain funding provided to State governments had to be decided upon with the involvement of regional bodies and local governments.

Of course, none of this was done in a clandestine manner. Whitlam had always been quite open about his disdain for the States and their so-called "States' House", that is, the Senate. Indeed, it had been Labor Party policy for many decades to abolish the States and the Senate, and create a regional form of government (and a republic to boot). Ironically, in 1975, the year of Australia's greatest constitutional crisis, it was the Senate, effectively acting as a States' House, that triggered the actions which saw the dismissal of the Whitlam Government.¹²

Needless to say there was no interest by the Whitlam government in rectifying VFI.

Fraser's New Federalism

Malcolm Fraser's New Federalism (1975-83) rolled back many of the aforementioned Whitlam Government initiatives, introduced a mild form of tax-sharing between the three levels of government, consulted the States on High Court appointments, involved local government more in intergovernmental forums, and, through its Advisory Council on Intergovernmental Relations, produced certain useful criteria for the roles and responsibilities of the three levels of government. Fraser was also hostile to multilateral international treaties, meaning that State powers were not threatened from this direction.

Because he also introduced a mild form of tax sharing with the State and local governments, Malcolm Fraser is therefore the only Prime Minister to have addressed the matter of VFI. State and local governments would now receive a fixed percentage share of the Commonwealth's income tax take in lieu of their former Financial Assistance Grants, and the total would be distributed among all the States (rather than just claimant states as hitherto), on the recommendation of the Commonwealth Grants Commission, thereby also addressing HFI.

However, in a very telling development, when Fraser also offered to allow each State to levy an income tax surcharge or grant a rebate to the taxpayers of that State, no State government accepted, and some used it as a political pawn, claiming it erroneously to be "double taxation". Thus the States lost an opportunity to reclaim some direct access to the growth-based income tax.

Hawke's consensus federalism

Undoubtedly, the most comprehensive reform of federalism, which has had the greatest impact on federal arrangements, was that of the Hawke Government. Elected in 1983 on a platform of consensus building, Bob Hawke is arguably the only Australian Prime Minister who has been equally comfortable in the boardrooms of big business as he was in those of the trade unions from whence he came. The beginning of the decline of purely ideological approaches to federalism in Australia can probably be attributed to this time.

During the early period of the Hawke Government, the emphasis was on macroeconomic reform and achieving international competitiveness for the Australian economy, with accompanying reform of the Commonwealth. However, before long the reform drive led to microeconomic reform. This in turn logically led to federal-State relations, because it was the States that controlled a significant proportion of infrastructure provision, and because their service delivery in many of the sectors impacting on business was uneven and incompatible across the nation. Australian businesses could not become more export-oriented and internationally competitive while their input cost structures were inflated by the operation of inefficient

State government activities, for example, in the areas of energy, transport, education and training.

With no national or State elections in sight for an 18 month period, and all governments bar that of NSW being Labor (and NSW Premier Nick Greiner being very sympathetic to rationalist reforms), a window of opportunity was presented to achieve radical change. A series of Special Premiers' Conferences (present-day COAG) took place. Hailed by all governments as cooperative federalism, the rubric was now that when a policy was deemed to be "national" this no longer simply meant "Commonwealth government"; rather, it meant "partnership with the States". COAG worked to reform federal arrangements based on four principles:

- The Australian Nation principle: All governments in Australia recognize the social, political, and economic imperatives of nationhood and will work cooperatively to ensure that national issues are resolved in the interests of Australia as a whole.
- The Subsidiarity principle: Responsibilities for regulation and for allocation of public goods and services should be devolved to the maximum extent possible consistent with the national interest, so that government is accessible and accountable to those affected by its decisions.
- The Structural Efficiency principle: Increased competitiveness and flexibility of the Australian economy require structural reform in the public sector to complement private sector reform; inefficient Commonwealth-State divisions of functions can no longer be tolerated.
- The Accountability principle: The structure of intergovernmental arrangements should promote democratic accountability and the transparency of government to the electorate.¹³

The single most important conceptual contribution of the new approach was to refocus the debate concerning allocation of powers in the federation *from functions to roles*. This was identified as a key element for reform in a paper prepared by the Economic Planning Advisory Council, itself a creation of this era.¹⁴ Drawing on successful experiences in modern federations like that of Germany, it was argued that the old style coordinate or layer cake federalism could no longer apply, because in so many functions of government there were now not one, but two, and often three, levels of government involved. Therefore, the challenge was to accept this milieu and, rather than trying to unravel the *discrete* functions, it was necessary to identify more clearly the roles and responsibilities which each level would play in the *shared* functions. From this time on there was a discernible increase in the use of the term "roles and responsibilities" in debate about federalism reform.

The era is probably best remembered for the *National Competition Policy* report ("Hilmer Report"),¹⁵ which demonstrated that significant financial benefits lay in the introduction of open competition into the Australian economy. This led directly to the subsequent National Competition Policy (NCP), which transformed the economic landscape across the nation. It created an almost level playing field between public and private sectors and saw State government business undertakings, usually conducted through government-owned corporations, subject to private sector style efficiency performance benchmarks. It also shifted the focus of regulation and deregulation markedly from State to national level. Some subsequent commentary on NCP has portrayed it as a policy initiative foisted on the State and local governments, whereupon they were forced to meet benchmarks set by the national government or lose their share of the productivity dividend being attained. However, it is important to remember that the Hilmer Report had been commissioned by COAG, and NCP had also had the full endorsement of COAG, which comprised all States and Territories, and representatives from local government.

Other outcomes from Hawke's New Federalism include the achievement of mutual recognition of professional and trade qualifications (based on the European Union model); the establishment of the eastern seaboard electricity grid; national standards in food labeling; a national rail freight corporation; uniform road regulations and user pays principles for charging; national performance monitoring of government trading enterprises, accompanied by national accounting standards, including standards for asset valuation, as well as other issues such as borrowing arrangements, taxation and competition policy; a uniform State-based system of prudential supervision for non-bank financial institutions; an intergovernmental agreement setting out roles and responsibilities of all governments across a range of environmental management issues; and ongoing review of duplication of services in many government functions, with an emphasis on health, welfare and vocational education and training. Subsequently, the Australian National Training Authority (ANTA) was established as a cooperative federalism body through complementary Commonwealth and State legislation (it was subsequently abolished by the Howard Government).

Following these successful reforms in areas of expenditure, which had seen the States return to a greater role as policy partners, Hawke was willing to consider some form of tax-sharing arrangement with the States. However, this became part of the cause of his downfall at the hands of centralist Paul Keating, who was never enthusiastic about most of the New Federalism agenda and no lover of the States. Hence, the opportunity to continue the federalism reform process so as to embrace intergovernmental revenue sharing, which would have addressed VFI and restored a degree of sovereignty to the States, was lost.

Howard's federalism enigma

The Howard Government (1996-2007) will probably be best remembered for its tax reforms, including the introduction of a 10 per cent GST. After considerable difficulty getting the reforms through the Senate, the final package of reforms ushering in the GST also included a reduction in personal income tax, a reduction in company tax (largely in line with the recommendations of the 1999 *Review of Business Taxation* ("Ralph Report")), and abolition of the sales tax.

In a complete surprise, the Government decided to give the proceeds of the GST to the States and Territories in lieu of their former Financial Assistance Grants, though this was subject to the condition that the States abolish, over a five year period, nine of their minor "nuisance" taxes, primarily those concerning property transactions and licenses. The revenue from the GST would be distributed amongst the States and Territories according to the recommendations of the Commonwealth Grants Commission (CGC), but a guarantee was given that no State would receive less than would have been the case under the old system. Most interestingly, the rate and base of the GST could not be changed without the unanimous agreement of the Commonwealth and all States and Territories (a measure designed to assuage concerns over the potential for the tax rate to increase, as had occurred in value added taxes in other nations). But it is important to remember that the GST is a Commonwealth tax, not a State one, and it does nothing to reduce VFI. The chariot now simply carries 8 GST purses to the State and Territory capitals.

The Howard Government's approach to federalism surprised many observers because of its profoundly centralist nature, given that the Coalition, especially the Liberal Party, had been born and bred on a diet of State's rights. It is tempting to explain this by the fact that all of the States and Territories were governed by Labor for almost all of the period from 1996-2007, but this is only part of the explanation. Howard and his long serving Treasurer Peter Costello pursued a different kind of economic reform agenda, one in which it was held to be essential for the Commonwealth government to be dominant, with the States predominantly as service deliverers rather than full policy partners. Consequently, COAG lost its punch and much of its relevance in this period.

Under Prime Minister Howard the Coalition pursued a centralising approach through a number of avenues, including:

- use of the s. 51(xx) corporations power to override State powers, most famously in the area of industrial relations;
- (increasingly) conditional funding to the States;
- simple overriding of States and Territories in a number of policy initiatives, the clearest example being the 2007 intervention into Indigenous affairs in the Northern Territory;
- by-passing States and Territories, for example, through the establishment of Australian Technical Colleges as Commonwealth government entities receiving direct Commonwealth funding;
- contracting out of Commonwealth services on a competitive basis, whereby State and Territory governments would not have preferential bidding rights; and
- direct appeals to citizens and parents to embrace national performance standards and reporting/accountability measures, which would then be forced upon the States and Territories, for example, in school education.

The public and media generally applauded the Howard Government's moves because they promised uniformity, portability, accessibility, rising standards of government services, more choice, and better reporting leading to greater accountability. School education was the prime example. Howard often stated words to the

effect that the person on the Bondi bus did not care which level of government was theoretically responsible for a service, as long as it was effectively and appropriately delivered.

By and large, business and industry also welcomed the Howard Government's measures in the field of intergovernmental relations, partly because of the national approach to issues of ongoing concern to the business community, but also because of the general feeling that the States and Territories had been incompetent with respect to the delivery of basic infrastructure and the provision of utilities. The business community had long expressed concern over clogged ports, dysfunctional infrastructure, lax regulation of non-bank financial institutions, regressive and burdensome State taxation regimes (despite the bonanza for the States from the GST), long hospital waiting lists, sub-standard literacy and numeracy in schools, and politically correct school-based curricula. Consequently, when Treasurer Costello flagged that the Commonwealth was considering taking over ports and other major aspects of infrastructure delivery from the States, together with the dimensions of financial regulation residing with the States, he received warm support from the business sector.

This period also saw the State governments come under severe pressure from the electorate, for their poor planning and management of infrastructure and basic services. Somewhat desperately, those State governments which had formerly been hostile to the market-based concepts involved in engagement with the private sector, took them on board, if only to relieve pressure on their budgets which were often under strain during this period. This budget strain was often of their own making as they eschewed borrowing, fearing that this would jeopardise their credit ratings, objects of almost religious worship since the 1980s – it was, one might say, “Government by Moody’s”.

Thus Australia began a fundamental shift away from its heavy reliance on the public sector for the provision of capital and recurrent services. This occurred even in remote areas, where the use of the Community Service Obligation could now see the private sector handling much of this activity, even though this would give rise to much debate and controversy as to standards of service. In Australia's remote areas, such as much of the Northern Territory, the delivery of vital functions depends more on the visible hand of the public service than the invisible hand of the market. Such delivery was supposedly watched over more vigilantly by regulators. Indeed, this was also the era in which regulators, both national and State, supplemented their increased prominence under NCP, albeit with mixed results and performances across the nation. It was the States who were largely being blamed during the 20th Century for clogged and inefficient infrastructure, for example in relation to ports, roads, energy, and water, because of a lack of foresight and under-funding, and often because of the inadequacy and economic insensitivity of their regulatory regimes. Business and citizens looked to the Commonwealth to step in and address these crises, whether by carrot or stick.

In stepping into these arenas the Commonwealth has been politically aided by the poor performance of State governments, as identified by the three sentinels of federal performance measurement – the Australian Bureau of Statistics, the Commonwealth Grants Commission, and particularly the Productivity Commission. Each, within its own mandate and using its own methodology, provides progressive comparative snapshots of State government performance, and the result is usually not a pretty sight.

Productivity Commission Chairman, Gary Banks, has criticised the national wastefulness of competitive federalism, especially attempts by States to poach industries. In response State governments, with the exception of Queensland, signed non-poaching of industry agreements. The Commission has also castigated the regulatory overlap in the federation, the proliferation of taxes across the three levels, and the barriers to establishment of a true common market because of differing State regimes in many policy areas.

At the Productivity Commission symposium on Productive Reform in a Federal System, the Secretary to the Commonwealth Treasury, Ken Henry, went so far as to suggest that Australian federalism had been characterised by both cooperative federalism and competitive federalism, but that it was the latter that had been dominant, to the detriment of the national economy.¹⁶

Another concern of most participants at the symposium was the lack of a true common market in Australia which, it was said, poses a serious economic hindrance because of the need for industry to meet differing standards of regulation and conform to differing legislative frameworks throughout various State jurisdictions. Again, it was Henry who put this most forcefully, stating that Australia did not have a national common labour market, nor national markets in electricity, water, and land transport, thus creating significant obstacles to the achievement of greater productivity and hindering the economy in an era of globalisation. He observed that the sections in the Constitution (in particular s. 92 and the powers concerning uniformity of policy in s.

51) which the Founders included in an attempt to ensure a common uniform market, had not been sufficient. Moreover, the courts and legislatures had not taken positive action to interpret these sections proactively or realise that, in themselves, they were not adequate, and had indeed been interpreted differently in different jurisdictions:

- These various constitutional prohibitions fall well short of ensuring nationally uniform laws affecting economic activity – except in narrowly defined areas.
- More generally, none of the Constitution’s so-called “common market” provisions compels the States to do anything at all to facilitate the development of national markets in anything – no good, no service, whether a business input or a household purchase.¹⁷

The basic causes of this malaise, Henry believed, could be found in geography, competitive federalism, and the way politicians at all levels refused to truly engage markets:

“The two biggest threats to economic reform in Australia are an aversion to the logic of markets and stubborn parochialism. Neither of these threats is new”.

The Productivity Commission with its focus on outputs, and the Commonwealth Grants Commission focusing on capacity and inputs, both produce stark revelations about the poor comparative performance of many State governments. However, the venues where one would most expect these findings to be closely examined and taken up, viz. State Parliaments, are simply hopeless on this score. Provided with a wealth of condemnatory comparative data on their State or Territory’s performance, the Parliaments (and particularly Opposition parties) too often do nothing with this vital information. This is a major defect in the functioning of the Australian democratic process and it weakens the very sinews of Australian federalism. It also augments the arguments of the lobby who argue for the abolition of the States.

Enter Rudd’s process ridden federalism

Labor’s platform for the 2007 national election was largely a mix of promises that copied those of the Coalition, along with a series of dot points in other fields which could not really be called policies. The latter was certainly true of the platform on federalism, despite the appointment before the campaign began of a panel of experts for advice, reporting to the Shadow Minister for Federal-State Relations, Bob McMullan.

Once in government no federalism principles were espoused, not even the Hawke Government’s four pillars policy, which Rudd had helped to draft in an earlier bureaucratic life. The States were described as “service providers” by Rudd and his Minister of Finance who, in his maiden speech to Parliament, had called for the abolition of the States. The key rhetoric of the campaign was to end the so-called “blame game” between the levels of government; this was based on the dubious assumption that it could easily be achieved because all of Australia’s governments would be Labor. (Australian history certainly proves that having the same party in power at different levels can never guarantee cooperation and harmony in intergovernmental relations). Moreover, Rudd’s stance was contradictory, on the one hand promising to reduce the number of conditions on Commonwealth funding, but in the same breath threatening to take over functions from the States and Territories if they did not perform, particularly in relation to hospitals.

It was not long after the election that COAG was summoned, and a plethora of working parties, comprising national and State ministers and officials, were established to review federal arrangements, ostensibly with a view to reducing overlap and duplication and achieving nationally cohesive approaches. Astoundingly, two more Mincos were created (in the areas of Ageing and Trade). Significant confusion reigned when it was stated by COAG that the achievement of such national approaches might occur in different ways in different areas, including template legislation, cooperative pledges of some kind, complementary legislation with some opting out allowed, and occasionally transfers of power to the national government. This applied in such fields as industrial relations, occupational health and safety, workers’ compensation, uranium mining, and the diffuse and confusing methods which were outlined for achieving a national school curriculum.

The matter of conditional funding was reasonably quickly addressed by an agreement to broadband the more than 90 SPPs into a smaller bundle and reduce the onerous burdens contained therein, but no further detail has emerged.

The comprehensive Human Capital Reform agenda, previously proposed to the Howard Government by the States and Territories at the behest of Victoria, and seen as a natural flow-on from the capital expenditure emphasis of NCP, was revived. It covered such fields as health, education, skills, and workplace safety. However, its modalities were flawed from a federalism perspective, because they would sacrifice the sovereignty of the States and Territories and subject them to performance benchmarks which would be set and policed by the Commonwealth; this would also involve an ambiguous role for a new Federalism Reform Council. The approach would also discriminate against the smaller States and Territories, who do not have the capacity to launch the same bids as larger and richer States. This was yet another example of the way in which NSW and Victoria have persistently refused to accept that HFE is part of the price of nationhood. Nor have they recognised that the smaller States often prop up Sydney and Melbourne through export earnings, tariff policy, and the fact that many company headquarters are taxed in Sydney and Melbourne in spite of the fact that the income involved is earned in other jurisdictions. It is also the case that monetary policy (applied uniformly across Australia) is primarily based on economic conditions in Sydney and Melbourne which do not always apply elsewhere.

Whether Rudd's process-ridden federalism was an antbed or a beehive of activity depended on the perception of the commentator; however, it appears that little has changed in terms of who is calling the shots. Prime Minister Rudd made it plain that the main role he saw for the States is to implement his election platform. Over subsequent COAG meetings in 2008 the "blame game" was only resolved by very significant grants of money to those States and Territories who complained or threatened to scupper any national approach; examples include water funding for the Murray-Darling, hospitals funding, and funding for computers in schools.

A number of side-deals were also done with particular States on specific programs. Some States, whilst agreeing to participate in particular areas, reserved the right to opt-out of aspects of the arrangements, as with occupational health and safety and industrial relations. Ironically, COAG did deliver on former Treasurer Costello's dream of a national takeover of the remaining financial services regulation. When Rudd announced a review of Australia's tax system, to be chaired by the Commonwealth Secretary to the Treasury, Ken Henry, but then excluded the GST from the review, most commentators saw this as opportunism and irrational policy-making designed to mollify the States and bolster the rhetoric of cooperative federalism.

Rudd's so called new federalism saw divided opinion amongst the media. Some were skeptical, others hopeful. To the skeptics, the continuous COAG meetings seemed like a series of opportunities for "spinfests", even by mid-2008 when the States finally agreed to abolish the remaining State and Territory nuisance taxes, to cede powers over financial regulation to the Commonwealth, and to make uniform a raft of other business regulations. By mid-2008 the Government had begun to set up its new body, Infrastructure Australia, with a sizeable cache of funding, although it was not clear whether it would take a truly national approach to project funding as business had called for, or whether the old parochialism would prevail. When various States started immediately putting in bids the signs were not hopeful; it seemed like the Loan Council revisited because, according to any mandated State bidding process, funding would be allocated on a regional or spatial basis rather than according to national economic priorities. The operative word here is "bidding" – the States could well be relegated to begging for money which constitutionally belongs to them. Beggars have little dignity, let alone sovereignty.

The largest challenge facing the Commonwealth government in 2008 has been climate change and its associated policy ramifications. Following the release of the Garnaut Climate Change Review *Draft Report* in mid-2008, which outlined a draft model for a national emissions trading scheme, many States and Territories, particularly NSW (which launched a scathing attack on the *Draft Report*), joined a lineup of business groups arguing for exemptions, special consideration, or compensation for particular industries, regions, consumers, or sectors.

In 2008 the Rudd Government also convened the Australia 2020 Summit, with some 1,000 handpicked persons in attendance. There was significant criticism of the logistics of the Summit from both observers and also attendees; these criticisms related to perceived bias in the selection of delegates and alleged engineering of the Summit's findings, which did not always match the actual discussions. Some of the topics covered related directly to federalism reform, and a response is awaited.

Despite all of the rhetoric of the Rudd Government, its actions to date have been profoundly centralist, and the engagement of the States has been almost entirely as service deliverers. Amazingly, State Ministers and bureaucrats have been conned into a myriad of processes where they now advise the Commonwealth

how they can be further subjugated to Commonwealth – determined performance benchmarks and become bidders rather than sovereign entities. There has been no talk of tax sharing, which would be the fastest and most effective way to end the “blame game”. All Rudd’s Chariots lead to Canberra, and the wheels do a lot of spinning.

The wake of the chariots

The 107 years since Federation have certainly brought significant changes that have impacted on the functioning of Australian federalism. Australia now has a truly national economy with significant mobility of capital, labour, and goods and services. It also has a sophisticated pattern of communications by land, sea, air, post and particularly telecommunications – a far cry from the 1890s when the Premiers would communicate in Morse Code. Remoteness has to a large extent been overcome by the revolution in communications, although this is not always a complete or adequate substitute for face-to-face service delivery by governments. The media remains largely regional and parochial, with just two truly national newspapers, and Australia, unlike most federations, has no major truly national television networked news.

The Australian economy is substantially locked in to globalisation with all of its challenges and opportunities regarding capital, migration, treaties, and international agreements. This process has also meant that the economy has been impacted on by forces and trends once considered external to the pure realm of economics, such as social capital, environmental linkages, and sustainable development. Business has begun to embrace triple bottom line reporting and aspects of Corporate Social Responsibility. Partnerships of various kinds have sprung up between government and business, and governments themselves have begun to create joined up government. Thus the community, business, and not-for-profit sectors now have a greater stake in federalism than ever before, especially as non-government entities now deliver any services that were formerly considered public goods or responsibilities.

However the stark reality is that *Australia is no longer a true federation* because the States have lost their *de facto* sovereignty. This is primarily because, as Deakin prophesied, the Commonwealth chariot has accrued so much fiscal power that it can ride roughshod over the States in every race. Instead, we now have a national polity with a virtually unitary system of governance. Politics has been transformed and power has clearly shifted to the national arena. All of the major political parties are now centralists.

This brings us to arguably the most significant change in the political landscape affecting federal-State relations in Australia, viz. the transformation of the Liberal Party. There are two dimensions to this. One is the change of the party from the States’ rights party of its foundation by Menzies, and which used to be based on a philosophical commitment to deconcentration of power and devolution of responsibility. For the Liberal Party to become a centralist party is truly a remarkable phenomenon, and it has changed the whole dynamic of federalism.

The second dimension is the discipline which the party now seeks to impose on its parliamentarians, whereas once it was considered the essence of liberalism that a Member of Parliament would have a free vote. Apart from producing the demise of much of the most creative and innovative elements of the Liberal Party, this has also been a major factor in destroying the role of the Senate as a States’ House as was envisaged by the Founders. Whilst the Labor Party has always been centralist, and advocated the abolition of the Senate and the States for most of its history, the Liberals were once the beacon of State sovereignty, free enterprise, competition, and liberty; but this is no more the case, and it has profound consequences for the ever faster rumbling of the Commonwealth’s chariot wheels. It is also a potent symbol of the decline of ideology in Australian politics, as both major parties move closer to the centre for electoral gain.

The economic and social trends have also created centripetal forces propelling power towards the centre. Australia’s constitutional design has not been able to accommodate this phenomenon, and so extra-constitutional structures and processes have evolved, spurred on by curious interpretations from the High Court that have given the Commonwealth substantially increased control over the nation by virtue of its taxation, corporations, and external affairs powers. Thus political structures have been introduced to adapt these forces of centralisation, in an attempt to make Australia’s federal system work. For example, executive federalism, in the form of the Premiers’ Conference and its morphed cousin COAG, might be seen as a substitute for the decline of the Senate as a States’ House, but the State Premiers sitting at COAG are servants, not sovereign partners, of the Commonwealth.

In essence, the institutions of federalism are not working as designed and intended by the Founders, and governments at all levels are no longer properly accountable to voters, particularly in the realm of intergovernmental relations. The Constitution has proved itself to be a distinctly rigid document, largely because many citizens have become so alienated from politics and politicians that they distrust any proposals from them to change its provisions.

Chariots cause damage

So what does it matter that the Australian federation is so financially centralized? The answers lie in the realms of democracy, accountability, efficiency, effectiveness, and self reliance.

Australian democracy, with its proud history in so many domains, can not remain robust whilst its governments are no longer fully and directly accountable to citizens. Fiscal centralization has been the main force which has produced all the distortion and blurring in roles and responsibilities between levels of government, to such an extent that citizens no longer know who to blame, or give credit to, for the outcomes of public policy in the vast terrain of activity encompassed by executive federalism. The breaking of the nexus between spending and taxing renders any government irresponsible for its actions. In Wood's words, "The need for the States to have revenues that match their expenditures is central to a functioning federation".¹⁸ As the Business Council of Australia has observed, the high level of VFI is causing waste and overspending because of the lack of accountability it produces. Indeed, in one of the most comprehensive series of reviews ever undertaken of Australian federalism, the Business Council of Australia has identified three major defects in the system and called for action to:

- “1. Clarify roles and responsibilities.
2. Institutionalise cooperation.
3. Fix federal arrangements.”¹⁹

Moreover, in this process of horse trading many interest groups and communities are frozen out of, or simply not consulted by, the peak government policy-making bodies of federalism policy, viz. the Ministers and bureaucrats who do the wheeling and dealing. This can be especially true for smaller private sector or civil society groups. It seems to be true at the moment, for example, for the private education and private health sectors, who are not fully consulted re COAG deliberations on their sectors.

He who pays the piper calls the tune, and the pipers in Canberra are more devastating than the legendary one of Hamlyn. Fiscal centralization means that the Commonwealth view prevails in so many parts of the public sector. Yet Australia cannot be governed, let alone administered, from Canberra, and certainly not by bureaucrats with a centric view of the world, never having worked at the coal face in service delivery areas in which they are attempting to impose uniform solutions on sub-national levels of government. (And they get no inspiration from their own back yard. The ACT Territory governments have mostly comprised political regimes that resemble a social experiment or work in progress, rather than a sound system of governance).

Such heavy reliance by the States on national funding, and with so much of it with conditions attached, sends the wrong signals, or no signals, to State governments. Their own priorities are constrained, they are led into policy solutions which may not be appropriate for their jurisdiction, and worst of all they see their main stakeholder as the Commonwealth government rather than the citizens and clients they are meant to serve. They manage upward to Canberra rather than outward and downward to their real constituents and stakeholders.

Fiscal centralization has produced overlapping, duplication, and second guessing between State and Commonwealth governments, the result of which is more bureaucracy, red tape, delays, and confusion for clients.

Tax distortion is also an inevitable consequence of the extremely high level of VFI. States have embarked on many journeys into bizarre, damaging, and inequitable tax avenues and possibilities in an endeavour to obtain greater own source revenue. The fact that there are some 56 taxes across the three levels of government is testimony to this pattern.

It all adds up to poor State performance since they have no incentive to manage more effectively or efficiently, either because they can blame the national government, or they do not have sufficient of their own

resources to address particular problems, having to wait for the wheels of the whole COAG machine to turn before special challenges can be addressed, and even then risk omission because of the drive for uniformity which such processes engender. A State government which had to directly tax its citizens to meet pressing community needs would be more inclined to lift its own game than one which ran to Canberra with every problem that arises.

A little competition between States does not go astray either, provided it is competition for improved governance and service delivery, and not just for interstate poaching of capital, labour or physical resources at taxpayers' expense across the nation. Whilst it is not true that if States simply pursue their own interests, an invisible hand will combine them to produce the national interest, it is the case that accepting continuing handouts from Canberra will not provide any incentive for improved governance. Hopefully, as the Australian population and capital are becoming considerably more mobile, they will be comparing State government performances as occur in North America and within the European Union. As Alan Wood remarked to this Society ten years ago:

“I believe that in a healthy federation, competitive federalism and the variety it brings is a crucial feature. It provides scope to respond to different community choices, provides competing models of service provision and funding, a greater capacity to respond to change, and to recognize the differing needs of different States more efficiently than a centralized system”.²⁰

Indeed it might be asked, if National Competition Policy is so good for Australia, why do we not also deregulate the States from the shackles of the Commonwealth and have them engage in some healthy competition? Governments are like people in many ways. It would be surprising if this were not the case. Anybody constantly on a drip of funding will lose their self reliance, their dignity, and their resourcefulness. The Australian States currently resemble this pattern. Every challenge that comes along is earmarked for Commonwealth assistance, and if this is not forthcoming then the strategy seems to be just to hope the problem will go away, or make some token gesture and start spinning.

Finally, it is the case that Australia is simply not homogenous. Proof comes from successive Commonwealth Grants Commission findings re disabilities of particular States re cultural diversity, scale, indigeneity, dispersion, industry and economic structure. It is also the case that the small jurisdictions, especially the Northern Territory and Tasmania, are at a disadvantage in any fiscal heavyweight bouts with the Commonwealth, and are easily discriminated against at a COAG or Minco table. As Deakin prophesied, “The less populous will first succumb”.

It is almost one of the laws of nature that centralization produces uniformity. The horrifying current spectacle of the European Union is a clear example, as the bureaucrats of Brussels are homogenising Europe and stamping out its greatest virtue – its cultural diversity. Any acceleration of fiscal centralization in Australia will result in harmful attempts to rid this nation of the diversity of its people and terrain, which is one of its great strengths. Indeed, our sophisticated if complex system of horizontal fiscal equalization, with its policy neutral methodology, is one guarantee that diversity can be protected despite all the centripetal forces in our federation. As such it truly is part of the glue that holds the nation together, far more effective than the Clag that COAG seeks to use to cement agreements between governments. Cultural diversity, like biodiversity, should be a key objective in the challenge of sustainable development on this planet.

Chariot paths for the future

Australia is trying to operate a 21st Century economy and society with a 19th Century Constitution and system of government. This, at least, is generally agreed.

However, the current crop of politicians, like most of those of the past two decades, want to reform the federation in an incremental fashion and from purely pragmatic perspectives. Any true and lasting reform has to begin from principles. This is the legacy of Henry Parkes, Alfred Deakin, Samuel Griffith and all of the founders. Agreement on principles was also the underpinning of the most effective reforms to Australian federalism to date, in the 1980s. It is also the case that federalism reform cannot just address the expenditure side of the ledger, it has to address simultaneously the revenue side; otherwise the result is just tinkering with the nuts and bolts, rather than a complete overhaul, of the chariot.

Moreover, no reform of federalism can begin until one basic question is resolved. ***Are the States going to be sovereign and genuine policy partners, or mere service deliverers?*** On the answer to this question hangs the whole direction of reform.

Taking all of these factors into consideration there would appear to be *three fundamental options for the reform of Australian federalism*:

1. Continue the process of centralisation, abolish the States, and create a two-tier system with one national government and numerous regional governments. The number of regions suggested has varied, generally between 32 and 56. The amount of discretion for the new regions is also an uncertainty but they are usually cast predominantly as service deliverers for the national government. Of course, this would spell the end of federalism, but it is an option which opinion polls tell us enjoys significant support among citizens, and is a favourite of much of the business community.

However, there is another alternative. Over the next century, as Australia's population and economy grows, there is a real possibility that New States will be created. The obvious candidates are Northern Territory, the ACT, North West Australia, North Queensland, and the old favourite – the New England region of New South Wales. Thus regionalism may come about with the federal constitutional design intact. Constitutionally it is far easier to create a new State than abolish an old State.

2. Restore State sovereignty and return to a truly federal system of government. Since federalism is essentially a contractual partnership, and the only true partnership is one in which the partners are equal, this must involve the States taking back their income tax powers so that they are no longer dependent on largesse from Canberra and can bargain from a strong independent financial position. Business has been very cool on this option, since it fears a two-tier tax system and a proliferation of taxes. However, there need only be one tax office, the ATO, which can do all the collecting on behalf of all levels, as is the case in Canada. It also raises the prospect of tax sharing, as occurs in many modern federations, Germany being the obvious example – which would be the most appropriate model for Australia, but only if the sharing formula and the means of its continuous modification were enshrined in the Constitution. Otherwise the Commonwealth will dominate this process as well, and Deakin's prophecy will still reign supreme.

There are other options. Alan Wood canvassed the comparative merits of tax base sharing and revenue sharing in his seminal contribution to this subject, so those arguments still stand.²¹ He also addressed the old shibboleth that the Commonwealth cannot surrender any tax room because it needs to manage the economy. On this point it is noteworthy that all the other federations with which we usually compare Australia, i.e., USA, Canada, Germany, have systems where the national and sub-national governments share the tax room, by tax sharing (Germany), separate tax bases (USA), or shared tax bases and joint collection (Canada). As Wood concluded, this argument "is the last resort of the centralist".

If the restoration of State sovereignty option is to be pursued, the States are going to have to develop more backbone and stop their past propensity, as identified by Alan Stockdale, as being to pass over revenue-raising responsibilities in return for greater grants from Canberra. The States will have to become Chariots of Fire themselves.

3. Continue muddling through with incremental changes at the margins, leaving the centralisation of power intact, but shunting around the roles and responsibilities of the three levels of government. This can be approached by tinkering at the margins (as has been going on for the last 20 years) or by a more fundamental attempt to change the constitutional alignment of powers.

If we were seriously going to consider constitutional amendments the following might be put on the list :

- four year terms of Parliament (preferably fixed terms);
- rectification of VFI by mandated tax sharing between levels of government;
- inserting new functions relating to the environment and sustainable development into the Constitution (*currently not even mentioned*);

- Institutionalising and formalizing COAG;
- clarification and possibly qualification of external affairs, corporations and trade powers;
- eliminating anachronistic passages, such as s. 51(xxxv) dealing with industrial relations;
- more clearly defining powers concerning national markets;
- the removal of past ambiguities in constitutional wording, particularly in respect of the “free trade” provisions, thereby casting aside restrictive High Court interpretations; and
- fostering a new alignment of functions between levels of government as well as defining their respective roles, responsibilities and shared functions, as occurs in the Joint Tasks provisions in the *Basic Law for the Federal Republic of Germany*.²²

A more inspiring and relevant Preamble would also not go astray. We should also take the opportunity to get our main constitutional monkey off our back by adopting Sir Charles Court’s suggestion of an amendment to stipulate that if the Australian Senate forces the House of Representatives to an election, the Senate itself should also face a full election.

Achieving all this requires a Constitutional Convention, bi-partisan agreement, a constructive debate in both national Houses of Parliament, and a clearly defined set of referendum proposals to be put to the Australian people accompanied by a positive education and information campaign.

However, this option can only have meaning if the preliminary step, clarifying just what sovereignty the States possess and whether they are genuine policy partners or mere service deliverers, is taken. There also needs to be the establishment of foundational principles. The principles put forth by Parkes in 1891 and Hawke in the New Federalism era could each contribute, since they remain relevant today, and Deakin’s warning needs to be inscribed on the table mats and coasters at every COAG table.

Endnotes:

1. Anonymous column [written by Alfred Deakin] in the London *Morning Post*, 1902.
2. See the full account in John Quick and Robert Randolph Garran, *The Annotated Constitution of the Constitution of Australia*, 1901 edition, Sydney, Legal Books, 1976.
3. The Interstate Commission, though disbanded on legal grounds, had run foul of political pressure from the States as it prevented them from using tapered rail freights to lure produce to their ports and retail outlets.
4. K C Wheare, *Federal Government*, OUP, 1947, p.10.
5. Kenneth Wiltshire, *Planning and Federalism*, St Lucia, UQP, 1987, Ch 2.
6. The small colonies were more fearful of the large ones than they were of the new national government, and so pressed for their protection, especially in the make up and powers of the Senate and in the amending formula. Since the Australian Senate can force the lower house to an election without itself having to face one, it is one of the world’s most powerful upper houses.
7. See Brian Galligan, *The Politics of the High Court*, St Lucia, UQP, 1987; and Geoffrey Sawer, *Australian Federalism in the Courts*, MUP, 1967.
8. Business Council of Australia, *Tax nation: Business taxes and the Federal-State Divide*, Melbourne, 2007.
9. See Morton Grodzins in *The American System: A New View of Government in the United States*, ed. Daniel Elazar, Chicago, Rand-McNally, 1966; and Geoffrey Sawer, *Modern Federalism*, Pitman, 1957.
10. See Kenneth Wiltshire, *Administrative Federalism*, St Lucia, UQP, 1977.
11. Gorton’s centralism was manifest in policies such as higher education and control over offshore resources.
12. The Queensland Governor, acting on the advice of the Premier, issued writs for the Senate election in that State, as provided for in the Constitution, in a manner which created sufficient vacancies to prevent the Whitlam Government from gaining a Senate majority at the ensuing election. This gave the Opposition control of the Senate, which led to the dismissal of the Whitlam Government by the Governor-General: Australia’s greatest constitutional crisis.
13. For an account of Hawkes’s New Federalism see Kenneth Wiltshire, *Australia’s New Federalism: Recipes for Marble Cakes*, *Publius*, 1992 Summer, 165-180.
14. Economic Planning Advisory Council, *Towards A More Cooperative Federalism*, Discussion Paper No.

90/04, 1990, AGPS, Canberra.

15. *National Competition Policy, Report by Independent Commission of Inquiry*, (Chair Fred Hilmer) 1997, Canberra, AGPS.
16. Productivity Commission, *Productive Reform in a Federal System*, Canberra, 2005.
17. *Ibid.*, p. 340-341.
18. Alan Wood, *Beneath Deakin's Chariot Wheels*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 10 (1998), p. 5.
19. See three reports from the BCA: *Modernising the Australian Federation, 2006*; *Reshaping Australia's Federalism: A New Contract for Federal-State Relations, 2007*; *Charter for New Federalism, 2007*, Melbourne.
20. Alan Wood, *op cit.*, p.6.
21. *Ibid.*.
22. In the German Constitution the concept of Joint Tasks between the levels of government is entrenched. It was inserted because the architects of this modern federation after World War II could see that the layer cake model of federalism did not operate in most federations, because so many functions of government now involved two or more levels of government. The emphasis was rather on the appropriate roles of the levels in the shared functions.