ON THE TERRITORIAL EVOLUTION OF THE AUSTRALIAN FEDERATION IN THE 21ST CENTURY

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ABSTRACT

This paper draws attention to the historical territorial evolution of the Australia Federation, and to the potential gains from continuing this evolution in the 21st century. To this end, the paper contemplates the desirability of new Australian States. While the size of states is a function of a number of variables,[1] some Australian States can be identified as too large (in terms of area). An analogy with the United States motivates this conclusion. Specialisation and agglomeration gains envisage smaller states, even at the size of conurbations and their hinterland. The paper reimagines conurbations, such as metropolitan Brisbane, as States within the Federation, analogous to Hamburg in Germany, and Vienna in Austria. Creating specially crafted governance units can benefit both cities and regions due to their ability to tailor their policies to their individual socio-economic needs. After canvassing the constitutional and political hurdles, the paper identifies Commonwealth leadership as imperative for the creation of new States.

I INTRODUCTION

In 1949, David Henry Drummond noted that

> It is significant that since the Imperial Parliament handed over the control of Australia to the Commonwealth, no new State has been created, notwithstanding that Sir Henry Parkes, the founder of the Federation, said – 'that as a matter of reason and logical forecast, the division of the existing colonies into smaller areas to equalise the distribution of political power, will be the next great constitutional change'.[2]

This paper provides 'broad brush' analysis to inspire this 'next great constitutional change'. Although a proviso is in order: No matter how persuasive the rationale for new States is, there is still a need for further evaluation.

In April 2016, the Australian Broadcasting Corporation (ABC) reported calls for a referendum on a new State in north Queensland. It could have been the same classic, funny-and-slightly-frivolous, redrawing-the-map-of-Australia, holiday-season news story. But this time it did not seem to have the zest that could be mistaken for the zeal of a country 'facing a reckoning'. A

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[1] The size of states varies, *inter alia*, with population, technology and geography.

[2] David Henry Drummond, *The Australian Constitution and New States: The Case For Constitutional Review* (The NSW Constitutional League, 1949) 7.

number of parliamentarians[3] are arguing not only that the *status quo* was a 'sinkhole' of funding to 'keep building aquariums in Brisbane and office buildings and to buy votes',[4] but that the problem of 'misallocation of resources' was nationwide and in need of urgent attention. Sceptics, however, suggest that the creation of new States 'is a 19th century response to what is a 21st century problem',[5] and that the idea of a new small State without a big city 'is crazy because the way the economy is shaping up, it really is those city areas that are producing the high-value industries that the economy depends on'.[6] The sceptics also warn that creating new States would saddle 'struggling regional areas with massive bureaucracies'.[7] Their advice is to outsource these bureaucracies to Brisbane. According to some, the alternative to the *status quo* is to replace all States with regions that have more (administrative) powers. On the other hand, those who contemplate the territorial evolution of the other great Anglo-American federations, the United States and Canada, explain that new States are vital for any federal reform process, and core to a regional development strategy. Australia needs new States given the spread of its natural resources, the need for climate change adaptation strategies, future settlement patterns, and the likely focus of development in the 21st century.[8]

This paper starts from the proposition that a country the size of Australia (in terms of territory) cannot be governed centrally without inviting the tyranny seen in countries like China and Russia. The starting point for the following analysis is the premise of federalism for attaining the socio-economic aspirations of Australians in the 21st century.

To this end, the paper considers the size (area) of Australian States. The analysis flows from an analogy with the territorial evolution in the United States. While our own *Commonwealth Constitution* [9] has been influenced by the *Constitution of the United States*, this influence seems to have stopped short of appreciating the way the US had been constituted on the ground. Of course, we have had our share of territorial evolution, with the division of New South Wales into new colonies, including New Zealand. The fact that there is a chapter in the *Constitution* for the creation of new States, Ch VI, goes to show the potential for post-federation evolution. However, we have not witnessed the creation of new States since Federation and no changes

[3] Parliamentarians that support the referendum include Katter's Australian Party (KAP) MP for Mount Isa, Robbie Katter; independent MP Rob Pyne; and the Federal Minister for Northern Australia, Matt Canavan.
[4] Brigid Andersen, *Split Queensland in Two or Face 'A Reckoning Across Australia', Katter MP says* (1 April 2016) ABC News <http://www.abc.net.au/news/2016-04-01/push-for-north-queensland-to-become-a-separate-state/7293548>
[5] Ibid.
[6] Ibid.
[7] Ibid.
[8] See, eg, John Cole, 'The Historical Context of Australia's Federation' in *A Federation for the 21st Century* Research Report of the Committee for Economic Development of Australia (CEDA, 2014) 28, 36-37 < http://www.ceda.com.au/research-and-policy/research/2014/10/27/federalism> .
[9] The *Commonwealth Constitution* as promulgated under s 9 of the *Commonwealth of Australia Constitution Act 1900* (Imp).

to the Territories since 1931.[10] This paper looks at the constitutional and political issues behind this ossification.[11]

These issues predate the Australian Federation. They are reflected in proposals for new colonies across Australia and New Zealand. Some of these proposals were successful, such as in the case of New Zealand, Victoria, and Queensland, which separated from New South Wales in 1841, 1851, and 1859 respectively. However, during the period from 1852 to 2005, there were at least 19 unsuccessful proposals for new colonies and states.[12] Had these proposals been successful, the Australian Federation would have between 15 to 20 States and Territories.[13] The main reason these proposals were unsuccessful is the perceived financial burden arising from the procedure for introducing new States under Ch VI of the *Commonwealth Constitution*. The general view is that Ch VI (through s 124) requires, at least, the consent of the Parliament of the affected State. Political calculations are likely to see the State Parliament adding an extra hurdle: a referendum. History suggests that such referenda are likely to be defeated, even if by narrow margins. The 1967 referendum on the creation of a new State in northern New South Wales (New England) is a case in point.[14]

The paper is structured as follows. In Part II, the paper compares the territorial evolution in the United States and Australia. Part III explains the economic rationale for further territorial evolution in Australia, first by looking at the inhomogeneous economic development in some Australian States, and second by contemplating the potential gains from the creation of new States. Part IV provides case studies from Germany and Austria to elucidate the advantages of creating states at the city-scale. Part V discusses specific constitutional and political hurdles towards further territorial evolution in Australia. In particular, this part queries whether new States in Queensland could be financially sustainable without Brisbane. The last part, Part VI,

[10] In 1927 the Northern Territory was split into two territories, which were reunited in 1931.

[11] For an analysis of new-state proposals relative to other governance structures (such as regional governments or unification), see Mark Lea Drummond, *Costing Constitutional Change: Estimates of the Financial Benefits of New States, Regional Governments, Unification and Related Reforms* (PhD Thesis, University of Canberra, 2007). Drummond suggests that 'New States appear likely to cost in the order of $1 billion per annum per New State, and possibly more if costs associated with State-Territory borders are taken into account, but their financial viability could be vastly improved if New State formation follows or is accompanied by functional transfers to achieve national systems in areas such as health and education' (at ii). Drummond goes on to suggest that 'a small number of New States would appear to be affordable, at least, and would probably be most viable for regions in the central and northern parts of Western Australia and Queensland with populations ranging from 100,000 to 500,000 or so. Such regions have large land areas and associated potential for mineral wealth, and could avoid significant border costs if borders were placed through areas with little or no population' (at 441).

[12] See Drummond, above n 11, Appendix 2A.

[13] This number of States and Territories found merit in the scholarship of some commentators. See, eg, J I Moorehead, 'Why New States' in F A Bland (ed), *Changing the Constitution* (NSW Constitutional League, 1950) 111. Moorehead suggests that '[t]he existence of about 16 States, each guaranteed a definite proportion of loan and tax moneys and each entitled to special grants from the Grants Commission, would immeasurably strengthen the Federation [and] see the proper and full development of our resources': at 115-16, cited in Drummond, above n 11, 2A-2.

[14] However, Rienstra and Williams suggest that the most insurmountable hurdles remain political, and that a constitutional amendment replacing Parliament consent with referenda would be more conductive to the introduction of new states. See Anna Rienstra and George Williams, 'Redrawing the Federation: Creating New States from Australia's Existing States' (2015) 37 *Sydney Law Review* 357, 360.

concludes by summarising the main arguments for and against new States within the Commonwealth.

This paper hopes to inform the drive towards new States, especially in Queensland. The desirability of such territorial evolution is based on efficiency and equity considerations. The economic development of regional territories within Queensland necessitates new States within the Commonwealth. Such states are feasible. While the Commonwealth can, at least in theory, create new States without existing States consent, their creation will most likely require a political agreement between the Commonwealth and the relevant existing State Government. The Council of Australian Governments (COAG) is ideal for negotiating such agreements. However, given that the Federation is starving existing States financially,[15] scarcely populated regions, such as north Queensland, could be disadvantaged in assuming the mantle of statehood. This is a question of viability (rather than feasibility). Negotiating a new *Constitution* might be the only hope for a viable federal system in Australia in the 21st century.

II TERRITORIAL EVOLUTION

A *Comparison between the United States and Australia*

Given the influence of the United States on the origins of Australian federalism, it is useful to compare and contrast the territorial evolution of the two federations. The territorial extent of the United States in 1804 is shown in Figure 1. The figure illustrates a push westwards towards the Pacific Ocean, which entailed creating new states from territories that were previously held by France, Spain, and Mexico.

Figure 1: Map showing the United States in 1804 and its continental extent today. Large territories were in the hands of Spain, while others were still unclaimed.

The US evidences an evolution towards smaller states. For example, in 1804, the area around the Michigan peninsula was one territory. Today, it stretches across five states: Michigan, Ohio,

[15] See D Crowe, 'Federation "Starving" States', *The Australian* (Surry Hills), 27 October 2014, 1. There is also the contrary view that the States have contributed to this 'starving' through policies leading to bloated public sectors, and through refusing to apply State assets to maximum advantage.

Indiana, Illinois, and Wisconsin.[16] The territory was subdivided into these states in 1866. Similar divisions took place in the eastern parts of the US.[17]

Similarly, smaller States (colonies) were created from New South Wales. See Figure 2 below. In 1804, New Zealand, Queensland, Victoria, Tasmania, and areas of South Australia and the Northern Territory (east of the 133° E longitudinal line) were all still part of New South Wales.

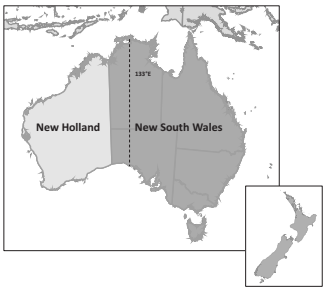

Figure 2: Map showing Australia in 1804. In 1804 there was only one colony, New South Wales (NSW). The western third of the continent was not claimed for the British Crown until 1827.

However, there is a key difference between Australia and the United States. As shown in Table 1 (below), the largest state in the US is 18 per cent of the total area of that country. In comparison, Western Australia (Queensland) accounts for 33 per cent (22 per cent) of the total area of Australia. After adjusting for the ratio of US to Australian total area, we find 'hyper-Alaskan' Commonwealth States.[18] The territorial evolution in the US went further than that in Australia.

In absolute terms, 15 per cent of Western Australia is equivalent to the area of Japan. Four per cent of Queensland is equivalent to the area of Ireland. Of course, in comparison to the geography of Japan and Ireland, these territories are quite inhospitable. However, this has not prevented the emergence of world cities such as Perth and Brisbane. Las Vegas, Dubai and Abu Dhabi emerged in even harsher conditions. Advances in technology, for example, water desalination, are making these cities feasible and viable.

[16] The 1804 territory also covered the eastern part of Minnesota.
[17] See generally Mark Stein, *How the States Got Their Shapes* (HarperCollins, 2009); M I Glassner, *Political Geography* (John Wiley & Sons, 1993); Carol Berkin et al, *Making America: A History of the United States* (Cengage Learning, 7th ed, 2014); Robert D Johnston and Douglas Brinkley, *The Making of America: The History of the United States from 1492 to the Present* (National Geographic, revised ed, 2010). See also Michael J Trinklein, *Lost States: True Stories of Texlahoma, Transylvania, and Other States That Never Made It* (Quirk Books, 2010).
[18] It is also instructive to look at other large countries. In Russia, the largest subdivision, the Sakha Republic, is 18 per cent of the total area (17 million km^2). In Canada, the largest province is 21 per cent of the area of Canada (roughly 10 million km^2). The largest state in Brazil accounts for 18 per cent of the total area (8.5 million km^2). Even in China (a unitary state), the largest region is only 17 per cent of the area of China (9.6 million km^2).

United States	Area (km^2)		**Australia**	Area (km^2)	
Alaska	1,723,337	18%	Western Australia	2,529,875	33%
Texas	695,662	7%	Queensland	1,730,648	22%
California	423,967	4%	Northern Territory	1,349,129	18%
Montana	380,831	4%	South Australia	983,482	13%
New Mexico	314,917	3%	New South Wales	800,642	10%
Arizona	295,234	3%	Victoria	227,416	3%
US total area (km^2)	9,833,517		Australia total area (km^2)	7,692,024	

Table 1: The area of the six largest States or Territories in the US and Australia as a percentage of total area in each country.

Large Australian States and Territories have a common denominator: a significant proportion above the Tropic of Capricorn. This region, which includes almost half of Western Australia, three-quarters of Queensland and 80 per cent of the Northern Territory, is referred to as Northern Australia. The area covers three million square kilometres (almost the size of India — the seventh largest country in the world) but is home to only one million people.

To understand the consequences, consider the population density in the US and Australia. Given a population ratio of 14:1, a direct comparison between their population densities is not useful. Notwithstanding, a closer look at Figure 3 suggests common features. First, within each State's limits, there is an increase in population density. There is a high-density nucleus. Second, smaller States seem to have higher population density per square kilometre. In fact, the highest population density in Australia belongs to the Australian Capital Territory (ACT), followed by Victoria, New South Wales and Tasmania. Similarly, in the US, the highest population density goes to the District of Columbia, followed by New Jersey, Puerto Rico, Rhodes Island, and Massachusetts. Hence, it is reasonable to suggest that increasing the number of States in Australia could result in higher-density population nuclei. Smaller size states are generally able to attain higher population density. Taking this density to be a proxy for socio-economic development,[19] we can expect the size of states to have an inverse effect on economic development.

[19] See, eg, Masahisa Fujita and Jacques-Francois Thisse, *Economics of Agglomeration: Cities, Industrial Location, and Globalization* (Cambridge University Press, 2nd ed, 2013).

Figure 3: The population density of the US and Australia mapped onto State and Territory boundaries. The figure illustrates the emergence of population clusters within state boundaries. Sources: the United States Census Bureau (2000 Census) and the Australian Bureau of Statistics (ABS) (Census of Population and Housing 2001).

III THE RATIONALE FOR NEW STATES

To get choices right, we need to mull over their economic rationale. Research seems to provide helpful normative signals as to optimal jurisdictional size. For example, internal political efficacy and citizen participation were found to be inversely proportional to the size of jurisdictions (in terms of population).[20] More recently, researchers found direct proportionality between size and public goods. For example, where the primary service is 'rubbish collection', a local government area would be ideal with 5,000 inhabitants. As more services are added, the optimal size of the jurisdiction adjusts upwards.[21] Hence, in the Australian context, as more functions are transferred to Canberra, the size of States should adjust downwards.[22]

[20] See David Dreyer Lassen and Søren Serritzlew, 'Jurisdiction Size and Local Democracy: Evidence on Internal Political Efficacy from Large-scale Municipal Reform' (2011) 105(2) *American Political Science Review* 238; J E Oliver, 'City Size and Civic Involvement in Metropolitan America' (2000) 94 (2) *American Political Science Review* 361.

[21] Martin Bækgaard, Søren Serritzlew and Kim M Sønderskov, 'The Hunt for the Optimal Jurisdiction Size: Looking for Simpler Questions that Can Be Answered' (Working Paper, Department of Political Science, Aarhus University, October 2013). But see also J Blom-Hansen, K Houlberg and S Serritzlew 'Size, Democracy, and the Economic Costs of Running the Political System' (2014) 58 *American Journal of Political Science* 790. Blom-Hansen et al suggest an inverse proportionality between size and administrative costs.

[22] While the research relates to population size, given the agglomeration benefits discussed earlier, the territorial extent of states should also adjust downwards.

The rationale for smaller jurisdictions goes back to the idea of 'Tieboutian sorting', where citizens are able to 'vote with their feet'.[23] This sorting could enable the public sector, for example, in Northern Australia, to emulate the efficiency of competitive markets. However, a *caveat* is in order. The following analysis provides only a sketch of the propositions therein. The intention is not to furnish a literature review or original empirical research. The intention is to provide a reference point, which remains in need of further development as discussed in the penultimate section.

A *Development in the Large Australian States is Inhomogeneous*

The proposition is that there is a positive correlation between the size of Queensland and the divergent socio-economic development within its boundary.

On 18 June 2015, the Australian Government released the first ever White Paper on developing Northern Australia.[24] The paper describes this region, which accounts for 40 per cent of Australia's area, as having 'untapped promise'.[25] For example, in Queensland, 75 per cent of the population aggregates in the south-eastern corner. Only 10 per cent live in northern Queensland. Brisbane alone accounts for half of the GDP.[26] The rest of the State continues to face limited water resources and limited infrastructure.[27] While over the last decade the total capital expenditure in Northern Australia has risen to around twice the level of investment across the rest of Australia,[28] the region is still lagging behind conurbations south of the Tropic of Capricorn in terms of development. Take for example the number of universities. There are only three: Charles Darwin (Northern Territory), James Cook (Queensland), and Central Queensland, out of 43 accredited universities across Australia. More importantly, the economies of Northern Australia and those south of the Tropic of Capricorn are heterogeneous. In 2012-2013, Northern Australia's economy accounted for 55 per cent of Australia's total exports.[29] The two main commodities are minerals and energy resources, and livestock. This economy is largely a primary resources economy. On the other hand, economies in major conurbations are tilted towards services and white-collar industries. For example, Brisbane's economy is driven by higher education, financial services, and information technology. This is not surprising given the high population density in urban areas.

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[23] Charles Tiebout, 'A Pure Theory of Local Expenditures' (1956) 64(5) *The Journal of Political Economy* 416. See also B F Gussen, 'On the Problem of Scale: Spinozistic Sovereignty as the Logical Foundation of Constitutional Economics' (2013) 7 (1) *The Journal of Philosophical Economics*; B F Gussen, 'On the Problem of Scale: Hayek, Kohr, Jacobs and the Reinvention of the Political State' (2013) 24 (1) *Constitutional Political Economy* 19; B F Gussen 'On the Problem of Scale: A General Theory of Morphogenesis and Normative Policy Signals for Economic Evolution' (2015) 12 (1) *Evolutionary and Institutional Economics Review* 81.
[24] Australian Government, *Our North, Our Future: White Paper on Developing Northern Australia* (2015) <http://northernaustralia.gov.au/files/files/NAWP-FullReport.pdf>.
[25] Ibid 1.
[26] SGS, *Australian Cities Accounts 2014-15* (SGS Economics and Planning, 2015).
[27] Australian Government, *Northern Australia: Emerging Opportunities in an Advanced Ecnonomy* (2015) < file:///C:/Users/u1065471/Downloads/Northern-Australia-emerging-opportunities-in-an-advanced-economy%20(2).pdf>.
[28] White Paper, above n 24, 140.
[29] Ibid.

There is a clear socio-economic differentiation within Queensland. It is hence reasonable to contemplate a role for a form of 'specialisation' for these heterogeneous territorial parts. The next section elaborates on this proposition.

B *Specialisation in Australia's Territorial Evolution in the 21st Century*

Governance is identified in the White Paper as an area in need of improvement. While the White Paper does not detail institutional arrangements to improve governance, it suggests, *inter alia*, the need for improving the links between different levels of government.[30] In addition, there are suggestions for public-private partnership under existing frameworks, such as the infrastructure connectivity agenda of the Association of Southeast Asian Nations (ASEAN).[31]

Given the uneven socio-economic development in larger Australian States, there is a need to redraw their boundaries. For example, Queensland could be subdivided into four states: two above the Tropic of the Capricorn, one from Noosa to the Gold Coast, and eastwards to Toowoomba (what Asher Judah refers to as Oxley),[32] and one covering the remaining area.

Figure 4: A stylised version of the Pape proposal for new States in Queensland:[33] North Queensland, Central Queensland, South Queensland and Oxley. The figure also shows the largest city in each state.

[30] Ibid 14.
[31] Ibid 12.
[32] Asher Judah, *The Australian Century* (Connor Court Ballan, 2014). Judah argues that Australia is not a continent but an archipelago of urban islands. For example, he re-imagines greater Brisbane as the 'Oxley' island, greater Sydney as 'Cumberland,' greater Melbourne as 'Yarra,' greater Adelaide as 'Vincent,' and greater Perth as 'Swan.' These islands account for 60 per cent of the population of Australia. A secondary chain of around 100 urban 'islets' accounts for another 25 per cent. Judah's key point is that the governance of Australia should be based on this archipelago, rather than the existing continental model. Our political organisation should be aligned with this reality by introducing new States that cater to the needs of these islands and islets.
[33] For the Pape proposal, see Denis Gregory, 'The Man Who's Creating a United States of Australia', *Sun-Herald* (Sydney), 11 May 2003, 13; Also cited in Geoffrey Blainey, 'Why Every Major Region Should Be Its Own State' in Wayne Hudson and AJ Brown (eds), *Restructuring Australia* (Federation Press, 2004) 26, 35.

Of course, theoretically at least, one could envisage subdividing Queensland into smaller units, but this brings viability into question. One should remember that what is being proposed is evolutionary in nature. It is conceivable that further sub-division could become optimal once new high-density population nuclei emerge and grow. In other words, States should be seen as living organisms that continue to subdivide.[34]

A division as envisaged in Figure 4 elevates these new states from third-tier local area governments to constitutionally recognised States. The elimination of a whole layer of government is likely to result in efficiency gains, while the constitutional recognition is likely to strengthen their bargaining position vis-à-vis the Commonwealth. The new States would then be able to focus on the unique challenges that they face.

IV CASE STUDIES

The proposition for new States at the city scale is informed by a number of examples, especially from Germany and Austria. Hamburg and Vienna illustrate the merits of city-states. The following narrative briefly describes their institutional arrangements.

A *The German State of Hamburg*

The vision for Oxley is inspired by Hamburg, one of the largest cities in Germany and in Europe, and one of the most prosperous in the continent. Notwithstanding the divergence in the constitutional evolution of Australia and Germany, given its status as a city as well as a state (*Land*), Hamburg's economic development is insightful.[35] The city has an area of around 750 square kilometres and a population of two million. The metropolitan region (*Metropolregion Hamburg*) has an area of 26,000 square kilometres and a population of around five million. Its nominal GDP is over AUD 140 billion—around three per cent of the German GDP. In comparison, the Brisbane Metropolitan Area has an area of around 16,000 square kilometres and a population of around three million. The Brisbane Metropolitan Area's GDP at AUD 155 billion accounts for 10 per cent of Australia's GDP. [36]

Hamburg is governed by a Mayor who is also the minister-president (*Ministerpräsident*) or the 'prime minister', representing the head of the state and its government. The position corresponds to that of the premier of an Australian state. The government of Hamburg, which is divided into executive (the Senate or *Senat der Freien und Hansestadt Hamburg*), legislative (the State Parliament or *Hamburgische Bürgerschaft*, which is elected every four years) and judicial (18 courts, including the constitutional court or *Hamburgisches Verfassungsgericht*) branches, has competence areas ranging from community organisations (the boroughs or administrative districts) to state organisations (the Senate). The Hamburg City Hall (*Das Rathaus)* is also the seat for the State Senate.

[34] Cell division in living organisms enables growth. The same mechanism applies to societies and their governance. See, eg, Mario Bunge, *The Sociology-Philosophy Connection* (Transaction Publishers, 1999).
[35] The information in this section comes from the Official Hamburg Website <english.hamburg.de>.
[36] SGS, *Australian Cities Accounts 2014-15* (SGS Economics and Planning, 2015).

Hamburg is made up of seven administrative districts (*Bezirke*), which are subdivided into 104 quarters (*Stadtteile*). Each administrative district is headed by a municipal councillor (*Bezirksamtsleiter*), who together with between 45-57 representatives (depending on the population size in the district) are elected alongside the State Parliament. The city is also part of the Hamburg Metropolitan Region which in addition to Hamburg's districts comprises districts from the states of Lower Saxony, Schleswig-Holstein and Mecklenburg-Vorpommern. There are around 800 cities and towns in this region.

It is Europe's second biggest port and Germany's largest trading centre. It is Germany's 'Gateway to the World'. The main sectors of the Hamburg economy are built around 'competence clusters' such as 'aviation, IT and media, logistics, life sciences, nanotechnology, renewable energies, and trade with China'.[37] Its major employers include the logistics industry, companies involved in foreign trade, and banks and insurance firms. The main sectors remain aerospace and media.[38] Hamburg's economy is dominated by companies such as Airbus, Beiersdorf, Hapag-Lloyd, Helm, Olympus, Otto Versand, Panasonic and Tchibo. The city is also the headquarters for iconic publications such as Der Zeit, Der Spiegel and Stern. Highly productive dairy, fruit and vegetable farms are also located in its hinterland. The city is the quintessential example of how 'a peripheral city can make the best of its location and the opportunities that come its way'.[39] The economy, especially the information technology sector, is boosted by four public and private universities and around thirty institutions, including the University of Hamburg, and the Hamburg-Harburg Technical University. Links between universities, institutes and companies help realise advances in life sciences, nanotechnology and energy.[40]

Hamburg is a resilient city.[41] For example, even during periods of economic stagnation, it grew its population to become the second largest city in Germany—mostly through the immigration of skilled workers from Central Europe. Hamburg is one of the few cities in Germany favoured by migrants from Central Europe in the 1990s.[42] This was encouraged by Hamburg's slogan of 'growing city'.

B *The Austrian State of Vienna*

Oxley is also inspired by Vienna. Vienna is not only Austria's capital city, but also one of its nine states (or federal provinces), and a charter city in its own right. Vienna's special position within the (federal) Republic of Austria means that it is a capital, a federal state, and a municipality with a legal status as a charter city. Notwithstanding the historical institutional divergence between Europe and Australia, Vienna is informative for new states at the city scale.

[37] Peter Karl Kresl, *Planning Cities for the Future: The Successes and Failures of Urban Economic Strategies in Europe* (Edward Edgar, 2007) 132.
[38] Ibid 105.
[39] Ibid 106.
[40] Ibid 132.
[41] Ibid 132.
[42] Ibid 102.

Vienna's statehood within Austria was granted by the Federal Constitution of 1920 and has been in force since January 1922. The mayor of the city is also the governor of the state (*Landeshauptmann*). The city-state has an area of around 414,000 square kilometres and a population of just under two million. Vienna's status was the culmination of a long period of *de facto* autonomy before World War I. However, formal statehood entitled the city to its own legislative body and executive government. It also entitles the city to direct representation in the Federal Assembly (or Chamber of Provinces), which serves as Austria's second chamber for federal legislation. This representation is analogous to the one that Hamburg has in the *Bundesrat*. The establishment of Vienna as a state seems to have resulted from a divorce of convenience between Vienna and Lower Austria (*Niederösterreich*) (one of the other nine states), for which Vienna served as a capital. This was a convenient divorce given the agrarian nature of Lower Austria, and the 'hydrocephalus' nature of Vienna (referring to its high unemployment rate after World War I). The former was squarely conservative, while the latter was in the camp of the Christian social movement.[43] Hence, the governance structures at the state and municipal levels have historically been associated with 'Red Vienna': a rich history of social welfare policies (see below).[44]

The municipality of Vienna has three bodies: the City Council, the City Government or Senate, and the Mayor. The city has 23 districts (*Wiener Gemeindebezirke*) which evolved from the 19th century to include surrounding villages and communities. Each of these districts has a political head (*Bezirksvorsteher*), and a district assembly (*Bezirksvertretung*). The city is described as an 'agglutination of villages (known as *Vororte*)'.[45]

Being the capital city, Vienna houses the Federal Parliament, the head of state, the federal government, and the highest courts. It is no surprise then that Vienna is Austria's largest city, and cultural and economic hub. This capital status suggests ties with economic, political and military power brokers. In fact, Vienna accounts for over a quarter of Austria's GDP. However, since the 1920s, the city-state has won the nickname 'Red Vienna', as it consistently voted for social welfare reforms. Even before World War I, Viennese politics were dominated by Christian and democratic social political parties. In particular, the Social Democratic Party (*Sozialdemokratische Partei Österreichs*, SPÖ), previously (from 1888 to 1945) the Social Democratic Workers' Party of Austria (*Sozialdemokratische Arbeiterpartei Österreichs*, SDAPÖ), and a member of the Labour and Socialist International from 1923-1940, has been able to hold a majority of seats in the Vienna City Council and govern alone for most of the 20th century. 'Red Vienna' became a socialist enclave within a conservative nation.[46]

[43] N Parsons, *Vienna: A Cultural History* (Oxford University Press, 2009) 13.
[44] V Redak, A Novy and J Becker 'Modernizing or Polarizing Vienna?' in F Moulaert et al (eds), *The Globalized City: Economic Restructuring and Social Polarization in European Cities* (Oxford University Press, 2005)167-80. Note that the social and Christian democratic movements register similar politics domination in Hamburg.
[45] Parsons, above n 43, xvii.
[46] P Pelinka, *Eine kurze Geschichte der SPÖ. Ereignisse, Persönlichkeiten, Jahreszahlen* (Ueberreuter, 2005).

V DISCUSSION

So far, the analysis has looked at creating new States. The proposition is that dividing existing States provides efficiency gains from specialisation. The new States could also be modelled after Asher Judah's Oxley (greater Brisbane),[47] which provides gains not just from specialisation, but also from agglomeration. New states should be governed according to a constitution adopted by their own constituencies. The key criterion is that some States should have a wider margin of autonomy. The current approach of one-size-fits-all can only exacerbate the low economic growth rates we witness today. These States allow the Federation to leverage jurisdictional asymmetries, to the end of boosting economic and social development, in urban and regional (rural) areas.

The remainder of this part looks at some of the salient issues relating to the creation of new states, especially in Queensland. The same arguments can be made in relation to Western Australia.

A *Are the New States Financially Sustainable without Brisbane?*

Even if the creation of new capitals is an opportunity for investment and job creation, is it possible for these capitals to be sustainable? Would people actually want to live there?

The key to answering these questions is 'asymmetric federalism'. The prism through which a 'better' federal system can be discerned is *development*. In its widest sense, development refers to political, social and economic spheres. The word comes from the prefix '*de'* or 'undo' and the stem '*veloper'* which means 'wrap up'. The German counterpart is '*Entwicklung'* which also has the '*ent'* and '*wickeln'* elements. The *hypostasis* of development is a process of unwinding or unwrapping of space.[48] In terms of constitutional designs, development is grounded in the unwrapping of jurisdictions, which the Romans identified as '*colonia'* (rather than '*municipia'*, or administrative entities). The same idea was later adopted by the British Empire. '*Colonia'* were settlements at the fringes of the Roman Empire, usually in newly conquered areas, where land was granted to Roman citizens as an incentive to move there. Many Roman colonies also enjoyed tax benefits as incentives to draw population and industry into these frontlines.[49] One such colony was Jerusalem (*Colonia Aelia Capitolina*). There were, in fact, many types of *coloniae*. Two are relevant to this discussion: the Roman type (*coloniae civium Romanorum* or *coloniae maritimae*), and the Latin type (*coloniae Latinae*).[50] The former were small towns usually built near the sea. The latter were large military strongholds at the borders of the Empire. The existence of these different types of colonies suggests that the Roman Empire differentiated the legal systems of its cities and towns, even in relation to

[47] Judah, above n 32.
[48] Henri Lefebvre, *La Production de L'Espace* (Anthropos, 1974).
[49] See Lesley Adkins and Roy A Adkins, 'Coloniae' in L Adkins and RA Adkins (eds), *Handbook to Life in Ancient Rome* (Oxford University Press, 1994); M Bunson, 'Colonia (Roman)' in M Bunson (ed), *Encyclopedia of the Roman Empire* (Facts on File , 1994).
[50] J Lendering, *Coloniae* (2006) <Livius.org>.

citizenship rights.[51] It was this unwrapping of jurisdictions that allowed for the development of the Roman Empire to the extent that it did.

The same idea motivates 'asymmetric federalism' in Australia. Examples include Spain, where the central government grants different levels of autonomy. Salient examples include Catalonia and Andalusia.[52] Similarly, in Italy, some regions are granted special status. For example, Sicily gets to keep all taxes raised on the island.[53] Even in the United Kingdom, Scotland and Wales are afforded legislative powers not mirrored in England (the West Lothian question).[54] It is advantageous to contemplate similar asymmetries to help new Commonwealth States become viable. Possibilities include special arrangements under s 96 of the *Commonwealth Constitution*.

B *What are the Constitutional Hurdles?*

Chapter VI of the *Constitution,* consisting of ss 121-124, provides mechanisms for the creation of new States and Territories. The following discussion looks at the operation of Ch VI and the constitutional hurdles associated with ss 121-124. The analysis does not only suggest that the creation of new states does not require referenda,[55] but also that ss 121, 123 and 124 should be interpreted as alternative mechanisms. This is analogous to the language in s 122, which envisages three different ways of acquiring territories by the Commonwealth: through surrender by any State, by placement by the Queen under Commonwealth authority, or '*otherwise acquired by the Commonwealth*'. The procedures in ss 123 and 124 are alternatives to the wider power under s 121. Similar to the language in s 123, the other sections in Ch VI are worded as additional and substantive powers.[56] Just as s 123 does not restrict ss 121 and 124, the other sections in Ch VI do not restrict s 121. The analysis also indicates a possible revival of the royal prerogative in the case of new States in Queensland, and potentially in other exiting States.

1 *Admitting or Establishing New States*

Under s 121, the Commonwealth Parliament has the power to 'admit' or 'establish' new States under any terms and conditions it thinks fit, including the extent of representation in either House of Parliament. The difference between s 121 and its US counterpart is instructive. In the US art IV § 3(1) states that 'New States may be admitted by the Congress into this Union.' In

[51] Ibid.
[52] See Victor Ferreres Comella, *The Constitution of Spain: A Contextual Analysis* (Hart Publishing, 2013).
[53] See Donald Sassoon, *Contemporary Italy: Politics, Economy and Society Since 1945* (Routledge, 2nd ed, 1997).
[54] See Cornelia Cecilia Eglantine (ed), *West Lothian Question: England, Federalism, Greater London* (TypPRESS, 2012).

[55] While the matter has not been judicially considered, the preferable view is that s 123 does not impose a condition on the formation of new states. See Rienstra and Williams, above n 14, 366.
[56] See John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths Australian, revised edition, 2015) § 474 (975). Cf Quick and Garran at § 475, where they suggest that s 124 'does not contain a fresh grant of power, but merely indicates several methods according to which the power granted by s 121 may be exercised' (at 977). In contrast, s 123 is 'worded, not as a limitation of powers elsewhere conferred, but as an additional and substantive power' (at 975).

contrast, s 121 states that the Commonwealth Parliament 'may *admit* to the Commonwealth or *establish* new States' (emphasis added). Moreover, the predecessor of this section (clause 114) appeared in the Commonwealth Bill of 1891 with the words 'establish *and* admit' rather than 'admit … *or* establish' found in s 121.[57] The interesting point is whether there is a difference between 'admit' and 'establish'. Is there any difference between admitting a new state and establishing a new one? At the third (Melbourne) session of the Australasian Federal Convention of 1897/8 there was a debate on the words 'admit' and 'establish'.[58] During the Convention, part of the debate on clause 114 was as follows:[59]

> Mr. BARTON (New South Wales). -
>
> This matter has not escaped the attention of the Drafting Committee, but so far they do not see that it is necessary to make any-alteration in this particular. The clause provides that the Parliament may, from time to time, admit to the Commonwealth any of the 'existing colonies'. That is, any of the colonies in their existing condition, and it also provides that the Parliament may, from time to time, establish new States. If an existing colony is sub-divided and becomes, say, instead of the colony of Queensland, three other colonies, although embracing the same territorial area as Queensland, they can be admitted to the Federation under the provision allowing the Parliament to establish new states [sic]. The admission phrase is designedly used so as to enable it to apply only to those colonies which might at first enter the Federation, and with their existing autonomy, and the remainder of the clause is intended to apply to the other colonies …

Later in the debate, the key concern was articulated as follows:[60]

> Mr. WALKER (New South Wales). -
>
> As the leader of the Convention has referred to clause 117 [which became s 124], I would draw attention to the fact that the great obstacle which prevents Queensland from joining the Federation is that at the present time the colony may be subdivided upon petition to Her Majesty the Queen, and a large proportion of the people there are afraid to come under a Constitution which might take away Her Majesty's prerogative in this respect, and prevent any division of the colony without the consent of the state Parliament. That was really the reason why the Queensland Federal Bill was not passed.

I submit that the use of 'or' instead of 'and' suggests a shift from non-contrasting procedures to alternative ones. Under s 121, new states could be created by two alternative mechanisms: by admission or by establishment. The former allows an existing entity to become a new State,[61] for example the Northern Territory, or even a sovereign country such as New Zealand. The latter sets up an entity as a new State, *ab initio*, through procedures such as those in ss 123 and 124. There are however other ways of establishing new states.

Under s 121, the Commonwealth Parliament can admit or establish new states through s 111 of the *Constitution*.[62] The section provides a mechanism through which State Parliaments can surrender any part of the State to the Commonwealth: either to the Commonwealth Parliament

[57] Ibid 967-68.
[58] *Official Record of the Debates of the Australasian Federal Convention,* Melbourne, 8 February 1898, 694-98.
[59] Ibid 696.
[60] Ibid 697.
[61] Examples of the entities that could be admitted are given by Quick and Garran, above n 56, at § 470 (967-69).
[62] On the influence of the *United States Constitution* on s 111, see Quick and Garran, above n 56, 941.

or to the Governor-General in Council.[63] Once this surrender is accepted by the Commonwealth, the surrendered territory becomes subject to the exclusive jurisdiction of the Commonwealth. The Commonwealth Parliament can then invoke s 121 to admit this territory as a new State, and impose the terms and conditions for its representation in either House of Parliament.

While the s 111 method (of establishing new States) would be available, it is not the only way in which new States could be established. Section 111 was inserted to allow for the creation of the ACT, not for the (indirect) creation of new States, which, as Quick and Garran point out, could occur under s 121 itself (without having to use s 111) 'by the partition of a State and the erection of its several parts into new States; by the union of the whole of two or more States so that such wholes may constitute one State; or by the junction of contiguous parts of two or more State, so that such parts may constitute one State'.[64] It is useful to emphasise that ss 111 and 121 provide two separate options for the establishment of new States—one direct and one indirect. As I point out in the next paragraph, one benefit of adopting a process through s 111 is that it would obviate the need for a referendum in the affected State or States, although the political reality is that it is very unlikely that any State government would willingly cede territory to the Commonwealth—without at least putting the matter to an election if not to a referendum.

However, a referendum is not necessary for the process in s 111. This was confirmed by the High Court in *Paterson v O'Brien*.[65] The case was about restraining electoral officers from causing an election to be made of senators in the Australian Capital Territory (ACT), and the Northern Territory (NT). The plaintiff's basic submission was that s 123 of the *Constitution* controlled s 111. In other words, a State Parliament might not validly surrender a part of the State to the Commonwealth except with the approval of a majority of the electors of the State, and that the Commonwealth could not validly accept such a surrender without the approval of a majority of the electors of the State. The essence of the plaintiff's argument was that a

[63] For example, in 1911, South Australia surrendered the Northern Territory to the Commonwealth through an agreement approved and ratified by the legislature of South Australia and the Commonwealth Parliament. The surrender was effected under s 111 of the *Constitution*, without a referendum. Under the agreement, the Commonwealth took over South Australia's loans in respect of the Territory. See Chief Justice Robert French, 'The Northern Territory — A Celebration of Constitutional History' (Speech delivered at the Kriewaldt Lecture for the centenary of the Northern Territory Supreme Court, 23 May 2011) <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj23may11.pdf>. See also *Paterson v O'Brien* (1978) 138 CLR 276, at 280 and 281 where the High Court of Australia specifically refers to the fact that any surrender of territory can be 'accepted' by the Commonwealth through either legislation or simply by executive act without legislation:

> Not only, in our opinion, is the power of the State legislature under s 111 unconditioned upon the approval of the electors of the State, but the ability of the Commonwealth to accept a surrender of State territory is unconditioned. Acceptance rests in the unconditioned discretion of the Commonwealth. Further, we are of opinion that that acceptance can be effected by an executive act of the Commonwealth. Acceptance within s 111 does not have to be by an act of the Parliament. Thus no statute approving or ratifying the acceptance is necessary, though because of the terms of a particular agreement, such a statute may be passed as was in fact the case in each of the surrenders of territory with which these cases are concerned.

[64] Quick and Garran, above n 56, 969.

[65] *Paterson v O'Brien* (1978) 138 CLR 276.

surrender of part of a State to the Commonwealth under s 111 is an alteration of the limits of that State within the meaning of s 123. The High Court disagreed with this reasoning:[66]

> Section 111 and s 123 are quite disparate, dealing with quite different matters and powers; they make no impact one on the other: s 111 empowers the legislature of a State to surrender part of its territory to the Commonwealth. It is of a different order to the power to alter State limits given to the Parliament by s 123. The only 'condition' imposed by s 111 on the power to surrender territory is that the surrender must be to and accepted by the Commonwealth.

More importantly, the Court indicated that no statute is required for approving or ratifying the acceptance. Acceptance rests on the discretion of the Commonwealth and can be effected by an executive act of the Commonwealth.[67]

A new State can be created by an agreement between a given State and the Commonwealth. For example, new States can be established by an agreement whereby Queensland surrenders North, Central and South Queensland to the Commonwealth (see Figure 4 above).The Commonwealth can then admit these new States to the Federation. One possible approach is for the Queensland and Commonwealth Parliaments to pass simultaneous statutes that are conditioned on the surrender and passing of these territories, and on acceptance by the Commonwealth. However, such statutes are not necessary under s 111.

In order for the indirect method (of creating a new State using ss 111 and 121) to work, there need to be further details as to the representation of new States in the Federal Parliament. In the US, the admission of new States is governed by the doctrine of the equality of states. This doctrine is a limitation upon the terms by which Congress admits a State.[68] Congress may not stipulate conditions for admission, but may in the admitting statutes, or subsequently, impose requirements after admission.[69] The same 'equal-footing' doctrine seems to hold in Australia. Section 121, which is based on the *US Constitution*, seems to be in line with this doctrine in that it allows for the imposition of requirements upon admission, including in relation to representation. Hence, in the US, it is established that '[e]quality of constitutional right and power is the condition of all the States of the Union, old and new'.[70] Hence, the s 121 stipulation of 'such terms and conditions, including the extent of representation in either House of Parliament, as [the Commonwealth Parliament] thinks fit' is not an unfettered power. The stipulation is still guided by checks and balances such as the US 'doctrine of the equality of

[66] Ibid 280.
[67] Ibid 281.
[68] *Coyle v Smith*, 221 US 559, 567 (1911).
[69] See *Pollard's Lessee v Hagan*, 3 How (44 US) 212, 224–225, 229–230 (1845); *Coyle v Smith*, 221 US 559, 573–574 (1911). See also *Bolln v Nebraska*, 176 US 83, 89 (1900); *Ward v Race Horse*, 163 US 504, 514 (1895); *Escanaba Co. v City of Chicago*, 107 US 678, 688 (1882); *Withers v Buckley*, 20 How (61 US) 84, 92 (1857). For further details see the *Congressional Research Services (CRS) Annotated Constitution*, 882-884 (art IV, Doctrine of the Equality of the States); available from the Legal Information Institute (LII) at https://www.law.cornell.edu/anncon/
[70] *Escanaba Co v Chicago*, 107 US 678, 689 (1883).

states'. Note, however, that this does not mean that all states will have the same representation. A proportional representation would still satisfy the equality requirement.[71]

However, a s 111 surrender and acceptance agreement might be unnecessary. Under s 121, the Commonwealth may be able to create new states through s 51(xxxix), which is analogous to the US 'ways and means' power in art I, § 8(18).[72] The Commonwealth has express authority to deal with matters of machinery, procedure and execution through implied or incidental powers to enable the creation of new States as envisaged under s 121. The same rationale extends to include alternatives such as compulsory acquisition (s 51(xxxi)). Where there is a petition for a new state, but no consent by the State Parliament, the Commonwealth can create a new State under s 51(xxxi).[73] The Commonwealth can act without State consent.

Section 51(xxxi) was introduced primarily for the acquisition of public works. However, a textual reading of the section suggests that territories could be acquired to admit new States, which is a 'purpose in respect of which the Parliament has power to make laws' under s 51(xxxi).[74] Where the creation of new States such as North Queensland is obstructed by the Queensland Parliament, s 51(xxxi) provides an alternative to the procedure in s 111.[75] The latter section was added to remove any doubt that States can cede territory to the Commonwealth. However, whether s 111 was 'primarily designed to meet the case of the seat of Government, and other places surrendered for public purposes, or whether it was intended to apply to territories generally, there is nothing in the [constitutional] debates to show'.[76] Section 51(xxxi) is analogous to amend V of the *United States Constitution*.[77] The section is seen as a constitutional safeguard where property is not to be taken for public use without just compensation. As a consequence, it has been interpreted broadly.[78] The test is whether the

[71] cf § 471 (970) where Quick and Garran expand on the approach in the US. See also John Pyke, Government Powers under a Federal Constitution: Constitutional Law in Australia (Thomson Reuters, 2017) 602.
[72] See Quick and Garran, above n 56, § 226 (652).
[73] On the exercise of the royal prerogative, see H V Evatt, *The Royal Prerogative* (Thomson Reuters, 1987).
[74] For a discussion of the US counterpart, the eminent domain under art I § 8(18) of the *US Constitution*, see Quick and Garran, above n 57, 761.
[75] Quick and Garran, above n 56, 942.
[76] See Quick and Garran, n 56, 941. Writing in 1901, they suggest that the acquisition of territory for the seat of Government 'seems to be provided for' by s 124, while the power to acquire territory by surrender and acceptance 'seems sufficiently implied by s 122': at 942. Citing authorities from the United States, they also suggest that s 111 is for acquiring territories for 'special public purposes', and hence territories thus acquired cannot be erected into new states: at 942. However, the language of these sections does not seem to support this conclusion. Section 51(xxxi) refers to a wide acquisition power: 'for any purpose in respect of which the Parliament has power to make laws'. The language of 'for any purpose' is substantially different from 'special public purposes'. Similarly, s 111, the alternative to s 51(xxxi), talks about the 'exclusive jurisdiction of the Commonwealth', which could only be limited by the Constitution itself. Where the Constitution bestows a clear power on the Commonwealth Parliament to admit new States into the Federation under s 121, it cannot be said that territory surrendered under s 111 limits the Commonwealth (Parliament) power to delegate the exclusive jurisdiction to a local legislature. If there is a limitation in s 111, it would be on the Commonwealth executive rather on the Commonwealth Parliament.
[77] Quick and Garran, n 56, § 217 (641).
[78] See *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193, 202.

acquisition is a necessary or characteristic feature of a means appropriate and adapted to the achievement of an objective falling within the power in s 121.[79]

There are two fundamental flaws with the s 51(xxxi) argument (above). First, it is doubtful whether it would extend to the acquisition of property simply to allow that property to then be established as a new State.[80] Second, any acquisition would not be from the affected State (with the exception of any part of the proposed property that was Crown Land); it would be from all of the landowners within the geographical confines of the proposed acquisition. As the only purpose of any such acquisition would be to create a new State, it is not clear what the Commonwealth would do with the land (e.g. sell it back to those from whom it compulsorily acquired it). It is both doubtful whether the acquisition power would extend to an acquisition for that purpose (and whether s 121 would even be held to be 'a purpose' in the required sense) and, practically, whether it would be workable.

Whether these limitations would be an effective barrier to using s 51(xxxi) for this purpose is yet to be seen. Legal fiction might be available to meet the unreasonable situation where new States cannot be created except through prerequisites that make their creation impossible. The utilitarian purpose behind the proposed s 51(xxxi) method (for the creation of new States) might after all chime with the *raison d'être* for the Federation more than limitations based on technical arguments.

But even if the s 51(xxxi) method is constitutional, will the 'on just terms' requirement be prohibitive? Section 51(xxxi) invites judicial review of the adequacy on which the territory of a new state is acquired.[81] High Court decisions suggest that 'on just terms' is concerned with fairness rather than compensation.[82] There is hence a need to balance the interests of the State where the territory of the new state is located, with the interest of communities in the new state. Given that Commonwealth sovereignty over the new state is only transitional, the passing of an admission bill might well constitute the 'just terms' for the acquisition. Some would argue that this approach is doubtful, especially given the transactions that would be required and the fact that they would not be with the State, or even 'communities', but with individual property holders. However, only testing these arguments in the High Court of Australia would provide a definitive answer as to the validity of the s 51(xxxvi) method.

However, even if s 51(xxxi) is not a viable means of circumventing a 'State consent' problem, the Commonwealth can obviate the need for State(s) consent by resuming the royal prerogative. This approach is discussed in more detail under the political hurdles (below).

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[79] See Peter Hanks, Frances Gordon and Graeme Hill, *Constitutional Law in Australia* (LexisNexis, 3rd ed, 2012) 569.
[80] See Quick & Garran, above n 56, §218 (642); and the comments in *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193, 200-02.
[81] However, compare the assertive approach of Latham CJ in *PJ Magennis Pty Ltd v The Commonwealth* (1949) 80 CLR 382, 397, with the reserved approach of Starke J in *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 291.
[82] See *Nelungaloo v The Commonwealth* (1948) 75 CLR 495, 569 (Dixon J).

2 *Formation of New States*

One rendition of the power under s 121 is provided in s 124. Section 124 provides for the '[f]ormation of new States' either by the separation of territory from a State, or the union of States or parts of States, but only with the consent of the Parliament(s) thereof. To better understand the operation of s 124, it should be compared to art IV § 3 of the *United States Constitution*, the 'Admission to the Union Clause' (on which it is based),[83] which states that:

> New states may be admitted by the Congress into this union; but no new states shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of the Congress.

Thirty-seven new states were admitted under this Clause. Most of these states were admitted after the people of a territory made their desires for statehood known to the federal government. Some states, such as Kentucky, were created from existing states. In Kentucky, which was part of Virginia, the residents petitioned the General Assembly and the Confederation Congress for separation from Virginia, and for statehood. The petition was followed by a number of constitutional conventions starting from 1784. Eventually, after Virginia and the Congress gave their consent, Kentucky was admitted as the 15th state, on 1 June 1792. The Australian procedure under s 124 is similar to this process.

3 *Alteration of State Limits*

Another rendition of the power under s 121 can be found in s 123. Section 123 provides for the alteration of the limits of a State, and for the alteration of territory belonging to a State, by the Commonwealth Parliament. The section requires: (1) the consent of the Parliament of the State, and (2) the approval of the majority of electors in that State. The section guards 'against the possible taking of country from one State and transferring it to another, such as for example the annexation of Riverina to Victoria'.[84] These requirements, however, do not act as limitations on the powers in s 111, or ss 121 and 124.[85]

4 *The Creation of Territories*

Similar to s 123 and 124, s 122 provides another option for the exercise of the power under s 121. Section 122 relates to the government of territories and gives the Parliament the power to make laws for the government of any territory. The section specifies three mechanisms through which a territory can come under the authority of the Commonwealth Parliament:

> The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

[83] See Quick and Garran, above n 56, 976.
[84] See Quick and Garran, n 56, 975.
[85] Ibid.

The first mechanism flows from the procedure in s 111 and confirms the exclusive jurisdiction of the Commonwealth over these territories.

C *What are the Political Hurdles?*

Recently, the current Queensland Premier, Annastacia Palaszczuk, suggested that 'Queensland should be bigger not smaller.'[86] This remark summarises the political resistance to new states. It is the same political resistance that saw Clause 117A negatived, over a century ago (see below). Under the current federal arrangement, State Parliaments have no incentive to release territories. The larger issue of reforming the Federation faces similar difficulties, as has been recently confirmed when the current Prime Minister, Malcolm Turnbull, after meeting State and Territory leaders, scrapped the Federation White Paper.[87] The political hurdles are significant. It would be naïve not to suggest that there will be vested interests militating against any changes to existing State boundaries.

But vested interests are not insurmountable. Inspiration comes again from Vienna, from a lawyer by the name of Benjamin Herzl, or as he became known later in life, Theodor Herzl:

> Our opponents maintain that we are confronted with insurmountable political obstacles, but that may be said of the smallest obstacle if one has no desire to surmount it.

Herzl was able to create a whole nation, let alone reinvent its identity. '[I]f you will it, it is no dream'.[88] It might take decades before there is momentum for change. Eventually, however, vested interests will be defeated by the strategic interests of Australia.

Political resistance to new States cannot be divorced from the democratic rationale underlying our system of government — a rationale that provides a strong case for new states. As pointed out by Rienstra and Williams 'the history of new state movements reveals that parliaments are unlikely to support the creation of a new state in the absence of a clear political mandate provided by a referendum'.[89] In Queensland, given the population concentration in the south-east, the 'No' vote is likely to prevail. Nevertheless, minorities' investment in creating new States could have a clear political signal, not just in Queensland, but in Canberra, and potentially even beyond.

Knowing that historically people have chosen to vote for the *status quo*, as only eight out of 44 referenda were carried, it is reasonable to expect any proposal for the creation of new States to be defeated. Nevertheless, there could be valuable lessons from those referenda that have been

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[86] Daryl Passmore, 'Referendum Queensland: MPs Will Force Referendum to Split Queensland in Two', *The Courier Mail* (online), 26 March 2016 < http://www.couriermail.com.au/news/queensland/queensland-government/referendum-queensland-mps-will-force-referendum-to-split-queensland-in-two/news-story/db33f9f3103008531585777eeb6e8e59>.

[87] Eliza Borrello, *Malcolm Turnbull Scraps Federation White Paper After $5 Million Work* (28 April 2016) ABC < http://www.abc.net.au/news/2016-04-28/malcolm-turnbulls-$5-million-tax-white-paper-scrapped/7367204>.

[88] Herzl's novel 'Altneuland' is credited as the source for this quote, although Herzl said 'if you do not will it, it is and will remain a fairy-tale' ('אגדה זו אין ,תרצו אם ;אגדה היא ואגדה ,תרצו לא ואם ,תישאר'). See Theodor Herzl, *Altneuland* (Hebrew) (Haifa Publishing, 1961) 226. For the original edition (in German) see Theodor Herzl, *Altneuland* (Hermann Seemann Nachfolger, 1902).

[89] See Rienstra and Williams, above n 14, 373.

carried, including those in favour of the 1901 Federation.[90] Probably, the fact that there were numerous constitutional conventions in the lead up to the Federation, suggests that changes to current State boundaries will have to go through a similar process. Maybe it will be a bi-partisan approach through a national constitutional commission to investigate territorial options and then go to the public for endorsement. The more people are aware of the facts and issues at stake, the more likely that they will accept change.

Another hurdle comes from s 124, which mandates the consent of the Parliament of the relevant State. It is useful to provide a historical note on this section.[91] At the third session of the Australasian Federal Convention (Melbourne, 22 January – 17 March 1898),[92] delegates thought that the power which the Queen then had to subdivide Queensland into a Northern and Central colonies should be preserved.[93] Objections to Clause 117 (what later came to be section 124) centred on the fact that:

> The event of Queensland coming into the Federation will depend upon Her Majesty's prerogative being maintained with regard to the division or separation of that colony. At present Her Majesty can sub-divide that colony upon a requisition from the inhabitants. We should, if possible, continue that power, so that if Queensland should come into the Federation, Northern and Central Queensland could, by petition to Her Majesty, have that portion of the colony, if they so desire, separated into another colony, and at the same time remain within the Commonwealth.[94]

In particular, Mr James Walker (delegate for New South Wales and a former resident of Queensland) proposed the insertion of the following clause (Clause 117A):

> If the colony of Queensland adopts this Constitution, or is admitted as a state of the Commonwealth, nothing in this Constitution shall be taken to impair any right which the Queen may be graciously pleased to exercise by virtue of Her Majesty's Royal prerogative or under any statute in respect of the division of Queensland into two or more colonies; but so that the Commonwealth shall retain the powers conferred on it by this Constitution to impose terms and conditions in respect of the establishment of any such colony as a state.[95]

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[90] Although, as pointed out by one of the reviewers of an earlier draft of this paper, referenda under the Constitution and the referenda that were conducted by the various colonies are quite different and should not be treated as one. Commonwealth referenda are much harder to pass because of the 'passage by both Houses' and the 'majority overall and a majority in a majority of states' provisions in s 128—as was reflected by the fact that the Federation referenda were passed at the first attempt in all States except NSW.

[91] See Quick and Garran, above n 56, 976.

[92] *Official Record of the Debates of the Australasian Federal Convention,* Melbourne, 8 February 1898, 699-700 (James Walker).

[93] See Imperial Acts 5 and 6 Vic c 76, s 51; 13 and 14 Vic c 59, s 32; 18 and 19 Vic c 54, s 7; 24 and 25 Vic c 44, s 2.

[94] *Official Record of the Debates of the Australasian Federal Convention,* Melbourne, 8 February 1898, 699 (James Walker).

[95] *Official Record of the Debates of the Australasian Federal Convention,* Melbourne, 1 March 1898, 1690 (James Walker). Mr Walker elaborated on the issue as follows (at 1690):

> We are all aware that one of the reasons why Queensland is not with us to-day [sic] is that in the Parliament of that colony the members for the Central and Northern Divisions voted against the Federal Enabling Bill because they were afraid, from the way in which the measure was introduced, that Queensland would be made one electorate, and that the members of the Federal Convention would therefore be largely elected by people resident in the Southern Division of the colony. In that case, they feared, if clause 117 [section 124] became a part of the Constitution, they would be deprived of the right of petitioning Her Majesty which they now have. It may be, perhaps, in the recollection of honourable members that on the 9th [of] April I presented at Adelaide a petition to the Convention

While the Northern and Central Separation Leagues supported Clause 117A, the Premier of Queensland, Sir Hugh Nelson, suggested that the Clause would be likely to injure the prospects of Federation in Queensland. Based on this feedback the Clause was negatived.[96] However, does negativing the Clause mean that the (Royal) prerogative is not available anymore? In the constitutional debates, the following was stated:

> Mr. BARTON (New South Wales). -
>
> I think the discussion which took place before raises a doubt whether there is any such right as my honorable friend wishes to preserve by this clause [Clause 117A]. The Acts on the subject are not very explicit, when one considers them in their chronological order, and in connexion with the action of the prerogative which has since taken place. It is a question whether any power to subdivide Queensland under Orders in Council or by letters patent has not been exhausted, so that it is not quite certain if it could have any effect.

It is submitted that the prerogative powers in relation to the subdivision of Queensland could well be in abeyance, however, it seems that the Commonwealth is able to revive the prerogative without the need to alter the *Constitution.* Under s 121, the Commonwealth is able to resume the prerogative to subdivide Queensland as it was petitioned and voted for by the Queensland Parliament on 4 November 1897.[97] Just as in the case of the UK Constitution, it might be practically impossible to avoid the 'clanking of mediaeval chains of the ghosts of the past'.[98]

The above historical note is informative in relation to the difficulties that need to be surmounted if Queensland is to be divided as envisaged even before federation. Under s 124, the Queensland Parliament will need to consent to the creation of new States out of the existing one. Given the population imbalance between south-east Queensland and the rest of the State, the same forces that prevented the inclusion of Clause 117A are likely to be still operative.

> from the Central Queensland Territorial Separation League. That petition has had the attention of the Queensland electors, and has not been dissented from. I think it would be well if I read a few extracts from it, showing the grounds on which the petitioners desire that a new clause shall be inserted in this Constitution so as to facilitate the entrance of Queensland into the Commonwealth. Before doing that I may mention that the colonies of Victoria and Queensland were separated from New South Wales on petition, and without the approval of the Parliament of New South Wales. In fact, Victoria would never have been able to secure separation from New South Wales if the consent of the New South Wales Parliament had been required. At the time Queensland was made into a separate colony, Her Majesty, as will be seen from the extracts I will presently read, reserved the right to separate Queensland into two or more colonies. The memorialists, amongst other things, made the following statements:
> *That, by Acts passed by the Parliament of Queensland, that colony has for certain administrative purposes been divided into three parts, described as the Southern Division, the Central Division, and the Northern Division respectively, with the several boundaries described in the 1st schedule to this memorial.*

[96] See *Official Record of the Debates of the Australasian Federal Convention,* Melbourne, 1 March 1898, 1690-1702 (James Walker), and 11 March 1898, 2398-2400 (James Walker).
[97] See *Official Record of the Debates of the Australasian Federal Convention,* Melbourne, 11 March 1898, 2400 (James Walker).
[98] *United Australia Ltd v. Barclays Bank Ltd* (1941) AC 1, 29 (Lord Atkin); *Council of Civil Service Unions v. Minister for the Civil Service* (1985) AC 374, 417 (Lord Roskill); *Bancoult, Regina (on the Application of) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2006] EWHC 1038 (Admin) [158] (Lord Hooper). Cited in Thomas Poole, 'United Kingdom: The Royal Prerogative' (2010) 8(1) *International Journal of Constitutional Law* (*I CON)* 146, 147.

Notwithstanding the wider power under s 121, the Council of Australian Governments (COAG) should play a key role in negotiating the creation of new states. The national significance of admitting new states into the Federation makes the COAG a natural venue for driving reform on this front. A ninth COAG Council could help the negotiation of intergovernmental surrender and admission agreements.

VI CONCLUSION

This paper is a modest contribution to the debate on the division of existing Commonwealth States. To motivate the discussion, the paper started by looking at the 'great constitutional change' that took place in the Unites States—a country that has a significant impact on our constitutional journey. In the US, the division of states into smaller areas continued long after federation. In comparison, the Australian States show resistance to any further division after federation. The analysis suggests that Western Australia and Queensland are too large in terms of area. They both have underdeveloped areas north of the Tropic of Capricorn (Northern Australia). The low population density in these areas contributes to the socio-economic challenges they face. Given gains from specialisation and agglomeration, subdividing these areas into new States could alleviate these challenges. Redrawing the boundaries should result in efficiencies from elevating the new States to (constitutionally recognised) second-tier governments, and from allowing these states to focus on the unique challenges that they face.

However, there are concerns as to the viability of new States, especially under the current fiscal imbalance between the States and the Commonwealth. To address these concerns, there is a need to move away from the current 'one-size-fits-all' approach and towards 'asymmetric federalism.' To tackle the low economic growth rates we witness today, some States should have a wider margin of autonomy (which would still satisfy the doctrine of equality between the States given the economic potential of each State). Roman colonies, where citizens enjoyed tax benefits as an incentive to move there, provide an example of this asymmetric approach. Spain, Italy and even the United Kingdom provide further examples of how this approach could help develop Northern Australia.

There are also constitutional and political hurdles. The consent of an existing State is a prerequisite for subdivision under some mechanisms in Ch VI of the *Constitution*. However, potentially, there are other mechanisms that do not require such consent. In particular, I have argued that s 121 confers on the Commonwealth the power to create new States without State consent. The relation of s 121 to the other sections in Ch VI should be understood as similar to the relation between s 111 and s 51(xxxi); they are alternative ways of achieving the same outcome, either with or without the consent of the States. Chapter VI allows for the creation of new States through alternative mechanisms. The widest, under s 121, gives the Commonwealth Parliament the power to admit or establish new States through procedures such as those in ss 111 and 51(xxxi), or through reviving the royal prerogative to subdivide Queensland. Another mechanism makes the formation of new States conditional on the consent of State Parliaments (s 124), while a third (s 123) enables the creation of new States through the alteration of State limits and territories, on the additional condition of approval by a referendum.

It is incumbent on the Commonwealth to show leadership in creating new States. The 'next great constitutional change' could see a new (ninth) COAG Council begin the process of consultation with State and Commonwealth governments, while s 121 and mechanisms such as s 51(xxxi) might be effective in establishing new States without the need for consent by State Parliaments and without the consent of the majority of electors in affected States.

Probably, new States are unlikely to pass muster if they have to emerge from the 'bowels' of the 1900 *Constitution*.[99] Maybe what is needed is a much bolder approach: a constitutional 'revolution' that not only patriates the current imperial instrument but also renegotiates a new constitution with the existing States and the Australian people. A 'revolution' that would see a rethinking of the republican question and a reimagining of our 'identity' *ex-post* the 'colonial flag.' In the words of Geoffrey Blainey:

> It is a frequent complaint that the Australian Constitution of 1901 belongs to the era of the T-Model Ford or even the horse and jinker, and therefore needs a new engine. Republicans continue to emphasise this argument, just as they did when in 1999 they called for the Constitution to be changed. Now, if this argument has some validity, it must apply just as much to the States as to the Commonwealth. While the Commonwealth is old, being a creation of the politicians and people of the late 1890s, the main States and their borders are even older. It is curious that a host of Australians should lament that the Commonwealth Constitution and therefore the federal system itself is in danger of becoming fossilised, but should be blind to the fact that the States themselves are in even more danger.[100]

Probably, reforming the Federation may require the adoption of a new constitution—maybe through a 'constitutional assembly' elected by the people to draft the constitution, and then having it voted on by the people. A new constitution that is alive to the demands of the 21st century might be a prerequisite for further territorial evolution. A new constitution is likely to need long fermentation before we are ready to toast its fruits of cultural maturity. Maybe coming of age for an 116-year-old federation is at least another century away.

[99] This is especially true if we envisage introducing many new States, which would take the total number of states in Australia to between 15 and 20 States. See Cheryl Saunders, 'The Constitutional Framework for a Regional Australia' in Wayne Hudson and AJ Brown (eds), *Restructuring Australia* (Federation Press, 2004) 63.

[100] Geoffrey Blainey, 'Why Every Major Region Should Be Its Own State' in Wayne Hudson and A J Brown (eds), *Restructuring Australia* (Federation Press, 2004) 26, 28.