



Foreign Relations in Australia: Evolution and Reform

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The federal distribution of foreign relations powers in Australia is closely connected to the evolution of Australia's independence from the United Kingdom. The consequence is that most foreign relations powers have been attributed to the Commonwealth although the Constitution scarcely deals with the subject at all. The High Court's broad interpretation of the Commonwealth's power to legislate with respect to "external affairs" means that it can be used to implement treaties on subjects that would otherwise be within State jurisdiction. This has led to reforms to the treaty-making process to increase transparency, accountability and consultation with the States.

Neither the Australian colonies nor the Commonwealth of Australia in the first decades of the 20th century possessed international personality or had significant powers in relation to foreign affairs. The foreign policy of Australia was still the primary concern of the United Kingdom. Australia could not enter into treaties on its own behalf, although it could 'adhere' to commercial treaties negotiated by the British Government and enter into technical agreements concerning postal and telegraphic services. Australian laws that were in breach of British treaty obligations could be refused assent on this ground.

The British declaration of war in World War I included Australia, as part of

the Empire. However, because of Australia's considerable contribution to the war effort, it was invited to participate in the Imperial War Conference, which promoted future readjustments to the constitutional relations of the Empire. Australia was represented at the subsequent Peace Conference, and the Australian Prime Minister signed the Treaty of Versailles, although his signature was indented under that of the British representative who signed for the Empire as a whole. Australia also became a member of the League of Nations, but as a self-governing Dominion, rather than a nation.

At later Imperial Conferences, the British gradually released control over the foreign affairs of the Dominions, including treaties, the appointment of diplomatic representatives and the conduct of foreign policy. Unlike Canada and South Africa, Australia was reluctant to take up these new powers. Australia believed its security depended upon the protection of the British Empire and therefore sought to retain a common Empire-wide foreign policy. When Britain declared war again in World War II, the Australian Prime Minister, Robert Menzies, simply assumed that Australia was also at war. It was not until 1941 that Australia first exercised the power to declare war. During the war, Australia also started to appoint its own diplomatic representatives and rely upon alliances with other countries, such as the United States, for its protection.

The transition from colony to sovereign independent nation occurred without any formal changes being made to the Commonwealth or state constitutions. It occurred through changes in convention and the simple recognition of Australia's new status by the United Kingdom and by other nations. The foreign affairs powers, however, were all attributed to the Commonwealth Government rather than the states.

The Commonwealth Constitution grants the Commonwealth Parliament a concurrent, not exclusive, power to legislate with respect to "external affairs." The power to enter into treaties is treated as part of the general executive power of the Commonwealth. The states are regarded as having neither a capacity to enter into treaties nor the right to involve themselves in a substantial fashion in foreign affairs.

The main battlefield between the orders of government has been the implementation of treaties. The external affairs power gives the Commonwealth Parliament the legislative authority to implement treaties. However, after World War II, the vast expansion of treaties into subject matters that were the traditional domain of the states, such as human rights and the environment, raised the question of whether the external affairs power supported the implementation of treaties dealing with domestic, rather than external, matters. In 1983, in a decision about the use of an environmental treaty to support legislation prohibiting the Tasmanian Government from building a dam, the High Court held that the Commonwealth Parliament could enact legislation implementing a *bona fide* treaty regardless of the subject matter of the treaty. This meant that the Commonwealth could, by

ratifying a treaty, gain a new order of legislative power and legislate on subjects that were the traditional domain of the states.

This development led to greater concern about how and why treaties were entered into and calls for greater consultation with the states before treaties were ratified. The public also raised concerns about the lack of

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transparency and the “democratic deficit” as there was almost no parliamentary involvement in the treaty-making process. Treaties were tabled in bulk in the Commonwealth Parliament every six months, often after they had already been ratified, with little or no time for debate. In 1995 a Senate Committee conducted a full inquiry into the treaty-making process and recommended major reforms, the majority of which were adopted in 1996. These reforms included the tabling of all treaties in the Commonwealth Parliament before ratification; publication of a “national

interest analysis” for each treaty, providing information about its likely impact and the case for entering into it; establishment of a Parliamentary Joint Standing Committee on Treaties to scrutinize and report on treaties before they are ratified; establishment of a Treaties Council, comprised of the heads of government of the Commonwealth and the states, to address treaties of particular concern to the states; and improvement of consultation with the states through the “Standing Committee on Treaties,” which is composed of officials from the Commonwealth and the states.

In their joint submission to the Senate Committee, the states had sought greater consultation and the establishment of a Treaties Council. However, they also wanted each House of the Commonwealth Parliament to have the power to veto treaties. If the ratification of a treaty were to be truly disadvantageous to a state, then the Senate might be persuaded to veto its ratification. In fact, this proposal was not adopted by the Commonwealth, and the ratification of treaties remains completely in the control of the Commonwealth Executive Government.

Despite this setback, the states have been relatively satisfied with the reforms of 1996. The Joint Standing Committee on Treaties has proved a powerful and effective committee. The amount of information on proposed treaties and the amount of consultation with the states has improved significantly. The Treaties Council, however, is regarded as a failure. It has only ever met once, and despite requests from the states for it to meet on several occasions, the Commonwealth Government has refused to convene it. The states have also complained that they do not receive sufficient information at an early enough stage in treaty negotiations to be able to make a significant input, and that there is insufficient consideration to the consequences of the treaties before they are ratified.