

# INTERGOVERNMENTAL RELATIONS IN AUSTRALIA

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## **PART I: THEORIES OF AUSTRALIAN FEDERALISM**

Australia is a federation in the common law mould. Typically, with occasional exceptions, this means that each governing unit, in both the national and sub-national spheres, has a complete set of institutions. Most obviously, these include an executive government, a legislature and courts. Typically also, sub-national polities have a role in central institutions, which nevertheless falls short of the degree of intra-governmental co-operation represented by the German Bundesrat.

Consistent with this model, the Commonwealth and the states have a full set of institutions, including separate representatives of the Queen and distinct written constitutions. The States formally are represented at the centre through a Senate and in the constitutional alteration procedure. Federation began on 1 January 1901. The Central government was named the Commonwealth of Australia. The existing colonies of: New South Wales, Victoria, Queensland, Western Australia, South Australia, and Tasmania continued. As the six original states, each of them already had constitutions at the time of federation and their governments continued after federation. The two self-governing mainland territories, the Australian Capital Territory and the Northern Territory, have been established since federation and hold a different constitutional relationship to the Commonwealth, in that their existence is not constitutionally entrenched.

In Australia, governments at the federal, state and territory level are based on a parliamentary system. At both Commonwealth and at state and territory levels there is a parliamentary executive responsible to a popularly elected legislature. For example, at the Commonwealth level, the party or parties holding a majority in the House of Representatives form the government.

Australian federalism is partly based on the U.S. model. Like the United States, an upper house, the Senate, has equal representation from each state. Many of the founders of Australia's federation envisaged the Senate as the House of Parliament that would represent state interests. However, the Senate does not play a significant federal role and has operated as a party-political chamber since its inception. Australia's federal structure is more greatly influenced by the United States' federal model rather than the Canadian. Madison's famous analysis of the federal and national features of the United States Constitution in Federalist 39 could equally apply to Australia.<sup>1</sup>

The principal departure from the United States in the Australian federal model concerns the courts. Australia's highest court, the High Court of Australia, is the final appeal court from both federal and state court systems. The constitution enables the Commonwealth to avoid establishing

a court system of its own by conferring federal jurisdiction on State courts. The Commonwealth used this facility for the first seventy years of federation. By the end of the twentieth century, however, a full hierarchy of federal courts was in existence, although state courts continued to exercise federal jurisdiction in some matters.

The creation of the High Court as a single final court of appeal has significance for the Australian federation in another way as well. The High Court has the final word on the development of the principles and procedures of the common law throughout Australia. As a result, it can be said that Australia has a single common law. The implications of this were teased out in a series of cases towards the end of the twentieth century. Differences in law between states are limited to statute law. The common law is required to adapt to the constitution. In the area of conflicts, or choice of law the Court has developed the common law to reduce the uncertainty about applicable law in diversity cases within Australia. The capacity of the Commonwealth to vest federal jurisdiction in state courts also has led to the conclusion that the constitution imposes some basic standards in the interests of the integrity of state courts. State courts cannot operate in a way that is incompatible with their authority to exercise federal jurisdiction.

### **a) Categorising federal systems**

A federal system in which each sphere has a full set of governing institutions sometimes is described as a dual federation. This differs from the concept of co-ordinate federalism though sometimes it is confused with it because both rest on common assumptions. Co-ordinate federalism assumes that the spheres of government execute their powers independently of each other. This may be contrasted with co-operative federalism, in which there is considerable interaction between the spheres of government, and with organic federalism, where all tiers of government are effectively integrated. Co-operation between governments is commonplace in Australia, affecting all institutions and all programs. The dualist character of the Australian federation does not preclude co-operation. It suggests a need for care in the choice of co-operative mechanisms, however, to preserve the accountability of the institutions and the constitutionality of the arrangements themselves.

### **b) Co-operative Federalism: Australia's experience**

The implications of co-operative federalism for the accountability of governments has been understood in Australia for a long time. It has been a principal ground of criticism of the dependence of the territories on extensive fiscal transfers from the Commonwealth. It has also been raised as a problem in connection with uniform legislative schemes, especially where these involve the centralisation of administration and adjudication in a single set of institutions. During the 1990s, the uniformity of corporations legislation and administration was achieved in this way. These arrangements were brought to an end by successive High Court decisions, which raised doubt about the constitutional power of the Commonwealth to agree to the conferral of state authority on federal courts and on the institutions of federal government. In these decisions the High Court

refused to accept that there was an implied constitutional principle of co-operation that could overcome a shortfall in power. In due course, a national corporations law was re-established, using a mechanism provided by the constitution itself, under which the states may refer legislative power to the Commonwealth. The mechanism is not popular with the states, who are concerned about their ability ultimately to retrieve a referred power but it is consistent with the dual federalist model.

### **c) Federalism and Australia's constitution**

As in all federations, the division of powers between the spheres of government in Australia is set out in a written, entrenched Constitution. The binding force of the Australian constitution initially stemmed from its status as an act of the British Parliament. Since independence, it has been accepted that the authority for the constitution lies in its acceptance by the Australian people. Over the 100 years since federation, judicial approaches to the interpretation of the constitution have varied between a literal interpretation normally associated with statute law and recognition of the constitution as a "living force" that needs to adapt to changing circumstances. These varying approaches to constitutional interpretation have affected the evolution of Australian federalism. For the first twenty years after federation, judicial doctrine accepted that the scope and application of Commonwealth legislative powers was limited by doctrines implied from the concept of federalism. As a result, the institutions of government (both the Commonwealth and the states) enjoyed some immunity from the legislation of other polities and ambiguity about the scope of Commonwealth power was resolved in favour of the states. In 1920, these implied limitations on power were abandoned. A new literal approach to interpretation led to expansion of the scope of Commonwealth legislative powers. Limitations on power implied from the nature of federalism subsequently re-emerged in other forms, however. In particular, it now accepted that the Commonwealth may not legislate for state governments in a way that discriminates against or between them or which threatens their existence or capacity to function.

When the Australian federation was established in 1901, neither the pre-existing colonies nor the new Commonwealth were fully independent. Independence was achieved over the century that followed. This phenomenon also has affected the Australian federal model. As a generalisation, formal recognition of the independence of Commonwealth institutions preceded state independence. Thus the Commonwealth Parliament was given the capacity to free itself from the sovereignty of the British Parliament in 1931, leaving the state parliaments subject to British laws of paramount force until passage of the Australia Acts in 1986.

More significantly, at the time of federation in 1901, Australia did not possess full international legal personality. The British government and Parliament, as the institutions of Empire, spoke for Australia instead. As independence was achieved, the Commonwealth government automatically assumed the right to act for Australia in international affairs. This authority included power to enter into treaties on behalf of Australia. Because the Australian states were never fully independent, they have no international legal personality. In consequence, in the 1970s, the High Court held that the states could not have inherited Australian rights at international law in relation to the territorial sea and contiguous zone. More significantly still, the capacity of the



Commonwealth to enter into all international treaties on behalf of Australia eventually was complemented by interpretation of the federal legislative power over “external affairs” to allow the Commonwealth to incorporate into Australian law any international treaty to which Australia is a party.

There is a federal dimension to the current debate about the model Australia might adopt if and when it becomes a republic. On the threshold of the twenty first century, Australia shares a Queen with many of the former constituent units of the British Empire. As Australia became independent, however, it was accepted that the Crown was “divisible” and that, in relation to Australia, the Queen is “the Queen of Australia”. Within Australia, the Queen is separately represented in both Commonwealth and state spheres, by the Governor General and State Governors respectively. Representatives of the Queen are separately appointed and removed, on the advice of the leader of the relevant government. Thus in Australia there are separate emanations of the Queen in each of the sub national units, under the umbrella of a single Australian crown. This has justified a practice under which, if the Governor General is not available to carry out national duties, a State Governor performs this national role.

By definition, the unifying symbol of the Crown would be removed under a republic. As a precaution, drafters of the 1999 bill<sup>2</sup> to establish an Australian republic (which was rejected at referendum) inserted a clause to reaffirm the unity of Australian law. This was unlikely to have been necessary. Reflection on the significance of the formal facade of the Crown, however, suggests a need to ensure that the President of an Australian republic is a national rather than a purely Commonwealth figure. How this transformation can be achieved, consistently within the traditions and assumptions of Australian federalism, is one of the greatest challenges for the future design and development of Australia’s federal model.

## **PART 2: PRACTICAL FEDERALISM IN AUSTRALIA**

As noted in Part one, the Australian model of federalism employs both constitutionally based and extra-constitutional, intergovernmental mechanisms. Intergovernmental processes provide vehicles for inter-jurisdictional dialogue, development of national approaches to policy issues and conflict resolution.

### **a) Institutional Mechanisms**

The Australian Constitution sets out the powers of the Commonwealth Parliament and, by inference, of the Commonwealth Government. However, the history of Australian federalism is that of the gradual growth of central power. This is primarily because the Commonwealth now effectively controls the major direct and indirect taxes. This has resulted in a very high degree of vertical fiscal imbalance. States and territories therefore rely on transfer payments from the Commonwealth for about 40 per cent of their revenue. This financial power means that the Commonwealth has power over a much wider range of powers than those set out in the constitution.



Due to the way the Australian Senate works, there are no truly federal institutions. Intergovernmental relations therefore generally operate between the parliamentary executives. A number of mechanisms have been established to deal with policy issues that have intergovernmental implications. In brief, there are a number of councils where First Ministers (Premiers and Chief Ministers) and other ministers meet. These bodies are primarily consultative in nature, although some have a small amount of decision-making power.

### **b) Council of Australian Governments (COAG)**

This is Australia's primary intergovernmental institution. It is chaired by the Prime Minister and includes all State Premiers and Chief Ministers and the President of the Australian Local Government Association. COAG generally meets at least once a year, but only if there are national issues of sufficient substance to warrant a meeting. One of COAG's main purposes is to increase cooperation among governments in the national interest. Where an issue takes on particular national significance, heads of government (or their senior officials) may decide to deal with the issue through the COAG process. At COAG, after setting out a strategy and action plan, the issue may be returned to a ministerial council for implementation. Recent policy issues that have been dealt with in this way include Natural Resource Management and Illicit Drugs plans.

- **The Treaties Council:** The membership is the same as for COAG. It deals with significant treaty negotiations that may have a particular impact on states and territories. It has met only once.
- **The Leaders' Forum:** The membership consists only of State Premiers and Territory Chief Ministers. One of the Forum's primary aims is to allow states and territories to discuss and, if possible, reach consensus on issues to be raised with the Commonwealth Government.
- **Ministerial Councils:** In contrast to COAG, ministerial councils are less formal arrangements for ministers to discuss current agreements and working arrangements. There are over 30 ministerial councils dealing with particular ministerial responsibilities, such as the Standing Committee of Attorneys-General or the Australian Transport Council. A minister from the Commonwealth, and each state and territory attends.

### **c) Jurisdictional intergovernmental arrangements**

In each jurisdiction, overall responsibility for intergovernmental relations lies with the heads of government: the Prime Minister of the Commonwealth, the State Premiers and Territory Chief Ministers. Jurisdictional leaders have respective agencies that manage and oversee intergovernmental relations. At the Commonwealth level, this branch sits within the Department of Prime Minister and Cabinet. In the State of New South Wales, this branch sits within The Cabinet Office.



**d) Co-ordination of intergovernmental relations**

Co-ordination of intergovernmental relations takes place at two levels: between the Australian jurisdictions and within each jurisdiction.

Along with formal meetings of officials, there are frequent informal discussions between the Commonwealth and the states and territories and between the jurisdictions. There are also many intergovernmental committees and taskforces that carry out work at the request of COAG, ministerial councils or senior officials.

Departments such as the Prime Minister's Department or The NSW Cabinet Office do not necessarily co-ordinate all relations between Commonwealth and State Departments. The respective Commonwealth and New South Wales Departments of Health, for instance, may have daily contact on a wide range of issues.

Central agencies do, however, have the capacity to oversee matters. In each jurisdiction the agenda and papers for ministerial councils are referred to the head of government's department before the meeting to ensure a whole-of-government approach is taken by the minister. In NSW, if the ministerial council is to announce a major policy initiative, this is referred to Cabinet before the minister attends the meeting. In NSW The Cabinet Office is responsible for advising both the Premier and the Director-General of The Cabinet Office on a wide range of intergovernmental issues.

**e) Conflict resolution between the federal and constituent units of governments**

As outlined, because of the way the Senate operates, there is no formal legislative mechanism for resolving conflicts between the Commonwealth and the states and territories. Executive governments, not the parliaments, therefore usually settle issues.

If the issue in dispute involves a constitutional matter, there may be a case brought before the High Court. The courts are the only formal mechanism for conflict resolution available between jurisdictions. While all courts have jurisdiction in constitutional matters the most important cases are dealt with by the High Court.

Some inter-jurisdictional conflicts are dealt with on an ad hoc basis bilaterally through correspondence or meetings. Jurisdictions have an interest in maintaining working partnerships on important matters affecting the federation and many of the conflicts between the Commonwealth and state governments are resolved through informal processes.

In recent years, negotiations on intergovernmental agreements have been used to resolve conflict between jurisdictions and to progress issues where jurisdictions have agreed on more formal co-operation. A recent example is the Australian Food Regulation Agreement. Constitutionally, each state has responsibility for food regulation. Lengthy negotiations between all jurisdictions have resulted in a national approach. Negotiations were formalised with an intergovernmental agreement signed at COAG in November 2000.

Other conflicts between jurisdictions are dealt with at COAG, the ministerial councils and other meetings of senior officials. These meetings allow differences to be discussed and provide a forum to attempt resolution.



On occasion, the process for resolving disagreements between jurisdictions is the establishment of specific ministerial council. An example is the Murray Darling Basin Ministerial Council. The Murray-Darling river system flows through Queensland, New South Wales, Victoria and South Australia. This Council is made up of representatives from these jurisdictions and the Commonwealth and was set up in 1987 by an intergovernmental agreement to overcome conflict in the management of the river system.

In recent years, however, COAG has become concerned at the increase in the number of ministerial councils. In 1970 there were 20. This had increased to 45 by 1993. In that year COAG reduced the number again to 21. This had crept up again to 31 by 2000 when COAG asked for another review. In an increasingly complex society, many policy issues require intergovernmental co-operation at the ministerial level. However, too many ministerial councils may lead to inefficiencies and fragmented intergovernmental processes. In 2001 COAG undertook an agreement to develop a plan to streamline the operation of ministerial councils by amalgamating a number of councils in related fields and creating a limited number of new councils.

As this brief overview of Australia's experience of federalism demonstrates, key federal structures such as COAG and ministerial councils augment and strengthen the institutions and arrangements laid down in the Australian constitution. From both a theoretical and practical perspective, this blend of constitutional and co-operative governance has facilitated a dynamic and flexible Australian federal structure.

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1. Madison identified a mixture of "national" and "federal" features in the way in which the Constitution was framed and can be amended, in the division of powers and the way in which they operate and in the constitution of the federal institutions, including the House of Representatives and the Senate.
  2. Constitution Alteration (Establishment of Republic) 1999.