

## Australia: Dualist in Form, Cooperative in Practice

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Australia is a federation in which the centre and constituent units each have an almost complete set of institutions of government in a style that is broadly typical of a common law parliamentary democracy. On the face of the Australian Constitution, each jurisdiction has considerable autonomy from the others in the design and operation of its own institutions. As in any federation, however, there is a range of ways in which the federal character of the polity affects the structure and operation of institutions and, conversely, in which the choice of institutions affects the dynamics of the federal system. Some are the consequence of the original design of the system of government. Others are the result of developments that have taken place over the course of more than 100 years since the Australian federation was established, including the reliance of governments on increasingly sophisticated forms of intergovernmental relations.

Australia was settled by the British from the end of the 18<sup>th</sup> century as six separate colonies scattered around the coast of the Australian continent and on the island of Tasmania. Over the following 100 years, the colonies gradually became self-governing, with their own constitutions and their own governing institutions, broadly in the British tradition. By the end of the 19<sup>th</sup> century, each colony had a parliamentary system with a bicameral legislature, from which the executive government was drawn; a governor, representing the Crown, who acted as local head of state; and a court system, with a Supreme Court at the apex within each colony, from which appeals could go to the Privy Council in London.

The colonies federated in 1901, under a constitution that borrowed primarily from Britain and from the United States. As a result, the Australian Constitution combines British-style parliamentary government with a federal system broadly along United States' lines. The Constitution allocates specific powers to the Commonwealth, mostly as concurrent powers, leaving residual power to the states. It also provides the framework for the Commonwealth institutions of government: Parliament, executive government and courts. This framework has been interpreted as mandating a separation of powers, with particular significance for the judicial branch of government, as the degree of separation between legislature and executive in a parliamentary system is necessarily rather weak.

On the face of it, therefore, Australia is a federation in which each sphere of government has a complete set of institutions of its own. There are some exceptions however. The most important concerns the courts. While each sphere of government in fact has its own court system, the Constitution allows the Commonwealth Parliament to give its jurisdiction to state courts, and this is often done; prosecutions for offences under federal law are one example. More importantly still, in a significant departure from the United States model, Australia has a single, final appellate court, the High Court of Australia, for both federal and state court systems. One result of this arrangement is that there is a single common law for the whole of the country.

A more unusual exception to the US model concerns the monarchy. Australia is still a constitutional monarchy, with Queen Elizabeth II as head of state in her capacity as Queen of Australia. She is represented in Australia by a governor-general, in the Commonwealth sphere, and governors in each state, who effectively perform all of her functions. This pattern of representation of the Queen in Australia is consistent with the dualist model; the monarchy itself, however, is a single institution, with no greater connection to any one jurisdiction than another. Australia has already had one failed vote in 1999 to establish a republic. If and when another

attempt is made, it will be necessary to consider how to choose a republican head of state in a manner that is both sufficiently democratic and sufficiently federal.

**Despite the duality of the institutions of the two spheres of government, federalism has a very considerable influence on the design of the central institutions.** Most obviously, the Commonwealth Parliament is bicameral, with a “popular” House, the House of Representatives, and a Senate, created as a federal chamber. Each original state is entitled to an equal number of senators (presently, 12) and the powers of the Senate are almost equal with those of the House of Representatives, with the exception of certain categories of money bills, which may not be initiated or amended in the Senate. State governments and parliaments also have some say over the manner and timing of Senate elections, unlike elections for the House of Representatives, which are solely within the responsibility of the Commonwealth itself.

Senators are directly elected, on a system of proportional representation, using each state as a single electorate. As a rule, senators act as representatives of their party, rather than as representatives of their state, although presumably they bring a state perspective to party deliberations. Within the Senate itself, senators typically vote on party lines. Usually, the party majority in the Senate differs from that in the House. In this way, the Senate operates as a check and balance in the system, blocking some government initiatives, requiring negotiation over others, and scrutinizing government action more carefully than is likely in the House of Representatives. There is a mechanism for the resolution of deadlocks, but it is time consuming and cumbersome, at least for the purpose for which it was designed.

Australians are divided on the merits of the Senate as a check on the power of the government in the House of Representatives. Change seems unlikely, however. A recent attempt by the Commonwealth government to stimulate interest in altering the Constitution to simplify the deadlock procedure in a way that would make it more likely that the views of the House would prevail was unsuccessful. For the moment the question may have been defused. In 2005, the governing coalition won a majority in the Senate for the first time in 30 years.

There are other, less obvious examples of federal influence on the design of central institutions as well. Constituencies for the House of Representatives cannot cross state boundaries. Each state is entitled to a minimum of five members in the House of Representatives, irrespective of the size of its population. The Commonwealth government is required, by legislation, to consult state governments in relation to High Court appointments. Many Commonwealth agencies have regional offices in most or all states. Alteration of the Constitution requires a positive vote at a referendum, with majorities in a majority of states, as well as a national majority.

The formal dualism of the Australian constitutional design is very considerably altered in practice by extensive intergovernmental cooperation.

Meetings of ministers from all jurisdictions take place at least annually in most areas of governmental activity. There is now an extensive network of ministerial councils, supported by intergovernmental meetings of public service officers and public officials of other kinds including, for example, parliamentary drafters. At the apex of this complex is the Council of Australian Governments, or COAG.

Second, there is a considerable fiscal imbalance in favour of the Commonwealth, which requires substantial transfers of revenue between the Commonwealth and the states each year. Many of these transfers are made on condition, for particular purposes. Acceptance of these transfers theoretically is voluntary. Nevertheless, in this way, the Commonwealth government and Parliament in fact exercise considerable control over areas of state responsibility.

In addition, Australia now has in place a wide range of highly complex intergovernmental legislative schemes, designed to achieve effective uniformity of legislation and administration on matters in which the Constitution divides responsibility between Australian governments. Typically, these schemes are agreed at meetings of ministers, who generally can rely on their parliaments to implement them, if legislative action is necessary. This form of executive federalism is now a pronounced feature of the Australian federation.

Intergovernmental cooperation in Australia is a response to perceived demands of efficiency, in a country with a relatively small and essentially homogenous population of 20 million people. However, given the constitutional structure of the system of government along lines that assume the responsibility of governments to parliaments and courts within each jurisdiction, some forms of cooperation also create concerns about transparency and accountability, which have not yet been effectively tackled.