


REBUILDING THE FEDERATION



AN AUDIT AND HISTORY OF
STATE POWERS AND RESPONSIBILITIES
USURPED BY THE COMMONWEALTH
IN THE YEARS SINCE FEDERATION



RICHARD COURT, MLA PREMIER OF WESTERN AUSTRALIA

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INTRODUCTION BY
THE PREMIER OF WESTERN AUSTRALIA
RICHARD COURT, MLA

I believe there is an urgent need both to reassess and rebuild the Federal system of Government in Australia.

The purpose of our Federal system of Government is to serve the people. Its purpose is not to serve the self interest of the bureaucracy, or the interest of politicians.

That was the spirit in which the Australian Federal system of Government was established.

The Australian Constitution and the Commonwealth Government were created by sovereign colonies who wanted a system of Government which would serve the diverse interests of people which inhabited a huge land mass.

As a result, the Federal system of Government which was created was designed to give limited but important powers to the newly established Commonwealth Government, yet retain significant responsibilities with the State Governments.

The Constitution was intended to create a Federal system of Government in Australia. From the text of the Constitution itself and the records of Constitution Convention debates, the Founders intended to establish a Commonwealth Government with limited and defined powers while leaving the States with their general plenary powers to regulate and the responsibility for the majority of social, economic and political concerns of Australia.

This balance of power, which was the essence of the Federation, was seen as critical in ensuring that both the national interest as well as the interests of the people living in the regions of Australia were served.

No one would dispute that Australia is a different country from the one in which the Federal system of Government was established.

We passionately believe that the Federal system of Government is as much relevant to the needs of Australia now as when it was created nearly one century ago.

As a nation we are attempting to meet the new challenges and opportunities that are being presented by the new era in world trade and our fast developing Asian neighbours.

We have no choice but to play to our economic strengths - a fact recognised by many State Governments which are now leading the nation in economic reforms.

Western Australia is no exception. As Australia's largest export earning State we have our sights on the world and, like many other State Governments, are developing policies which best enhance the special strengths of our regional economies.

The desire by the public for policies which are relevant to the special needs of the regions of Australia is also as relevant as it was when the Federation was founded.

Health and Education are just two key areas of Australian life where both the formulation and delivery of services should be done at a local level so that these services are both appropriate and accountable.

Since gaining office a year ago, I have become deeply concerned about the weakening of the Federal system of Government in Australia caused by a growing concentration of both political and financial power in the Commonwealth Government.

This trend is I believe a regressive step for both the democratic process and the future interests of all Australians.

Nearly all modern centralist economies have failed and are in the process of decentralising rapidly. They offer stark lessons for a young, growing country such as Australia.

The reality in Australia is that we are moving in the opposite direction.

Duplication and bureaucratic control has replaced the efficient delivery of services which are relevant to local needs.

Greater financial powers have been concentrated in the Commonwealth Government with a comparable decrease in their accountability.

The unsavoury consequences of this concentration of financial power in the Commonwealth has been highlighted recently by media coverage on sports funding which essentially should be a State Government responsibility.

Not only has political accountability been diminished in Australia by this growth in centralism but the performance of the economy which ultimately produces employment and higher living standards is being inhibited.

This is underlined by another abuse of the external affairs powers by the Commonwealth Government in an attempt to prevent the State Government from implementing progressive industrial relations reforms which will best position their local economies to exploit the new trading opportunities in our region.

Because I believe this growing centralism is a major backward step in the political and economic well being of this country, I have conducted an audit of the State's powers and functions usurped by Canberra since the creation of the Federation.

I hope that this document is a positive first step in an informed debate which will lead to a rebuilding of the Federal system of Government in Australia.

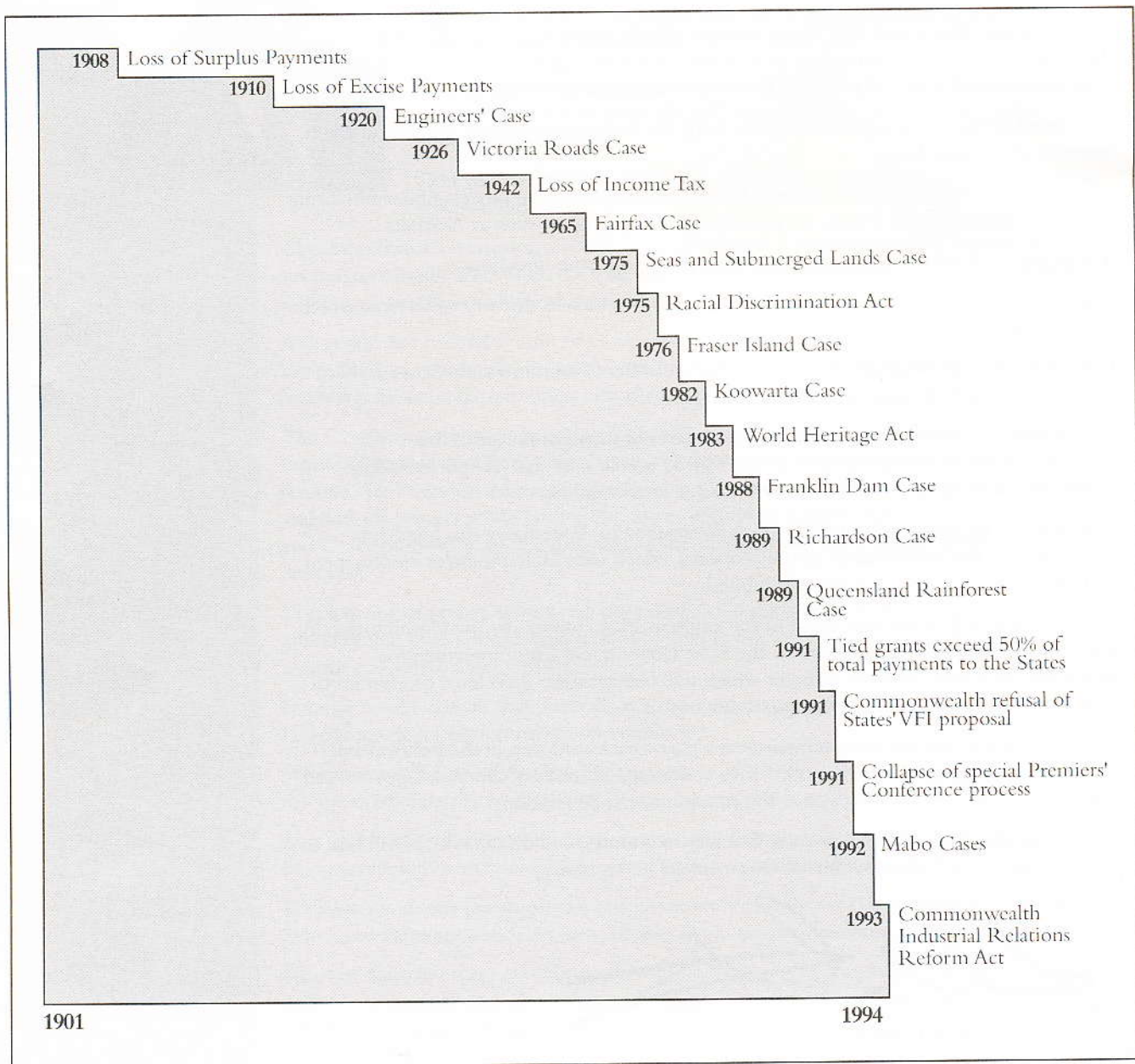


RICHARD COURT, MLA
PREMIER OF WESTERN AUSTRALIA

February, 1994

THE FEDERATION STAIRCASE

*The downward spiral towards
Centralism*



In 1900, and subject only to very light Imperial control from London, each of the Australian colonies was legally and constitutionally independent.

In 1901 the colonies became States within the Australian Federation. By the Federal Compact which their efforts had produced, a limited number of powers were handed to the new Commonwealth. Some of these powers were exclusive. Most were shared with the States. Powers not given to the Commonwealth remained with the State, and these covered the bulk of everyday matters concerning the ordinary citizen. *Our founding fathers recognised very clearly that a national government was best placed to determine national priorities, but recognised equally clearly that the State governments were far better placed to determine local priorities, and far better placed to determine the most effective way to deliver services to their citizens.*

The wisdom of these timeless principles, understood clearly by our founding fathers, has been ignored. Since Federation the Commonwealth has steadily increased its power, taking State powers for itself, using its financial strength to control the exercise of powers nominally remaining with the States, and taking advantage of the Commonwealth-appointed High Court's interpretations of the Constitution.

INTENTIONS AT FEDERATION

The main legislative responsibilities given to the Commonwealth in the Australian Constitution (Section 51) related to:

- defence and external affairs;
- navigation, quarantine and meteorological services;
- immigration, citizenship, matrimonial status;
- international and interstate trade and commerce, together with specific powers, eg. with respect to patents, companies and bankruptcies, which were intended to enable the Commonwealth to regulate certain areas of business activity;
- currency, non-State banking and insurance;
- conciliation and arbitration for the prevention and settlement of interstate industrial disputes;
- postal and telecommunications services, and conditional powers with respect to railways; and
- invalid and old age pensions.

The Constitution left the States with sole responsibility for *everything else*, including:

- law and order;
- the regulation of commerce and industry;
- transport services;
- natural resources, including land;
- essential services such as water supply, sewerage, drainage, electricity and gas;
- local government;
- education, housing and health;
- the environment.

Since Federation, Canberra has intruded into every one of these sole State responsibilities, in some cases to such an extent that the Commonwealth effectively has usurped the States' role for all practical purposes.

FINANCIAL STARVATION

Centralisation of tax powers, combined with the Commonwealth's ability to make tied grants (i.e. grants with conditions attached) to the States has allowed the Commonwealth to use financial powers to intrude into areas of State responsibility. Some of the key areas where tied grants have been used to usurp State responsibilities include health (the Medicare Agreement), housing (Commonwealth/State Housing Agreement), urban development (Building Better Cities), education and roads.

CENTRALISED TAX POWERS

At Federation the Commonwealth and States had approximately equal tax powers, with the Commonwealth having exclusive power only over customs and excise duties. This was entirely appropriate, as the States had retained responsibility for the bulk of public sector activity at Federation, and had equally retained the power to raise funds to carry out those activities. In 1942, using its defence power, the Commonwealth assumed control of income tax. After the War, the High Court upheld Canberra's authority to levy income taxes. This resulted in the States being forced out of the income tax field.

In the period since, through various High Court decisions, States have effectively been barred from levying both income and sales taxes.

As a result, the revenue the Commonwealth collects far exceeds its expenditure needs. Only part of the surplus is returned to the States. The States are forced to rely on the Commonwealth for more than half of their revenue.

The worsening of this trend towards centralisation of financial powers is shown by the following figures:

	1901-02		1993-94	
	C/wealth	States	C/wealth	States
Share of revenue	58%	42%	75%	25%
Share of expenditure	13%	87%	54%	46%

Source: 1901-02 derived from: Barnard (1987), "Government Finance", in Wray Vamplew (Ed), *Australians Historical Statistics*, Fairfax, Syme and Weldon Associates, Sydney. Figures for 1993-94 supplied by WA Treasury

TIED GRANTS

An ever-increasing proportion of Commonwealth funding has been provided in the form of tied grants. As a proportion of total State revenues, tied grants have increased from 26 per cent in 1972-73 to 53 per cent in 1993-94.

This has allowed Canberra to interfere forcibly in areas of State responsibility. It has also resulted in considerable bureaucratic duplication, increasing total public sector administrative costs paid by taxpayers and causing extra delays.

ABUSE OF CONSTITUTIONAL POWERS

External Affairs

One of the matters placed within Commonwealth power was external affairs [Section 51 (xxix)]. Originally the scope of this power was small, because most of Australia's external affairs were handled in London. That has changed over the years, but without altering the Federal Compact.

What has altered the Compact has been Canberra's deliberate use of the external affairs power, with the High Court's assistance, to enforce throughout Australia the policies of the Commonwealth Government in matters which were never intended to have anything to do with Canberra, and which nothing to be found within the Constitution puts within Commonwealth power.

To an ever-increasing extent the

Commonwealth is using the external affairs power to govern Australian citizens, often rushing to sign international covenants which trample on their existing rights.

These agreements are made primarily by people outside Australia. The terms and conditions are set by officials from other countries. While Australia takes part in the negotiations it does not exercise a dominant influence - the foreign countries do. We never see them, we never meet them, and we cannot question them (Figure 1).

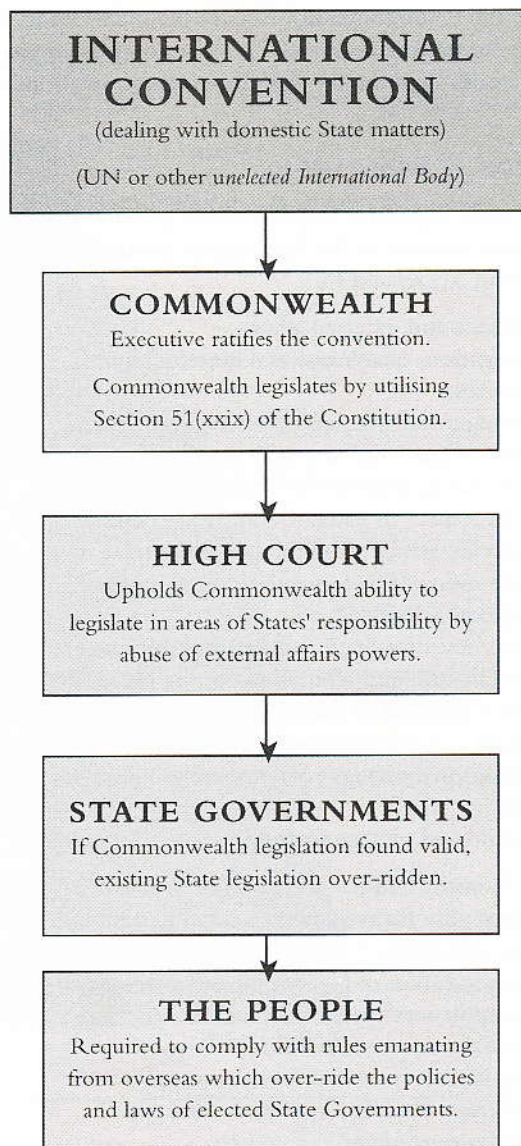


FIGURE 1

And when the Commonwealth adopts these agreements, there is never consultation, never a mandate. Just an 'international agreement' stemming from the deliberations of bodies virtually or totally unknown to Australians, unelected by Australians, and unrepresentative of Australians. Were Australians ever asked, they would reject the notion of unelected international organisations dictating what Australians could and could not do - but Australians have never been asked.

Perhaps they have not been asked whether they want their national government to enter into such agreements because when Australians have been asked for specific decisions via referenda they have invariably rejected the national government's wishes. Yet despite the clear message delivered to Canberra by the results of nearly all Federal referenda, Canberra is using the external affairs power to push the States out of areas which the federal Compact intended to leave with them.

Canberra has already used this power to interfere with properly elected State governments as to the granting of pastoral leases in Queensland, and the construction of a dam in Tasmania. It appears the next target for Canberra's appetite may be the Nullarbor Plain in South Australia and Western Australia.

More recently, Canberra has enacted the *Industrial Relations Reform Act 1993*. It is based tenuously on alleged International Labor Organisation conventions, some of which are yet to be ratified by member nations.

Potentially the Commonwealth can go on using this power to ratify international treaties on a very wide range of issues - an apparently unlimited range - and then legislate concerning those issues, whether or not they have hitherto been State responsibilities. *Section 109 then makes State laws invalid if they are inconsistent with the new Federal laws.*

If Canberra continues to exploit the external affairs power with the ruthless resolve shown thus far it will, in a relatively short time, succeed in what it appears to have been trying to do since 1901 - *to reduce the Federal Compact to a mere shell of what it was intended to be.*

Trade

Canberra used its commerce and trade power to prevent iron ore development in Western Australia during the 1950s and 1960s, long after it was abundantly clear that Australia had more

than sufficient reserves for its own needs. It blocked the North West Shelf gas development in 1973, when the companies involved were ready to go ahead. The Commonwealth Government is using the trade power to restrict uranium mining, despite significant world demand and the potential for this industry to earn billions of dollars in export revenue.

In doing so it has denied jobs to Australian citizens, denied earnings to Australian companies and investors, *and rendered meaningless the States' Constitutional responsibility for resources, and for the regulation of commerce and industry within their borders.*

The High Court

The High Court has played a crucial role in this constant expansion of centralist control in Canberra. Its decisions have upheld Commonwealth intrusion into areas of State responsibility, and have upheld the use of Commonwealth financial power to control decisions in areas nominally remaining with the States. *In both categories these decisions have encouraged Canberra to go further.*

Referenda

Since Federation thirty eight proposals to amend the Constitution have been put to the Australian people. Thirty involved a request by the Commonwealth for further powers. *The Australian people have granted only two of those thirty requests; power to grant social service pensions, and power to make laws with respect to Aboriginal people. In both cases there was bi-partisan support in both Canberra and the States.*

The Australian people have proved they are suspicious of moves to change the Constitution, *especially if the object is to grant more centralised power. The vesting of greater power in Canberra is clearly against the express wishes of the majority of Australians.* Yet the Commonwealth continues to pursue what the people do not want it to pursue, through any means available to it - with the exception, given its previous failures, of seeking the approval of ordinary Australians.

Successive Commonwealth Governments have abused their Constitutional powers and High Court decisions effectively to achieve the same centralised controls they sought through failed referenda.

In doing so, they have very deliberately thwarted the will of the people and thereby the intention of the Constitution.

THE PICTURE TODAY

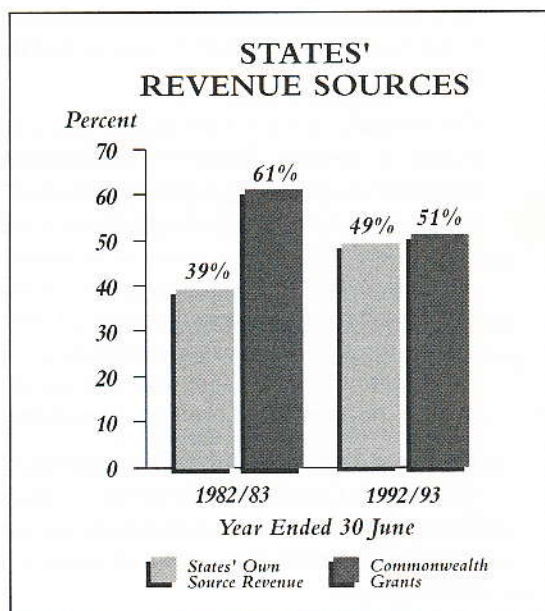
The loss of income taxing powers and the key High Court judgements which defined the meaning of excise tax very broadly have reduced greatly the financial independence of the States.

In 1942, with Australia under dire threat in a World War, there was justification for Canberra assuming control, under its defence power, of all income taxes. But few could foresee the devastating effect the move would have on State financial independence and political accountability. Subsequent High Court and Commonwealth decisions have, for all practical purposes, barred States from re-entering the income tax field.

The Commonwealth's intrusion into State financial affairs is depicted clearly in Western Australia's 1993/94 Budget Paper No. 5 - Economic and Financial Overview (pages 90 - 92). It summarises the current picture starkly and the relevant text is re-stated below:

The driving feature of Commonwealth-State financial relations is the State's heavy reliance on Commonwealth funding to supplement their own source revenue. Currently, the States receive approximately 50 per cent of their total revenue from the Commonwealth (Figure 2).

FIGURE 2



This situation, where a government's own source revenues do not match its expenditure responsibilities, is termed vertical fiscal imbalance (Figure 3).

Vertical fiscal imbalance has been present in Australia to some degree since Federation. However, with the Commonwealth's takeover of State income taxes during World War II, the State's dependence on the Commonwealth increased markedly.

The level of vertical fiscal imbalance has fallen over the last decade, reflecting cutbacks in Commonwealth funding, the transfer of the Commonwealth debts tax to the States, and increases in State tax rates and revenue bases. Despite this, vertical fiscal imbalance remains much higher in Australia than in other Federations.

While Commonwealth grants provide the necessary revenue for the States, they also limit State budget flexibility.

In addition, over the last decade the Commonwealth has tended to regard funding to the States as a discretionary item in formulating its budget strategy. To provide tax cuts while reducing its budget deficit in the 1980's, the Commonwealth reduced funding to the States while maintaining expenditure on its own programs. As a result, while payments to the States have fallen by 13 per cent in real per capita terms over the last decade, the Commonwealth's own purpose outlays have increased by 17 per cent in real per capita terms over the same period.

Commonwealth payments to the States are provided as either general purpose funds (i.e. funds with no condition attached) or as tied grants (i.e. grants which carry with them conditions or which must be used for a specific purpose).

Tied grants provide a means by which the Commonwealth is able to achieve its own policy objectives in areas of State responsibility while restricting the budget flexibility of the States.

The level of tied grants has grown significantly at the expense of general purpose funding (Figures 4 and 5). In fact, tied payments as a proportion of total payments to all States have increased from 44 per cent in 1983-84 to an estimated 53 per cent in 1993-94.

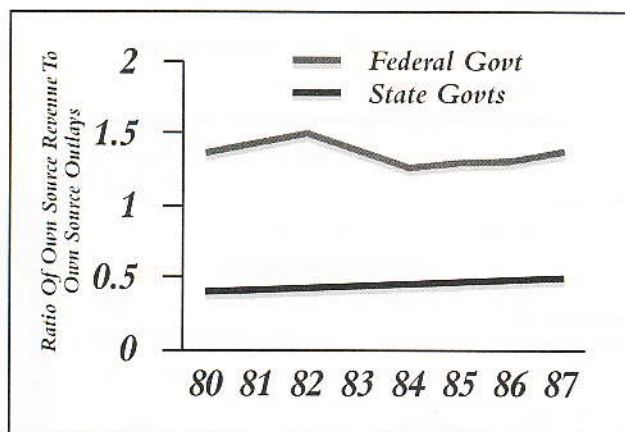
The material set out above shows a relentless Commonwealth financial squeeze of the States. If the trend continue, the States' financial independence will have eroded much further by the end of the decade.

Appendices Four and Five give a brief history of changes to Commonwealth-State financial arrangements, as expressed in recurrent general revenue grants and specific purpose payments.

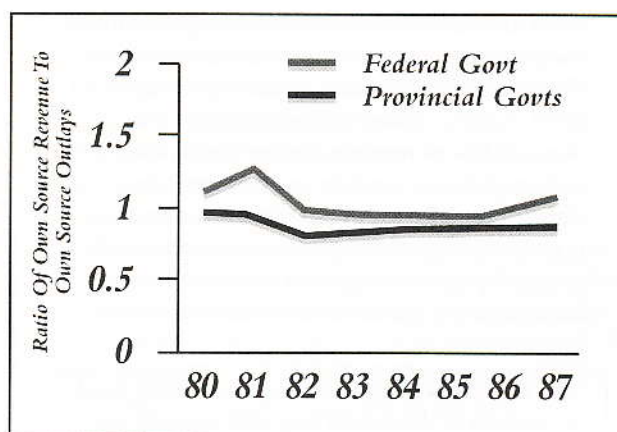
VERTICAL FISCAL IMBALANCE RATIOS FOR FOUR FEDERATIONS (1980 -1987)

FIGURE 3

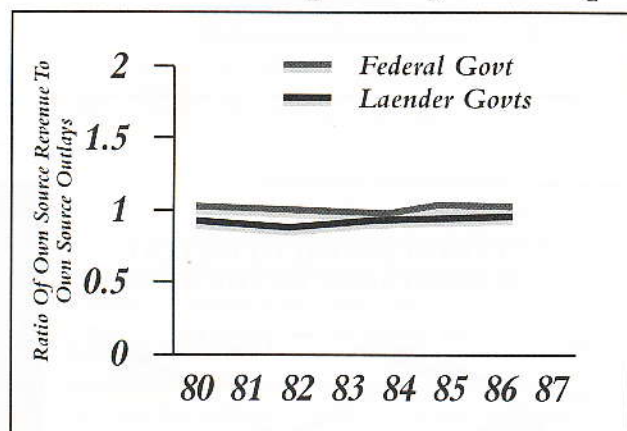
Australia



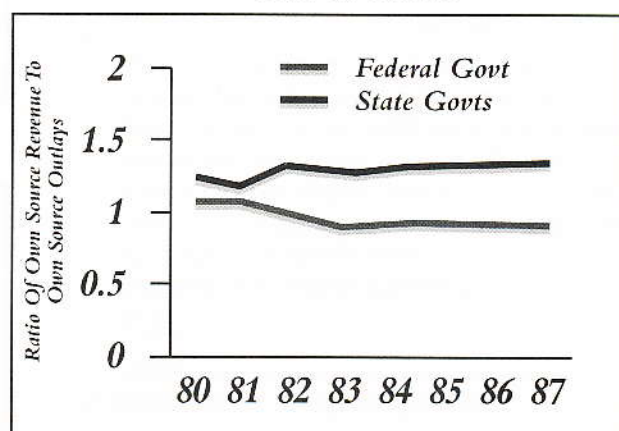
Canada



Federal Republic of Germany



United States



Source: Derived from: International Monetary Fund Government Statistics Yearbook, Volume XII, 1988.

The history shows an unmistakable push by the Commonwealth for complete financial dominance.

Clearly, the Commonwealth has abandoned any pretext of maintaining financial independence for the States. Unless stopped, the Commonwealth will continue its financial squeeze of the States, fund more expenditure through tied grants, take over functions previously the accepted responsibilities of the States, and retain still more funds for its own purposes (Figure 6).

Our State Treasury has estimated that the total all-States loss of financial assistance grants during the period 1982-83 to 1993-94 is \$4.0 billion. Western Australia's share of this would be about \$400 million. These figures represent a very material loss of revenue for the States collectively and a significant increase in Canberra's financial discretion. All States have been forced to raise taxes and charges to a greater extent than inflation and population growth would otherwise have required, merely to maintain real service levels.

This is not in the best interests of the ordinary people of Australia or the nation's long term economic and social well being.

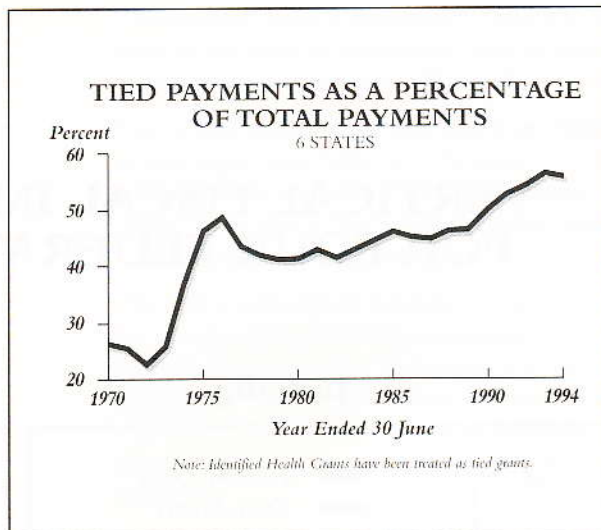


FIGURE 4

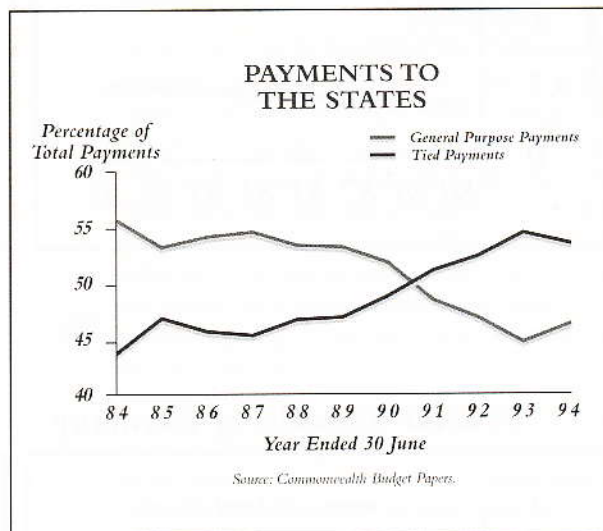


FIGURE 5

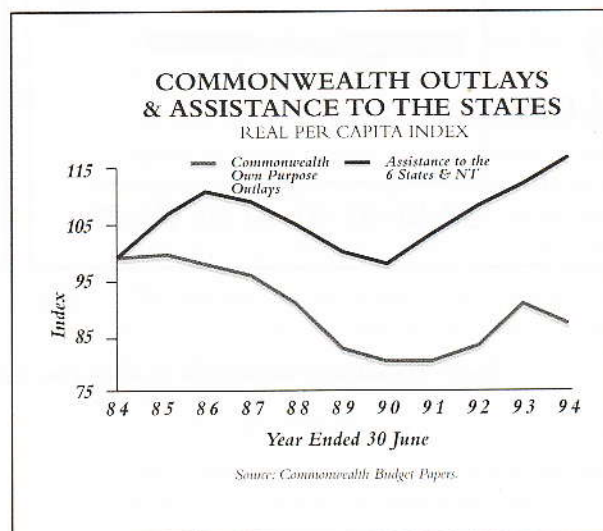


FIGURE 6

WHY FEDERATE?

Why do independent States federate?

Most Federations have arisen because their member states or provinces have seen economic and social advantages from establishing a customs union between them, that is, a "ring fenced" area within which trade and commerce can occur without restriction. An additional requirement is common tariffs or bounties applying to imports into the area.

An economic union may not necessarily involve a common currency or a central government. For example, the European Union, to this point at least, has neither.

However, States which desire to take the further step of *federating* must then provide for a common currency and a central government.

Other benefits arise from coordinated action in matters where there is a common or shared interest. These may include immigration, emigration, defence and foreign affairs.

The Colonial Parliaments and the people *created* the Commonwealth, in a Federal Compact set down in the Australian Constitution. It was not, despite what some in Canberra may believe, the other way around.

A strong motivation for federation was commerce and trade. This was an important area where the former colonies had a vital common interest. They sought free trade between the colonies, and a common tariff system. *They did not seek and did not intend to create a Commonwealth Government which would or could override the wishes of the States*, but rather sought to create a Commonwealth Government which would provide a framework for a national approach to matters of national importance. The most important matter for the fledgling nation was commerce and trade, but there were also other areas in which a national approach was vital - such as defence, immigration and currency. The power to deal with these and other common interest matters was given to the new Commonwealth.

THE FEDERAL MOVEMENT IN AUSTRALIA

The first seed for Australian Federation was sown as early as 1847 when Earl Grey, Secretary of State for the Colonies, proposed in a dispatch that a General Assembly be established to deal with matters of common Australian interest.

Although his proposal was not taken up, over the next half century, the federal movement gathered pace in each colony as Constitutional Committees and Inter-Colonial Conferences tackled the issues. Enthusiasm for federation waxed and waned and varied from colony to colony.

Towards the end of the century sentiment moved more decisively in favour of federation, *although this was much less so in Western Australia than in other States*. The pivotal events at the end of this time were the Constitution Conventions held in various capital cities in 1897 and 1898, referenda in each of the colonies in 1898 (with the exception of Western Australia, which did not hold its referendum until 1900), a Premiers' Conference in 1899, enactment of the Constitution in the British Parliament in 1900 and a proclamation by Queen Victoria that the Commonwealth of Australia would come into being on January 1, 1901.

What is clear is that the Founders never intended to relinquish any more than certain specific powers to the Commonwealth. All residual powers, such as those relating to education, health and management of land, maritime and mineral resources were to remain with the States.

These residual powers, while presenting scope in varying degrees for common interests, all involve strong elements of *local preference, local decision-making and local service delivery*. They were intended to, and should, remain firmly in *State hands*. The overriding consideration is to have maximum local involvement and to keep government as close as possible to the people it serves.

THE BENEFITS OF A FEDERAL SYSTEM

A true federal system automatically provides checks on the power of central governments, introduces healthy competition in government decision-making, caters for diverse local wishes and is responsive to people's needs.

CHECK ON CENTRAL POWER

While wishing to secure the benefits of coordinated action on common interest matters, the

Founders, who were all political leaders from colonial Parliaments, were keenly aware that they were creating a powerful central government.

The main means of constraining Commonwealth power was written into the Constitution itself. The Founders included explicit constraints on the power of the Commonwealth. One of these was the Senate. Unfortunately, the Senate, conceived as a "States House" and a House of Review, has not been an effective institution to control Commonwealth power.

Section 51(ii), which prohibits the Commonwealth from discriminating between the States, was another Constitutional limitation on Commonwealth power. However, as has been seen with certain tied grants, Section 51(ii) has not stopped the Commonwealth from discriminating between States which accept conditions imposed by tied grants and those which do not. Similarly, it has not stopped the Commonwealth from permitting the operation of uranium mines in South Australia while prohibiting the operation of uranium mines in Western Australia.

The ultimate constraint was to be Section 128, which sets out the procedure for changing the Constitution itself. In one sense it has proved effective. The Australian people have rejected nearly all proposals to increase central control in Canberra.

But in another sense Section 128 has not served the Federal Compact well. Only the Commonwealth, and not the States, can initiate the nationwide referenda required to change the Constitution. This fact alone has swung the balance Canberra's way.

Value of Competition

Compared with a centralised system, a federation is *dynamic* because it is *competitive*. This competitiveness results from mobility of people and capital between States.

The mobility of people, coupled with the independence of State Governments, makes State Governments much more responsive to the wishes of their citizens.

It is not only people who are mobile. So too is capital, especially financial capital. This mobility makes States more responsive, particularly when setting taxes and charges. Queensland's abolition of probate duties was a potent case in point. It led to abolition of this tax in other State jurisdictions and the Commonwealth.

Local Wishes and Diversity

Another major benefit of a *true* federation is that it allows for local wishes and opinions on taxes, government policies and services to be heard and reflected in practice.

Think for a moment about what Australia would be like with only a Commonwealth Government and no States. All decisions would effectively be made by the huge Canberra bureaucracy. Uniform policies would then be implemented across all parts of Australia, regardless of local circumstances, issues or complaints.

This is a special problem in countries such as Australia where some States are large and geographically distant from one another, where there are disparities in economic and environmental conditions, and where there is strong evidence that the community's wishes concerning services like education differ substantially from State to State.

Uniform national policies sound fine. All too often, however, they fail to reflect an obvious and inescapable truth; namely, that in many important respects the various States, while part of a customs union, nevertheless operate as separate and distinct economic units.

A federal system, by decentralising decision-making to States, can cater for diversity and the needs of local people far better than a distant central government.

An ideal example is seen in the Northern Territory, which just two decades ago was administered from Canberra, and going nowhere.

Since self government was granted in 1978 the population has doubled, new industries have arisen, new relationships formed – to the extent that the Northern Territory is now in the vanguard of Australia's push into Asia. The Northern Territory's long neglected health and education systems are advancing strongly.

And this has come about despite Canberra, not because of it. It has come about because the power to govern the Northern Territory was given to the people who live there.

Flexibility and Responsiveness

Since they are closer to the people, State governments are much more accessible, and because they tend to be smaller and less bureaucratic than Canberra, State governments are more responsive to community needs.

A State Government can provide the services

✓ required by the community far more efficiently than Canberra, with its unavoidable extra layers of bureaucracy.

Inter-State Cooperation

A federation allows some or all of the States the flexibility to cooperate through agreements made with each other, rather than opt for "national solutions" imposed and administered from Canberra.

When State Governments reach agreement in this way concerning matters for which they are responsible, there is no legitimate need for Canberra to become involved.

*P's needs are ignored
in large central bureaucracies*

INDEPENDENT SELF-GOVERNING COLONIES

By 1890 all of the colonies, which later became the Australian States, had achieved self government, apart from very light ultimate authority in London. While the histories of each colony differ as to detail, their respective marches toward self government bore many similarities.

As the Premier of Western Australia, I will not attempt to summarise the political and economic advancement of the other colonies, but I will discuss briefly my State's early development as one example of how the colonies reached their independence.

THE FOUNDATION OF WESTERN AUSTRALIA

Western Australia was founded as a British colony on 18 June 1829. The governor and specified officials were given authority to make laws for the peace, order and good government of Western Australia.

This meant they could make laws about any matter, subject to the British Parliament's authority to pass laws for the various colonies within the Empire, and retention by the Crown of power to disallow any local legislation. The plenary power (i.e. not subject to limitation) of Australian Colonial Parliaments was confirmed in 1865 by the British Parliament in the *Colonial Laws Validity Act*.

Representative government was attained in 1870 when twelve members were elected to the Legislative Council of Western Australia. In 1889 that Council enacted a Constitution Bill for the Colony, establishing a Parliament (consisting of a Legislative Assembly and Legislative Council) with full powers to make laws for the peace, order and good government of Western Australia.

The British Parliament ratified this grant of power in 1890 and responsible government commenced when Sir John Forrest was commissioned by the Governor to form a ministry.

From 1890 Western Australia possessed a written Constitution granting full power to its Parliament. A Westminster system of representative and responsible government operated. Legislation and executive orders were promulgated to govern the colony.

Subject to a very limited residual British authority, Western Australia was legally and constitutionally an independent and autonomous political entity.

EARLY PROSPERITY

The 1890s was a period of very rapid development and prosperity for Western Australia. During this time the population increased from 47,000 to 179,000, total annual external trade from 2,000,000 to 12,000,000, the area under agriculture from 70,000 to 201,000 acres and the length of railways from 188 to 1,355 miles.

Gold discoveries at Coolgardie and Kalgoorlie in the 1890s and the gold rush which followed had a pivotal bearing on Western Australia's development in this period. The free, independent and enterprising spirit engendered by self-government enabled Western Australia to take full advantage of its newly found mineral resources.

RELUCTANCE TO FEDERATE

Western Australia was less enthusiastic about the move to federate than any other colony. The settled population in the agricultural areas strongly opposed federation for two reasons.

First, they feared the effects of removal of duties on inter-colonial produce. This would make agricultural products imported from the eastern States much more competitive with local produce.

Second, there was a view that if Western Australia federated and accepted uniform tariffs, the State's rural industries would have to pay higher prices for their inputs.

The discovery of gold led to a great influx of people from the other colonies. These people had a strong preference for federation and in number had grown to outweigh the established agricultural interests.

Pressure from the goldfields and the British Secretary of State for the Colonies led to a referendum on the issue in 1900, two years after the other colonies. Strong support for federation came from the goldfields, where the new settlers from other colonies were concentrated.

Sir John Forrest, despite his earlier opposition to federation, led the referendum campaign in

favour of federation. *His view was that although the benefits of federation for Western Australia were not obvious, the State's interests would be better served by joining the union at the outset and helping to mould it from within rather than standing aloof.*

By the time this decision had been made the Commonwealth Bill had been introduced in the British Parliament. Western Australia's decision was made just before the Queen's proclamation establishing the Commonwealth.


SHOULD WESTERN AUSTRALIA HAVE GONE IT ALONE?

These events highlight the great reluctance of Western Australia to join the federation and raise the question of how the Colony would have fared had it not federated.

By the 1890s the Colony was already on a path to prosperity. Many of the achievements which laid the groundwork for later success were in place by federation and had been achieved during colonial days using local resources and initiative. These included the gold rushes and the development of Kalgoorlie, agricultural expansion, and construction of public infrastructure such as major dams, pipelines, roads, ports and rail networks.

Milestones in the State's growth since that time have also occurred *independently of the Federal Compact.*

The North West resource industries developed in the 1960s are a source of immense wealth for the State and nation. Western Australia, with only nine per cent of the population, accounts for 25 per cent of Australia's exports. The resource developments were made possible by the State Government and the private sector, with almost *no Commonwealth involvement.* The same is true of the burgeoning diamond industry.


 These economic events, which have underpinned the State's prosperity, would have occurred *earlier* if the State had remained outside the Commonwealth as an independent political entity. This is certainly true of the iron ore and North West Shelf petroleum industries, where Western Australia eventually won the battle against Canberra's attempts to stop these developments. Uranium mines would have been operating in Western Australia long ago were it not for Commonwealth interference.

Small export-oriented economies can be highly


successful, as Singapore, Hong Kong and Switzerland attest. New Zealand's future as a relatively small country is again bright since the reforms of the 1980s, which have liberalised its economy and increased its international competitiveness.

THE MOVE TO SECEDE

In the first two decades after federation, the Western Australian people continued to be dissatisfied with the Federal Compact. They felt their State had lost more than it gained by joining the federation.

These feelings culminated in a referendum in April 1933 to decide whether or not Western Australia should secede. *The vote was overwhelmingly in favour of secession - by a two thirds to one third majority.* 

Many of the reasons underlying Western Australians' feeling of resentment continue today. Centralist policies fail to accommodate Western Australia's reality as a separate economic unit. The people feel they are being ignored by Canberra. The State is profoundly relevant to Australia's economic prosperity, but this is seldom reflected in the attitudes emanating from the national capital.

Western Australians can not be blamed for these feelings which reflect their frustrations at the Federal Government's actions. 

DIVISION OF POWERS

The Constitution was intended to create a Federal system of government in Australia. From the text of the Constitution itself and the records of Constitution Convention debates, the Founders *intended* to establish a Commonwealth Government with *limited and defined powers* while leaving the States with their general plenary powers to regulate and the *responsibility for the majority of social, economic and political concerns of Australia*.

The defined powers given to the Commonwealth Parliament can be considered under the following headings:

LEGISLATIVE POWERS

The main legislative responsibilities given to the Commonwealth are itemised in Section 51 of the Australian Constitution. *The Constitution left the States with sole responsibility for everything else.* (Page 7).

Section 109 allowed valid Commonwealth legislation to prevail over State legislation in cases of conflict.

TAXATION POWERS

Power to levy tax was given to the Commonwealth by Section 51 (ii). In addition, Section 90 gave the Commonwealth exclusive power over customs and excise duties. However, what was *not* given to the Commonwealth - until the High Court so determined, many years later and without the support of either the Constitution or Constitution Convention debates - was the *exclusive power to tax*.

Thus, the States and Commonwealth were given *concurrent* taxing powers with the exception of customs and excise which, given the nature of the federation as a customs union, was made exclusive to the Commonwealth.

The Founders were quite clear about what taxing powers the Commonwealth and States should have, and sent a strong signal that, with the exception of customs and excise, the States should be the *equal* of the Commonwealth in the taxation field.

BORROWING POWERS

Section 51 (iv) gave the Commonwealth the power to borrow on its own behalf while Section 105 gave it the power to take over State debt.

Supporting the Commonwealth's borrowing powers were other provisions relating to currency, coinage and legal tender, banking and the issue of paper money.

THE POWER TO MAKE GRANTS TO THE STATES

Section 96 gave the Commonwealth the power to make grants to the States on any terms it thought fit.

The years since federation have seen Canberra usurp control over many areas intended to be governed by the States.

High Court decisions favouring the Commonwealth, the enforced financial dependence of the States, increasing Commonwealth legislative dominance via use of the external affairs power, and so-called "national" policies which lead to *de facto* Commonwealth control of service delivery functions, have all underpinned moves to more centralism in Canberra

HIGH COURT DECISIONS

An important role of the High Court is to interpret the Australian Constitution.

It was the intended responsibility of the Court to ensure that *the letter and the spirit of the Constitution were upheld*, enabling the Constitution to provide a consistent framework for the operation of the Australian Federation.

Contrary to this intention, the High Court has acted as a force for the centralisation of powers in Canberra.

One of the Court's early landmark decisions was the Engineers' Case, 1920. The jurisdiction of the Commonwealth Arbitration Court was extended to employees of State instrumentalities. Applied more generally, the decision meant that Federal legislation can be binding on State Governments. One consequence is that the Commonwealth is able to impose taxes (e.g. fringe benefits tax) on the States and their instrumentalities.

Another important early decision was *Victoria versus the Commonwealth*, 1926. The Court held that under Section 96 of the Constitution the Commonwealth could attach any terms and conditions to the grants of money to the States, regardless of the Commonwealth's legislative powers. This meant that the Commonwealth could use tied grants as an instrument to dictate and control State policies and service delivery programs.

These early decisions set the scene for many other rulings which have acted to further the centralisation of power (Appendix One).

APPEALS

At federation, the Judicial Committee of the Privy Council decided appeals from State courts in matters involving constitutional law, common law and State legislation. Appeals to the Privy Council have now been abolished.

The ultimate court of appeal for all matters including State law and powers and Federal constitutional issues is the High Court. That Court consists of judges appointed solely by the Commonwealth. It is funded by the Commonwealth and most of its jurisdiction depends upon Commonwealth legislation.

Thus, one party to constitutional disputes, the Commonwealth, has a major influence on the Court, while other parties, e.g. the States, have no role - other than the requirement under the *High Court of Australia Act 1979* (while the Commonwealth leaves it in place) that they be consulted in the appointment of High Court Justices.

From a States' viewpoint, the High Court is not a completely neutral, independent arbiter.

With no avenue of appeal, the States are at Canberra's mercy whenever High Court judgments allow further centralisation of powers.

STATE FINANCIAL DEPENDENCE

The financial independence of States is determined by the extent to which States are able to decide their own budgetary requirements and raise funds to meet those requirements; and the freedom of States in determining how they spend funds within their budget.

Since early this century there has been a steady erosion of the States' financial independence (Appendix Three). There are several aspects to this.

Loss of Surplus Revenue

Section 94 of the Constitution provided that after five years from the imposition of uniform customs duties, surplus Commonwealth revenues may be distributed to the States. Uniform customs duties came into effect in 1901; thus in 1906 the Commonwealth had power to distribute surplus revenues to the States.

The efficient get less funds, The wasteful w/ low A^o get more funds.

Instead, the Commonwealth enacted the *Surplus Revenue Act 1908*, so that the surplus would go into Commonwealth trust funds, ensuring that there were no surplus funds for the States.

Section 87 of the Constitution stated that for the first ten years of federation and subsequently until the Commonwealth otherwise provided, only one fourth of the Commonwealth customs and excise revenue was to go to the Commonwealth, the rest to the States. In 1910 the Commonwealth passed another *Surplus Revenue Act* substituting smaller per capita payments to the States in lieu of the surplus customs and excise revenue.

These first examples of cynical Canberra creative accounting were the beginning of the rot. They established the pattern ever since. The trend has been to use financial power to diminish the States and subvert the true intentions of the Federal Compact.

Loss of Indirect Tax Powers

At federation the States had access to all forms of taxation except customs and excise duties, access to these taxes being barred by Section 90.

However, a series of High Court interpretations of the meaning of duties of excise have effectively prevented States from levying taxes related to the production or distribution of goods and services. This has restricted the States' access to the indirect tax field.

Loss of Income Tax Powers

Prior to World War II the States were the dominant collectors of income taxes. Power over income tax was assumed by the Commonwealth during World War II on the understanding that it would be handed back to the States. This did not occur. The States repeatedly sought to regain the income tax power in the early post war period through the High Court, but the High Court denied the States access to taxation powers which only a few years earlier had been their right.

This centralisation of taxing powers, through a combination of the High Court's interpretation of excise and the loss of income tax powers, has severely restricted the States' ability to raise revenue and fund their commitments.

While responsible for around 41 per cent of total public sector expenditures, the States collect only 24 per cent of all Government revenues. They are forced to rely on the Commonwealth for around 50 per cent of their funds. Western

Australia depended on the Commonwealth for 53 per cent of its revenue in 1992-93.

For all practical purposes, funding to the States has become a residual item in the Commonwealth budget. The Commonwealth determines the revenue required for its own-purpose expenditures. What is left over is passed on to the States, *over half of it with onerous conditions.*

This means that the States have borne the brunt of fiscal restraint in the late 1980s and early 1990s. Over the last ten years real per capita payments to the States have fallen by 13 per cent while real per capita Commonwealth own-purpose outlays have increased by 17 per cent.

Tied Grants

Another way the Commonwealth has increased the financial dependence of the States is through its ability, via Section 96, to make grants to the States in any manner it sees fit. By the High Court's decision in *Commonwealth versus Victoria 1926*, the Commonwealth was held to possess the power to attach almost any conditions it likes to these grants, regardless of whether these conditions have anything to do with any of the Commonwealth's powers under the Constitution.

This enabled the Commonwealth to make so-called tied grants to the States. These specify what the States must do with the funds and, in many instances, involve matching arrangements requiring States to contribute some of their own funds. Frequently the matching arrangement involves 50-50 contributions.

By using this power the Commonwealth has been able to greatly reduce the freedom States have to choose how they spend funds within their budgets. *CONTROL*

The greatest expansion of tied grants occurred during the Whitlam administration but growth resumed during the 1980's. Tied payments as a proportion of total payments to the States have more than doubled since the early 1960s, increasing from around 25 per cent at that time to 55 per cent in 1993-94.

In other words, over half the States' revenue from the Commonwealth comes with conditions attached. Given that this income originates in the States themselves, and that State Governments are elected by their own communities to carry out a specific mandate, tied grants present a totally unfair and inequitable restriction on a State Government's ability to govern.

BUREAUCRATIC DUPLICATION

* As well as greatly eroding State financial independence, tied grants have created a whole new level of Commonwealth bureaucracy and duplication. To administer particular programs there are now duplicated bureaucracies at State and Commonwealth level. Pro-Canberra commentators then talk of this duplication and call for abolition of the States as "unnecessary".

✓ As a piece of tortured logic this argument takes some beating. It is the original intrusion by Canberra which is unnecessary, given the substantial State experience and facilities in place. It is the Commonwealth bureaucracy which is unnecessary. Without the Commonwealth bureaucracy the States would continue to deliver services, and would do so more efficiently and effectively. Without the State bureaucracies the entire workforce in Canberra would be lost trying to deliver effective services to ordinary Australians.

A recent trend in tied grants has been not only to dictate the purpose for which funds must be used, but also to place much broader requirements on how the State develops policies in areas such as health, education and other mainstream services.

effectively federal policies

DEPLETION OF STATE INFRASTRUCTURE

* The Commonwealth has been able to dominate the Loans Council, a body established in 1927 to coordinate Commonwealth and State borrowings. These borrowings are required for State funding of capital works for schools, roads, public transport, energy supply, water supply and sewerage.

Dominance from Canberra has meant that the States have lost considerable independence in determining capital expenditure priorities for these vital services.

COMMONWEALTH LEGISLATIVE DOMINANCE

* Section 109 of the Constitution provides that where a State law is inconsistent with a valid Commonwealth law, the Commonwealth law prevails and the State law is invalid to the extent of the inconsistency. This means the Commonwealth can override States in any area in which it enacts valid legislation.

As noted previously, the Constitution provided the Commonwealth with the power to legislate

over only a limited number of areas such as defence, commerce and trade. There were relatively few areas where the Commonwealth was intended to have legislative dominance over the States.

One of the areas defined as a Commonwealth responsibility was external affairs [Section 51 (xxix)]. At the time the Constitution was framed, few issues fell within the ambit of this Section, because external affairs were seen as an Imperial matter, largely handled in London.

No one foresaw the proliferation of international treaties. Since the 1970s this has become a growth industry. Australia is now a party to over 2,000 international treaties, many of them requiring detailed prescriptions about domestic affairs in participating countries.

Supported by High Court decisions, the Commonwealth has ratified international treaties relating to matters which have hitherto been State responsibilities - e.g. the environment, labour relations, human rights - and has then used those treaties as a basis for legislation overriding State laws (Appendix Six).

undriven to weaken states.

POLICES IMPOSED BY CANBERRA

* So-called "national solutions" to government administration can be desirable where there are areas of common interest between States. But it is greatly preferable for all States and Territories to reach agreement among themselves about such solutions, especially when regulatory and service delivery matters are involved.

* During the 1980s and early 1990s there has been a huge proliferation in the extent of intergovernmental dealings on policy issues where, supposedly, there is a strong common interest. This proliferation has been accompanied by an equal explosion of ministerial councils dealing with very nearly every aspect of government, Federal, State and Local. By 1992, there were nearly 60 of these councils. Following a resolution by the Council of Australian Governments, these were reduced in number to 21 during 1993. This was done by combining functions, not by eliminating them.

Canberra has been able to use these councils to control the reform agenda, and thereby to intrude into areas of State policy responsibility. *In many cases, the Commonwealth has insisted upon providing the chairperson of these councils and controlling their agendas. This has led to an automatic*

growth in the Canberra bureaucracy which cannot be justified to the taxpayer in cost efficiency terms.

✓ An important result stemming from the work of these councils, and from the numerous working parties and committees associated with them, has been more Commonwealth/State agreements. These can lead to tied grants and prescribed policies which participating States are obliged to observe.

* The Canberra bureaucracy has been very effective in setting council agendas. Almost invariably its will has prevailed in negotiations at council meetings. "Divide and rule" tactics, taking advantage of the lack of a consolidated position between States, has been a major reason for Canberra's rapidly growing dominance.

* The supposed need for reforms and the process of achieving them are driven too often by a false view that "national solutions" are necessary. This is frequently not the case. There are relatively few areas where there is a genuine need for, or real benefit to be gained from, uniform national solutions.

* Insufficient consideration has been given to interstate cooperation to reach desirable uniform standards and administrative policies, thus avoiding any need for Canberra's involvement.

* National bodies developed through Commonwealth/State processes have typically taken a centralist approach to decision making. Despite different regional circumstances, they have attempted to impose the same "solution" universally.

REFERENDA - THE PEOPLE SPEAK

* A referendum to amend the Constitution can only be initiated by the Commonwealth Parliament. This means that the Commonwealth has control over any proposals for Constitutional amendment put before the people. Only eight of the 42 proposals for change put to Australian voters have been agreed to by the required majority of voters in a majority of States (Appendix Seven). The rejected referenda indicate that Australians are reluctant to increase central power at the expense of the States. Successful referenda have been characterised by a strong measure of bipartisan support, and have not been perceived as a move towards greater centralisation of power.

* The 1967 referendum amended Section 51 (xxvi), which empowers the Commonwealth to make laws with respect to particular races. In the original 1901 Constitution this excluded Aboriginal Australians. In other words, they were to be treated constitutionally in the same way as all other Australians. After the 1967 referendum, the so-called "race power" could be applied to Aboriginal Australians.

The most recent and repugnant example has been Canberra's response to the High Court's judgements in the Mabo case. The Commonwealth's Native Title Act 1993 attempts to take *de facto* control of land management and resource development within States.

— & premiers not aware of federalism
& states' sts.

UN - seeks control of land
& thereby resources
& private property
& ↓ home ownership

Canberra has hurt regional areas
& needs. Centrally financed.

— ∴ Cbr doing it by bypassing
constituted

COOPERATIVE PLANNING

In 1990, the then Prime Minister, The Honourable R J Hawke, MP, proposed a special Premiers' Conference aimed at achieving long-overdue reforms in efficient service delivery at both Commonwealth and State levels.

In the lead-up to the first such conference in Brisbane (October 1990), the Commonwealth and States worked cooperatively on a sweeping review of the entire ambit of government administration. The States agreed to cooperate in Mr Hawke's initiative because he assured Premiers and Chief Ministers that he would commit himself personally to achieving the reforms needed in the public sector to make Australia internationally competitive.

✓ Mr Hawke was prepared to include on the Conference agenda a special task force to investigate and propose an income tax sharing arrangement which would have made the States much more financially independent.

BRISBANE COMMUNIQUE

The joint communique released after the first special Premiers' Conference in Brisbane gives clear evidence of both the wide-ranging agenda and the genuine spirit of cooperation which prevailed among Heads of Government at the meeting. Apart from agreeing to continue such special Premier's Conferences, the Heads of Government agreed about the need to reform Commonwealth-State financial relations. The communique stated:

"Leaders and representatives have agreed on the need for a fundamental review of Commonwealth-State financial arrangements by a committee of senior expert officials.

In this review the Commonwealth and the States recognise the need to address the question of vertical fiscal imbalance - with a view to reducing that imbalance while recognising the necessity for the Commonwealth to have adequate means to meet its national responsibility for effective macro-economic management.

It is against that background that the appropriate balance between Commonwealth, State and Local Government revenue raising will be examined."

Following this promising start, the "committee of senior officials", in practice the various Under Treasurers of the States and the Secretary to the Commonwealth Treasury, met regularly to prepare a tax sharing proposal which would give the States a guaranteed and predictable revenue stream. The committee's final report was substantially completed and was due to be considered at a special Premiers' Conference meeting scheduled for November 1991.

ROLES AND RESPONSIBILITIES

Apart from addressing the crucial question of vertical fiscal imbalance, the special Premiers' Conference agenda included fresh reviews of nearly all significant aspects of government administration where duplicated bureaucracies were adding appreciably to total community costs. Commonwealth and State ministers undertook wide-ranging investigations of how the roles and responsibilities of government could be rationalised to achieve greater effectiveness and efficiency, while reducing costs.

KEATING RENEGES

The process was undermined by Mr Keating in a speech to the National Press Club during his bid to become Prime Minister. In response to pressure arising from statements made by Mr Keating, the then Prime Minister, Mr Hawke, ✓ publicly reversed his position on the key revenue sharing issue.

This led to a decision by Premiers and Chief Ministers to cancel the November 1991 special Premiers' Conference and hold a meeting of their own without the Commonwealth. They agreed to form the Council of Australian Governments (COAG).

Following that meeting, which took place in November 1991, Premiers and Chief Ministers ✓ jointly put forward a proposal for a personal income tax sharing arrangement. Key elements in the proposal were:

• The States would become accountable and responsible for an identifiable component of personal income taxation, which would be ✓ collected by the Australian Taxation Office under a single tax regime determined by the Commonwealth.

- . The State component would be set initially at approximately six cents in the dollar of taxable income, and held at that rate for at least the first three years of the new system.
- ✓ . Revenue neutrality, budget neutrality for the Commonwealth and State governments, and tax liability neutrality for individual taxpayers, would be assured at the time of introduction of the scheme - by the Commonwealth making a corresponding cut in its income tax rates and an offsetting cut in its general revenue grants to the States.
- . After the initial three year period, the States would be free to vary the rate they apply to the income tax base, individually or jointly, and mechanisms would be set in place for consultation between the Commonwealth and States when changes to income tax rates, the tax base or thresholds were contemplated.

These proposals were crucial from the States' viewpoint. Giving them a say concerning tax rates would have seen a partial return of financial independence.

- * After becoming Prime Minister, Mr Keating rejected out of hand any proposal of this kind to give States an assured source of revenue.

The proposals remain a sensible and workable alternative to the divisive and unsustainable taxation regime now operating in Australia.

MUST ↓ Federal Expendit.

HIGH COURT DECISIONS OF GENERAL APPLICATION

High Court decisions since 1908 have supported the trend to centralisation.

1908 *NEW SOUTH WALES V COMMONWEALTH*

The High Court held valid Commonwealth legislation which directed that money in excess of Commonwealth requirements for the financial year should be paid into trust funds for defraying the costs of services in succeeding years. Therefore, such money would not form part of any surplus revenue distributable among the States under Section 94 of the Constitution. As a result, the Commonwealth has ensured that there is no surplus revenue to be distributed to the States as the Constitution envisages in Section 94.

1920 *ENGINEERS' CASE*

This case established that Commonwealth powers should be interpreted broadly. The effect was that Commonwealth powers were expanded. This has permitted Commonwealth laws to intrude into areas which would otherwise have been subject to State control. In particular, the case held that

- (1) Commonwealth legislation can bind the Crown in right of a State. One consequence has been that the Commonwealth is able to impose taxes on the States (eg payroll tax, fringe benefits tax).
- (2) Commonwealth legislative powers listed in Section 51 of the Constitution are to be interpreted broadly and generally without taking into account State legislative powers or the effect of such a broad interpretation on State powers.
- (3) Commonwealth industrial awards can bind State instrumentalities.

The case was further evidence of the High Court taking constitutional amending and law-making powers to itself.

1926 *VICTORIA V COMMONWEALTH (ROADS CASE)*

This case held in making Section 96 grants to States the Commonwealth may attach terms and conditions to the grant of monies which are -

- (i) outside the area of Commonwealth legislative powers; and
- (ii) within State legislative and policy domains; and

One consequence of this is that the Commonwealth can dictate and control State policy.

1942 *SOUTH AUSTRALIA V COMMONWEALTH (FIRST UNIFORM TAX CASE)*

This case enabled the Commonwealth to become the dominant revenue raiser in the federation. The States were forced to relinquish income tax as a source of revenue.

1965 *FAIREAX V COMMISSIONER OF TAXATION*

This case permitted the Commonwealth to impose a liability to pay income tax and then exempt from the tax if specified conditions (normally within State control) were met.

1971 *STRICKLAND V ROCLA CONCRETE PIPES LTD*

The High Court indicated that the corporations power - in Section 51(xx) of the Constitution - should be given a wide interpretation so that it would apply in relation to intra State matters previously governed by State domestic laws.

**1975 NEW SOUTH WALES V COMMONWEALTH
(SEAS & SUBMERGED LANDS CASE)**

Until 1975 it was accepted that the States' territorial boundaries ended three nautical miles from their coastline. In this case the High Court held that:

- (1) Offshore boundaries of States ended at low water mark and did not extend over the 3 mile territorial sea.
- (2) Commonwealth legislation - the Seas and Submerged Lands Act 1973 - gave sovereignty over territorial waters (including the seabed and airspace) to the Commonwealth, not the States.

As a result, the States' powers with respect to the territorial sea (including minerals, fisheries, navigation) no longer rest upon State legislative power, but upon Commonwealth legislation enacted pursuant to the 1976 Offshore Constitutional Settlement.

**1976 MURPHYORES V COMMONWEALTH
(FRASER ISLAND CASE)**

Despite State development permission having been granted, this case permitted a Commonwealth Minister to control the mining of mineral sands in Queensland by making the grant of an export permit conditional upon the mining company complying with environmental standards. The case held that

- (1) Commonwealth legislation can be valid even if it includes conditions designed to achieve ends in themselves outside Commonwealth legislative power.
- (2) The overseas trade & commerce power of section 51(i) of the Constitution was validly exercised in Commonwealth regulations to prohibit (on environmental grounds) exports of mineral sands, mined in Queensland.

Not only are Commonwealth powers interpreted broadly (following the *Engineers' Case*), but also when using those powers Canberra can attach conditions to regulate matters which go beyond even that broad interpretation of Commonwealth power.

**1979 R V FEDERAL COURT OF AUSTRALIA;
EX PARTE WA NATIONAL FOOTBALL
LEAGUE (INC) (ADAMSON)**

The High Court held that a non-profit organisation - a Western Australian League football team - incorporated under the *Associations Incorporation Act 1895* came within the corporations power - Section 51(xx) - and was therefore validly subject to the *Trade Practices Act* (Commonwealth).

1982 KOOWARTA V BJELKE-PETERSEN

This case (following *Engineers'*) gave a wide interpretation to the words "external affairs" in Section 51(xxix) of the Constitution. This enabled the Commonwealth, by relying on an international treaty, to make laws governing human rights which had previously been considered to be a matter for State Parliaments and the common law. As a result, Australia is subjected to international standards and criteria without the possibility of local needs and conditions being taken into account by State Parliaments and laws.

In particular, this case held that

- (1) the external affairs power supported the *Racial Discrimination Act 1975* (Clth) which implemented the UN Convention on the Elimination of all Forms of Racial Discrimination 1965.
- (2) Queensland policies, regulations etc concerning land (eg granting of pastoral leases) became subject to the *Racial Discrimination Act*.

**1983 COMMONWEALTH V TASMANIA
(TASMANIAN DAM CASE)**

This case gave a broad interpretation to Sections 51(xx) - corporations power - 51(xxvi) - race power - 51(xxix) - external affairs power. The High Court

- (1) upheld the validity of the World Heritage Properties Conservation Act 1983 (Clth) which -
 - (a) implemented the Convention for the Protection of the World Cultural and Natural Heritage; and
 - (b) prevented Tasmania building a dam.
- (2) indicated that Section 51(xx) permits

the Commonwealth to regulate the non-trading activities of a trading corporation undertaken for the purpose of its trading activities such as the Tasmanian Hydro Electricity Commission's preparatory work to construct a dam to generate electricity to sell.

- (3) State statutory authorities could be trading corporations for the purposes of Section 51(xx) and therefore subject to Commonwealth legislation.

Because most economic activities in a State are carried out by trading corporations, this case may enable the Commonwealth to regulate those activities and associated activities. Consequently, the Commonwealth may have power over virtually all aspects of business and associated activities (eg trading activities, working conditions, wages and salaries, safety standards). These are matters that have been governed by State laws and policies.

1989 *QUEENSLAND V COMMONWEALTH*

This case expanded the range of environmental matters in which the Commonwealth could override existing State policies and laws. The High Court held Section 51(xxix) supported the validity of a Commonwealth law permitting Commonwealth identification and nomination of Queensland rainforest for world heritage listing. It also supported Commonwealth regulations prohibiting, without Commonwealth Ministerial consent, activities in that area, for example, road and forestry work.

1992 *MABO V QUEENSLAND* (No 2)

For the first time the High Court recognised common law native title to land. Matters concerning title to land and land laws have always been within the jurisdiction of State Parliaments.

1986 *RE LEE EX PARTE HARPER*

This case indicates that virtually all employment relationships can be governed by Federal awards. For example, school teachers employed by the State in State schools can be bound by a Federal industrial award governing their terms and conditions of employment, including pay scales and hours of work.

1988 *RICHARDSON V FORESTRY COMMISSION* (Tas)

This case (following the Franklin Dam case) reinforced the Commonwealth's ability (by international treaties) to legislate on matters within States relating to the environment. The Court held that Section 51(xxix) supported the validity of a Commonwealth Act establishing a commission to inquire into and report on the possible identification, delineation and eligibility of an area of land in Tasmania for World Heritage and to protect that area (4.5 percent of Tasmania) from any intrusion.

HIGH COURT DECISIONS PARTICULARLY AFFECTING STATE TAXING POWERS

(Important cases are underlined)

1904 *PETERSWALD V. BARTLEY*

- . This was the first time the High Court examined the Constitution's prohibition on the States imposing excise duty.
- . The High Court adopted a narrow interpretation of excise duty by deciding that licence fees imposed by States on breweries were not excise duties.
- . Under the narrow interpretation, excise duty was a tax specifically on the quantity or value of goods produced in the State. States could therefore apply a tax on goods which did not discriminate between goods produced within the State and goods produced outside the State.

1904 *D'EMDEN V. PEDDER*

- . The High Court examined the power of the States to impose taxes on Commonwealth activities.
- . The High Court ruled that the Tasmanian Government could not impose stamp duty on a receipt given for the salary of a Commonwealth postal official.
- . It should be noted that a 1904 High Court ruling (*Deakin and Lyne v. Webb*) which held that a State could not impose income tax on the salaries of Commonwealth public servants, was later overruled by the Privy Council.

1908 *WIRE NETTING CASE (KING V. SUTTON) & STEEL RAILS CASE (A.G. NEW SOUTH WALES V. COLLECTOR OF CUSTOMS)*

- . Confirmed that the Commonwealth could impose customs duty on imports by State Governments, despite the Constitutional prohibition on the Commonwealth taxation of State property.

1911 *OSBORNE V. THE COMMONWEALTH*

- . Commonwealth land tax ruled valid.

1916 *FAREY V. BURVETT*

- . The High Court ruled that a Commonwealth order under the War Precautions Act fixing the price of bread was valid.
- . In this case, the High Court gave a wide interpretation to the Commonwealth's defence power under the Constitution. The Commonwealth's defence power was used in 1942 to take over the States' income tax administrations.

1920 *AMALGAMATED SOCIETY OF ENGINEERS V. ADELAIDE STEAMSHIP CO LTD*

- . High Court discarded the principle of general State immunity from Commonwealth legislation.
- . This case dealt with the power of the Commonwealth Arbitration Court to determine the wages and conditions of employees of State Governments. The High Court ruling extended the scope of Commonwealth power to State industrial activities, but its effects were much wider.

1926 *PETROL TAX CASE (COMMONWEALTH V. SOUTH AUSTRALIA)*

- . The High Court ruled that a South Australian tax of 2.5 cents per gallon on sellers of petrol was invalid, despite the fact that some of the petrol came from overseas, some from Victoria and some was produced within South Australia. The tax was ruled invalid under Section 92 (free interstate trade) and Section 90 (prohibition on States levying customs and excise duty) of the Constitution.

1927 NEWSPAPER CASE

(JOHN FAIRFAX AND SONS LTD V. NEW SOUTH WALES)

- . The High Court ruled that a New South Wales tax on newspapers published and sold in that State was invalid, on the grounds that it was an excise duty.
- . The Petrol Case and Newspaper case effectively excluded States from levying any tax on commodities.

1937 A.G.(NSW) V. HOMEBUSH FLOUR MILLS LTD.

- . High court ruling widens excise duty definition to cover any tax imposed in substance on production.
- . The case involved State legislation which expropriated flour, paid the former owner of the flour compensation and entitled the former owner to buy back the flour at a higher price. This was held to impose a tax measured by the difference between the compensation and repurchase price.

1938 MATHEWS V. CHICORY MARKETING BOARD

- . The High Court ruled that a levy of \$2 per half acre on land planted with chicory was invalid.
- . This case established the principle that a tax did not have to be specifically imposed on the quantity or value of goods produced to be an excise. It was sufficient for a tax to be imposed with respect to a commodity to be termed an excise.

1942 STATE OF SOUTH AUSTRALIA AND OTHERS V. COMMONWEALTH OF AUSTRALIA (FIRST UNIFORM TAX CASE)

- . The Commonwealth in 1942 introduced legislation which replaced separate State and federal income taxes with one single uniform national income tax. The legislation also provided for grants to be paid to States which abstained from levying income tax.
- . Victoria, Queensland, South Australia and Western Australia unsuccessfully challenged the legislation as unconstitutional.

1949 PARTON V. MILK BOARD (VIC)

- . A levy of 0.1 cents per gallon imposed by the Victorian Milk Board on sellers of milk who were not the original producers was declared to be an excise and therefore invalid.
- . Hence, a tax on a commodity at any point in the course of distribution was held to be an excise duty.
- . However, the High Court held that a tax on consumers or consumption cannot be an excise.

1957 VICTORIA V. COMMONWEALTH (SECOND UNIFORM TAX CASE)

- . The Victorian Government in 1955 took out a writ in the High Court challenging two aspects of the uniform tax legislation (New South Wales intervened in 1956 to support Victoria):
 1. Tax reimbursement grants being conditional upon the States not levying income taxes or reducing the grant payable if such actions were undertaken by the States. The challenge was unsuccessful with the High Court in 1957 upholding the validity of this aspect of the uniform tax legislation.
 2. Taxpayer's obligation to discharge any liability for Commonwealth income tax before paying State income tax. This challenge was successful with the High Court declaring in 1957 that this facet of the uniform tax legislation was invalid.

1958 DENNIS HOTELS V. VICTORIA

- . The validity of Victoria's liquor licence fees was challenged when they were increased in 1958.
- . The High Court ruled that:
 1. The annual licence fee based on sales during the previous twelve months was valid; and
 2. The temporary licence fee based on sales during the permit's duration was invalid.
- . This case formed the basis for State franchise fees based on sales in a previous period.

1963 *BOLTON V. MADSEN*

- . The High Court endorsed State taxes on road haulage.

1964 *ANDERSON'S PTY LTD V. VICTORIA*

- . The High Court endorsed State taxes on the provision of credit to finance purchase of goods. The case involved stamp duty on hire purchase and instalment sale agreements.

1969 *THE STATE OF WESTERN AUSTRALIA V. HAMERSLEY IRON PTY LTD*

- . In 1967 Western Australia introduced a requirement for a receipt to be issued for any payment valued at \$10 or more. Receipts were subject to stamp duty at the rate of 0.1%. All States copied this tax. Effectively, this was a tax on turnover.
- . The High Court ruled that the stamp duty on receipts of iron ore sales was an excise and therefore invalid under Section 90 of the Constitution.

DEC 1969-FEB 1970

THE STATE OF WESTERN AUSTRALIA V. CHAMBERLAIN INDUSTRIES PTY LTD

- . The High Court ruled that stamp duties on receipts in respect of sales at any stage from manufacture to consumption of goods manufactured in Australia were excise duties.
- . This did not invalidate stamp duty on receipts of wages and salaries (which was deemed to be a tax on services), although the States subsequently abandoned this duty altogether.

**1971 *VICTORIA V. COMMONWEALTH*
(PAYROLL TAX CASE)**

- . The High Court held that the Commonwealth Parliament could legislate to impose a tax on State Governments by reference to the amount of wages paid by each State to its employees.
- . This was later relevant to the Commonwealth's imposition of fringe benefits tax on States.

1974 *DICKENSON'S ARCADE PTY LTD V. TASMANIA*

- . In 1973 the Tasmanian Government introduced a consumption tax on tobacco collected by tobacco retailers, accompanied by a business franchise fee on tobacco. The High Court considered that the collection of the consumption tax by tobacco retailers converted it from a consumption tax to a sales tax and therefore an excise duty. Hence the tax was ruled invalid.

- . However, the High Court upheld tobacco franchise fees, as it had upheld liquor franchise fees in the Dennis Hotels case.

1974 *MG KAILIS PTY LTD V. WESTERN AUSTRALIA*

- . The High Court disallowed a "licence fee" tax on the processing of fish.

1977 *LOGAN DOWNS PTY LTD V. QUEENSLAND*

- . States were excluded from imposing taxes on livestock used for the production of meat and wool.

1977 *HC SLEIGH V. SOUTH AUSTRALIA*

- . The High Court upheld fuel franchise fees, following its earlier decisions on tobacco and liquor licence fees.

1983 *HEMATITE PETROLEUM PTY LTD V. VICTORIA*

- . The High Court held that an annual licence fee imposed on the operator of pipelines was a tax on the production of the oil and gas carried by the pipelines and so an excise duty.

1985 *GOSFORD MEATS PTY LTD V. NEW SOUTH WALES*

- . The High Court disallowed an annual licence fee on the operator of an abattoir, as being a tax on the production of meat and therefore an excise duty (invalid under Section 90).

1993 *CAPITAL DUPLICATORS PTY LTD v*
AUSTRALIAN CAPITAL TERRITORY.

The High Court held that a licence fee imposed by the ACT on the sale of videos by Capital Duplicators was an excise and therefore invalid.

The High Court upheld its earlier decisions on the validity of tobacco and liquor licence fees (Dennis Hotels and Dickenson's Arcade) but expressed less support for fuel licence fees (which had previously been endorsed by the HC Sleigh case).

STATE - COMMONWEALTH FINANCES

There have been a number of important episodes in State-Commonwealth relations which have contributed to the loss of State independence since federation. The more important of these episodes are listed below.

SURPLUS REVENUE ACT 1908 AND THE BRADDON CLAUSE

The Constitution bound the Commonwealth to pay back to the States any revenue it raised over and above what was needed to meet its Constitutional responsibilities.

Under the so-called "Braddon Clause" and "book-keeping" arrangements, which determined how payments were to be made to the States in the first 10 years after federation, the Commonwealth was required to return to the States at least three quarters of all customs and excise duties to the States.

In 1908, however, the Commonwealth passed the Surplus Revenue Act which allowed it to avoid its obligation to pay the surplus to the States and keep more revenue for its own purposes.

This was an early move by the Commonwealth to expand its spending beyond its Constitutional responsibilities.

SURPLUS REVENUE ACT 1910

Following an agreement with the States the Surplus Revenue Act 1910 was passed, determining how payments were to be made to the States from 1910 to 1920 (the Braddon Clause and book-keeping arrangements ceased in 1910).

The Act provided for agreed per capita payments to the States of a smaller size than those made in the first 10 years. This was possible because by 1910 most States were in a sound financial position. Apart from Section 90, they had unlimited access to taxation revenues and most States had an income tax. There was no Commonwealth income tax.

Even then, special payments were to be made to the smaller States.

FEDERAL LABOR GOVERNMENT (1910-13)

Significantly increased Commonwealth expenditure into new areas.

WORLD WAR I AND THE COMMONWEALTH INCOME TAX

This period saw a large increase in Commonwealth control over the economy, commerce and trade (including many new taxes) and social services.

The Commonwealth introduced its own income tax in 1915 (the initially low rates increased by 25% in 1916-17 and a further 10% in 1917-18). Commonwealth income taxes existed side by side with State income taxes.

THE 1920s

During most of this period the Commonwealth Parliament was controlled by the Nationalist and Country Parties, who made a concerted effort to reverse the growth in Commonwealth power.

Negotiations were held to seek reductions in grants to the States and allow the Commonwealth to withdraw from the income tax field.

FINANCIAL AGREEMENT OF 1927

Established the Loan Council to coordinate and control all Commonwealth and State borrowings and established general coordination between the States and Commonwealth over public borrowing, debt repayment matters and grants to the States.

COMMONWEALTH GRANTS COMMISSION ESTABLISHED IN 1933

The Grants Commission was established to formalise the payment of general revenue grants to the States after many years of dissatisfaction with the ad-hoc grant system since federation (mainly on behalf of the smaller States).

WORLD WAR II AND INCREASING COMMONWEALTH FISCAL DOMINATION

This period saw the Commonwealth's financial dominance expand considerably.

Two key events were a large escalation in the Commonwealth's role in welfare services (ie. income redistribution) and, in 1942, the exclusion of the States from the income tax field and a large increase in income tax rates.

Following the War the States requested that they be allowed to re-enter the income tax field but this was not agreed to and several High Court challenges by the States were unsuccessful. The general revenue grants introduced by the Commonwealth to compensate the States for the loss of income taxes have continued to this day.

The Commonwealth's move to take the income tax power away from the States was a watershed in State-Commonwealth relations. In conjunction with the States being locked out of the sales tax field by the High Court's interpretation of Section 90, it has been instrumental in leading to the high degree of State dependence on the Commonwealth that we see today.

Exclusive income tax powers also gave the Commonwealth the fiscal capacity to support the steady increase in tied grants to the States and expand its expenditure into welfare services and undertake income redistribution.

HISTORY OF RECURRENT GENERAL REVENUE GRANTS

1901 - 1909/10

- . Under the Constitution, the Commonwealth was required to pay the States three quarters of customs and excise revenue collected during the first 10 years of federation.
- . The Commonwealth was also required to pay its surplus revenue to the States. However, commencing 1907/08, the Commonwealth avoided this requirement by paying its surplus revenue into a trust account as a reserve for old age and invalid pensioners.
- . Western Australia was initially permitted to keep its own lucrative tariffs, to be phased out over the first 5 years of federation.

1910/11 - 1941/42

- . In 1910/11, payment of three quarters of customs and excise revenue ceased, and was replaced by grants of \$2.50 per capita to each State (which reduced State grants by over 30%).
- . In addition, special grants were paid to:
 - Western Australia from 1910/11;
 - Tasmania from 1912/13; and
 - South Australia from 1929/30.
 From 1934/35, these special grants were paid on the recommendation of the Commonwealth Grants Commission.
- . Up until the Second World War, grants from the Commonwealth were relatively small. The States were able to meet their own expenditures primarily from their own source revenues. By 1938/39, Commonwealth grants provided only 14% of State and local revenues (compared to around a quarter in the first 10 years of federation).

1942/43 - 1945/46

- . As a temporary war time measure, commencing from the start of 1942/43, the Commonwealth took over income tax and levied it at a uniform rate across States (formerly, both the Commonwealth and the States levied income tax, with State income tax rates varying between the States).
- . The States were paid tax reimbursement grants based on their average collections of income tax in 1939/40 and 1940/41. This provided the States with \$67 million per annum (fixed in nominal terms).
- . As a result of the Commonwealth's takeover of income tax, vertical fiscal imbalance was greatly increased, with grants comprising 36% of State and local revenues in 1942/43 (increasing to 46% in 1946/47).
- . The Commonwealth also took over entertainments tax from October 1942 and paid the States \$1.5 million per annum (fixed in nominal terms), based on collections in 1941/42.
- . States could also apply for additional financial assistance (in the form of a supplementary grant) if the tax reimbursement grant appeared insufficient to meet that State's revenue requirements.

1946/47 - 1958/59

- . The Commonwealth decided that it would levy uniform income tax indefinitely. Total tax reimbursement grants were set at \$80 million per annum for 1946/47 and \$90 million for 1947/48.
- . Total grants in future years were calculated by escalating the 1947/48 grant by a formula which took account of six State population growth and growth in average wages in Australia.

- The Commonwealth did not vary this escalation formula until 1959/60. After 1948/49, the Commonwealth made supplementary grants to all States each year on an ad hoc basis. Total tax reimbursement and supplementary grants grew from \$84 million in 1946/47 to \$410 million in 1958/59.

1959/60 - 1964/65

- From 1959/60, financial assistance grants were introduced. These grants replaced the tax reimbursement grants and the supplementary grants. They were also set at a level so as to reduce the number of States seeking special grants from five (all States except New South Wales, although Victoria and Queensland had not yet received any special grants) to two (Western Australia and Tasmania).
- In 1959/60, the financial assistance grant pool was set at \$489 million (compared to \$451.5 million paid to the States in the previous year by way of tax reimbursement, supplementary and special grants).
- From 1960/61 to 1964/65, each State's financial assistance grant was escalated by that State's population growth, wages growth for Australia as a whole, and a betterment factor equal to 10% of the wages growth.
- After 1959/60, only Western Australia and Tasmania continued to receive special grants. Queensland and South Australia could receive special grants in exceptional circumstances, but did not until the 1970s.
- From 1961/62 to 1963/64, the Commonwealth provided additional assistance for generating employment, in the amount of \$20 million for 1961/62, \$35 million for 1962/63 and \$40 million for 1963/64.

1965/66 TO 1969/70

- From 1965/66, the betterment factor used in escalating financial assistance grants was set at 1.2% per annum, regardless of wages growth (in the

previous five years the betterment factor had contributed about 0.4% per annum to the increase in grants).

- The Commonwealth provided special financial assistance to address budgetary problems arising from drought in various States, amounting to \$11 million in 1966/67 and \$14 million in 1967/68.
- Western Australia withdrew permanently from the special grants system and received instead \$15.5 million in each of 1968/69 and 1969/70.
- In recognition of States' budgetary difficulties, the Commonwealth provided special revenue assistance totalling:
 - \$14 million in 1968/69; and
 - \$12 million in 1969/70.

1970/71 TO 1974/75

- In 1970/71, the Commonwealth added \$40 million to the financial assistance grant pool as determined under the existing formula (this addition was built into the base for future years) to assist the States with their budgetary difficulties.
- Commencing in 1971/72, the betterment factor was increased to 1.8%.
- As of 1972/73, \$112 million was permanently added to the financial assistance grant pool.
- Also, the financial assistance grants for New South Wales and Victoria were increased by \$2.00 per capita in 1970/71 and 1971/72; and \$3.50 per capita in the three years commencing 1972/73.
- The \$15.5 million received by Western Australia in the two years preceding 1970/71 was phased down to \$6.5 million over the three years commencing 1970/71. Western Australia also received temporary additional assistance of \$3.5 million in each of 1972/73 and 1973/74.
- The four less populous States could apply to the Commonwealth Grants Commission for additional grants to enable them to provide services at a comparable level to New South Wales and Victoria. South Australia commenced receiving special grants in 1970/71 and Queensland commenced

receiving special grants in the following year. Tasmania continued to receive special grants until 1974/75, when it withdrew permanently from the special grants system in return for an increase in its financial assistance grant of \$15 million. Western Australia did not rejoin the special grants system.

- . The Commonwealth adjusted financial assistance grants to take account of the following changes in tax powers and expenditure responsibilities:
 - the loss of State receipts duty in 1970/71, with grants increased by \$60 million in 1970/71 and by \$88 million in the following year;
 - the transfer of pay-roll tax to the States from 1971/72, with \$224 million in 1971/72 and \$305 million in 1972/73 taken from the States' grants. The States immediately increased the payroll tax rate from 2.5 per cent to 3.5 per cent, but with no reduction in grants; and
 - the Commonwealth takeover of funding of tertiary education from 1973/74, with grants decreased by \$112 million in 1973/74 and by \$230 million in the following year.
- . The Commonwealth provided special revenue assistance to the States, in recognition of their budgetary difficulties, of \$43 million in 1970/71, \$55 million in 1971/72, \$25 million in 1973/74, and \$60 million in 1974/75.

1975/76

- . The financial assistance grant pool was increased by \$220 million above the amount otherwise payable.
- . Western Australia's additional \$6.5 million received in the previous year was reduced to \$5 million, but absorbed into its financial assistance grant.
- . South Australia's and Tasmania's financial assistance grants were reduced to take account of the transfer of their railway systems to the Commonwealth.
- . South Australia withdrew from the special grants system in return for an

increase in its financial assistance grant of \$25 million.

The Whitlam Government also promised to increase the betterment factor to 3% from 1976/77, but lost office before it could fulfil that pledge.

1976/77 - 1980/81

- . From 1976/77, tax sharing grants were introduced, based on a share of Commonwealth personal income tax collections. These were subject to a guarantee that (for the first four years of the new arrangements) no State would receive a lower grant than under the arrangements promised by the Whitlam Government in the previous year.
- . The Commonwealth also legislated to enable States to impose a surcharge or provide a refund on personal income tax in that State. The Commonwealth would administer these surcharges / rebates for the States. However, no State ever used these provisions, as the Commonwealth did not "make room" for the States by reducing its income tax rates, and this legislation was repealed in 1989.
- . In 1976/77, the tax sharing grant pool was set at 33.6% of personal income tax collections in that year, with a downward adjustment being made in 1977/78 once actual collections were known.
- . From 1977/78 to 1980/81, the tax sharing grant pool was set at 39.87% of personal income tax collections in the previous year.
- . From 1976/77 to 1979/80, additional funds were added to the tax sharing grants to meet the "Whitlam guarantee". Additional funds were also added to meet a real terms maintenance guarantee on each State's grant in 1980/81 (the year after the "Whitlam guarantee" expired).
- . Only Queensland was receiving special grants at this stage.

1981/82

- As a transitional arrangement (in moving to the use of total tax receipts rather than personal income tax as the basis for determining tax sharing grants), total grants were increased by 9%, with additional funds as follows:
 - to guarantee that payments to each State would grow by 8% in 1981/82;
 - \$69.1 million to compensate the States for functions transferred to their control following the Review of Commonwealth Functions; and
 - \$60 million provided to the larger States in recognition of their larger entitlements had the new Grants Commission relativities been implemented.
- The 9% increase in tax sharing grants for 1981/82 compares with the 17% increase that would have occurred if the previous tax sharing arrangements had remained in place.
- The Commonwealth replaced grants for public hospitals (including smaller grants for community health and the school dental program) by untied identified health grants for all States except South Australia and Tasmania (whose hospital cost sharing agreements with the Commonwealth had not yet terminated).
- In 1981/82, Queensland received its final special grant.

1982/83 - 1984/85

- The tax sharing pool was set at 20.72% of the Commonwealth's total tax receipts in the previous year (based on the relation between the 1981/82 pool and tax collections in 1980/81).
- The Commonwealth added to the tax sharing pool in 1983/84 and 1984/85 in order to meet guarantees that had been made (in conjunction with the introduction of new Grants Commission funding relativities) that each State would receive a 2% real increase in its grant in 1982/83 and a 1% real increase in each of the two following years.
- The application of the Grants Commission relativities replaced the system of special grants for claimant States.

- From 1 February 1984, South Australia and Tasmania commenced receiving identified health grants on the same basis as the other States.
- The Commonwealth paid special revenue assistance of \$30 million in 1982/83, \$184 million in 1983/84, and \$51 million in 1984/85, to assist States with budgetary difficulties and to take account of altered petroleum royalty arrangements:

1985/86 - 1987/88

- In 1985/86, tax sharing grants were replaced by financial assistance grants, breaking all links between Commonwealth revenue collections and general revenue grants (to the detriment of the States).
- The Commonwealth passed legislation setting the financial assistance grant pool at the same real level for 1985/86 as in the previous year and providing for a 2% increase in real terms in the following two years.
- Under real maintenance in 1985/86, the pool increased by 8%, compared to an increase of 16% that would have occurred if the tax sharing arrangements had continued.
- The Commonwealth adhered to the legislated 2% real increase in the pool in 1986/87, but did not do so in 1987/88, limiting the growth in the pool to the effect of inflation.
- The Commonwealth paid special revenue assistance of \$87 million in 1985/86, \$46 million in 1986/87 and \$31 million in 1987/88, to cover the cost of programs transferred from the Commonwealth to the States and to assist some States during changes to the grant distribution formula arising from the Commonwealth Grants Commission's 1985 Report.
- The Commonwealth made major cut-backs to general purpose capital funds (grants and loans) provided to the States and the Northern Territory, totalling \$400 million in 1986/87, and \$715 million in 1987/88.

1988/89 - 1990/91

- . The financial assistance grant pool was subject to real cutbacks of \$650 million in 1988/89, \$550 million in 1989/90, and \$400 million in 1990/91.
- . In 1988/89 and 1989/90, the Commonwealth also made cutbacks to the financial assistance grant pool to recoup 90% of additional State tax collections due to the removal by the Commonwealth of exemption from State taxes (mainly payroll tax) for a number of Commonwealth trading enterprises.
- . In 1988/89, the Northern Territory's general revenue grant was absorbed into the financial assistance grant pool for distribution between the "7 States".
- . In 1988/89, the identified health grants were merged with the Medicare grants to form hospital funding grants under the Medicare Agreement.
- . In 1988/89, the Commonwealth paid special revenue assistance of \$50 million to cover the cost of the transfer of some programs from the Commonwealth to the States.
- . Debits tax was transferred from the Commonwealth to the States as of 1 January 1991, with the revenue benefit to the States being fully offset by a reduction in the financial assistance grant pool.

1991/92 - 1993/94

- . The financial assistance grant pool was maintained in real terms each year over this period.
- . In addition, a once off \$166 million augmentation of the financial assistance grants was paid by the Commonwealth in 1992/93.
- . In 1992/93, Victoria received \$138 million special revenue assistance as compensation for the Commonwealth's decision to retain Bass Strait petroleum resource rent tax revenues. The grant was absorbed into the financial assistance grant pool in the following year.
- . Commencing from 1 January 1994, the Commonwealth has untied \$350 million

per annum (\$175 million in 1993/94) of road funds, which are to eventually to be distributed in line with financial assistance grants.

- . In 1993/94, the ACT's general revenue grant was absorbed into the financial assistance grant pool for distribution between the "8 States".
- . In 1993/94, the Commonwealth provided special revenue assistance to New South Wales and Victoria totalling \$217 million to meet funding guarantees it had provided those States in relation to the Medicare agreement. 50% of this assistance was funded by the Commonwealth, and the remaining 50% was funded from the financial assistance grant pool by the other States. This special assistance will continue to be provided to 1997/98, but the amount funded by the Commonwealth will fall to 25%, with the other States funding 75%.
- . The ACT was also paid \$104 million special revenue assistance of which \$84 million was provided by the Commonwealth, and \$20 million was funded from the financial assistance grant pool.

HISTORY OF SPECIFIC PURPOSE PAYMENTS (SPPS)

1901 - EARLY 1950s

The first SPPs were for the provision of roads in 1923. Apart from this, only a few ad hoc grants (for primary industry, employment creation and railway capital projects) were provided prior to the 1940s. SPPs really only began to gain prominence from 1942. Some highlights were:

- . negotiation in 1945-46 of the first Commonwealth-State Housing Agreement; and
- . commencement of assistance to universities in 1951/52.

Other major tied grants up to the late 1940s/early 1950s were provided for railway standardisation and upgrading projects, shipping and harbours, water supply and electricity infrastructure and agriculture programs.

The provision of such assistance was frequently accompanied by the establishment of advisory or coordinating commissions advising on State grants. For example:

- . The Australian Universities Commission;
- . Commonwealth Bureau of Roads;
- . Schools Commission;
- . Hospital and Health Services Commission;
- . Social Welfare Commission; and
- . Cities Commission.

In other cases decisions were made at a political level and on a political basis.

EARLY 1950s - 1975/76

1955/56 saw the introduction of SPPs for mental health institutions. Assistance for blood transfusion services and tuberculosis control commenced in 1953/54 and 1949/50 respectively. By 1954/55, payments were being made under 12 different

programs. By 1969/70 the number of programs had more than tripled. Important tied grants which commenced in the mid-1960s were assistance for secondary schools, Colleges of Advanced Education and TAFE colleges.

SPPs grew rapidly in the Whitlam period, with the number of programs increasing from 65 to 95 between 1972/73 and 1975/76 and the percentage of tied payments increasing from 26% to 49% over the same period. The value of SPPs over this period more than quadrupled. New SPPs in this period included payments for:

- . pre-schools;
- . child care;
- . hospitals;
- . community health;
- . urban and regional development;
- . urban public transport; and
- . local government.

In 1974, the Commonwealth also took over the funding of higher education with commensurate cutbacks in financial assistance grants.

1976/77 - PRESENT

The Fraser government began dismantling some of the Whitlam programs, particularly in the area of urban and regional development.

In 1981/82 the Commonwealth replaced SPPs for public hospitals, community health programs and the school dental program with identified health grants. Despite their name these grants could be used by the States in whatever manner they saw fit. Initially this arrangement applied only to Victoria, New South Wales, Queensland and Western Australia. South Australia and Tasmania entered into these arrangements after 1984.

During the Fraser years, between 1975/76 and 1982/83 SPPs fell from 49% of total payments to 43% (if according to usual convention, identified health grants are treated as tied grants) or 36% (if identified health grants are treated as untied grants). The proportion of SPPs has grown again under the Hawke and Keating governments reaching 56% in 1992/93, before declining slightly to 55% in 1993/94 (the 1992/93 figure was inflated by large one-off grants under the *One Nation* statement and a tax compensation payment to New South Wales).

Medicare grants to the States to fund free hospital services were introduced in 1983/84, and the untied identified health grants were converted into tied hospital funding grants (amalgamating the Medicare grants) from 1988/89. Other reasons for the increase in the proportion of tied funding were the large cutbacks in general revenue and general capital grants, the conversion of \$300 million in general purpose capital grants into housing grants in 1989/90, and the inception of the *Building Better Cities* program in 1991/92.

Reflecting the concern over the level of SPPs it was decided at the Special Premiers' Conference in 1990 to reduce the level of tied grants. Despite the untying of \$350 million per annum of road funding from 1994, the proportion of tied grants has increased from 52.5% in 1990/91 to 54.8% in 1993/94.

COMMONWEALTH LEGISLATION

1936-1993

INCOME TAX ASSESSMENT ACT 1936***INCOME TAX ACT 1942******FRINGE BENEFITS TAX ACT 1986***

This legislation makes the Commonwealth the predominant source of revenue raising. This includes Commonwealth taxes (eg fringe benefit taxes) imposed on the States. The States are unable to raise income tax and, because of Section 90 of the Constitution, cannot impose excise or customs duties. Therefore, the Commonwealth obtains revenues and is able to determine the portion which is returned to the States and can impose conditions on how and where that money is to be spent.

1973 SEAS AND SUBMERGED LANDS ACT

This legislation vests sovereignty over the territorial sea (including the seabed, the waters and airspace above those waters) in the Commonwealth. It was upheld by the High Court in the *Offshore Case*.

1974 TRADE PRACTICES ACT

This legislation governs the activities (including those activities which only occur within one State) of trading corporations in Australia, for example, restrictive trade practices and matters of consumer protection. These matters were previously the subject of State laws and regulations.

1975 RACIAL DISCRIMINATION ACT

This legislation implements the UN Convention on the Elimination of All Forms of Racial Discrimination. It was the subject of the *Koowarta Case*. The legislation includes a provision under which conflicting provisions in parallel

State laws can be valid so long as they do not impose lower standards. Hence for example if penalties are less for breach of a State Act than for the Commonwealth legislation the State penalties are invalid. On the other hand, if penalties under the State Act are greater, then they can apply.

1983 WORLD HERITAGE PROPERTIES CONSERVATION ACT

This implements the Convention for the Protection of the World Cultural and Natural Heritage and enables the Commonwealth to make regulations governing the terms and conditions upon which developments in the States can take place. *The Franklin Dam Case*, *Richardson Case* and *Queensland v Commonwealth* illustrate the vast potential for Commonwealth control.

1984 SEX DISCRIMINATION ACT

Implements a UN Convention and imposes on Australia international standards rather than locally determined laws.

1986 HUMAN RIGHTS AND EQUAL OPPORTUNITIES COMMISSION ACT

This legislation implements a number of international treaties and conventions. Given the wide interpretation of the external affairs power, the Commonwealth may be able to give its laws precedence over existing State laws.

1992 *ENDANGERED SPECIES PROTECTION ACT*

This act implements international treaties and agreements regulating actions and activities with respect to reptiles, birds, mammals, fish and plants.

1993 *INDUSTRIAL RELATIONS REFORM ACT*

The *Industrial Relations Reform Act* is subject to current challenge in the High court, but if found valid would impose several recommendations and International Labour Organisation Conventions on Australia to regulate matters of employment and industrial disputes.

NATIVE TITLE ACT

The *Native Title Act* is subject to current challenge in the High court, but if found valid would recognise native title over land within the States and regulate dealings with and management of that land.

