1

Introduction

The Australian States and territories are key components of the federal system of government established in 1901. The Australian people drew on their constitutional heritage to join in a federation under the Commonwealth Constitution, and thereby give birth to the Commonwealth of Australia. In transforming their colonies into States, they created two levels of representative government by granting specific powers to the Commonwealth and by retaining for themselves residual power. All of this occurred pursuant to the *Commonwealth of Australia Constitution Act* 1900 (Imp). From the beginning the colonies' progeny, the Commonwealth, was given ascendency over the States to the extent that s 106 subjects their Constitutions to the Commonwealth Constitution, and s 109 overrides their laws so far as they are inconsistent with Commonwealth law. Moreover, since federation, the States have battled to maintain their autonomy in the face of increasing Commonwealth power and financial influence. It is a battle they have substantially lost. Consequently, at the beginning of the second century of federation, the future role of the States in the federation needs to be redefined.

As for the Commonwealth's territories, they are entirely creatures of the Commonwealth. There is considerable homogeneity between the constitutional systems of the six Australian States, but more divergence is evident in relation to the Commonwealth's territories. Three territories have been conferred distinctly different forms of self-government: the Northern Territory in 1978; Norfolk Island in 1979; and the Australian Capital Territory in 1988. The remaining seven territories remain under direct Commonwealth control, although their legal regimes draw on those of a State or one of the self-governing territories. As creatures of the Commonwealth, these 10 territories remain entirely within the scope of the territories power in s 122 of the Commonwealth Constitution. Throughout the 20th century, legal debate waged over their place in the federal system; in

particular, the extent to which the territories power was subject to the restrictions which apply to the Commonwealth's other powers.[1] The High Court has only in recent times clarified their position in the federal system.[2] This affected the constitutional status of the residents of the territories. Consequently, there developed, in effect, two categories of Australian citizen depending on whether they resided in a State or a territory.

The primary focus of this book is to outline and compare the institutions of government at the State and territory level, in particular, the scope of their powers and the restrictions which pertain to their exercise.[3] Before doing so, there are two key interrelated issues which need to be addressed in relation to the States. The first is the role of the States today and in the future. The second is their relationship with the Commonwealth. Both issues lie at the heart of Australian federalism. The role of the territories and their relationship with the Commonwealth are specifically considered in Chapters 11 and 12.

1.1 Role of the States

The current role of the States is clearly different from that envisaged by most of the drafters of the Commonwealth Constitution in the 1890s. Their expectation was a federation of Australian States and a Commonwealth – each working with considerable autonomy as equal partners within their respective spheres of responsibility.[4] Their view was one of coordinate federalism. The linchpin of this perceived federal balance was the Senate, composed of an equal number of senators from each State irrespective of their size and population. This would ensure that the most populous States of New South Wales and Victoria could not override the interests of the four smaller States. Accordingly, responsibility for maintaining an appropriate federal balance was left in the hands of the political process.[5] But this plan came undone soon after federation when the Senate began to vote on party, rather than State, lines.[6] Consequently, the States lost their chief political protection, enabling the Commonwealth to focus primarily on the 'national' interest.

1 See Chapter 11.
2 See *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146.
3 James Madison referred to these restrictions as 'parchment barriers' in *The Federalist No 48*, A. Hamilton, J. Madison and J. Hay, *The Federalist* (Everyman's Library, J. M. Dent and Sons, 1971 reprint) 251, 252.
4 For instance, at the first of the Constitutional Convention Debates in Sydney in 1891, Sir Samuel Griffith cited the essential condition of federation to be that: 'the separate States are to continue as autonomous bodies, surrendering only so much of their powers as is necessary to the establishment of a general government to do for them collectively what they cannot do individually for themselves, and which they cannot do as a collective body for themselves.' *Official Record of the Debates of the Australasian Federal Convention Vol I*, Sydney 1891, 31; cf the views of Alfred Deakin, *Official Record of the Debates of the Australasian Federal Convention Vol III*, Adelaide, 1897, 297–8.
5 See James Warden, 'Federalism and the Design of the Australian Constitution' (1992) 27 *Australian Journal of Political Science* 143.
6 Recognised even in 1910: W. Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd edn, Melbourne: Charles F. Maxwell (G. Partridge and Company) 1910) 614.

Naturally, the Commonwealth looked to the Commonwealth Constitution for the power to achieve its national objectives and was on the whole not disappointed. Initially, the High Court, led by Sir Samuel Griffith as Chief Justice, protected the States by reading down various heads of power to protect traditional areas of State regulation. But soon after Sir Samuel's retirement in 1919, the High Court in the *Engineers* case[7] established the fundamental principle of interpretation that all Commonwealth heads of power were to be given their ordinary and natural meaning. This facilitated an expansion in Commonwealth power in the absence of any enshrined legal principle of a federal balance in the Commonwealth Constitution. The very nature of the Commonwealth's powers in s 51 with respect to (i) 'Trade and commerce with other countries, and among the States', (ii) 'Taxation . . .', (xx) 'Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth', and (xxix) 'External affairs', enabled the Commonwealth to control a significant range of commercial activity. The Commonwealth also benefited from increasing sources of Commonwealth revenue – from the implementation of the uniform income tax scheme in 1942, the High Court's rigid enforcement in 1997 of the prohibition of State customs and excise duties by s 90, to the imposition of the Commonwealth goods and services tax (GST) in 2000. This financial dominance (referred to as vertical fiscal imbalance) – together with the power to make grants to the States pursuant to s 96 on such terms and conditions as the Commonwealth thinks fit – enabled the Commonwealth to regulate far beyond the division of powers contemplated by the drafters of the Constitution in such areas as environmental protection, health and education.

The terms of the Commonwealth Constitution facilitated the expansion of Commonwealth power, yet this only occurred in response to political forces or events. Significant among these were in turn: the gradual emergence of a sense of Australian nationhood following the end of the First World War, the Depression, the economic demands of defending Australia during the Second World War, technological advances, recognition of Australian citizenship, ratification of prolific international treaties, economic reform for international competitiveness, multiculturalism, globalisation, and the so-called 'war on terror'. In response to each of these political forces and events, Commonwealth legislation was enacted and, where challenged, was mostly upheld by the High Court. Nonetheless, when faced with a lack of constitutional power, the Commonwealth has relied on numerous occasions for State cooperation to achieve its national objectives. Indeed, over the last 20 years, the level of federal–State cooperation has increased substantially – along with burgeoning government bureaucracies – to implement policies in almost every area of activity including law and order, health, education, transport, water conservation, environmental protection and, most recently, security. To be sure, this level of *cooperative* federalism has not always been voluntarily

7 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

embraced by the States. Commonwealth economic coercion and political pressure have played a significant role.

In one sense, the Senate has been more of a constraint on the expansion of Commonwealth power and influence than the High Court. In other words, political, rather than legal constraints have played a more significant role – especially when the Government has lacked control of the Senate. Then again, Australia may enter a new era of constitutional evolution with the Howard Coalition Government achieving majority control of the Senate from 1 July 2005 – albeit with a very slender majority of one.[8] No Commonwealth government has enjoyed control of both Houses since 1981. That control, combined with the fact that there is an Australian Labor Party Government in each of the six States as well as in the ACT and the Northern Territory, has created a political environment in which a conservative Commonwealth government is less constrained politically to exercise the full scope of Commonwealth legislative authority. The opportunity is ripe for the Commonwealth to test how far its powers extend. Not since the Second World War has such an opportunity presented itself. Moreover, there is a real likelihood that the High Court might give full effect to the corporations power (s 51(xx)) and the interstate and overseas trade and commerce power (s 51(i)) to enable the Commonwealth to directly regulate traditional State areas of responsibility such as education and health, as well as expand Commonwealth control over industrial relations.

The political dilemma this raises for all Australians is whether such an expansion of Commonwealth control is in the best interests of the nation. And that depends on how one views the federal system and the role of the States. These issues resurrect the debate between centralism and State rights which reached a climax in the *Tasmanian Dam* case in 1983.[9] In support of central authority are the benefits of more streamlined government, no duplication of government services, uniformity of national regulatory schemes, effective coordination of services, and all the economic efficiencies which flow from those benefits. On the other hand, in support of the preservation of State rights are the benefits of a diversity of policies and experimentation, recognition of regional loyalty, responsiveness to local circumstances, and the enhanced opportunity for political participation. Over and above these advantages are the checks and balances which flow from divided power, thereby enhancing government accountability and responsiveness. There is some truth in the view that '[t]here is no more effective way of checking the action of one government than by the counter-action of another government'.[10]

How to weigh up these arguments is a personal decision. How they are reconciled is probably no longer significant so far as the interpretation of the current

8 This means the Coalition's party room deliberations assume much greater importance, especially in view of the comments of newly elected Senator Barnaby Joyce (Queensland National Party) who, in May 2005 before assuming his seat, identified the protection of State rights as one of his responsibilities as a senator.
9 *Commonwealth v Tasmania* (1983) 158 CLR 1.
10 Campbell Sharman, 'Working Together: Towards an Inclusive Federalism?' (1998) 5 *Agenda* 267, 268.

Commonwealth Constitution is concerned. Their reconciliation is, nevertheless, crucial within the political process. Yet in the absence of any effective legal constraints, the trend towards further centralism will inevitably continue. Presently, there is no forum to debate whether this trend should continue, let alone to reconsider the entire federal compact. The Australian Constitutional Conventions provided such a forum during the 1970s and 1980s. Before these, two major constitutional reviews conducted by the Commonwealth in 1929[11] and 1959[12] considered Commonwealth–State relations. There is a real need to restore such a forum today. Unfortunately, the republic debate preoccupied the celebrations of the centenary of federation at the expense of reconsidering a more fundamental issue – why have a federation at all?

It should be acknowledged that the States do not have an undisputed right of continued existence. Mere sentimental State loyalty alone cannot justify their continued existence. Instead there needs to be a careful assessment of the competing political, economic, social and constitutional advantages of a federal system over that of a unitary system. There is a wide spectrum of possibilities between these two basic options. Where Australia should be on that spectrum depends on a rational assessment of what is in the best interests of the nation. At whatever point we select, we must appreciate that a federal system always involves compromise – a compromise arising from balancing the advantages and disadvantages of the division of power.[13] For instance, it is obvious that a federal system is more expensive to maintain than a unitary system of government. Yet, as Chief Justice Gleeson highlighted in his *2000 Boyer Lectures*:

> [a] federation, it must be said, is not a model of efficiency. Then again, neither is a parliamentary democracy. If efficiency were the main objective, there would be better ways of running a country than by a federal representative democracy.[14]

Yet the promotion of 'efficiency' dominates a global world obsessed with political success and national economic performance.

It is fascinating to ponder how the drafters of the Commonwealth Constitution imagined the federation developing. Did they aspire to establish a federation which would last substantially unchanged for centuries? Or did they envisage a process of continual evolution? And if so, in what direction? Towards centralism or towards more regionalism? The reference to an 'indissoluble' Federal Commonwealth in the preamble to the *Commonwealth of Australia Constitution Act* 1900 (Imp) suggests a permanent union of States was contemplated. On the other hand, a commentator in 1906 discounted that reference 'as one of those preliminary flourishes addressed to the conscience, which are to be found in the

11 Commonwealth of Australia, *Report of the Royal Commission on the Constitution* (Canberra, 1929).
12 Parliament of the Commonwealth of Australia, *Report from the Joint Committee on Constitutional Review* (Canberra, 1959).
13 Robert R. Garran, *Prosper the Commonwealth* (Sydney: Angus and Robertson, 1958) 202; R. G. Atkinson, 'Federalism in a Post-Modern World' (2004) 16 *Bond Law Review* 5, 7.
14 Murray Gleeson, *Boyer Lectures 2000 – The Rule of Law and the Constitution* (Sydney: ABC Books, 2000) 10.

preambles of instruments that suggest more than they accomplish'.[15] At least, given the amendment procedure in s 128, they clearly did not imagine a frozen constitution. They also appreciated that the central authority in federal systems tends to grow at the expense of the States,[16] and that the High Court would play a significant role as the 'keystone of the federal arch'.[17] After all, they lived at a time of profound political, social and economic change. It seems likely that some drafters, such as Alfred Deakin, would be disappointed at the lack of constitutional evolution which has occurred to date. He might have agreed with this eloquent assessment:

> The Commonwealth of Australia was no Phoenix arising from the ashes of revolution or disaster; it was begotten of no great surge of political idealism; it was in fact the child of as hard-headed a *mariage de convenance* as was ever arranged in the salons of France . . .
>
> The parent States, however, had no intention of keeping their child in swaddling clothes for ever.[18]

There is a strong case for saying that federation in 1901 was a fundamental step in Australia's constitutional evolution towards the adoption of some form of unitary system. And following the success of federation in terms of achieving its objectives of a free trade economy, the provision of defence, international recognition as a polity, the regulation of interstate commercial activities, and the establishment of a national communication infrastructure, the obvious question to ask is whether a closer union between the States is now warranted. Here the arguments in favour of a unitary system need to be weighed against those in favour of the status quo or some variation in between. It cannot be said that a unitary State is inevitable – since this depends on the will of the people. Certainly, modern advances in communication and transport, as well as Australia's embracement of multiculturalism and globalisation, strengthen Australia's suitability as a unitary State.[19]

Yet the above viewpoint of a logically inevitable unitary system fails to take into account the earlier separation movements which led to the establishment of four new colonies from New South Wales: Van Diemen's Land (1825); South Australia (1836); Victoria (1851), and Queensland (1859). Of course, other separation movements in the 19th century failed, such as in the Riverina, New England, and central and northern Queensland. Why this yearning for separation? Local control to ensure economic prosperity was the primary motivation. But it seems the yearning to separate may have been accompanied by a desire to join in some

15 P. Mc M. Glynn, 'Secession' (1906) 3 *Commonwealth Law Review* 193, 204.
16 Harrison Moore, above n 6, 621.
17 Cited by Alfred Deakin in the Second Reading Speech to the Judiciary Bill, Parliamentary Debates, Australia House of Representatives, Hansard (18 March 1902), p 10963.
18 R. Anderson, 'The States and Relations with the Commonwealth' in J. Else-Mitchell (ed), *Essays on the Australian Constitution* (2nd edn, Sydney: Law Book Company, 1961) 93. The last sentence is a reference to s 87 which for the first 10 years of federation allowed the Commonwealth to expend no more than one-fourth of its net revenue from customs and excise with the balance paid to the States.
19 Cf K. C. Wheare, *Federal Government*, 1947 (1st American edn, New York and London: Oxford University Press), Chapter III at 35–54.

form of union, other than remaining simply as part of the British Empire.[20] This is perfectly natural, given the overarching bonds of Empire and the need to promote trade. Do these same forces persist? If so, do they hold the key to the appropriate direction of federation today? These questions require a separate study. Still, in deciding the future direction of the federation and the role of the States today they do highlight the need to have some regard to the forces which led to the creation of six separate colonies in the first place. It is evident that their role is to provide for a regional form of government as part of the division of powers effected by the Commonwealth Constitution. A unique perspective is provided by Sir Robert Garran who, on the eve of his death in 1957, wrote:

> Some people hold that federalism is merely a transitory stage between disunion and full union. I cannot see that history gives any support to this. None of the best-known federations (for instance the United States of America, the Dominion of Canada, and the Confederation of Switzerland) seems to show any tendency towards unification. It is true that federation often tends to become closer than its cautious founders contemplated, but that seems to be merely the process of reaching something approaching an equilibrium.[21]

The probable outcome is more likely to be determined by centralist political forces. Consequently, the evolving political and constitutional relationship between the Commonwealth and the States holds the key to the future of the States. In particular, the most dominant force is likely to be the Commonwealth–State financial relationship. Indeed, it has been argued that the future of the States as administrative agencies was settled by the Uniform Tax Scheme of 1942.[22] That is a view which must now be reconsidered in the light of the *New Tax System* of 1999. Also, the political environment seems less antagonistic towards the retention of the States than it was in the 1970s.[23] Support for a unitary system appears to have waned, although other options which involve more regional government, or even more numerous and smaller States, are now canvassed. These options have also influenced public opinion.[24] Ultimately, the only change which is likely to occur, in the absence of some seismic shift in Australia's political or economic circumstances, is continued incremental evolution of the federal system in favour of the Commonwealth. To understand that evolution, it is necessary to identify the constitutional relationship between the Commonwealth and the States.

20 This has been suggested, at least in relation to Van Diemen's Land and Victoria: A. J. Brown, 'One Continent, Two Federalisms: Rediscovering the Original Meanings of Australian Federal Ideas' (2004) 39 *Australian Journal of Political Science* 485, 493.
21 Garran, see n 13, 204. Sir Robert Garran was secretary to the drafting committee at the 1897 Convention and later became the first head of the Commonwealth Attorney-General's Department.
22 Suggested by Kenneth Bailey, 'The Uniform Tax Plan' (1942) *The Economic Record* 170 and cited with approval by Bradley Selway, 'The Federation: What Makes It Work and What Should We be Thinking About for the Future' (2001) 50 *Australian Journal of Public Administration* 116, 120.
23 Brian Galligan, 'Australian Federalism: Rethinking and Restructuring' (1992) 27 *Australian Journal of Political Science* 1.
24 A. J. Brown, 'After the Party: Public Attitudes to Australian Federalism, Regionalism and Reform in the 21st Century' (2002) 13 *Public Law Review* 171.

1.2 Constitutional relationship between the Commonwealth and the States

The constitutional relationship between the Commonwealth and the States might be described in terms of these fundamental propositions:

- the Commonwealth Constitution implicitly guarantees the continued existence of the States as polities comprising a parliament, an executive and a judiciary;[25]
- the States are vested with residual legislative power (s 107), some part of which is concurrent with Commonwealth power – while all Commonwealth exclusive powers are denied to the States;
- any direct or indirect inconsistency with Commonwealth law renders the State law inoperative to the extent of that inconsistency (s 109);
- the Commonwealth cannot force the States to give up any of their powers, but it can offer them financial inducements to suspend their exercise;[26]
- the Commonwealth cannot hinder the States' capacity to function as a State Government.[27] Similarly, the States cannot regulate the Commonwealth's 'capacities' but can regulate the transactions which the Commonwealth undertakes within those capacities;[28] and
- certain Commonwealth constitutional guarantees extend as restrictions on State power by virtue of the practical indivisibility of many Commonwealth and State affairs.[29]

1.2.1 Commonwealth–State financial relations

The Commonwealth–State financial relationship is often described as one of 'vertical fiscal imbalance'. This means that the Commonwealth raises more by way of government taxation than required for its operations, while the States raise far less than they need for their operations. The foundation of this relationship was accepted at federation when the Commonwealth acquired from the States the exclusive power to impose customs and excise duties (s 90). In return for the States giving up their most lucrative source of taxation revenue, s 87 of the Commonwealth Constitution (the Braddon Clause) guaranteed for 10 years after federation that the Commonwealth would return to the States 75 per cent of the Commonwealth's customs and excise duties revenue. The original clause was not confined to 10 years but this was changed in 1899 to secure approval from New

25 In *Leeth v The Commonwealth* (1992) 174 CLR 455, Deane and Toohey JJ at 485 derived from the Commonwealth Constitution an implication protecting the continued existence and political viability of the States.
26 *South Australia v Commonwealth* (*First Uniform Tax* case) (1942) 65 CLR 373; *Victoria v Commonwealth* (*Second Uniform Tax* case) (1957) 99 CLR 575.
27 Known as the *Melbourne Corporation* principle as interpreted in *Austin v Commonwealth* (2003) 215 CLR 185, Gleeson CJ at [24], Gaudron, Gummow and Hayne JJ at [124], Kirby J at [284]; cf McHugh J at [223].
28 The difficult distinction adopted in *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (*Henderson's* case) (1997) 190 CLR 410.
29 For example, the implied freedom of political communication. The necessity to protect Commonwealth constitutional guarantees inevitably means that those guarantees creep or leap into the State field.

South Wales. At the same time, s 96 was added to empower the Commonwealth to make grants of financial assistance to any State on 'such terms and conditions as the Parliament thinks fit'.

Since federation the vertical fiscal imbalance has worsened following two further financial setbacks for the States. The first was the impact of the Commonwealth's uniform taxation scheme introduced during the Second World War which effectively prevented the States from continuing to impose their own income tax.[30] By the combined effect of a package of Acts, the Commonwealth forced the States politically to repeal their income taxes by imposing a new federal income tax equivalent to that previously levied by both the Commonwealth and the States. In return the States received a share of the total income tax raised. This scheme, although intended to operate for only a limited period after the end of the Second World War, has continued to the present. The second State setback occurred in 1997 with the High Court in *Ha v New South Wales*[31] invalidating lucrative state licensing fees[32] under s 90 as excise duties within exclusive Commonwealth power.

Consequently, the States are substantially dependent on Commonwealth funding for their budgets. In the absence of any constitutional mechanism for determining the level of funding since 1910, the States have been at the mercy of the Commonwealth. And their position is further weakened because s 96 of the Constitution empowers the Commonwealth to impose wide ranging conditions on most federal funding to the States in areas well outside its prescribed legislative heads of power.[33] Consequently, the State Premiers fought each year for their share of Commonwealth financial assistance by way of general revenue grants and specific purpose payments. Until 1999, this state of affairs allowed the Commonwealth to squeeze the States in real terms, aggravating the vertical fiscal imbalance.[34] A new direction was taken in 1999 with the *Intergovernmental Agreement on the Reform of Commonwealth–State Financial Relations*.[35] This has worsened the vertical fiscal imbalance,[36] yet it has provided a formula for the distribution of Commonwealth revenue to the States and territories. Pursuant to that agreement, the Commonwealth agreed to return to the States, the ACT and the Northern Territory, all revenue from the Commonwealth's goods and

30 Upheld by the High Court, see above n 26.
31 (1997) 189 CLR 465.
32 These fees accounted for 16% of the New South Wales State revenue: Martin Painter, *Collaborative Federalism* (Cambridge: Cambridge University Press, 1998) 58.
33 *Victoria v Commonwealth* (*Federal Roads* case) (1926) 38 CLR 399; cf the reservation expressed by Dixon CJ in *Victoria v Commonwealth* (*Second Uniform Tax* case) (1957) 99 CLR 575 at 609 that if the Court was considering s 96 for the first time, it could be contended that s 96 'did not admit of any attempt to influence the direction of the exercise by the State of its legislative or executive powers.'
34 For example, 33% of Commonwealth revenue was paid to the States and territories in 1983–84, compared with 21% in 1999–2000: see *Northern Territory Budget Report*, Chapter 7, 'Reform of Intergovernmental Financial Relations', fig. 7.4 <www.nt.gov.au/ntt/financial/0001bps/bp3/shares.pdf> (accessed 25 August 2005). For other undesirable consequences, see Cheryl Saunders, 'Federal Fiscal Reform and the GST' (2000) 11 *Public Law Review* 99, 100–101.
35 In Schedule 2 to *A New Tax System (Commonwealth–State Financial Arrangements) Act* 1999 (Cth).
36 Leslie Zines, 'Changing Attitudes to Federalism and Its Purpose' in Robert S. French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (Sydney: Federation Press, 2003) 86, 103.

services tax since its imposition on 1 July 2000 (less administration expenses), in return for the States and territories abolishing their sales tax and other certain 'inefficient' taxes.[37] The Commonwealth also promised to ensure, for a transitional period[38] of six years, that the States and territories would be no worse off as a result of this agreement. The distribution between the States and the two territories is determined by the Commonwealth Grants Commission (CGC)[39] in accordance with the principles of horizontal fiscal equalisation (HFE):

> State governments should receive funding from the Commonwealth such that, if each made the same effort to raise revenue from its own sources and operated at the same level of efficiency, each would have the capacity to provide services at the same standards.[40]

The CGC and the calculation of the distribution have been criticised.[41] For instance, the distribution is calculated on the basis of the population of each State or territory – weighted according to the HFE. This means that the respective populations of New South Wales and Victoria are adjusted downwards while the population of each of the other States is adjusted upwards, in accordance with the expenditure needs and revenue capacity of each State.

The other significant Commonwealth grants made under the 1999 Intergovernmental Agreement are special purpose payments (SPPs).[42] These are primarily designed to advance Commonwealth policies, often in traditional State fields of responsibility such as health, education and transport. Accordingly, the vast bulk of SPPs are made to the States on conditions as 'tied grants', although other SPPs are made direct to local governments (for example for roads). The State SPPs comprise grants made 'to' the States and those made 'through' the States to local governments and other bodies such as non-government schools. An example of Commonwealth incursion is evident in the conditions attached to proposed tied grants to the States for schools for the 2005–08 quadrennium which require national student testing, a common age for starting school, and plain language report cards by 2010. At times, the conditions attached to SPPs are unrelated to the purpose of the grants. So far, the States and territories have unsuccessfully sought to reach agreement with the Commonwealth on a set of principles and guidelines for SPP agreements which simplify the reporting requirements, adopt output performance measures instead of input controls, and allow greater flexibility.

37 Pursuant to the 1999 Intergovernmental Agreement, the States abolished their bank account debits tax by 1 July 2005. However, the Commonwealth demanded that they abolish a range of business stamp duties which the States had only previously agreed to review.
38 The Commonwealth indicated in 2005 that it is prepared to extend this period to 30 July 2009 if business stamp duties are abolished.
39 Established on 17 July 1933 as an independent arbiter of intergovernmental financial relations.
40 Commonwealth Grants Commission, *Report on State Revenue Sharing Relativities* (Canberra: Australian Government Printer, 2002) 5.
41 See R. Garnaut and V. Fitzgerald, *Review of Commonwealth–State Funding: Final Report* (Melbourne: Review of Commonwealth–State Funding, 2002).
42 They represented 13% of total Commonwealth expenditure in 2005–06. Other Commonwealth grants include the National Competition Policy Payments.