

The Power of the Purse: An Examination of Fiscal Federalism in Australia

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In 1901 the people of six self-governing Crown Colonies “agreed to unite in one indissoluble Federal Commonwealth”, to be known as the Commonwealth of Australia. The drafters of the *Australian Constitution* established a federal structure to divide power between the federal and State levels of government. This federal balance “is not to be maintained as a matter of political or social preference, but as a matter of constitutional imperative”¹. When considering the federal balance today it is important to remember that while the Founding Fathers created a Commonwealth government they still intended for the State governments to continue operating as independent constitutional entities and not merely as branch offices of the central government. This is apparent in the assertion by Deakin at the 1897 Adelaide Convention that delegates should remember that “the States are only parting with a small part of their powers of self-government, and that the Federal Government has but a strictly defined and limited sphere of action”².

The advantages of a federal system, such as the one created in the *Australian Constitution*, are well known³. It is designed to be a system that “controls power, safeguards democracy, and promotes liberty”⁴. In a federation, compared to a unitary system of government⁵:

government is more adaptable to the preferences of the people, more open to experiment and its rational evaluation, more resistant to shock and misadventure, and more stable. Its decentralized, participatory structure is a buttress of liberty and a counterweight to elitism [...] Through greater ease of monitoring and the action of competition, it makes government less of a burden on the people. It is desirable in a small country and indispensable in a large one.

These benefits are not purely structural, with a well designed federal system of government also resulting in direct economic benefits. In Australia, the ‘federalism dividend’ (being the specific economic advantage achieved through the federal structure) was estimated to be approximately \$4,507 per capita in 2006⁶. Across the

world the modern trend is strongly towards federalism, with a federal constitutional structure being regarded internationally as a structure that “enables a nation to have the best of both worlds, those of shared rule and self-rule, co-ordinated national government and diversity, creative experiment and liberty”⁷.

Whilst the international trend has been firmly in the direction of federalism, the opposite has been the case in Australia. Since federation the Australian federal system has grown progressively weaker, with the powers and reach of the Commonwealth government continuing to expand. Nowhere is this more evident than in the area of fiscal federalism, with Australia’s systems of intergovernmental fiscal relations performing comparatively poorly by international standards⁸. The result has been the transformation of the States over the past century from financially independent colonies to “institutionalized beggars”⁹ dependent on Commonwealth hand-outs and “impotent debating societies”¹⁰. The fiscal dominance of the Commonwealth Government has important implications for the federal balance as “[w]ith fiscal power comes policy power [...] Thus fiscal dominance within a federal system brings with it the ability to skew the federal balance”¹¹.

This paper will trace the growing financial dominance of the Commonwealth government over the past century and its implications for the federal balance in Australia. It will argue that such an economically dominant central government was never intended by the Founding Fathers, and indeed that it undermines many of the protections they sought to establish through the adoption of a federal structure in the *Constitution*. Finally, it will go on to brief-

ly highlight a number of possible reforms that, if introduced, would go some way to restoring the fiscal position of the States relative to the Commonwealth government.

Fiscal Federalism at the time of Federation

The question of finances was a contentious one at the time of the drafting of the Constitution and threatened on more than one occasion to derail the entire process of federation. So controversial was it that one delegate said at the time of the 1897 Sydney Convention¹²:

No human being – I do not believe even an archangel from heaven – could at this moment introduce into the constitution which it is our mission to frame a provision which would do justice all round upon the financial question.

Ensuring the continued independence of the States was seen as an important consideration at the time, with financial independence being recognized as an important element of this. As was noted by Barton during the Sydney Australasian Convention¹³:

we cannot do away with the solvency of the several States. If we do that those States die, and we have no longer a federation but a legislative union.

The debate concerning the financial provisions of the Commonwealth Constitution has been described as “the hardest nut to crack”, and as creating divisions that “were deeper and more serious than those caused by any other issue”¹⁴. In particular, colonies that had protectionist economic policies and who derived much of their income from inter-colonial tariffs were con-

cerned about the economic consequences of federation and the creation of a 'free trade zone' within the new Commonwealth. One such example was Western Australia, a late and reluctant entrant into the Commonwealth who derived half of its revenues from customs duties and expressed concern "that their economy would be crippled for the benefit of continental neighbours with whom they had little affinity"¹⁵. The insertion of special five-year transitional arrangements for Western Australia under s. 95 of the *Constitution* was one way of trying to address some of these concerns.

On the revenue side it was agreed that the Commonwealth would have the exclusive power to impose customs and excise duties (s. 90), which was at the time the primary source of revenue for the colonies, averaging three-quarters of colonial revenues¹⁶. The Commonwealth was also granted a general taxation power to operate concurrently with State taxation powers (s. 51(ii)), although not all delegates foresaw the Commonwealth needing to levy taxes beyond customs and excise duties with, for example, McMillan commenting that "they will never go beyond Customs; nobody dreams of such a thing"¹⁷.

Another key provision was the power of the Commonwealth under s. 96 to "grant financial assistance to any State on such terms and conditions as the Parliament thinks fit". This was never intended to be an expansive power, but rather a safeguard to be invoked only in the exceptional situation of a State being "threatened with a financial shipwreck"¹⁸. It was described at the time as "a guarantee to the public with regard to dangers that are never likely to happen"¹⁹ and as a power that was "not intended to be used, and ought not to be used, except

in cases of emergency"²⁰. The clause itself was a compromise inserted by the Premiers Conference following the failure of the first constitutional referendum in New South Wales, and "most of the Premiers assumed that the grants power would be terminated as soon as the States' financial arrangements were adjusted to the uniform tariff scheme and as soon as the operation of the Braddon clause was itself terminated"²¹.

Many of the early debates concerning the financial provisions of the *Constitution* centred around the question of transferring what were expected to be the surplus revenues from the Commonwealth back to the various States. A number of complicated formulas were considered and, interestingly in light of the current debate about the existing Commonwealth Grants Commission formula, the Finance Committee Report of 1897 recommended that after a five year transitional period "all future surpluses should be distributed to the several States on a *per capita* basis"²². By the time of the final document this formulation had been abandoned, with the adoption instead of a provision providing for the Parliament to distribute surplus Commonwealth revenue "on such basis as it deems fair"²³ after the expiry of a five year transition period.

Despite the framers seeking to ensure a federal balance in the *Constitution*, the financial provisions that were ultimately adopted "gave the whip hand to the Commonwealth"²⁴. Alfred Deakin prophetically foresaw that the *Constitution* would leave the States "legally free, but financially bound to the chariot wheels of the central Government"²⁵. This is borne out when examining the evolution of fiscal federalism in Australia, with the Commonwealth continuously extending its financial reach

over the past century while the financial independence of the States becomes ever more precarious. The end result, according to Professor Greg Craven, is that²⁶:

even within some of their acknowledged areas of power, the states are no longer masters of their own destiny.

An increasingly centralized fiscal landscape

It did not take long for the federal balance that had been carefully constructed by the Founding Fathers to begin shifting decisively towards the Commonwealth, aided by a series of key constitutional decisions by the High Court of Australia. Among the key features that have contributed to this increasingly centralized fiscal landscape are the takeover of income taxes by the Commonwealth government, the broad reading that has been given to the excise duties power under s. 90, and the expansive interpretation of the grants powers under s. 96. The combined effect has been to "have left financial resources and power disproportionately in the hands of the Commonwealth"²⁷.

An early example of the Commonwealth deliberately circumventing the federal balance envisaged by the drafters of the *Constitution*, and the assistance that would be provided to them in these attempts by the High Court of Australia, can be seen in the *Surplus Revenue Case*²⁸. This case concerned s. 94 of the *Constitution*, which provides:

After five years from the imposition of uniform duties of customs, the Parliament may provide, on such basis as it deems fair, for the monthly payment to the several States of all surplus revenue of the Commonwealth.

In 1908 the Commonwealth passed legislation that diverted surplus revenue into trust funds, with the result that there was no surplus revenue remaining to be distributed under s. 94. The High Court upheld the constitutional validity of this legislation in the *Surplus Revenue Case*, holding that the diverted money had been duly appropriated and was no longer surplus revenue for the purposes of s. 94.

Federal taxation powers have also expanded to the point today where income tax is levied exclusively by the Commonwealth government. Although the Commonwealth was given the power to make laws with respect to taxation under s. 51(ii) of the *Constitution*, this was a power to be exercised concurrently with the States and the States initially continued to levy their own income taxes. The Commonwealth first introduced concurrent personal income taxes in 1915, and went one step further during World War II when it introduced a uniform income tax scheme that effectively took over all income tax collection from the States. The Commonwealth initially asked the States to cease levying income tax for the duration of the war, and offered financial compensation if they did so. When the States refused the Commonwealth proceeded in 1942 by way of legislation, with a series of four Acts that imposed a Commonwealth income tax at a level approximately equal to the combined total of the previous Commonwealth and State income taxes, gave legislative priority to the payment of Commonwealth income tax over any State income taxes, provided financial grants to the States conditional upon them not imposing income taxes, and transferred State resources used in the collection of income taxes to the Commonwealth²⁹. This scheme was upheld

by the High Court of Australia in the *First Uniform Tax Case*³⁰. As Professor Greg Craven noted³¹:

If the *Surplus Revenue Case* sounded a shrill warning note for the States, the *First Uniform Tax Case* in 1942 set their financial death knell in earnest.

At the conclusion of the war the continuation of this scheme was unanimously opposed by the State Premiers. The Chifley Government nevertheless decided to continue the scheme over these objections, and its peacetime continuation was subsequently largely validated (with some exceptions) by the High Court in the *Second Uniform Tax Case*³². As Brian Dollery noted³³:

The effects of the uniform taxation scheme were profound. By the fiscal year 1948/49, the Commonwealth was collecting 88 per cent of all taxes levied in Australia, compared to 8 per cent by the states and 4 per cent by local governments.

The States therefore find themselves in a position today where they are effectively unable to raise their own income taxes, and are realistically unable to raise anywhere near the revenue that they need to fund their areas of responsibility. The result is a "steady decline in the revenue raising powers of the States"³⁴ and a level of vertical fiscal imbalance that is "among the highest of any federation"³⁵. The impact on the overall fiscal balance and the financial independence of the States was not an entirely unintended result. At the time of the uniform income tax scheme being introduced by the Labor Government, Minister Arthur Calwell predicted "the slow strangulation of the States" noting that "[...] if they lose their right to impose income tax, they will become mendicants existing upon the bounty of the Commonwealth"³⁶.



Alfred Deakin (1856-1919): Australian politician, was a leader of the movement for Australian federation and later the second Prime Minister of Australia. (Photo from Wikipedia)

The High Court has also reinforced the financial dominance of the Commonwealth through its expansive interpretation of the Commonwealth's exclusive power to impose customs and excise duties under s. 90 of the *Constitution*. Although a relatively narrow interpretation of excise duties was adopted in the early case of *Peterswald v Bartley*³⁷, subsequent cases have significantly expanded the scope of s. 90. For example, in *Commonwealth v South Australia* Rich J criticized the narrow approach in *Peterswald* and interpreted s. 90 as granting the Commonwealth exclusive power "[...] over all indirect taxation imposed immediately upon or in respect of goods"³⁸. Similarly in *Matthews v Chicory Marketing Board* Dixon J

defined an excise duty as “a tax on or connected with commodities”³⁹ and in *Parton v Milk Board (Vic)* he held that the intention of s. 90 had been to give the Commonwealth “real control of the taxation of commodities and to ensure that the execution of whatever policy is adopted should not be hampered or defeated by State action”⁴⁰. In *Hematite Petroleum Pty Ltd v Victoria*⁴¹ the High Court ruled that excise duties not only encompassed taxes on the production of goods, but also extended to include any tax on the distribution or sale of goods.

For a number of years the States were able to continue obtaining significant revenue through the imposition of “business franchise fees” on petroleum products, tobacco and alcohol. This ended however with the majority decision of the High Court in *Ha v New South Wales*⁴² when it struck down these fees, and unexpectedly removed an important source of revenue for State governments. This left a considerable financial hole in State budgets, with the State governments raising just under \$5 billion (or one-sixth of their total taxation revenue) from these business franchise fees in 1995-1996⁴³. In response to this judgment the Commonwealth introduced a rescue package of revenue replacement payments, however the effect of these measures was to further entrench State reliance on Commonwealth funding. The decision in *Ha* (which was decided by a 4:3 majority) has been described as “perhaps the most significant for Federal-State financial relations since the *First Uniform Tax Case* of 1942”⁴⁴ and as a decision that will “further marginalize the States within the Australian Federal system”⁴⁵.

It is arguable that the broad interpretation of s. 90 is at odds with the original

intentions of the drafters of the Constitution. This observation was made by Neil Warren⁴⁶:

An examination of the historic record shows that in fact the rationale for s. 90 was to avoid the imposition of discriminatory tariffs between States and hence facilitate free trade. This has led to the argument that the High Court’s interpretation of s. 90 is not only economically and financially unsound, it is in conflict with the intentions of the founders of the federation.

The High Court’s expansionist approach to the interpretation of s. 90 has had significant consequences for the fiscal balance in Australia. As noted by Professor Colin Howard⁴⁷:

The definition of excise duty cannot be counted among the High Court’s successes. No escape from the morass of judicial disagreement now seems possible by curial action alone. The main consequences have been lasting uncertainty, and consequential litigation, in a significant area of liability to taxation and now a severe and unnecessary restriction on the taxation revenue of the States [...] The case law on s. 90 suggests that the High Court is by and large unsympathetic to State revenue and expenditure problems in general.

The third constitutional provision which has helped to entrench an unequal financial relationship between the Commonwealth and State governments is s. 96 which provides that:

During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

This provides the Commonwealth with “considerable leverage over State policies and actions”⁴⁸. Over time specific purpose payments (“SPPs”) made by the Common-

wealth to State governments under s. 96 of the *Constitution* have become⁴⁹:

a major, and flexible, instrument for enlarging the boundaries of Commonwealth action; or, to use realistic terms, Commonwealth power.

While grants made by the Commonwealth government to the States were initially made "largely on an ad hoc and unconditional basis"⁵⁰ this changed with the *Federal Aid Roads Act 1926* (Cth) where the Commonwealth Government attempted to make s. 96 grants to the States contingent on the money being spent on the construction of roads nominated by the Commonwealth. In *Victoria v Commonwealth*⁵¹ the High Court upheld this legislative approach, rejecting the argument that any conditions attached to grants made under s. 96 were limited to the exercise of legislative powers provided for under s. 51 of the *Constitution*. As a result of this decision the Commonwealth is effectively empowered to make s. 96 grants conditional on virtually any terms and conditions that it sees fit⁵². The conditions imposed by the Commonwealth do not need to be conditions that themselves fall within the constitutional reach of the Commonwealth, with the result that s. 96 allows the Commonwealth to insert itself into policy areas that were never designed to fall within its domain.

The expansive approach adopted in *Victoria v The Commonwealth* was subsequently questioned by Dixon CJ in *Second Uniform Tax Case*⁵³. The Chief Justice suggested that, but for the weight of existing legal precedent, he might have taken a narrower approach to the interpretation of s. 96 such that⁵⁴:

the true scope and purpose of the power which s. 96 confers upon the Parliament of granting money and imposing terms and conditions did not

admit of any attempt to influence the direction of the exercise by the State of its legislative or executive powers. It may well be that s. 96 was conceived by the framers as (1) a transitional power, (2) confined to supplementing the resources of the Treasury of a State by particular subventions when some special or particular need or occasion arose, and (3) imposing terms or conditions relevant to the situation which called for special relief or assistance from the Commonwealth. It seems a not improbable supposition that the framers had some such conception of the purpose of the power. But the course of judicial decision has put such limited interpretation of s. 96 out of consideration.

The Commonwealth began to use s. 96 grants more extensively from the early 1950s and by the end of the Whitlam government in 1975 SPPs accounted for 57% of all Commonwealth grants⁵⁵. By 2006-07 there were⁵⁶:

at least 90 distinct SPP programs providing \$28 billion to the States or directly to non-government schools and local governments. SPPs account for 42 per cent of total payments made by the Commonwealth to the States. The requirements in many SPPs that States match funding and maintain existing efforts mean that up to 33 per cent of State budget outlays can be effectively controlled by SPPs, reducing State budget flexibility.

There has been significant reform of SPP arrangements in recent years. A rationalized SPP framework commencing operation on 1 January 2009, being designed to provide States with greater flexibility and discretion in the way that they spend the funds allocated to them. It has been suggested that these reforms "in retrospect, represented the high point of cooperative federalism under Kevin Rudd"⁵⁷. However, the overall conditional funding provided to the States for specific purposes remains significant, with an estimated \$50.1 billion being allocated in 2009-10, which equates

to 14.8 per cent of total Commonwealth expenditure⁵⁸. Furthermore, while the SPP framework has been consolidated the system of tied grants continues with the introduction of National Partnership Payments, being highly conditional payments to the States totaling \$19 billion by 2010-11. Under this new payment stream "the Commonwealth remained free to engage in the kind of selective and coercive intervention it had traditionally applied via SPPs"⁵⁹.

The current fiscal imbalance

The stark turn-around in the relative financial positions of the States *vis-à-vis* the Commonwealth can be seen by examining their changing share of revenue and expenditure over the past century. Immediately following Federation State and local governments raised 87% of total taxation revenues, whilst the Commonwealth collected only 13%. A century later this situation had almost entirely reversed, with the Commonwealth collecting 82% of total taxation revenues in 2004-05 and State and local governments collecting only 18%⁶⁰. In the 2011-12 federal budget grants to State Governments are estimated to amount to \$95 billion, which represents approximately 50% of total State revenue⁶¹.

The Australian federation today is characterized by comparatively high levels of vertical fiscal imbalance ('VFI'), with Twomey and Withers suggesting that the extent of VFI in Australia "is the most extreme of any federation in the industrial world"⁶². The revenue raising powers of the State governments no longer match their expenditure responsibilities, and they have

become increasingly reliant on Commonwealth grants to make up this shortfall. This has a number of damaging consequences. Most importantly, State government reliance on Commonwealth funding allows the Commonwealth government to assert "financial and policy control over the States"⁶³ and has given the Commonwealth government the opportunity to enter into policy areas that have traditionally been the exclusive domain of the States.

The 1999 *Intergovernmental Agreement on the Reform of the Commonwealth-State Financial Relations* represented an attempt partially address and reduce VFI. The Commonwealth government agreed to allocate GST revenues to the States, which was intended to give the States access to a growth tax. This has, however, arguably actually worsened the situation, with the States being required as part of this arrangement to abolish a number of their existing taxes and becoming even more reliant upon the Commonwealth. As was noted by Neil Warren⁶⁴:

The GST has only replaced one form of general revenue assistance with another. The GST is not a shared tax base, but is the base for calculating general revenue grants to the States. The States have no ability to alter either the GST rate or its base. Furthermore, GST revenue grants are subject to high level equalization and are therefore not distributed among the States according to where the revenue is raised, resulting in a large redistribution between States.

Western Australian in particular has been increasingly critical of horizontal fiscal equalization arrangements that have seen its share of GST funding drop from 72 cents in the dollar in 2011-12 to 55 cents in the dollar in 2012-13, with projections that it will continue to drop to 25 cents in the dollar by 2015-16⁶⁵. The most recent

recommendation by the Commonwealth Grants Commission would result in Western Australia's share of GST funding falling by \$598 million in 2012-13, which was described by the WA Treasurer as "a slap in the face for all Western Australians"⁶⁶. The WA government has argued that such significant cuts to its funding "severely constrain the state government's ability to continue investing in the infrastructure and services needed to grow WA's resource sector, which is propping up the national economy"⁶⁷. It is the WA government that has been the most vocal in arguing for reform of the GST funding arrangements, suggesting in particular that a 'floor' should be imposed on the GST equalization formula so that a States' share of GST revenues cannot fall below a minimum return of 75 cents in the dollar.

Partly as a result of the political controversy generated in Western Australia by the reduction in its share of GST funding, a review into GST distribution arrangements was announced in early 2011. An interim report was released on 23 April 2012 and a final report is due to be given to Parliament before the end of the year. Although the establishment of the review committee is a positive step forward in acknowledging the need for reforms to strengthen fiscal federalism in Australia it is notable that the review committee does not include a representative from Western Australia. While the interim report has acknowledged the need for reform it has rejected the above argument by Western Australia that a 'floor' should be applied to the GST equalization formula.

The state of the Australian federation has emerged in recent years as a topic of some political significance and controver-

sy. The 2020 Summit identified the creation of a "modern federation" as one of its "priority themes" and one of its proposed goals was to "reinvigorate the federation to enhance Australian democracy"⁶⁸. This was followed by the creation of the Senate Select Committee on the Reform of the Australian Federation in June 2010 which was charged with inquiring into "key issues and priorities for the reform of relations between the three levels of government within the Australian federation" and exploring "a possible agenda for national reform"⁶⁹. The Committee reported to the Australian Senate on 30 June 2011, presenting twenty-one recommendations for reform.

All too often, however, discussions about reinvigorating or reforming the Australian federation are really discussions about shifting State responsibilities into the Commonwealth sphere and the further centralization of power. This has certainly been the case in recent years, with the Commonwealth government continuing to move into traditional areas of State responsibility. Two controversial recent examples include the use of an expanded corporations power to create a national industrial relations system (which was upheld by the High Court in the *Work Choices Case*⁷⁰) and the proposed "claw-back" of a third of GST payments to fund national health reforms. The Commonwealth government tends to justify such policy expansions by pointing to underperforming State governments that they claim are failing to fulfil their responsibilities in these areas of public policy. However, as Twomey and Withers have observed⁷¹:

It is disingenuous to suggest that the States are failing in their responsibilities because they require Commonwealth funding and that the

Commonwealth should therefore take over State policy functions, when this is the system that the Commonwealth deliberately created.

On the revenue side the Commonwealth government has also been aggressive in recent years in attempting to increase its revenue share. One example of this has been the introduction of the Minerals Resource Rent Tax on 1 July 2012, which is a tax to be imposed on the profits generated from the mining of iron ore and coal. The new tax is designed to ultimately replace State royalties, which would seemingly exacerbate VFI by further expanding the revenue base of the Commonwealth at the expense of the States. Western Australia, in particular, has been a vocal critic of the tax, with the Western Australian Department of Treasury and Finance stating that the mining tax regime is viewed within WA "as an unwelcome intrusion into an area of state government responsibility, undermining the state's autonomy and budget flexibility"⁷². The tax has been called "an attack on Western Australia"⁷³ on the basis of estimates that \$7 billion of the expected \$10.5 billion raised from the tax in 2012–2014 will come from WA⁷⁴. It is currently being challenged in the High Court, with the Fortescue Metals Group and Queensland arguing that the legislation invalidly discriminates against States and is therefore constitutionally invalid.

Reforming Australian fiscal federalism

The growing financial dominance of the Commonwealth government and the increasing financial dependence of the States

has significant implications for Australia. Neil Warren argues that "Australia performs comparatively poorly in international comparisons of intergovernmental fiscal arrangements"⁷⁵ and notes that "National and State governments in Australia have not had a serious discussion between the different tiers of government since prior to federation in 1901"⁷⁶. The Business Council of Australia considers this to be an issue that Australia needs to address as a priority, noting that:

[t]he extent of the problems and dysfunctions of the current system of federal-state relations[...] is such that it has become a major barrier to future prosperity. The challenge of reforming federalism has now become an economic imperative.

There have been a number of reforms that have been proposed as measures that could be instituted to redress the fiscal imbalance currently characterizing the Australian federation. On the revenue side there is no constitutional impediment to the States reintroducing their own personal income taxes, although there would certainly be significant political hurdles to be overcome. Another reform that would reduce VFI and increase the financial independence of the States would be the introduction of a formal tax-sharing arrangement between the Commonwealth and the States, guaranteeing the States a certain percentage of Commonwealth tax revenue. Such an arrangement would not only reduce VFI but would provide all States with a direct economic interest in the financial success of the entire federation, introduce greater certainty and transparency into financial transfers from the Commonwealth to the States, and would likely reduce State reliance on specific purpose payments.

In relation to the distribution of GST revenue there is an urgent need for reform, with growing anger particularly in Western Australia over what are perceived to be serious inequities enshrined within the existing arrangements. The establishment of the current GST review committee is a positive step, although it remains to be seen precisely what recommendations are put forward by the committee. While there is disagreement about whether the current equalization formula should be amended to insert a 'floor' into the allocation of GST revenues to the States there does appear to be general agreement that the existing formula is overly complicated, and would benefit from reforms that would introduce greater certainty and transparency to the transfer process.

On the expenditure side the key issue from the States perspective is the continued entry by the Commonwealth into policy areas that have traditionally been the domain of the States. In many respects this is an inevitable result of the financial dominance of the Commonwealth, which has become adept at using its financial muscle to impose itself across a range of policy areas far removed from the limited enumerated powers provided for under s. 51 of the *Constitution*. Addressing the fiscal imbalance described above and strengthening the financial independence of the States would provide the States with a greater ability to resist further Commonwealth intrusion

into their traditional policy areas. At the same time, given that the *Constitution* is now over one hundred years old, there is merit in the suggestion that it may be beneficial to revisit the distribution of constitutional powers and responsibilities between that national and state levels of government at a constitutional convention to ensure greater clarity and to better reflect modern conditions.

Conclusion

Since Federation the Commonwealth government has continued to expand well beyond the intentions of the Founding Fathers, and the Australian federal system "has not always been as coherent or effective as the framers might have hoped"⁷⁷. The financial dominance of the Commonwealth government, and the increased reliance of the State governments on Commonwealth funding, has significant implications for the federal balance in Australia. Reforming fiscal federalism in Australia, with the aim of restoring the fiscal position of the States relative to the Commonwealth government, is an important goal if Australia is to protect the independent status of our State governments and to fully realize the benefits that a true federal structure is intended to bring.

¹ *New South Wales v Commonwealth* (2006) 229 CLR 1, p. 796, per Callinan J.

² *Official Report of the National*

Australasian Convention Debates, Adelaide, 1897, p. 292.

³ See A. Zimmermann and L. Finlay, *Reforming Federalism: A*

Proposal for Strengthening the Australian Federation, in «Monash University Law Review», vol. 37, n. 2, 2011, pp. 194-199.

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- ¹⁸ J.M. Williams, *The Australian Constitution: A Documentary History*, Melbourne, Melbourne University Press, 2005, p. 813.
- ¹⁹ Ivi, p. 1102.
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- ²¹ E. Campbell, *The Commonwealth Grants Power*, in «Federal Law Review», vol. 3, 1968-1969, p. 225.
- ²² Recommendation 15, Finance Committee Report, 9 April 1897, in Williams, *The Australian Constitution: A Documentary History* cit., p. 489.
- ²³ Section 94.
- ²⁴ B. Galligan, *Fiscal Federalism: Then and Now*, in Appleby et al., *The Future of Australian Federalism* cit., p. 327.
- ²⁵ A. Deakin, Letter to the Editor, *Morning Post* (London), 1 April 1902, quoted in G. Williams, *It's Time to Repair Australia's Tattered Federalism*, Canberra, Canberra Times, March 28th, 2008, p. 15.
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- ²⁷ The Hon. Chief Justice Paul de Jersey AC, *A sketch of the modern Australian federation*, in Appleby et al., *The Future of Australian Federalism* cit., p. 72.
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