

## REGIONALISM – A CURE FOR FEDERAL ILLS?

ANNE TWOMEY\*

### I INTRODUCTION

When complaints are made about the operation of federalism, the response is often given that the answer is ‘regionalism’. There are various motivations that underlie the arguments made in favour of regionalism. First, there is the desire to bring government closer to the people and the concern that governments based in State capitals neither know nor care sufficiently about what is happening in the outer reaches of the State. Secondly, there is the desire to establish a more efficient form of government that is cheaper to run and avoids the problems of duplication, cost-shifting, buck-passing and lack of coordination. Thirdly, there is the desire to enhance democracy by giving people greater responsibility and involvement in the decisions that affect them.

The difficulty lies in designing a form of regionalism that actually satisfies these aims and desires. There is no consensus amongst the proponents of regionalism as to what are the regions, let alone how a system of regionalism could operate in practice in a manner that would meet these desires and improve upon the operation of the existing system of government. Much of the discussion of regionalism simply assumes that it will achieve outcomes such as efficiency and greater democracy, without pinpointing how this is actually to be done. The attractiveness of regionalism is therefore enhanced by its fuzziness and unhindered by practical detail which might render it a less attractive proposition. This article seeks to move beyond the warm fuzzy glow of regionalism to identify and analyse the various different forms of regionalism that have been proposed. It challenges some of the assumptions that underlie the proposition that regionalism is the cure for all federal ills.

The article commences by addressing the question of what are Australia’s regions and disputes the contention that Australia has an established set of regions that can simply assume devolved powers and responsibilities. It then moves on to consider the different forms of regionalism. First, it discusses the use of regions for service provision and community development, as currently occurs in Australia. Next, it considers the use of regions as a fourth level of government in Australia. It then moves to the most contentious argument, that States should

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\* Associate Professor, University of Sydney Law School.

be abolished and that instead there should be a two-tiered system of national and regional governments. It considers the problems with two different versions of this proposal – a system of national and regional governments in which regional governments are creatures of Commonwealth legislation and one in which regional governments are established and given powers by the *Constitution*. The final proposal discussed is a three-tiered system of government, comprising national, regional and local governments. The most common form of this proposal is the establishment of new States, so that every State is effectively a region. The article considers the constitutional difficulties involved with this proposal and the establishment of new States. It concludes by noting the difficulty in assessing regionalism proposals and that the case for regionalism as an alternative to federalism or as a means of reforming it has not yet been made out.

## II WHAT ARE AUSTRALIA'S REGIONS?

### A The Size and Number of Regions

Much of the literature on regionalism appears to assume that Australia has a fixed set of regional boundaries and that people identify with their own region. It is then simply a matter of devolving powers to these existing regions. In reality, there is no consensus as to the number and boundaries of regions in Australia and, to the extent that there is regional self-identification, it usually does not coincide with the types of regions identified for governmental purposes.

Different sized regions are identified for different governmental purposes. A J Brown has noted the 85 biogeographic regions of Australia, the 69 regions used for statistical purposes, the 64 regions used by the Regional Organisations of Councils, the 57 regions used for natural resource management purposes and the 54 regions used for Commonwealth funding purposes and the establishment of Area Consultative Committees.<sup>1</sup> In addition, there are other regions such as Commonwealth and State electorates and regions identified by postcodes or telephonic area codes. Each State also, no doubt, identifies different regions with different borders for its own funding, service-provisions and regional development purposes. For example, New South Wales ('NSW') has eight regions for the purposes of area health services but thirteen regions for the purposes of regional development of business.<sup>2</sup>

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1 A J Brown, 'Federalism, Regionalism and the Reshaping of Australian Governance' in A J Brown and Jennifer A Bellamy (eds), *Federalism and Regionalism in Australia – New Approaches, New Institutions* (2007) 15. See also the 68 regions (later increased to 76) identified by the DURD in 1973: Department of Urban and Regional Development, *Regions*, Discussion Paper (1973).

2 For a history of how regions have been identified at Commonwealth and State level, see Peter Wilde, 'The Delimitation of Government Regions and Statistical Areas in Australia (1979) 37(2) *Australian Journal of Public Administration* 190.

As for those who propose a system of ‘regionalism’, the suggested number of regions range from 20,<sup>3</sup> 25,<sup>4</sup> 31,<sup>5</sup> 30–40,<sup>6</sup> 30–50,<sup>7</sup> 51<sup>8</sup> to 50–60.<sup>9</sup> A detailed and systematic approach to the determination of regions and borders, conducted in the 1940s, identified 48 regions in NSW alone.<sup>10</sup> For the purposes of this paper, I will assume that the number of regions that might hypothetically be established across Australia is 40, but any other number could just as easily be chosen.

Unlike the existing States, which have fixed territory and identifiable borders, the territory and borders of regions change according to the purpose for which regional identification is required. To the extent that there is an infinite number of potential purposes, there is also an infinite number of potential regions. Concepts such as ‘natural’ regions and bioregionalism have been criticised by political geographers.<sup>11</sup> It has been argued that ‘regions, whether defined in terms of their biophysical attributes or their socio-political characteristics are diverse, dynamic and amorphous’.<sup>12</sup> A water catchment area will be identified in a different manner to regions identified for development purposes and differently again when it comes to service provision. Even when one is identifying areas for the purposes of environmental schemes, a dilemma is faced as to whether geographical considerations or other factors, such as socio-economic status, should prevail. This is because there is a link between socio-economic status and the voluntary participation needed to support regional environmental schemes.<sup>13</sup> There is therefore a risk that regionalism may entrench inequalities and disadvantage, rather than remedy them.<sup>14</sup>

## B Self-Identification and Regions

The classic definition of a region is ‘a homogenous area with physical and cultural characteristics distinct from those of neighbouring areas’ which has a ‘consciousness’ of customs and ideals and a ‘sense of identity distinct from the

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3 Victorian Labor Conference proposal of 1918. See Ulrich R Ellis, *New Australian States* (1933) 138. Capital cities were also to have separate provincial administrations.

4 Lindsay Tanner, *Open Australia* (1999) 210.

5 Labor Party proposal for a unified Australia and 31 provinces, 1920. See Ellis, above n 3, 142–3.

6 Rodney Hall, *Abolish the States!* (1998) 36; Jim Soorley, ‘Do We Need a Federal System? The Case for Abolishing State Governments’ in Wayne Hudson and A J Brown (eds), *Restructuring Australia* (2004) 38, 45.

7 John August, *Issues, Problems and Solutions in State Abolition* <<http://www.beyondfederation.org.au/ja2-8th.html>> at 11 July 2008.

8 Chris Hurford, ‘A Republican Federation of Regions: Re-forming a Wastefully Governed Australia’ in Wayne Hudson and A J Brown (eds), *Restructuring Australia* (2004) 47, 50.

9 Klaas Woldring, ‘A Maximalist Republic: Achieving Constitutional Change by a Strategic, Participative Process’, in Wayne Hudson and A J Brown (eds), *Restructuring Australia* (2004) 111, 121.

10 James Macdonald Holmes, *The Geographical Basis of Government* (1944) 58.

11 Marcus Lane, G T McDonald and Tiffany H Morrison, ‘An Agnostic View on Regionalism, Decentralisation and other Silver Bullets: A Response to Thom’ (2004) 42(3) *Australian Geographical Studies* 398, 401.

12 Ibid.

13 Ibid 402.

14 Ibid. See also Ian Gray, ‘What is Regionalism?’ in Wayne Hudson and A J Brown (eds), *Restructuring Australia* (2004) 23.

rest of the country'.<sup>15</sup> In Australia, however, it would be difficult to identify regions by this definition as there are few cultural characteristics, customs or ideals that would mark differences between regions. How is the culture of the Darling Downs different from the culture of New England? Are there really different customs or ideals that distinguish the two regions, or do differences instead lie in geography and land use?

While the difficulties in using differences in cultural characteristics and customs as the criteria for identifying regions are obvious, there are also problems with using 'self-identification' for this purpose. Some parts of Australia have a reasonably strong regional identification, such as New England, the Kimberley and the Riverina. Others do not fall within self-identified regions. This is particularly the case with urban areas. To the extent to which there is a kind of self-identification in large cities such as Sydney, it tends to relate to smaller areas, being a suburb or a collection of suburbs, rather than the type of regions that are identified for governmental purposes. For example, the people of the Sutherland Shire (to whom, like the Hobbits, it is simply known as 'the Shire') may well self-identify as a 'region', but are not recognised as such by governments because of insufficient territory and population.

Even in rural areas where there is greater regional self-identification, the region identified by the locals is almost always smaller and different from that identified by governments. I grew up in Shepparton, Victoria, which was considered a 'regional centre' for the Goulburn Valley, but the Goulburn Valley does not appear to be a 'region' for governmental purposes. In fact, for most Victorian governmental purposes, such as education, Shepparton falls within the region of 'Hume' – not a familiar locally-recognised name – which also includes Wodonga to the north, Seymour to the south and Falls Creek in the snowfields. You would be hard-pressed to find anyone in Shepparton who regarded Wodonga and Falls Creek as being within their region.

However, for economic and administrative reasons, regions used for governmental purposes are usually much larger in size than those self-identified by the locals.<sup>16</sup> For example, the Commonwealth's identification of 54 regions through its Area Consultative Committees lists the entire Northern Territory ('NT') as one region, yet it is likely that people living in different parts of the NT would not identify themselves as all belonging to the one region. To break up the NT into smaller regions, however, might not be economically sustainable or justifiable in terms of population.

The problem here is self-delusion rather than self-identification. The notion of regionalism might be comforting when one imagines the region as being the

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15 Rupert B Vance, 'Region' in *International Encyclopedia of the Social Sciences* (1968) vol 13, 377–8, quoted by Gray, above n 14, 17–8.

16 This problem is not confined to Australia. Even in the geographically much smaller England, its eight regions, identified for governmental purposes, have been criticised on the ground that they 'scarcely coincide at all with the traditionally expressed regional identity of the English': see Brigid Hadfield, 'Devolution in the United Kingdom and the English and Welsh Questions' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (5<sup>th</sup> ed, 2004) 248.

familiar area around the place where one lives, but when it is much larger in size and the region is intended to replace both State and local governments in a two-tiered structure of national and regional governments, then the prospect of regionalism is far more alienating. For example, a person in Shepparton would most likely consider that Wodonga is as remote from Shepparton as Melbourne (it taking about the same time to drive to either). While many people in Shepparton would probably respond to a survey by supporting the abolition of the States and the institution of a two-tiered system of national and regional governments, you would again be hard-pressed to find anyone who would support that proposal if it involved people in Shepparton being governed in all things from Wodonga and Canberra with no local government of their own.

It is the detail of such proposals that is usually their undoing. The NSW Royal Commission of Inquiry into New States in 1925 described in graphic detail the deep disputes about the boundaries of the regions which advocates sought to establish as new States.<sup>17</sup> The only way 'new States' conventions could reach consensus was to leave the difficult issue of boundaries to one side. The boundary issue was also an important factor in the failure of the referendum in NSW in 1967 for the establishment of a new State in north-east NSW.<sup>18</sup>

The assumption underlying talk of regionalism is that these regions already exist and provide a ready-made structure that can simply be incorporated into the existing federal structure or substitute for one or more existing tiers of government. In reality, the number and borders of regions is a contentious issue and if regions were to be used to substitute for one or two levels of government there would be likely to be a serious clash between the desire of the people for some level of self-government in what they see as their regions on the one hand and the number and size of regions that may be viable in a country the size of Australia for governmental purposes on the other. At present, this conflict is disguised by the discussion of regionalism in terms of generalities.

### III THE USE OF REGIONS FOR SERVICE PROVISION AND COMMUNITY DEVELOPMENT

Currently, regions are used by governments primarily for two purposes. First, governments use regions for administrative purposes in the hope that they will provide a more efficient means to provide services across a large area.<sup>19</sup> An example is the establishment of regional area health services in NSW or the regions used for education purposes in Victoria. Secondly, governments use

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17 New South Wales, New States Royal Commission, *Report of the Royal Commission of Inquiry into Proposals for the Establishment of a New State or New States, Formed Wholly in or in Part out of the Present Territory of the State of New South Wales* (1925) 9–10.

18 The referendum was only held in the electoral districts that fell within the proposed boundaries of the new State. The 'Yes' vote was 168 103 and the 'No' vote was 198 812. A major point of contention was whether or not the City of Newcastle should be included in the proposed new State.

19 See Commonwealth, Royal Commission on Australian Government Administration, *Regionalising Government Administration*, Discussion Paper No 1 (1975).

regions when providing funds for community and business development. An example is the Commonwealth's Regional Partnerships Programme.<sup>20</sup> This has been described as 'regionalisation' rather than 'regionalism'.<sup>21</sup>

One of the problems with regionalisation is that it is often done in an ad hoc manner with little consideration given to its effectiveness. Christine Smith has pointed to the 'ever-expanding array of regional bodies'. She has observed that 'the costs associated with these bodies have not been fully documented and neither have the benefits of their achievements relative to their costs'.<sup>22</sup>

While the stated purpose of such programmes is often to give local people a greater say in the distribution of services and to vest in them greater responsibility for developing their communities, Wiltshire has argued that '[r]arely have these measures been accompanied by any real devolution of power to the regions'.<sup>23</sup> Ultimately, the Government that establishes the regions controls the policies and priorities implemented in the region, rather than such matters being determined or influenced by the region itself.<sup>24</sup> Further, regional programs tend to suffer from a lack of legal, administrative, financial and professional expertise, rely too heavily on volunteers and are subject to short-term policy fashions.<sup>25</sup>

This is particularly the case where regional programs involve the grant of funding to projects within regions.<sup>26</sup> Both sides of politics have used regional programmes as a means of pork-barrelling and currying electoral favour, particularly in marginal seats. In 2007, the Australian National Audit Office ('ANAO') provided recent evidence of such practices. Its examination of the Commonwealth's Regional Partnerships Programme<sup>27</sup> ('RPP') was critical of the administration of the programme and the exercise of ministerial discretion. The

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20 For a brief history of such programmes at the Commonwealth level, see Al Rainnie and Julie Grant, 'The Knowledge Economy, New Regionalism and the Re-emergence of Regions' in Al Rainnie and Mardelene Grobbelaar (eds), *New Regionalism in Australia* (2005) 4–9.

21 Gray, above n 14, 19; Mark Drummond, 'Options for Governing Australia's Large Metropolitan Areas: Some Statistical Insights into the Viability of Various Two-sphered Government Models' (Paper presented at the 7<sup>th</sup> Shed a Tier Conference, Sydney, 16 March 2003) 2; Brown, above n 1, 14.

22 Christine Smith, 'Quantifying the Costs and Benefits of Change: Towards a methodology' in A J Brown and Jennifer Bellamy (eds), *Federalism and Regionalism in Australia: New Approaches, New Institutions?* (2007) 201, 203–4.

23 Kenneth Wiltshire, 'Reforming Australian Governance: Old States, No States or New States?' in A J Brown and Jennifer Bellamy (eds), *Federalism and Regionalism in Australia: New Approaches, New Institutions?* (2007) 185, 188.

24 Ralph J K Chapman, 'Regionalism, National Development and Governmental Institutional Arrangements: Regions as Moderating Institutions' (Occasional Paper No 24, Centre for Research on Federal Financial Relations, ANU, 1982) 42.

25 Smith, above n 22, 204.

26 For a criticism of the Whitlam Government's approach to regionalism, see John M Power and Roger L Wettenhall, 'Regional Government versus Rational Programmes' (1976) 35(2) *Australian Journal of Public Administration* 114.

27 This Programme, established in 2003, encompassed several earlier programmes, including Regional Solutions, Regional Assistance, Rural Transaction Centres, Dairy Regional Assistance and a number of specific structural adjustment programmes: ANAO, 'Performance Audit of the Regional Partnerships Programme' (Audit Report No 14, 2007–8) vol 1, 10.

RPP was a non-statutory discretionary grants programme. The ANAO recorded that in some cases grants were approved by Ministers, even though no application was received prior to the grant being approved, departmental assessments were truncated or not undertaken rigorously, criteria were not satisfied and the Department or Area Consultative Committees advised against the grant.<sup>28</sup> The ANAO also noted that:

Ministers were more likely to approve funding for ‘not recommended’ projects that had been submitted by applicants in electorates held by the Liberal and National parties and more likely to not approve funding for ‘recommended’ projects that had been submitted by applicants in electorates held by the Labor party.<sup>29</sup>

This type of regionalisation is aimed more at seizing the electoral benefits from directly supporting regional projects than strengthening and supporting the regions. Regionalisation, to this extent, is not a political philosophy or a genuine attempt to achieve subsidiarity or decentralisation, but merely a political tool to by-pass the States, undermine federalism and defeat political enemies.

#### IV REGIONS AS A FOURTH TIER OF GOVERNMENT

Ian Gray has argued that true regionalism has a stronger democratic element that involves giving people greater control over what happens in their regions.<sup>30</sup> Some have argued that regions should provide a fourth tier of government. This could involve the establishment of regional elected assemblies ‘with powers over resource allocation and possibly revenue-raising’.<sup>31</sup> The perceived advantages are that such a reform would require ‘minimal disruption to Australian constitutional arrangements’ and permit regional governance that is ‘more directly accountable and responsive to the needs of each region’s community’.<sup>32</sup>

On the other hand, some have criticised regionalism for adding ‘an additional layer of government to an already crowded political and institutional landscape’.<sup>33</sup> The cost of additional elected assemblies and the associated institutions of government would be very significant. Lines of accountability would be likely to become even more blurred, and opportunities for cost-shifting and buck-passing would be likely to increase.

The United Kingdom provides an interesting example. While the devolution of power to Scotland, Wales and Northern Ireland was approved by their people in referenda in 1997 and 1998, the establishment of directly elected regional

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28 Ibid 21–4.

29 Ibid 24. The ANAO also noted the ‘reduced due diligence’ and the significantly higher proportion of approval of projects in the months leading up to the 2004 federal election: at 24–5.

30 Gray, above n 14, 19.

31 Wiltshire, above n 23, 185, 196.

32 Ibid.

33 See Lane, McDonald and Morrison, above n 11.

assemblies<sup>34</sup> in England was a step too far and failed at a referendum in the North East of England in November 2004. It was resoundingly defeated with 78 per cent of voters voting against the proposal. Those campaigning against the referendum argued that a regional assembly would mean more politicians and higher local taxes. After the defeat of this referendum, further referenda proposed for other regions were indefinitely postponed.

Australians hold a strong sense that they are currently over-governed,<sup>35</sup> even though this may not necessarily be the case.<sup>36</sup> Only 16 per cent of those surveyed in Queensland in 2001 and 9.6 per cent of those surveyed in NSW in 2005 supported the establishment of a four-tiered system of government.<sup>37</sup> It is unlikely that a referendum to approve the establishment of regions, with elected assemblies as a fourth tier of government, would succeed.

## V A TWO-TIERED SYSTEM OF NATIONAL AND REGIONAL GOVERNMENTS

A fairly common response to the frustrations of federalism is to argue that the States should be abolished and instead there should be a two-tiered system of government, comprising the national level of government and regional governments. In surveys in 2001 in Queensland and 2005 in NSW, when people were asked how the system of government should look 100 years from now, 31 per cent in the Queensland survey and 47.4 per cent in the NSW survey opted for a two-tiered system of national and regional governments, replacing State governments. This was the largest group, with 29 per cent (Qld) and 12.5 per cent (NSW) favouring the existing system, 16 per cent (Qld) and 9.6 per cent (NSW) preferring a four-tiered system and 15 per cent (Qld) and 4.8 per cent (NSW) wanting three tiers but with a larger number of States.<sup>38</sup>

What is not clear from these surveys is what sort of two-tiered system the largest group of respondents envisaged. Was it a system where the regions would

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34 Regional assemblies exist in the eight English regions to scrutinise the work of Regional Development Agencies. However, they are not directly elected bodies. They are comprised of local councillors, business people and community representatives and exercise limited advisory and planning functions: *Regional Development Agencies Act 1998* (UK). See also Hadfield, above n 16.

35 See, eg, the Gallup Poll, July 1987, which indicates that 61.4 per cent of the sampled population agreed that Australia is over-governed: Australian Social Science Data Archive, *Australian Gallup Poll, July, 1987* (1987) <<http://assda.anu.edu.au/polls/D0517.html>> at 13 July 2008. See also the statement by The Hon Joel Fitzgibbon that Australia is 'the most over-governed country in the world': 'New Thinking for a New Century – Building on the Barton Legacy' (Speech delivered at the Inaugural Edmund Barton Lecture, Newcastle, 3 July 2008). See further Max Blenkin, 'Federalism – We're too governed', *The Advertiser* (Adelaide), 4 July 2008; Jonathan Pearlman, 'Minister Bemoans Cost of States', *Sydney Morning Herald* (Sydney), 4 July 2008.

36 Anne Twomey and Glenn Withers, *Federalist Paper 1 – Australia's Federal Future*, Report for the Council for the Australian Federation (2007) 20–1.

37 Ian Gray and A J Brown, 'The Political Viability of Federal Reform: Interpreting Public Attitudes' in A J Brown and Jennifer Bellamy (eds), *Federalism and Regionalism in Australia* (2006) 33, 41.

38 A J Brown, 'After the Party: Public Attitudes to Australian Federalism, Regionalism and Reform in the 21<sup>st</sup> Century' (2002) 13 *Public Law Review* 171, 184; Gray and Brown, above n 37, 41.

be established and controlled by Commonwealth legislation (just as local government is established and controlled today by State legislation) but would have no substantial powers of their own? Alternatively, was it a system where each region would be established and preserved by the *Commonwealth Constitution* and vested with specific (or residual) legislative and executive powers, much as the States are today? Both approaches have been proposed from time to time and both have particular problems which were probably not considered by those surveyed.

### A Regional Government Established by Commonwealth Legislation

Under this system, regional governments are creatures of the Commonwealth, established under Commonwealth laws and given such powers as Commonwealth legislation confers upon them, which it may also take away. Klaas Woldring has stated that under such a system ‘there will no longer be state or regional constitutions and no local government powers, or regional powers, that have the quality of being “sovereign”, protected in a federal constitution’.<sup>39</sup> All legislative power would be vested in the Commonwealth Parliament and all executive power in Commonwealth Ministers. The regions would be used to administer Commonwealth laws and policies.

The objections to such a system include that it would provide:

- insufficient checks on Commonwealth legislative or executive power;
- a less responsive and accountable government, with all legislative and executive decisions being made remotely from the people; and
- increased opportunities for cost-shifting and buck-passing.

Labor Party proposals from 1918 and 1921 advocated a similar system. The States would have been abolished and the Commonwealth Parliament would have been given full legislative power over all subjects. It would have had the power to establish provincial bodies and give them constitutions. Each Province would have had its own council, but its powers would have been defined by Commonwealth legislation.<sup>40</sup> The Labor Party also proposed the abolition of the Senate. This would have left a majority government in the House of Representatives with few restraints on its power.<sup>41</sup>

One of the benefits of the current federal system is that power is divided and the need for co-operation drives greater moderation, more public debate and better considered proposals. For example, in 2005 the fact that State support was

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39 Klaas Woldring, *Discussion Paper* (2001) Beyond Federation

<[http://www.beyondfederation.org.au/Klaas\\_Woldring\\_1st\\_SATC\\_220601.html](http://www.beyondfederation.org.au/Klaas_Woldring_1st_SATC_220601.html)> at 13 July 2008.

40 See Ellis, above n 3, 138, where the author describes the 1918 proposal of the Victorian State Labor Conference. However, the Conference also contemplated the retention of a form of municipal government, so it was effectively a three-tiered system.

41 Ibid 143, where the author describes a 1921 Labor proposal. Note that while it proposed to abolish the Senate, Labor also proposed that electors be permitted to initiate or recall legislation, placing one potential brake on Commonwealth power.

required for Commonwealth anti-terrorism laws meant that the Commonwealth could not simply ram extreme measures through the Parliament, but rather, had to engage in a public debate on the nature of and need for the proposed laws and negotiate amendments with the States that provided greater safeguards for individuals. The advocates of two-tiered government sometimes argue that checks on government power should be traded off against more responsive government.<sup>42</sup> Many, however, would baulk at concentrating such power in so few hands and removing the checks and balances of the federal system that currently operate to separate power and impose moderation.

The second objection to such a proposal is that rather than bringing government closer to the people it would be likely to make government more alien and less responsive to local needs. The types of decisions that affect local communities concerning their parks, libraries, community facilities and garbage would instead be dealt with by a regional government that may be two or more hours drive away. All major policy decisions involving the enactment of legislation or the allocation of significant spending would be dealt with by the national government and Parliament. The regions would instead administer these laws and policies within their territory but have no control over the making of those laws or policies. Any powers granted to the regions would have to be exercised in a manner that met with the approval of the Commonwealth, or otherwise those powers could be revoked.

The NSW Royal Commission of Inquiry into New States, in discussing the centralising effect of the abolition of the States and the creation of 20–30 provinces, quoted from Dr Radford of Goulburn. He complained that such a proposal would result in ‘the most over-developed bureaucracy one can imagine under the form of an apparent increase of local powers’.<sup>43</sup> The Royal Commission reported that one of the main complaints from those seeking the establishment of new States was that existing State legislators lacked sufficient understanding of the developmental needs of country districts. It pointed out that such problems would be exacerbated if those responsible for legislating had to deal with all the problems of Australia instead of just one State.<sup>44</sup> The Royal Commission concluded:

Unification would in our opinion only tend to greater centralisation in the control of those works that are most complained of as not being properly carried out under the present system, and that system of government, with this centralised control, would not meet the requirements of the country to-day, as disclosed in the evidence before us.<sup>45</sup>

Mark Drummond, an advocate of the abolition of the States, has also made the point that a two-tiered system of government would make government more distant from the people. He argued that if each of the five largest metropolitan

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42 August, above n 7.

43 See New South Wales, New States Royal Commission, *Report of the Royal Commission of Inquiry into New States*, above n 17, 93.

44 Ibid 94.

45 Ibid.

regions only had a single government (instead of the current number of local government bodies), it ‘would be far too big and distant from their people to provide optimal government’.<sup>46</sup> He went on to expand his point to other regions, saying:

[I]f we were to move to a system comprising, for example, *just 20* regional governments, as the only sub-national governments within Australia, and if our five largest metropolitan areas each formed one of these regional governments, then ... the remaining 15 regional governments would serve ‘communities’ – if you could call them that – with populations averaging over 500,000 (which exceeds Tasmania’s population) and land areas averaging over 500,000 square kilometres (about the land area of Spain, and more than twice Victoria’s land area). If we had 100 regions, with 25 taken up by our 25 largest metropolitan areas ... then the remaining 75 regions would still average about 61,000 in population and about 100,000 square kilometres in land area.<sup>47</sup>

Drummond concluded that if Australia were to abolish the States and establish a system of 100 or fewer regional governments and a national government, then ‘we’d probably need to retain at least some form of local government or local governance’.<sup>48</sup> A two-tiered form of government is simply not practical if one of the aims is to ensure governance that is responsive to the needs of the people.

The third objection to this proposal is that it does not resolve problems of buck-passing and cost shifting and may even exacerbate them. Regions that are smaller than States, especially those that do not contain a metropolitan city, would most likely be completely reliant on Commonwealth funding to fulfil the administrative functions conferred upon them. They would be at the mercy of the Commonwealth, which could shift its costs by increasing the functions of the regions while at the same time decreasing their funding, whenever it chose. The likely outcome is that when services were found wanting, the regions would blame the Commonwealth for a lack of funding and the Commonwealth would blame the regions for not fulfilling their functions efficiently.

## **B Regional Government Established by the *Constitution***

An alternative approach is for each region to be established by the *Constitution* and vested with specific or residual legislative and executive powers, much as the States are today. This has the advantage of preserving the checks and balances of a federal system.<sup>49</sup>

Under this system each region would presumably require its own legislature, its own Ministers, and its own public service. One of the reasons given for a two-tiered system of national and regional governments is that that it will ‘save money by getting rid of the middle layer that contributes comparatively little to business and to our quality of life’.<sup>50</sup> However, no adequate assessment is ever made of the cost of replacing the States with legislative, executive and perhaps

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46 Drummond, above n 21, 9.

47 Ibid (emphasis in original).

48 Ibid 10.

49 See Hurford, above n 8, 50.

50 Soorley, above n 6, 39; Woldring, above n 9, 118–21.

judicial institutions in each of 40 or so regions. There is a fair likelihood that if such an assessment were made, the cost of duplicating institutions of government across regions would be much greater than the cost of maintaining the existing federal system, even after taking into account the abolition of local government.

Issues of institutional competency also arise. If a regional legislature is relatively small because it serves a region with a small population, it is likely that there will not be a sufficient number of members to form a capable ministry or an adequate committee structure to scrutinise the actions of the government.<sup>51</sup> This has already arisen as an issue in States such as Tasmania and South Australia where proposals to reduce the number of Members have been rejected on the ground that this would seriously affect the capacity to form governments and scrutinise them adequately.<sup>52</sup> This problem would be exacerbated if there were 40 or so regional legislatures. Chris Hurford has suggested as a solution the adoption of a form of executive government, with a directly elected Chief Minister who chooses his or her Executive from outside the legislature.<sup>53</sup> This would ensure that there was more scope for choosing people of competence and experience as Ministers,<sup>54</sup> but would fundamentally alter Australian notions of responsible government and probably weaken the Opposition and the capacity of the legislature to scrutinise government.

In addition to the infrastructure of government, there would be a significant economic cost to business in having to deal with 40 different sets of laws on particular subjects. If regions were to have the power to deal with matters that are of real and practical interest to their people and which may reflect different preferences, such as daylight saving, shop trading hours and poker machines, then there would be a patchwork of different laws across Australia making it extremely difficult for national businesses to operate. On the other hand, if the regions did not have significant powers, there would seem to be little point in having regions if they could not implement the different preferences of their people. As in the case above, government would become more remote from the people.

The establishment of many regions would also magnify the number of borders between different jurisdictions. This, in turn, would drastically increase the problems that arise from people living and working in different jurisdictions which have different laws or administrative practices. Cross-border problems in areas such as environmental management would be likely to increase greatly.<sup>55</sup>

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51 Cheryl Saunders, 'The Constitutional Framework for a Regional Australia' in Wayne Hudson and A J Brown (eds), *Restructuring Australia* (2004) 63, 72.

52 Clement Macintyre, 'The Size of Parliament and the Location of Ministers' in Clement Macintyre and John Williams (eds), *Peace, Order and Good Government* (2003) 241; Tasmania, *Report of the Advisory Committee on the Proposed Reduction in the Number of Members Elected to Both Houses of the Tasmanian Parliament* (1984); Tasmania, *Report of the Board of Inquiry into the Size and Constitution of the Tasmanian Parliament* (1994).

53 See Hurford, above n 8, 53.

54 There may, however, still be difficulty finding persons with appropriate skills and experience in some regions.

55 See Lane, McDonald and Morrison, above n 11.

At the same time, efforts to harmonise laws, policies and administrative practices would be more difficult to achieve given the large number of participants in negotiations.

Many advocates of a two-tiered system of national and regional governments make justifiable criticisms of the operation of the current federal system, but fail to explain how this two-tiered system of government would avoid the same problems. For example, Jim Soorley has noted that under the present system, the States and the Commonwealth argue about who has responsibility for problems.<sup>56</sup> However, he did not explain why regions, if they were to have any effective powers, would not find themselves in similar disputes with the Commonwealth. These disputes tend to arise either because of expansive interpretations of Commonwealth power or because the Commonwealth becomes involved in areas of State responsibility by providing funding for them and placing conditions upon such funding. To resolve such problems in a two-tiered system would not only require a much clearer allocation of powers between the Commonwealth and the regions, with certain matters expressly reserved for the regions, but would also require the regions to be financially independent from the Commonwealth.

While Soorley has suggested that regions would have ‘their own constitutional ability to raise or call on the necessary funds to fulfil [their responsibilities] without having to go “cap-in-hand” to federal and State governments’,<sup>57</sup> it is hard to imagine what taxes could sensibly be imposed in 40 different regions which could raise sufficient funds to support the functions of the regions without causing economic havoc. The Organisation for Economic Co-operation and Development (‘OECD’) has noted that ‘there are few taxing powers which can be transferred to sub-national governments without raising efficiency and/or distributional concerns’.<sup>58</sup> The economic cost of having 40 different income taxes or 40 different sales taxes would be high, and it makes no sense to tax objects or transactions that can be moved or undertaken outside of a region, as this simply fuels tax avoidance.<sup>59</sup>

The most obvious taxes for regions to impose are land taxes,<sup>60</sup> as land cannot be moved. However, there would be serious public resistance to regions funded by taxes on land, including the family home, and this would only be an effective source of revenue in capital cities and some coastal regions with high property values, leaving most rural regions to struggle. Despite the economic viability of regions being a crucial issue, more recent advocates of regionalism rarely

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56 Soorley, above n 6, 40–1.

57 Ibid 43–4.

58 Isabelle Jourard and Per M Konsgud, *Fiscal Relations across Government Levels*, OECD Economics Department Working Papers, No 375 (2003) 161–2.

59 Highly mobile tax bases are normally allocated to the national level of government to prevent tax evasion and economic distortions: Smith, above n 22, 208.

60 The Victorian Labor Conference’s proposal in 1918 for provincial government stated that Provincial Councils would raise revenue from land taxes: Ellis, above n 3, 138.

consider what taxes regions would impose to fund themselves or the effect of even greater vertical fiscal imbalance on their proposed system of regionalism.

Hurford has proposed that regions would apply a supplementary rate to the taxes imposed by the Commonwealth, such as income tax and the Goods and Services Tax ('GST').<sup>61</sup> While this is a more feasible approach, consideration should be given to why a similar proposal by the Fraser Government failed in the 1970s. First, a necessary prerequisite is that the Commonwealth significantly lowers its tax rate so that the regions have room to impose the additional rate of tax. The extent to which the Commonwealth would have to drop its tax rate would be a politically highly contentious issue and it is unclear how the regions could force the Commonwealth to do so.

The second problem would be that the regions would presumably have no control over the operation of the Commonwealth's tax laws on which they would piggy-back, such as the tax base, exemptions, deductions and rebates.<sup>62</sup> The Commonwealth could make changes to its tax laws and adjust the way in which it received revenue (eg, fees for services rather than taxes), leaving the regions under-funded as a result of the reduction in overall tax receipts. Thirdly, the amount of revenue received by the regions from imposing a supplementary rate on income tax and GST would vary vastly according to the wealth of the region. A region encompassing the eastern and northern suburbs of Sydney would be extremely wealthy, while rural regions might well be destitute. The consequence would be that the Commonwealth would still have to provide significant funding to most regions, leading back to the original problems of vertical fiscal imbalance, tied grants and mendicant regions.

Another problem with replacing the States with 40 or so regions is the risk of losing some of the benefits of the current federal system. Given the small population bases of most regions, especially those outside the existing capital cities, the size of the bureaucracy in most regions would necessarily be small, with insufficient depth and capacity to produce innovative policies and genuine competition. Transaction costs would also be likely to be higher because of the absence of economies of scale. There are real advantages in having such a small number of States with relatively substantial populations, as they can assert greater influence in the national sphere and are more likely to be able to reach collective State positions on matters of importance.<sup>63</sup> Forty regions could not expect to have the same influence as the existing States on national policy through the Commonwealth Parliament. While State representation in Cabinet is

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61 See Hurford, above n 8, 52.

62 Note that although Commonwealth legislation purports to require the agreement of the States before the rate or the base of the GST may be amended, it is not constitutionally possible for the Commonwealth to abdicate its power in this fashion. The provisions are therefore ineffective and the Commonwealth Parliament may legislate to amend the base or rate of the GST whenever it so chooses.

63 See, eg, the establishment of the Council for the Australian Federation through which the States can reach agreed positions upon matters of interest to the States alone and upon matters that are to be negotiated with the Commonwealth. How effectively would such a body operate if there were 40 regions rather than six States?

currently a factor that influences appointments, it would not be feasible for each of 40 regions to be represented in Cabinet or in any other national institution.<sup>64</sup>

If Australia were to have a two-tiered government with constitutionally entrenched and empowered regional governments, then the Senate could become a House representing the regions. This would at least retain one potential limit on Commonwealth power. However, problems would still arise. If there were, for example, 40 regions, then the Senate would presumably be comprised of no more than two representatives from each region. This would effectively wipe the small parties out of the Senate, taking away another source of scrutiny. If there were 100 regions or more, and only one representative of each region in the Senate, then the likely result would be that whichever party won government in the House of Representatives would take complete control of the Senate, neutering its role as a check on power.

Another proposal is that the Senate be comprised of the mayors of local government areas.<sup>65</sup> This would either entail significant amalgamations of local government areas or an enormous Senate, as there are over 670 local government areas in Australia. If the current nexus between the sizes of the two Houses in section 24 of the *Constitution* were to be retained, this would result in a House of Representatives of over 1340 Members, which is both impracticable and inconceivable. Hurford has proposed instead that the Senate comprise the Chief Minister of each of the regions.<sup>66</sup> While this would be more manageable, it is doubtful whether the people would agree to losing their right to elect Senators directly.

## VI THREE TIERS OF GOVERNMENT – REGIONS OR NEW STATES?

Many of those who advocate the economic advantages of abolishing the States either directly or indirectly support the continuation of three tiers of government.<sup>67</sup> As noted above, proposals to replace States with regions result in the decisions of government being removed further away from the people. Retaining the system of local government is one way of ameliorating this problem. Former Senator John Cherry has noted that the size of the Brisbane City Council, with half a million ratepayers, is such that it serves as a regional council, but ‘is a dismal failure’ as a local council, ‘with councillors too remote to provide any effective representation on local issues’.<sup>68</sup> Some advocates of regionalism therefore concede that a system of local government must be retained, leaving three tiers of government in existence.

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64 See Saunders, above n 51, 75–6.

65 John August, *Abolishing the States – The Benefits Ignored* (2005) On Line Opinion <<http://www.onlineopinion.com.au/view.asp?article=3705>> at 13 July 2008.

66 See Hurford, above n 8, 54.

67 See, eg, Drummond, above n 21.

68 John Cherry, ‘Why abolishing the states is good for regional Australia’ (Paper presented at 2<sup>nd</sup> Shed a Tier Congress, Canberra, 21 September 2001) 5.

Woldring has accepted that '[w]ith 30 or even 100 Regional Governments for many Australians the first level of Government would still be quite remote, in spite of superior means of communication'.<sup>69</sup> He has therefore proposed the abolition of States and the establishment of two tiers of government, being national and local government. However, he has proposed in addition the inclusion of a 'mezzanine' level of regional governments elected by local councils, which would be provided for in the *Constitution*.<sup>70</sup> The use of the term 'mezzanine' is an apparent attempt to avoid a third tier of government being recognised as such. This verbal quibble is employed because the argument is based upon the proposition that having only two tiers of government will provide substantial economic savings that can be invested in regional development.<sup>71</sup> If instead, one sees one tier of government (six States and two Territories) being replaced by another tier of government (40 or so regions), then the anticipated economic savings begin to slip away.<sup>72</sup>

Similarly, Hurford has argued for a two-tier system of national and regional governments on the basis that it will result in significant financial savings,<sup>73</sup> but has stated that matters such as rubbish collection would be dealt with 'at the community level', based on existing local government boundaries. He stated that there would be no separate community bureaucracies, but that the local member in the Regional Assembly would be responsible for such matters, assisted by 'chosen advisory committees' and supported by the use of 'discretionary funds'.<sup>74</sup> This attempt to avoid a third tier of government leads to the prospect of Members of regional legislatures each being a 'Lord of the Manor' in their local area, in charge of all local policy decisions and able to spend 'discretionary funds' as they and their mates wish. It is unlikely that such an approach would be acceptable in Australia.

A major problem for those who advocate any form of regionalism that involves the abolition of the States is the fact that such a constitutional alteration must be passed in a national referendum approved by a majority of electors overall and a majority in every State. This is because such a constitutional alteration would arguably affect the representation and borders of the States (by abolishing them) and in such a case the penultimate paragraph of section 128 of the *Constitution* requires the referendum to be approved in each State that is affected. The chances of success of such a referendum are negligible.

An alternative, however, is to use the mechanisms in Chapter VI of the *Constitution* to create a large number of new States, so that each is effectively a

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69 Klaas Woldring, 'A Republic with Two Levels of Government – plus Mezzanine Regions and City Governments' (Paper presented at the 7<sup>th</sup> Shed a Tier Congress, Sydney, 16 March 2003) 5.

70 Ibid 5–6.

71 Ibid 5.

72 Note also that the oft-quoted figures concerning the economic savings involved in abolishing the States have been the subject of serious criticism: Smith, above n 22, 211–16; Twomey and Withers, above n 36, app 1.

73 See Hurford, above n 8, 56.

74 Ibid 50.

region. This is sometimes regarded as the constitutionally easier option.<sup>75</sup> It is arguable that it could be done without a referendum, although it would still require the consent of the Commonwealth and State Parliaments and from a political point of view, it is difficult to see how it could be achieved without consulting the people. Moreover, unless the nexus between the size of the Senate and the size of the House of Representatives were broken by a constitutional amendment, such a proposal would result in an enormous Senate<sup>76</sup> with a House of Representatives double the size of the Senate.

Wiltshire has argued for the creation of new States as part of a comprehensive national reform program. These new States, which would effectively be regions, ‘would employ many former State public servants, and deal directly with Canberra on most issues of funding, taxation and national regulation – a simplified, more efficient and more accountable version of what is increasingly happening now’.<sup>77</sup> From a practical point of view, it is extremely difficult to see how it could be more simple, efficient and accountable for 40 States to deal directly with the Commonwealth on such matters rather than the existing six States and two Territories. Moreover, unless the *Constitution* were to be amended to create a national judicial system and remove the functions conferred on State Governors, each new State would require the establishment of its own set of courts as well as its own Governor to fulfil constitutional functions.

### A The ‘New States’ Movement

The path to the establishment of new States is neither easy nor clear. While there have been reasonable amounts of local enthusiasm for the creation of new States from time to time and occasional bursts of political support, there has also been confusion about who has the responsibility for initiating the process and how to determine the conditions of statehood, such as the territory, the assets and liabilities, and the constitution of the proposed new State. Moreover, the hurdle of obtaining the support of voters for a new State has been formidable.

There is a long history of attempts to establish new States in Australia, particularly in Queensland and NSW.<sup>78</sup> It commenced even before Federation with claims in 1856 that the Riverina area should have formed part of Victoria

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<sup>75</sup> Wiltshire, above n 23, 197–8.

<sup>76</sup> New States could be given smaller representation in the Senate than the original States, but this would still result in a larger Senate, with double the size of the increase in the House of Representatives. An issue might also arise about the continuing status of an original State if so much territory has been removed from it to create new States that it no longer can be regarded as an original State. Questions might also arise as to why the rumps of original States should retain higher Senate representation than new States, especially if the new States had larger populations.

<sup>77</sup> Wiltshire, above n 23, 199.

<sup>78</sup> See also discussion of the ‘new State movement’ and proposals to change the provisions of the *Constitution* concerning new States in the Commonwealth, Royal Commission on the *Constitution* of the Commonwealth, *Report of the Royal Commission on the Constitution* (1929) 256–9; Commonwealth, Joint Committee on Constitutional Review, *Report from the Joint Committee on Constitutional Review* (1959) 158–70; Commonwealth, Constitutional Commission, *Final Report of the Constitutional Commission* (1988) vol 1, 429–34.

when it was separated from NSW and in 1867 that the Clarence, Richmond and New England districts should have formed part of Queensland. Some sought annexation by Victoria or Queensland, but others proposed the establishment of new States.<sup>79</sup>

In Queensland there was also agitation to separate central and northern Queensland from the southern part of Queensland. Reasons included the physical distance from northern and central Queensland to the capital in Brisbane, and resentment at the perception that revenue raised in the north and centre was being spent in the south. The dispute over separation was one of the factors that led to Queensland not being represented at the 1897–8 Constitutional Convention.<sup>80</sup> This meant that Queenslanders lost their influence over the terms of the crucial provisions in Chapter VI of the *Constitution* dealing with new States. The only concession to Queensland's separation concerns came at the Premiers' Conference of 1899 during which it was agreed that provision would be inserted in section 7 of the *Constitution* for the Senators of Queensland, if it were an original State, to be chosen from separate divisions rather than the State as one electorate.<sup>81</sup>

The pre-Federation calls for the separation of territory from NSW continued post-Federation with the establishment of 'Separation Leagues' in New England, the Riverina and the Monaro areas. In 1922 the NSW Parliament recognised the desirability of creating a new State in New England and proposed that a federal convention be held to determine its boundaries and powers.<sup>82</sup> The Commonwealth responded that the State must first determine the terms of any separation, including the allocation of public debts and public assets. Once this was settled, the Commonwealth Government indicated that it would 'take whatever steps are necessary to give effect to the wishes of the Parliament and people of New South Wales'.<sup>83</sup> A Royal Commission was then appointed in New South Wales to consider the creation of new States.<sup>84</sup>

The Royal Commission systematically considered and demolished the arguments given for the creation of new States, including false analogies with the position of the United States and Canada.<sup>85</sup> It considered practical matters such as the apportionment of assets and liabilities to the proposed new States and the

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79 For a more detailed history, see Ellis, above n 3.

80 See Geoffrey Bolton and Duncan Waterson, 'Queensland' in Helen Irving (ed), *The Centenary Companion to Australian Federation* (1999) 94.

81 In 1974, when control of the Senate was hotly contested, consideration was given in Queensland to breaking up Queensland into five electorates for Senate elections. It was suggested that boundaries could be devised that would guarantee the return of more Liberal/Country Party Senators than if Queensland were one electorate only: Queensland State Archives, Series 1043 Item 540289, Constitutional Reform.

82 New South Wales, *Parliamentary Debates*, Legislative Assembly, 19 September 1922, 1973.

83 Letter from the Prime Minister, Stanley M Bruce, 12 June 1923, reprinted in Commonwealth, Royal Commission on the *Constitution* of the Commonwealth, *Report of the Royal Commission on the Constitution* (1929) 218–19.

84 See New South Wales, New States Royal Commission, *Report of the Royal Commission of Inquiry into New States*, above n 17.

85 *Ibid* 37–44.

probable financial, economic, industrial and political effects of establishing new States.<sup>86</sup> It concluded unanimously that the creation of new States in the Riverina and the Monaro was neither practicable nor desirable. In the case of New England, one commissioner thought it was practicable to establish it as a new State, but all the others that it was not, and they all agreed that it was not desirable.<sup>87</sup>

Another Royal Commission was held in the 1930s on the creation of new States. The Hon Harold Nicholas reported in January 1935<sup>88</sup> that an area in the north of NSW and an area in the central west and south of NSW were both suitable for self-government as States. This time the further question of the desirability of the creation of the new States was not considered. No further action was taken to establish such States.

In 1966 a different approach was taken to the new State issue. Instead of a royal commission, the voters of New England were asked whether they were in favour of separation from NSW. Work on the financial viability of the proposal and the constitutional procedures for achieving it would only take place if general approval was given by the people. One of the problems, however, was that the voters did not know the terms upon which statehood would be granted, so were therefore voting blindly on the subject. There was also a dispute about the borders of New England, with the Government including Newcastle within the proposed new State. Further, the voters in the rest of New South Wales were not given any opportunity to express their views. The referendum was held on 29 April 1967. It failed, with 168,103 in favour and 198,812 against.

More recently, the NT has created the most credible case for establishment as a new State. The people of the NT were consulted by the holding of a referendum. There was some ambiguity as to whether the referendum was to approve the principle of statehood or the form of the draft *Constitution*. The draft *Constitution* was the subject of criticism in relation to its provenance and form, especially from Aboriginal groups. The referendum was held on 3 October 1998. It also failed.<sup>89</sup> Efforts to revive the prospects of statehood for the NT continue and it is likely that statehood will eventually be attained.<sup>90</sup> In contrast, although other proposals are still raised from time to time to create a new State, such as one in Northern Queensland,<sup>91</sup> they have not attracted sufficient support to proceed.

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86 Ibid 125–31.

87 Ibid 149.

88 New South Wales, New States Royal Commission, *Royal Commission of Inquiry Respecting Areas in the State of New South Wales Suitable for Self-Government as States in the Commonwealth of Australia* (1935).

89 Alistair Heatley and Peter McNab, 'The Northern Territory Statehood Referendum 1998' (1999) 10(1) *Public Law Review* 3.

90 The great constitutional complexities involved in establishing a new State are therefore likely to be addressed in the context of NT statehood: Anne Twomey, 'A Constitution for a New State: Dilemmas for the Northern Territory' (2007) 18(3) *Public Law Review* 200.

91 Geoffrey Blainey, 'Why Every Major Region Should be its Own State' in Wayne Hudson and A J Brown (eds), *Restructuring Australia* (2004) 26, 36.

Some have blamed the failure to establish new States in Australia on the difficulty of meeting the constitutional requirements.<sup>92</sup> From the Royal Commission on the *Constitution* in 1929 to the Constitutional Commission in 1988,<sup>93</sup> recommendations have been made to change the new State provisions in the *Constitution* to resolve the difficulties and uncertainties they present, but none have proceeded to referendum. Even if these problems were resolved, the main difficulty in the path to achieving new States has been the reluctance of the people, when consulted, to commit themselves to a new State without knowing the detail, or to commit themselves to a new State when they do have the detail but object to aspects of it. The likelihood of achieving regionalism through the creation of many new States is, therefore, extremely low.

### **B Can Regions be Made New States Without a Referendum of the People?**

One crucial aspect of the proposal to achieve regionalism through the creation of many new States is the proposition that a referendum of the people is not required. This proposition requires further analysis.

Chapter VI of the *Constitution* deals with 'New States'. Two powers are conferred upon the Commonwealth Parliament. The first, in section 121, is the power to 'admit to the Commonwealth or establish new States'. In doing so the Commonwealth Parliament may impose terms and conditions, including the extent of representation in either House of Parliament. These terms and conditions are to be made or imposed 'upon such admission or establishment'. This provision raises a number of unresolved questions. First, what is the difference between 'admission' and 'establishment' and does this difference have any constitutional significance?<sup>94</sup> Secondly, do these 'terms and conditions' apply simply as a condition precedent that must be met for admission or

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92 Commonwealth, Joint Committee on Constitutional Review, *Report from the Joint Committee on Constitutional Review* (1959) 158; Commonwealth, Constitutional Commission, *Final Report of the Constitutional Commission* (1988) 430, referring to complaints made during the proceedings of the Australian Constitutional Convention in 1973.

93 Commonwealth, Royal Commission on the *Constitution* of the Commonwealth, *Report of the Royal Commission on the Constitution* (1929) 213–19 and 256–9; New South Wales, Joint Committee of the Legislative Council and Legislative Assembly, *Report of the Joint Committee of the Legislative Council and Legislative Assembly upon the Australian Constitution* (1958) vii–ix, app II; Commonwealth, Joint Committee on Constitutional Review, *Report from the Joint Committee on Constitutional Review* (1959) 158; Commonwealth, Constitutional Convention, *Proceedings of the Australian Constitutional Convention* (Melbourne, 1975) 176; Commonwealth, Constitutional Commission, *Final Report of the Constitutional Commission* (1988) 434.

94 See John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (1901, 1995 reprint) 968–9; Sir William Harrison Moore, *The Constitution of the Commonwealth of Australia* (2<sup>nd</sup> ed, 1910, 1997 reprint) 593; Commonwealth, Royal Commission on the *Constitution* of the Commonwealth, *Report of the Royal Commission on the Constitution* (1929) 16; Richard D Lumb, 'The Northern Territory and Statehood' (1978) 52 *Australian Law Journal* 554; Geoffrey Sawer, 'The Northern Territory: Constitutional States Present and Future' in Richard Herr and Peter Loveday (eds), *Small is Beautiful: Parliament in the Northern Territory* (1981) 99; Patrick H Lane, *Lane's Commentary on the Australian Constitution* (2<sup>nd</sup> ed, 1997) 824.

establishment, or can they have an ongoing application? If so, what is the remedy, if any, for a subsequent breach of these terms and conditions?<sup>95</sup>

Section 121 simply grants the power to the Commonwealth Parliament to admit or establish the new State. It does not set out any procedure for doing so or any conditions precedent. Section 124 qualifies the power granted in s 121. It does not contain a grant of power itself, but rather sets out the conditions precedent for the exercise of s 121 in certain circumstances. It states that a new State ‘may be formed by separation of territory from a State, but only with the consent of the Parliament thereof’. It also states that ‘a new State may be formed by the union of two or more States or parts of States, but only with the consent of the Parliaments of the States affected’. It is therefore clear that State Parliaments must approve of the separation of part of the State’s territory to create a new State. Section 124 does not state, however, whether the consent of voters in the State is required. Is this because the *Constitution* does not require them to be consulted, or is it because the consent of State voters has already been dealt with by section 123?

Section 123 confers a power on the Commonwealth Parliament to ‘increase, diminish or otherwise alter the limits of a State’. It may only do so, however, with the consent of the relevant State Parliaments and ‘the approval of the majority of the electors of the State voting upon the question’. An alternative way of altering the limits of a State is to do so by referendum under section 128 of the *Constitution*, but in such a case any alteration ‘increasing, diminishing, or otherwise altering the limits of the State’ must be approved by the majority of electors voting in each affected State.

Given that sections 123 and 128 require voters in affected States to approve any alteration to the ‘limits’ of the State, whether that alteration be implemented by Commonwealth legislation or constitutional amendment, and given that the formation of a new State from one or more existing States would necessarily alter the limits of those States,<sup>96</sup> the question arises as to whether the approval of voters is required before a new State may be formed under section 121 of the *Constitution*? Logically, the formation of a new State from territory in an existing State would appear more likely to affect the interests of voters (both in the new State and the rump of existing States), than a mere border alteration which deals with matters such as ownership of islands in the Murray River, or a redrawing of lines through a desert. From a democratic point of view, most would assume that voters in the area that would become a new State and voters in the rest of the affected existing State(s) ought to have a say in a referendum on whether the new State should be established.

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95 See Lane, above n 94, 824; Twomey, above n 90, 210–13.

96 There is an argument that the separation of an internal area of a State (such as the separation of the Australian Capital Territory from NSW) would not alter the ‘limits’ of the State, on the basis that this means the outer limits of the State: Quick and Garran, above n 94, 975. However, there is also an argument that the separation of an internal area from a State simply creates new limits by decreasing the territory of a State.

The reason for the difficulty in interpreting these provisions lies in their drafting history. The Constitutional Conventions of 1897 and 1898 sought only to require the approval of the relevant Parliaments. No vote of the people in affected States was required by section 123, as finally adopted by the 1898 Convention. Nor was there a specific requirement in section 128 that constitutional amendments altering the limits of States must be approved by the voters of such States.<sup>97</sup>

After the 1898 draft failed to meet the threshold to pass in a referendum in NSW on 3 June 1898, the NSW Parliament passed a resolution seeking the alteration of aspects of the proposed *Constitution*. It included a request that ‘better provision should be made against the alteration of the boundaries of a state without its own consent – namely, by the protection afforded by clause [128], as to the representation of the states’.<sup>98</sup> Clause 128 contained a paragraph which prevented any alteration to the *Constitution* that diminished the proportionate representation of any State in the Commonwealth Parliament, unless it was approved by a majority of the electors in that State. The New South Wales Parliament was concerned that the requirement in sections 123 and 124 of the *Constitution* that a State Parliament must consent before the State’s borders could be altered or territory separated from it, might be repealed by a referendum under section 128 that was passed in the other States. The NSW Parliament therefore latched onto the existing extra protection in clause 128 given to State representation in the Parliament, and sought to add to it protection of State borders, by requiring the consent of the voters of any affected State. This was not an attempt to transfer power from the Parliament to the voters.<sup>99</sup> The focus was on preventing section 128 from being used as a means of avoiding the requirement for State parliamentary consent in sections 123 and 124. The resolution, although only referring to State borders, was clearly intended to entrench also section 124 with respect to the separation of territory from a State.

This recommendation was taken by the NSW Premier, George Reid, to a Premiers’ Conference on 29 January 1899. The Premiers unanimously agreed on a number of changes to the draft *Constitution*, including that ‘[n]o alteration should be made in the limits of a State without the approval of its electors voting upon the question’.<sup>100</sup>

The NSW recommendation, which had focussed on section 128, was somehow turned into a more general principle concerning the approval of voters. Perhaps this was the price to be paid for securing special protection for State borders in

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97 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne 1898) 2542–3. Note that at that stage s 123 was numbered 122 and s 128 was numbered 127. To avoid confusion, the discussion below refers to the final numbering of provisions, rather than their clause numbers at the time of particular debates.

98 New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 October 1898, 1439, 1457; New South Wales, *Parliamentary Debates*, Legislative Council, 1 December 1898, 2794–5.

99 See the failed attempt to give affected voters a greater role: New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 October 1898, 1448, 1457.

100 John A La Nauze, *The Making of the Australian Constitution* (1972) 242. See also John Williams, *The Australian Constitution – A Documentary History* (2005) 1150, 1157.

section 128, or perhaps it was the consequence of misunderstanding or lax use of language. This principle was then expressed by the making of amendments to sections 123 and 128 that required the vote of electors in affected States. The amendments to these provisions were prepared and approved by the Premiers at their Conference, even though they had no drafter with them.<sup>101</sup> It is therefore unclear whether any consideration was given to how section 123 related to other provisions in Chapter VI of the *Constitution*.

Quick and Garran argued that section 123 was an ‘additional and substantive power’ rather than a limitation on powers elsewhere conferred.<sup>102</sup> They stated:

[I]t can hardly be contended that section 123 operates as a restriction of, or condition on, the exercise of the independent powers conferred by ... secs 121 and 124. It contains not the slightest allusion to the surrender of territory to the Commonwealth, or the establishment of new States; and it purports, not to restrict those power, but to confer an additional power.<sup>103</sup>

Quick and Garran suggested that section 123 was aimed at ‘the possible taking of country from one State and transferring it to another; such as for example the annexation of the Riverina to Victoria’.<sup>104</sup> If this were the mischief at which section 123 was directed, it would be curious that a vote of the people would only be required if the area were to be transferred to another State but not if the same area were to be established as a new State.

The views of Quick and Garran on this point have influenced other practitioners and commentators on the subject. Harrison Moore accepted Quick and Garran’s conclusion but described the outcome as ‘very curious’.<sup>105</sup> Likewise, the 1929 Royal Commission on the *Constitution* accepted that section 123 was ‘apparently intended to cover cases other than those contemplated in sections 121 and 124, and not restrict the powers conferred by those sections, but its effect is not quite clear’.<sup>106</sup> Lane has also accepted that section 123 ‘is a power-provision ... carrying within itself qualifications’. He did not consider it a limitation that affected the operation of section 124.<sup>107</sup> However, he also referred to the possibility of New England being established as a new State, noting that this would be a ‘step that would engage ss 123 and 124’.<sup>108</sup>

Isaac Isaacs, in an opinion from 1906, when he was Commonwealth Attorney-General, noted the amendments made to sections 123 and 128 after the Constitutional Convention had ended and concluded that ‘it would appear that their intention was to forbid any alteration of the limits of a State except with the

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101 La Nauze, above n 100, 243.

102 Quick and Garran, above n 94, 975.

103 Ibid. See also the opinion by Garran as Solicitor-General in 1922 to the same effect: Robert Garran, ‘Opinion on New State Carved Out of Existing State: Whether Approval at Referendum of State Voters Required in Addition to Consent of State Parliament’ in Patrick Brazil (ed), *Opinions of Attorneys-General of the Commonwealth of Australia* (1988) vol 2, 872–3.

104 Quick and Garran, above n 94, 975.

105 Moore, above n 94, 594.

106 Commonwealth, Royal Commission on the *Constitution of the Commonwealth, Report of the Royal Commission on the Constitution* (1929) 16.

107 Lane, above n 94, 848–9.

108 Ibid 824.

consent of its electors; but this is not, in my opinion their effect'.<sup>109</sup> Isaacs drew a distinction between sections 123 and 111, but did not consider whether section 123 affected the operation of section 121.<sup>110</sup>

The same issue arose in the High Court in *Paterson v O'Brien*.<sup>111</sup> The Court dismissed a claim that the surrender of the NT and the Australian Capital Territory to the Commonwealth under section 111 of the *Constitution* was invalid because no referendum was held and passed as required by section 123. The Court observed that sections 111 and 123 were 'quite disparate, dealing with quite different matters and powers'. Their Honours noted that section 111 'empowers the legislature of a State to surrender part of its territory to the Commonwealth'.<sup>112</sup> In contrast, section 123 gave to the Commonwealth Parliament a power to alter State limits. The two sources of power were quite different, so it did not make sense for one provision to be regarded as a limitation on the other. Moreover, even if the surrender of the territory by the State did have the effect of altering the limits of the State, this was not an alteration caused by Commonwealth legislation under section 123. Hence the referendum requirement was inapplicable.<sup>113</sup>

Moens and Trone have suggested that the reasoning in *Paterson v O'Brien* 'would appear to be applicable to the relationship between s 124 and s 123'.<sup>114</sup> However, there are significant differences. First, sections 123 and 124 are in the same Chapter of the *Constitution*, whereas sections 111 and 123 are in different Chapters. Sections 123 and 124 both concern exercises of legislative power by the Commonwealth Parliament, whereas section 111 concerns an exercise of power by the State Parliament, not the Commonwealth Parliament. The more persuasive argument is that section 124, which itself confers no power, is a qualification on the power conferred by section 121. If section 123 also qualified section 121, then the conditions in section 124 concerning the consent of State Parliaments would be redundant as section 123 also contains such a condition. On this basis, it would appear that no referendum of the voters in States affected by the creation of a new State would be required. However, the issue is not cut and dried<sup>115</sup> and, as noted above, there would be huge political pressure to hold such a referendum before establishing any new State.

It is also possible, as Nicholas pointed out in the 1935 NSW Royal Commission of Inquiry Respecting Areas in the State of New South Wales Suitable for Self-Government as States in the Commonwealth of Australia, that the Commonwealth Parliament, in imposing terms and conditions upon the

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109 Isaac Isaacs, 'Opinion on whether the Commonwealth has power to alter: modes of altering boundaries of Commonwealth and limits of States' in Patrick Brazil (ed), *Opinions of Attorneys-General of the Commonwealth of Australia* (1981) vol 1, 298, 300.

110 Ibid.

111 (1978) 138 CLR 276.

112 Ibid 280.

113 Ibid 281.

114 Gabriel Moens and John Trone, *Lumb and Moens' The Constitution of the Commonwealth of Australia Annotated* (6<sup>th</sup> ed, 2001) 393.

115 Commonwealth, *Report from the Joint Committee on Constitutional Review* (1959) 161.

admission or establishment of a new State, might require the passage of a referendum in the area concerned, or the whole of each affected State.<sup>116</sup>

The problems with the provisions in Chapter VI of the *Constitution* have led to many proposals to reform them,<sup>117</sup> to clarify their operation to make it easier to establish new States by excluding the requirement for the approval of the Parliament of a State affected by the loss of territory. Not one of these proposals has been regarded as a high enough priority by the Commonwealth Government to be put to the people in a referendum. Given the lack of enthusiasm for reform, the use of Chapter VI to create a federation of new regional States is unlikely. Moreover, even if a referendum were not required for the creation of new States, it would undoubtedly be required to amend other provisions, such as section 24 regarding the nexus and Chapter III regarding State courts, to make a federation of many more States workable.

## VII CONCLUSION

While the above discussion might seem unnecessarily negative, it is appropriate to add a note of reality to the frequently unrealistic claims made for regionalism as the cure for all federal ills. The problem is that when regionalism is raised in the debate on the reform of Australia's federal system, it is usually in the form of a phantasm. It has no form, no detail and no substance. It changes its shape every time it is conjured up in the debate. It can mean five different things or none and any discussion about it is usually at cross-purposes.

Smith has also pointed to this problem, noting the multiple reform agendas 'with scant details on the specifics', and commenting:

There are calls for the abolition of states and a move to a two tier system of government, but no consensus on what replaces them at the sub-national level (eg, how many regional governments, with what boundaries, which current state government expenditure responsibilities and taxing powers would divert to the Commonwealth and which would be assigned to the new regional governments, and the system to be put in place to ensure horizontal and vertical fiscal equalisation). Similarly, there are calls for new states, but no consensus on how many or where they would be located.<sup>118</sup>

She called on those who advocate regionalism to set out a concrete reform agenda which could be costed and compared to the current system.<sup>119</sup> It is only once a substantial and detailed regionalism proposal is advanced that a genuine assessment of its merits as a reform to the current federal system can be made. It

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116 Francis A Bland, *Government in Australia – Selected Readings* (2<sup>nd</sup> ed, 1944) 459.

117 Commonwealth, Royal Commission on the *Constitution of the Commonwealth*, *Report of the Royal Commission on the Constitution* (1929) 213–19, 256–9; New South Wales, Joint Committee of the Legislative Council and Legislative Assembly, *Report of the Joint Committee of the Legislative Council and Legislative Assembly upon the Australian Constitution* (1958) vii–ix, app II; Commonwealth, Joint Committee on Constitutional Review, *Report from the Joint Committee on Constitutional Review* (1959) 158; Commonwealth, *Proceedings of the Australian Constitutional Convention* (Melbourne, 1975) 176; Commonwealth, Constitutional Commission, *Final Report of the Constitutional Commission* (1988) 434.

118 Smith, above n 22, 205.

119 *Ibid.*

may be that the advantages of such a reform outweigh the disadvantages, but that assessment simply cannot yet be made.