Commonwealth of Australia

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Australia's Constitution was negotiated during the last decade of the nineteenth century and came into force on 1 January 1901. Its federal features were substantially influenced by United States federalism, as then understood. Nevertheless, the Australian Constitution was distinctive from the outset in ways that were recognized during the drafting and that have become more prominent over time.

Australia's Constitution combines United States-style federalism with British institutions of parliamentary responsible government, creating a different dynamic for decision making within and between the spheres of government. The framers of the Constitution initially feared that these two sets of principles would be antagonistic, and indeed, accommodation has not always been easy. More significantly, however, with federalism and responsible government came different approaches to constitutionalism. One involved the limitation of power in an entrenched, written constitution. The other was highly pragmatic, favouring flexibility and efficiency over written constitutional rules. The tension between the two is still reflected in Australian constitutionalism. Those parts of the Constitution that create the legislature and the executive leave considerable discretion to the institutions of government. Attempts to apply constitutional restraints to them, even in the name of protecting democratic principles, have met considerable resistance.[1] Few rights are secured through the Constitution; the framers, in the British tradition, assumed that rights could be protected by the Parliament and the common law. Few limits are placed on decision making by the states beyond those necessitated by federalism itself.

By contrast, those parts of the Australian Constitution -- namely, allocating power for federal purposes, providing for social and economic union, and establishing the judicature, originally considered an incident of federalism[2] -- are taken very seriously. Federal limits on the power of the Australian Parliament are given effect through judicial review. A separation of federal judicial power has emerged as a considerable constraint on the legislature in ways that now go well beyond the protection of the independence of a judicature that monitors the boundaries of the federal division of power.[3]

There is one other distinctive characteristic of Australian constitutionalism. Australia's constitutional system, as the High Court has occasionally observed, is the product of evolution, not revolution.[4] There has been no break in the legal order since European settlement, which itself was built on a foundation of English law, deemed to have been absorbed by the Australian colonies. The Constitution originally derived its binding force from an act of the British Parliament. It was democratically advanced, by the standards of the time, as befitted a new, relatively egalitarian nation. Otherwise, there was neither need nor incentive for the framers of the Constitution to be particularly constitutionally creative. The Australian federation was largely a response to considerations of economic advantage and shared interests in defence and immigration, although recent historical work has drawn attention to the rise of national sentiment as well.[5]

Even after federation, the same evolutionary process enabled Australia to achieve independence without constitutional change or any break in legal continuity. In consequence, the Constitution retains some outward signs of earlier colonial status, including the continuing link with the British monarchy. Even more significant to Australian federalism was the impact

on Australia's internal constitutional arrangements of the Commonwealth's assumption of authority to exercise Australia's external sovereignty as the imperial power withdrew.

THE FEDERAL CONSTITUTION IN HISTORICAL-CULTURAL CONTEXT

Australia has been a federation for more than 100 years.[6] The polity comprises six states, two self-governing mainland territories, and some external territories. The national population of 20 million is spread over 7,682,300 square kilometers. Most of the population lives in eight large cities around the perimeter of the land mass and on the island of Tasmania. These cities are the capitals of the respective states and territories. The dominant ethnicity is Anglo-Celtic, and the dominant language is English. The society is multicultural, however, especially in the Southeast, where post-Second World War migration from southern and eastern Europe, Asia, and Africa has produced considerable diversity. In addition, there is an indigenous population of Aboriginal and Torres Strait Islander peoples, now representing about 2 percent of the total population. The predominant religion is Christianity, with a mixture of Protestants and Roman Catholics, although all denominations are in relative decline. Australia is an affluent society whose gross domestic product was US$23,100 per capita in 2002.[7]

Federation

Federation took place on 1 January 1901 after a decade of intermittent negotiation. At this time, the territorial distribution of the population was much the same as it is today but on a smaller scale. British settlement had begun in 1788 with the establishment of a penal colony at Sydney Cove. By 1890 Australia comprised six self-governing British colonies, which subsequently became the original Australian states. Formally, therefore, federation brought together six distinct polities, each of which needed to be persuaded to surrender a measure of its autonomy. The Constitution still shows signs of this negotiation process. In particular, it includes concessions to Western Australia, which, as the most remote colony, was a reluctant participant.[8]

Nevertheless, there was a considerable degree of preexisting unity between the colonies, which provided an impetus for federation and helped to form its character. The vast majority of the population were settlers from the British Isles. The four eastern colonies began as part of the settlement of New South Wales, which was gradually subdivided during the first part of the nineteenth century. All six colonies constituted parts of the same empire, which tended to administer them collectively. Even before federation, there was a degree of intercolonial collaboration through meetings of premiers and other government officials. Discussion of federation had been underway in a desultory fashion since the middle of the nineteenth century.

The eventual impetus for union came in response to a range of factors, the most dominant being (1) the need for defence at a time of concern about French, German, and Russian activity in the Pacific; (2) the attractions of a common market; (3) the desire to control immigration; and (4) less tangible feelings of incipient national unity. The distance between Britain and Australia brought other subtle pressures to bear as well, including the advantages of a single final Australian court of appeal as an alternative to the Privy Council based in London.[9]

An early attempt at a weak form of confederation was made in 1885 with the establishment of the Federal Council of Australasia, involving most of the Australian colonies and Fiji but not, importantly, New South Wales.[10] The council was still operating when the movement for a more effective form of federation began. The first step was a conference in 1890, involving representatives from all Australian colonies and New Zealand, to determine how best to proceed. Thereafter, the nature of the federal settlement and the terms of the federal

Constitution were effectively determined by two constitutional conventions. The National Australasian Convention in 1891 was comprised of delegations of members of Parliament from each of the six Australian colonies and New Zealand. This convention agreed on a draft constitution, on which the final Constitution was ultimately based, although the 1891 draft never came into effect. No agreement had been reached on the process for its adoption and, once the convention adjourned, more pressing economic and political priorities monopolized the attention of governments and parliaments. Following a revival of the federation movement by forces both within and outside the colonial parliaments, a second convention, the Australasian Federal Convention, took place in 1897-98. The somewhat more popular character of the issue at this stage was reflected in the composition of the new convention. Four of the five participating colonies sent an elected delegation, although the fifth, Western Australia, once more sent members of Parliament. Moreover, the enabling legislation of the four colonies that had elected their delegates called for a referendum on the draft constitution before it could be sent to the imperial Parliament for enactment.

Although the process was more complicated than originally envisaged, it was ultimately effective. The convention agreed on a draft constitution, which, despite minor but important subsequent changes by both an Australian Premiers' Conference and the British Parliament, was essentially the instrument that came into effect on 1 January 1901. By this time, the sixth colony, Queensland, had reentered the federation movement and had passed an act to authorize approval of the Constitution by referendum. Western Australia eventually passed an enabling act as well, although New Zealand never did so.[11] In due course, therefore, the Constitution was approved by referendums in all six Australian colonies. By the standards of the time, this was a relatively popular process although, to modern eyes, the franchise was restricted, and the voting turn-out was low.

Upon federation, the six Australian colonies became the original states of the Commonwealth of Australia. At this time, the whole of the Australian land mass was divided between these states. After the first decade of federation, however, South Australia ceded its Northern Territory to the Commonwealth. In 1978 this territory became self-governing. A second self-governing territory, the Australian Capital Territory, was carved out of New South Wales for the seat of government in a compromise between Victoria and New South Wales that is enshrined in the Constitution itself.[12] The Constitution recognizes that a territory (although probably not the seat of government itself) may be established as a new state and that new states may be created from existing ones.[13] Although there have been occasional pressures to create new states, this has never happened largely because the Constitution requires the consent of the Parliament of any state whose territory would be diminished by the change.

In the 1990s, however, there was a serious debate on statehood for the Northern Territory, in time for the centenary of the Constitution. This was driven by several factors. By definition, a territory has less autonomy than a state. Moreover, as the Australian Constitution has been interpreted, some constitutional safeguards do not apply to territories.[14] On this occasion, the movement to have the Northern Territory granted state status failed largely because of the inadequacy of the constitution proposed for the new state and the process by which it was developed. It seems likely that, at some stage in the future, the Northern Territory will seek statehood again. If this occurs, one issue to be resolved will be the number of senators to be elected from the new state.

There is no provision for secession. The Preamble to the Constitution Act refers to an "indissoluble federal Commonwealth." A secession movement nevertheless took place in the

1930s, when Western Australia voted to leave the Commonwealth.[15] Western Australia had been a reluctant participant in federation partly because of its geographical isolation from the rest of the country. It also considered itself economically and politically disadvantaged by federation. The secession movement failed in the face of British reluctance to alter the Australian Constitution in order to recognize secession of a state at a time when Australia was on the cusp of independence. Support for secession was defused by establishing the Commonwealth Grants Commission in order to make equalization grants to claimant states more systematic.[16] There has not been a serious secession movement since then.

The Constitution

The Commonwealth Constitution is relatively short, comprising 127 sections and 11,908 words. Its two principal goals, both satisfactorily achieved, were to establish a federation on a basis to which all colonies were prepared to agree and to provide for the institutions of national government. The temper of the Constitution was broadly democratic, again judged by the standards of the time. Both chambers of the Commonwealth Parliament were to be directly elected. The qualifications for both voters and members were to be the same in the Senate as in the House of Representatives. The Constitution offered some mild encouragement for extension of the franchise to women, which had already taken place in two colonies.[17] In the end, however, consistent with the philosophy underpinning this part of the Constitution, the decision was left to the discretion of the Commonwealth Parliament. On the other hand, "aboriginal natives" were not to be counted for constitutional purposes, including the calculation of the size of state representation in the House of Representatives.[18] This discriminatory provision was not removed until 1967.

At least two distinctive characteristics of the Constitution can be attributed to the circumstances of its framing.

The first characteristic concerns its substance. Australia's Constitution draws on the common-law constitutional traditions of Britain and the United States. The Australian colonies were established along British lines with institutions of parliamentary responsible government. It was natural to provide similar institutions for the new national government. The federal part of the Australian Constitution, however, drew extensively on the Constitution of the United States, popularized in Australia through the work of James Bryce.[19] The United States' influence extended not merely to the manner of the division of federal powers, conferring specific powers on the centre and leaving the residue to the states, but also to the idea of an upper house, or Senate, in which the states are equally represented; to a written constitution representing fundamental law, which can be changed only by a process involving both national and state consent;[20] to the concepts of federal jurisdiction and a distinct federal judicature; and even to the terms and structure of the Constitution. One consequence, probably unintended, has been judicial interpretation of the Australian Constitution as embodying a three-way, albeit asymmetrical, separation of powers, including a strict separation of judicial power from the federal government's executive and legislative branches.

The combination of federalism and responsible government has generally been regarded as a success. It involves tensions of at least two kinds, however. Most obviously, there is potential for conflict between the principles of parliamentary responsible government, in which the government relies for office on the support of the lower House of Parliament, and a powerful Senate with authority to reject all legislation, including financial legislation, thus putting the government itself at risk. Even at the time of the framing, this difficulty was foreshadowed. It

was captured in a prediction that "either responsible government would kill federation, or federation would kill responsible government."[21] The particular problem of disagreement over financial legislation was the subject of a key compromise during the conventions of the 1890s, which restricted the power of the Senate to amend key categories of money bills but left its power to reject them in place, thus failing to overcome the difficulty altogether.[22] Following a constitutional crisis in 1975 involving the Senate's power to reject financial legislation,[23] a range of proposals for change was publicly debated; none, however, has been put in place.[24]

Tension between the British and American constitutional traditions, as embodied in Australia's Constitution, is reflected in Australian attitudes toward the role of a constitution and of courts in interpreting it. An uneasy compromise has been reached by restricting the content of the Constitution to the essential requirements for operating a federation and establishing national institutions of government. Australians tend to disagree over the important question of whether the purpose of constitutional rules is to empower governments or to restrain them in the exercise of power. The Constitution provides no express protection for individual rights, although a handful of limits on Commonwealth or state power have a similar effect. There is satisfaction in many quarters with the considerable degree of flexibility left to elected institutions under current arrangements. At the same time, however, Australians expect the courts to enforce the boundaries of federal power with regard to both the national and state spheres of government. Judicial decisions that derive further limits on power from the separation of judicial power[25] or from the institutional logic of representative government[26] also attract some, although far from universal, approval.

The second circumstance of the framing of the Constitution that has had a profound and continuing effect on its character is the manner of its making. Australians used a relatively popular process whereby the people, organized in their colonies, voted to approve the draft. This process is now complemented by the procedure for change, which requires approval by the people voting both nationally and in the states,[27] following the example of the Constitution of Switzerland. From this perspective, Australia's constitutional experience raises a question that is familiar in many federal systems: whether authority for the Constitution lies with the people organized nationally or with the people organized in states. In Australia this question has had no practical significance. From one perspective, in any event, the answer is neither. The Constitution originally gained its effect as fundamental law as a statute of the then sovereign British Parliament. Although the British Parliament is no longer sovereign, in outward form the Constitution remains a section of a British statute. After the formal renunciation of British sovereignty, in the Australia Acts 1986, the High Court began to attribute authority for the Constitution to the Australian people.[28] This was done both as a convenience and as a justification for implied limits on power, in the style of *Marbury v. Madison.*[29] For this purpose, the "people" invariably are conceived as organized nationally. This may be significant for the nature of Australian federalism, but it is also clear that observations of this kind have been made without any implications for federalism in mind.

The rather casual process by which authority for Australia's Constitution moved from the British Parliament to the "people" points to another characteristic of the Constitution and of Australian constitutional culture. As the High Court has occasionally observed in considering comparative case law, unlike its counterpart in the United States, the Australian Constitution is the product of evolution, not of revolution. Australia became a federation without achieving full independence, and it achieved full independence without a break in legal continuity. This history, in turn, has had some important consequences. First, the Constitution builds upon, and

in many respects assumes, a preexisting common law.[30] There is and always has been a single Australian common law, declared by the High Court in its capacity as the court of final appeal. Second, many important constitutional rules lie outside the Constitution. These include, for example, the rules establishing effective Australian independence, most recently set forth in the Australia Acts 1986. Third, the attitude toward constitutionalism that underlies the preference for evolution affects Australia's approach to constitutional change. Major changes tend to be made without alteration of the constitutional text or with as little alteration as possible. The result is a constitution that is quite misleading about how key aspects of the system of government work. On the face of the Constitution, for example, the queen is a dominant figure, whose responsibilities within Australia are performed by a governor general. The prime minister and the Cabinet, the effective executive decision makers, are not mentioned at all. Political parties are referred to only in passing, in the context of a relatively minor change to the procedure for filling casual Senate vacancies, implemented in 1977. None of the institutions of intergovernmental relations, including the Council of Australian Governments, is mentioned in the Constitution.

CONSTITUTIONAL PRINCIPLES OF THE FEDERATION

Federalism

On the face of the Constitution, Australia is a dual federation in that it is understood as involving two spheres of government, each with a complete set of governing institutions and corresponding allocations of power. Thus both the Commonwealth and each state has its own legislature, executive institutions, and courts. Legislative, executive, and judicial powers are divided between the Commonwealth and the states for federal purposes. The constitutional arrangements for the judiciary depart from this model (1) to the extent that the Constitution enables the Commonwealth to confer jurisdiction on state courts, if it so chooses,[31] and (2) by creating the High Court as the final court of appeal for all Australian courts in all matters. The dualist features of the federation have recently been held by the High Court to present some difficulties for the constitutional validity of certain types of intergovernmental cooperation.[32]

Australia is not a dual federation, however, if dualism is understood as two spheres of government exercising powers in isolation from each other and inhibited from legislating for each other. It is possible to characterize the federation in other ways as well if attention is focused solely on the Constitution. Thus some provisions of the Constitution mandate or facilitate cooperation: The Commonwealth has power to make laws on additional matters referred to it by state parliaments,[33] the Constitution authorizes intergovernmental agreements in relation to borrowing,[34] and the Commonwealth has a right, born of convenience at the time of federation, to make use of state courts and state prisons for federal purposes.[35] The division of federal and state powers, which leaves substantial legislative and taxation powers to the states, creates real potential for competition between jurisdictions in relation to taxation and public policy more generally. The fiscal imbalance, to which the Constitution itself makes a direct contribution by denying the states power to impose customs and excise duties, offers the opportunity for regulatory federalism.

With hindsight, it is apparent that the Constitution created a federal framework that was capable of development in a variety of ways. The actual operation of Australia's federal system over the course of more than 100 years has been the result of political developments and judicial decisions occurring within a relatively flexible framework. The concept of dual, in the sense of

coordinate, federalism has long been discredited by judicial decisions.[36] In practice, a vast range of cooperative arrangements has substantially modified the formal constitutional allocation of powers.[37] Commonwealth dominance of tax resources and the reliance of the states on revenue transfers have prompted occasional speculation that Australia is moving toward a system of regulatory federalism in which the principal state role is to administer Commonwealth programs. This is an overstatement; the states still retain sufficient constitutional and political power to compete with the Commonwealth for electoral advantage and policy choice.

For like reasons, it is difficult to characterize the Australian federation as either centralized or decentralized, inclined toward either unity or diversity. At the time of its establishment, the federation was relatively noncentralized, with considerable potential for policy diversity, which was not necessarily realized because of the relative homogeneity of the states. Over the century that followed, Australia became significantly more centralized in practice, tending to value uniformity at the expense of diversity. The Commonwealth has progressively assumed more responsibility in areas originally considered the domain of the states, ranging from human rights and the environment to education, health, housing, and transport. The causes are various: the fiscal dominance of the Commonwealth, an expansive interpretation of Commonwealth powers by the High Court, the Court's own role as the final authority on the form of the single Australian common law, and the Commonwealth's assumption of responsibility for foreign affairs as Australia achieved independence. This last development ultimately led to an interpretation of the Commonwealth's external-affairs power in a manner enabling the Commonwealth to make laws to incorporate any international treaty obligations of Australia, which contributed further, and controversially, to the centralization of the federation.

Centralization is not always the result of unilateral Commonwealth action. In some areas, of which corporations law was for a long time the prime example,[38] uniformity of policy making, legislation, and administration is effectively achieved through intergovernmental cooperation, facilitated by the dynamics of parliamentary government, giving rise to the phenomenon of executive federalism.

Status of the Constituent Political Communities

The principal constituent polities of the Australian federation are the six original states. The constitutional provisions relating to them establish the Australian federation as remarkably symmetrical. Despite substantial differences in population size, from 6.6 million in New South Wales today to only 470,000 in Tasmania, all original states are equally represented in the Senate and guaranteed minimum representation in the House of Representatives.[39] These provisions may not be changed without a referendum in which majorities are secured in the state affected. In addition, the constitutional powers of the present states are the same. The Commonwealth is constitutionally precluded from discriminating between states in taxation and from giving preference to particular states in laws of trade, commerce, or revenue.[40] These are important features of the Australian federation. It is unlikely that the colonies would have agreed to unite on any other basis.

The Constitution provides some protection for the states, their constitutions, and their territorial limits. Both "state" and "original state" are defined in the Commonwealth of Australia Constitution Act 1900, which established the Constitution. The Commonwealth Constitution expressly preserves state constitutions, albeit subject to its other provisions.[41] State boundaries cannot be altered without the consent of the Parliament and a majority of electors in the state concerned.[42] Any alteration of the constitutional provisions dealing with state boundaries

requires a referendum in which a majority in the affected state or states approves the proposal. Judicial doctrine prevents the Commonwealth from using federal power to threaten the continued existence of the states or their capacity to function.[43]

The institutions of state government are created by the respective state constitutions. They are largely autonomous from Commonwealth institutions; even state governors are appointed by the queen on the advice of state governments rather than through the governor general. While state constitutions are subject to the Commonwealth Constitution, the latter includes relatively few restrictions on the structure and organization of state government. With a few exceptions, there is no obvious framework of national principles with which state institutions must comply.

The principal exception derives from the structure of the judicature. The potential for state courts to exercise federal jurisdiction has been held by the High Court to prohibit the states from structuring or empowering their courts in a way that would be incompatible with their position as component parts of the Australian judicature.[44] The High Court of Australia, established by the Constitution at the apex of the judicature, also has profound significance for state government. Most obviously, it may declare state laws and state constitutions to be contrary to the Commonwealth Constitution. However, it also declares the common law of Australia and develops it in a manner consistent with the Commonwealth Constitution.[45] In addition, as the final court of appeal in state as well as in Commonwealth matters, the High Court is the final interpreter of state legislation and of state constitutions.

The Constitution allows some variation in the position of new states vis-à-vis the original states, the extent of which has not yet been tested because no new states have been created. New states have no guarantee of equal representation in the Senate or of minimum representation in the House of Representatives. On the contrary, the Constitution provides for the admission of new states on "such terms and conditions, including the extent of representation in either House of the Parliament," as the Commonwealth Parliament sees fit. Through this mechanism, the Commonwealth could exercise some control over the content of the constitution for a new state. The Commonwealth might also be able to vary the federal division of powers in relation to a new state,[46] although there is some uncertainty over the extent of Commonwealth power in this regard. This differential treatment of categories of states reflects a pragmatic judgment on the part of the framers of the Constitution that the original states would only join on conditions of equality but that there was no reason to extend these concessions automatically to later additions to the federation.

Territories, Localities, and Indigenous Peoples

The constitutional position of the territories is different. The two mainland territories, the Northern Territory and the Australian Capital Territory, govern themselves through their own elected institutions. For purposes of the day-to-day operation of the federal system, they are treated as virtually equivalent to the states. Nevertheless, there are institutional and constitutional differences. The governor general appoints the head of state, or the administrator, of the Northern Territory. The system of government in the Australian Capital Territory is designed to avoid altogether the need for an office of this kind; in extreme circumstances, however, the governor general would perform any necessary function. The Self-Government Acts of the territories are ordinary statutes of the Australian Parliament and may be changed by this Parliament. The Australian Parliament may override territory legislation even within areas of territory responsibility, as occurred in 1997, for example, after the Northern Territory passed

legislation to legalize euthanasia. These differences between the constitutional status of the states and territories carry through to other parts of the Constitution. In particular, the provisions of the Constitution dealing with the composition of the Australian Parliament do not extend to voters in the territories, the strict separation of judicial power does not apply fully in the territories, and the relatively few other limits that the Constitution places on the powers of the Commonwealth and the states do not apply to the Commonwealth acting in the territories or to the territory governments themselves.

There are about 800 local government authorities in Australia. However, local government is not mentioned in the Commonwealth Constitution. Rather, it is established and regulated by each state, generally in legislation, although each state constitution now recognizes the state system of local government and provides some minimal protection for it. The question of whether local government should be recognized in the Constitution has been a political issue since the 1970s. Change has been resisted partly because it might adversely affect state power and partly because, in Australia, local government is relatively weak. A referendum to recognize local government in the Commonwealth Constitution was rejected in 1988 by large majorities.

The Constitution now makes no mention of the indigenous peoples of Australia. At the time of federation, Aboriginal Australians were specifically excluded from Commonwealth power under the Constitution and from any population count taken for constitutional purposes. The former reflected a view that indigenous peoples were a state responsibility; the latter was simply racist. Following a 1967 referendum, passed with an overwhelming majority both nationally and in all states, these references were repealed, giving the Commonwealth power to make laws for "the people of any race for whom it is deemed necessary to make special laws."[47] The "race power" is a concurrent power, and both Commonwealth and state laws now affect Aboriginal Australians.

Indigenous law was not recognized by the common law of Australia until relatively recently. This changed in 1992 to the extent that *Mabo v. Queensland (No. 2)*[48] held that the common law would, in some circumstances, recognize indigenous title to land. *Mabo* was followed by Commonwealth legislation providing a regulatory framework for indigenous land claims. Other significant changes in Aboriginal governance also took place in the late decades of the twentieth century. These included the creation of an elected national institution, the Aboriginal and Torres Strait Islander Commission, with responsibilities for both representing and delivering services to indigenous peoples; the conferral of some opportunities for self-governance on particular Aboriginal communities either on their own lands or through local government structures; and the execution of land-use agreements of various kinds between Aboriginal groups, governments, and the private sector. None of these arrangements have a base in the constitutions of either the Commonwealth or the states.

The Allocation of Powers

The Commonwealth Constitution enumerates the powers of the federal legislature and the federal judiciary. Federal executive powers have been defined by judicial interpretation in a manner analogous to federal legislative powers.[49] Subject to the Commonwealth Constitution, the states have plenary powers under their respective state constitutions. The notion that the states have residual power is the consequence of this arrangement. The 40 powers allocated to the Commonwealth can be broadly categorized as concerned with trade and commerce, foreign affairs and defence, and selected social powers, including powers in relation to marriage and divorce.[50] Key powers on which the Commonwealth draws for much of its legislation deal with

trading and financial corporations, external affairs, and interstate and overseas trade and commerce. Police powers generally lie with the states, although federal criminal law is significant and growing in response to international developments. There is a federal police force in addition to the more general police forces of the states.

The model for the division of legislative powers draws on that of the United States. Most Commonwealth powers are concurrent in the sense that they may be exercised by the states as well. The principal exception is the exclusive Commonwealth power to impose customs and excise duties.[51] In the event of inconsistency between Commonwealth and state law in an area of concurrent power, the Commonwealth law prevails.[52] Inconsistency is defined broadly for this purpose to include not only laws that are directly in conflict with each other but also circumstances in which a Commonwealth act purports to cover an entire legislative "field," leaving no room for state legislation.[53]

Although the Constitution places relatively few absolute limits on the powers of the Commonwealth or the states, these limits have proved significant. Some are designed to secure economic union. These provide some protection for the internal common market and some guarantee of interstate mobility.[54] Other express limits on power require the Commonwealth (but not the states) to provide for the payment of "just terms," or compensation, in connection with the acquisition of property and to provide some protection for religious freedom.[55] In addition, the sections of the Constitution that create the institutions of government and Parliament imply limits on both Commonwealth and state power to impair freedom of political communication.[56]

The only other governmental institution contemplated by the Constitution is an Interstate Commission.[57] This was originally conceived as a watchdog to monitor the provisions of the Constitution dealing with the common market. It was a Commonwealth rather than an intergovernmental institution in that it was to be established by the Commonwealth and that its members were to be appointed by the Commonwealth. Although the Interstate Commission has played an intermittent role in Australian federalism, it has been relatively unimportant. No Interstate Commission presently exists, and this is unlikely to change.

Jurisdictional Conflicts

Jurisdictional conflicts between the Commonwealth and the states are fairly common. When they occur, they tend to be significant, although major conflict cannot be described as either frequent or severe. Questions of jurisdiction may be raised in any court, whether Commonwealth or state, by governments or by private parties with an interest sufficient to meet the Australian requirements of standing. This is implicit in the common-law constitutional model and recognized, somewhat obliquely, by Covering Clause 5 of the Commonwealth of Australia Constitution Act. If a constitutional issue is raised, Commonwealth legislation requires that notice be given to the attorneys general of all Australian jurisdictions to enable them to decide whether to intervene and whether to seek removal of the case to the High Court. A case in which a significant constitutional question is raised is likely either to begin in the High Court as mandated by its original jurisdiction or to be removed to the High Court. In any event, it is likely that the High Court will finally deal with such matters on appeal. The courts play a significant role in enforcing the limits of the Commonwealth Constitution with respect to both spheres of government, and there are relatively recent cases invalidating both Commonwealth and state legislation on constitutional grounds. In 1995, for example, the High Court held that Commonwealth legislation regulating the employment contract between two parties, one of

whom was also in a contractual relationship with a "trading corporation," could not be supported as a law with respect to trading corporations and was thus invalid.[58] In 1997 the High Court held that state business-franchise license fees are excise duties, which may not be imposed by the states in accordance with the Constitution.[59]

There are no particular mechanisms, other than the normal political and administrative processes, to forestall jurisdictional conflicts. The cost and disruption of constitutional litigation no doubt offer some incentive to avoid conflict or at least to keep it out of the courts.

FEDERALISM AND THE STRUCTURE AND OPERATION OF GOVERNMENT

Institutions of Commonwealth Government: General

Both the Commonwealth and the states have parliamentary systems: Members of the government must be members of Parliament; governments must have the "confidence" of the lower House of Parliament; and a governor general or governor representing the queen acts as a largely nonexecutive head of state, formally exercising power on government advice.

Despite the historical imperative favouring a parliamentary system, one consideration gave the framers of the Constitution pause before they would mandate responsible government for the Commonwealth. This was concern about whether federalism and responsible government were compatible. Their concern centred on potential for conflict between a House of Representatives with the composition and powers of the Senate, on the one hand, and the requirement that a government have the support of the House, on the other hand. The draft of the Constitution that emerged from the convention of 1891 left the question of responsible government open. One of the most significant changes made by the convention of 1897-98 was to reintroduce a requirement that ministers be members of Parliament.

The Constitution is characterized also by a separation of federal powers. This has become an important principle but remains subordinate to the central requirements of parliamentary government. The conclusion that the Constitution requires a separation of federal powers has been drawn by courts from the structure of the Constitution and, in particular, from the division of the first three chapters between the judicial, legislative, and executive branches of the federal government.[60] The separation of powers, however, is “asymmetrical.” Parliamentary government assumes that the legislative and executive branches interlock and that legislation overrides executive power. The judicial branch, on the other hand, enjoys a strict separation of judicial power, which distinguishes courts from other institutions of government, precludes bodies other than courts from exercising federal judicial power, and restricts the federal courts to the exercise of federal judicial power.

A system of checks and balances emerges from this institutional structure, although it was not necessarily a design feature of the Constitution. Courts may declare actions of the executive illegal and may invalidate acts of Parliament. Governments appoint judges; courts require funding, pursuant to appropriations approved by parliaments; and judges can be removed through a combination of legislative and executive action on the grounds of “proved misbehavior or incapacity.”[61] With regard to relations between the executive and the legislature, the legislature may withdraw confidence from the executive, while the executive may dissolve the lower House of the legislature by advising the governor general to do so. New laws must be passed by Parliament, which is also expected to play the usual role of scrutinizing executive action. In practice, the Senate has made the Commonwealth Parliament more effective in this regard because, for reasons explained below, the Senate is generally constituted differently from the House of Representatives.

The governor general also operates as a check to the extent that he or she has "reserve" powers exercisable without or against government advice. In reality, this check is limited: The prime minister effectively selects the governor general, although the formal appointment is made by the queen; the reserve powers are few; and their exercise is always controversial. Nevertheless, there have been times in Australian history when the governor general has influenced the outcome of events, most notably in 1975, when Prime Minister Whitlam, who had a majority in the House of Representatives, was dismissed from office after the Senate blocked the passage of key financial bills.

The Parliament[62]

The Commonwealth Parliament has the powers traditionally allocated to the legislature in a common-law parliamentary system subject to the division of powers for federal purposes. In other words, the Parliament must make or approve all laws, including tax laws, and must appropriate monies for expenditure by the executive government.

The Parliament is bicameral, and considerations of federalism affect the composition of both houses.[63] The Senate consists of a minimum of six senators for each of the original states; the number may be increased and is presently twelve, but the equal representation of these states must be maintained. The total size of the House of Representatives is required to be approximately twice the size of the Senate, and the Constitution requires the total number of seats to be allocated between states, in proportion to population, before divisions into constituencies are determined.[64] Constituencies need not be equal in population, but current legislation limits population variation to 10 percent above or below the average. A federal constituency may not cross the borders of a state, and each original state is entitled to a minimum of five members of the House of Representatives, irrespective of population.

The self-governing status of the two mainland territories has made some small difference to the scheme. These territories are represented in both houses of the Parliament but pursuant to Commonwealth legislation rather than by constitutional right. Territory representatives are not subject to many of the constitutional requirements that apply to representatives from the states, including the rules that senators have fixed six-year terms, that in general half the Senate faces election every three years, and that the total number of members of the House is linked to the size of the Senate.

The Senate has almost coequal powers with the House. The exceptions are that it may not initiate bills imposing taxation or appropriating monies and may not amend taxation or key appropriation bills. In addition, the Constitution provides a procedure for breaking deadlocks between the Senate and the House in relation to both ordinary legislation and constitution-alteration bills, which, after an extended process -- including, in the case of ordinary bills, a double dissolution of both houses -- ultimately gives the edge to the House of Representatives.[65] Nevertheless, the Senate is a relatively powerful chamber even though, unlike the United States Senate, it has no special, additional constitutional powers of its own.

Since federation, senators have generally voted in accordance with their party allegiances rather than on state lines or with a view to state issues. However, this does not mean that the Senate is irrelevant to Australian federalism. At the very least, its composition ensures that there are more members from the smaller states in the Commonwealth Parliament than there would be otherwise. Thus the smaller states have a larger voice than they would have had in the respective party caucuses, and there is a larger pool of members from the smaller states on which to draw in selecting the ministry and constituting parliamentary committees.

In other respects, too, the Senate has had a profound effect on the operation of the Commonwealth government. Whereas the House is composed of members elected for maximum three-year terms from single-member constituencies through a system of preferential voting, the Senate consists of an equal number of members from each state, half of whom are elected for fixed six-year terms every three years through a system of proportional representation that regards each state as a single electorate. Typically, representation of parties in the Senate is very different from that in the House, and it is unusual for either the government or the opposition parties to have a majority of seats. Hence governments cannot assume that their legislation will be enacted, and government action tends to be subjected to more severe scrutiny in the Senate than in the House. The Senate thus constitutes a real, if not always consistent, check on the will of the government that draws its authority from the House of Representatives. Australian opinion is typically divided over whether this should be so. In 2003 the incumbent Australian government established an inquiry into how the deadlock procedures might be modified to ensure that the will of the House of Representatives is more likely to prevail. While the results were still unknown at the beginning of 2004, the evident lack of public interest in or enthusiasm for such a change make it unlikely that the proposal will be taken further.

The Executive

The executive government of the Commonwealth comprises the prime minister and the ministers, all of whom must be members of the House or the Senate and who depend for office on the confidence of the House. As Australia has a constitutional monarchy, the executive also comprises a governor general, representing the queen and appointed on the advice of the prime minister. Formal executive power is vested in the queen and exercisable by the governor general.[66] In practice, pursuant to unwritten constitutional convention, the powers of the governor general are exercised on the advice of the executive government unless, exceptionally, a discretionary or "reserve" power of the governor general comes into play. Also pursuant to convention, the executive government is responsible to the Parliament for the conduct of the business of government according to the principles and practices generally associated with responsible government in the British parliamentary tradition. The powers of the executive are those normally exercisable by executive government in a common-law parliamentary system, again subject to the division of jurisdictions for federal purposes. Thus the Commonwealth executive derives powers directly from the Constitution (e.g., to dissolve the House of Representatives), from statutes, and from the inherent powers of the executive recognized by the common law. Although some matters fall within state rather than federal executive power, the Commonwealth executive has the powers normally exercisable by a national government, including the powers to enter into international treaties, to declare war, and to make peace.

There is no constitutional requirement that the states be represented in the Commonwealth executive. In practice, however, the ministry usually includes at least one member from each of the six states. The position of head of state in the Australian federation is complicated by constitutional monarchy. The queen is the single head of state for the whole of Australia. To this extent, she plays a role in relation to the states as well as to the Commonwealth. In practice, however, she has seven separate representatives in Australia, each of whom has an effectively discrete role in relation to his or her jurisdiction. Thus the queen appoints the governor general, on the advice of the prime minister, without consultation with the states. The queen also appoints each state governor, on the advice of the state government, without consultation with other jurisdictions. A state governor plays the role of governor general

if there is no incumbent or if for some reason the governor general is not available. This may be explained by the fact that, formally, both the governor general and the governors represent the same monarch. If Australia becomes a republic, this link will be removed and there will be a question about how, if at all, the federal structure of Australia should be reflected in the new arrangements for a head of state.

The Courts

The Constitution divides judicial power between the Commonwealth and the states and contemplates two distinct court hierarchies, united at the apex by the High Court. Federal judicial power includes matters arising under the Commonwealth Constitution and under federal laws, matters involving parties or governments in different jurisdictions, and matters in which the Commonwealth is a party.[67] This jurisdiction may be conferred on either federal or state courts. During the first half-century of federation, the Commonwealth made extensive use of state courts. Since the 1970s, however, the federal court system has been progressively developed to the point where there is now a clear federal court hierarchy, comprising a Federal Magistrates Court, a specialist Family Court, and the Federal Court of Australia, below the High Court itself. The governor general appoints members of the federal judicature on the advice of the Federal Executive Council, which is always accepted.

The highest court is the High Court. It has both appellate and original jurisdiction. Constitutional matters may be taken to the High Court as mandated by its original jurisdiction, although they may also commence elsewhere. The High Court has appellate jurisdiction from both federal and state courts, now subject to a requirement that the High Court itself give special leave to appeal the decision. Courts, including the High Court, may declare acts of either the Commonwealth or state parliaments to be void on constitutional grounds, but they have no advisory jurisdiction. Within at least the federal government, such jurisdiction would be contrary to the separation of judicial power.

The role of the High Court as final court of appeal gives it significant authority in state matters: The High Court is the final arbiter on issues arising under state constitutions; it finally interprets state legislation; and it declares and develops the common law. The states thus have a significant stake in the predilections of High Court justices. However, there is no constitutional role for the states in appointments to the Court. Since 1978 Commonwealth legislation has required Commonwealth attorneys general to consult with their state counterparts before making an appointment. The effect of this change is difficult to gauge. It is symbolically significant and may be presumed to have made some difference in practice, weak though a mere requirement to "consult" may be. No concept of state representation in the High Court has developed in Australia. There are two states from which a High Court justice has never been drawn, and the present seven-member court has five justices from one state, New South Wales (all of whom are men). The composition of the court is emerging as a controversial issue. Ironically, other federal courts have a more substantial presence in the states. They have registries and resident judges in most states, drawn from the legal communities of the states concerned. The High Court itself is based in the national capital, although it has regular hearings in the state capitals.

State Institutions

State institutions are broadly similar to those of the Commonwealth: Most states (except Queensland) have a bicameral legislature; state ministers are members of the state Parliament and depend on the lower House of Parliament for their continuation in office; each state has a

governor representing the queen who acts on the advice of the state executive; and each state has a court system able to declare actions of the state executive to be unlawful and acts of the state Parliament unconstitutional.

There are some institutional differences between the Commonwealth and state constitutional systems. One is that state constitutions are generally easier to change and, in some cases, have no higher status than ordinary law. A second is that the states do not have a constitutionally entrenched separation of powers. Thus, while there is a general expectation that state courts exercise judicial power, there is no constitutional rule to inhibit its exercise by, say, a tribunal or to restrict state courts exclusively to the exercise of judicial power. A third difference concerns the upper houses of the state parliaments. The rationale for the Australian Senate, which still informs its composition, does not exist in the state sphere. State legislative councils originated in the design for colonial governance, whereby a relatively conservative upper house in a bicameral legislature was permitted to represent propertied interests and to operate as a check on the lower house. Although these times have passed and the franchise for upper houses is the same as for lower houses, most states still struggle to identify a useful role for the upper house that does not merely replicate the views of the lower house nor inappropriately stymie the upper house's decisions. To this end, a different electoral system is now used for many state upper houses (typically, proportional representation) to enable representation of a wider variety of interests. Most state upper houses also have lost their legal or effective power to reject money bills and, thus, to threaten the continued existence of the government.

Typically, each state has a complete court hierarchy, beginning with lower magistrates or district courts and culminating in a supreme court. State courts exercise federal as well as state jurisdiction. Judges are appointed by the state governor on the advice of the relevant government. There is no Commonwealth influence over state judicial appointments. Moreover, even though state courts can exercise federal jurisdiction, the Commonwealth has limited capacity to influence the composition of state courts for this purpose. The Commonwealth is expected to "take state courts as it finds them" subject to any implications that can be drawn from the Commonwealth Constitution.[68]

Consistent with common-law method, the decisions of the higher courts of each state hierarchy are binding on courts below. The decisions of other state court systems are not binding but are likely to be persuasive, particularly in the interpretation of intergovernmental legislative schemes. This apparently decentralized judicial system is substantially modified by decisions of the High Court, which are binding in all state systems, resulting in a homogenizing effect that tends to increase the likelihood of a state's judicial decisions proving persuasive in the other states.

Relations between States

The Constitution provides a minimum framework for comity between states in the interest of ensuring national unity on key matters. Provision is made for giving full faith and credit to all state laws and judicial proceedings throughout Australia.[69] Other constitutional provisions inhibit protectionism in interstate trade and provide some mobility rights.[70] States are territorially restricted in their capacity to legislate for other states.[71] The Commonwealth has the power to make laws for the service and execution of judicial process throughout Australia and has done so.[72] Suits between residents of different states arise in federal jurisdiction, although they are generally dealt with in state courts.

There is a vast network of intergovernmental ministerial councils, which proliferated in the last half of the twentieth century. With one partial exception, none is specifically authorized by the Constitution. The exception is the Australian Loan Council, through which government borrowing is coordinated in Australia and which is established by an intergovernmental agreement authorized by Section 105A of the Constitution. There is no constitutional prohibition on compacts between states. While Commonwealth-state cooperation is the norm, agreements are sometimes made between the states alone without giving rise to particular problems.[73]

FISCAL AND MONETARY POWERS

Taxation

With two important exceptions, the Constitution allocates general taxation authority to both the Commonwealth and the states. In this sense, it is a competitive system. The exceptions are customs and excise duties, which are allocated exclusively to the Commonwealth. These taxes have been interpreted by the High Court as denying the states power to impose any taxes on goods. This development also inhibits the states from imposing taxes on natural resources within their territories or in the offshore areas adjacent to a state to the extent to which such taxes can be characterized as imposed on the production of the resource.[74] However, state ownership of these resources within the states' own borders and within the three-mile territorial sea[75] entitles them to collect royalties on the use of these resources.

The taxation powers of both the Commonwealth and the states are constitutionally restricted in various ways. Commonwealth taxes may neither discriminate between nor give preference to states or parts of states.[76] The states are limited in their authority to tax with extraterritorial effect unless a connection can be established between the state and the subject matter of the tax.[77] Neither order of government may tax each other's property. States, and thus local government, may not tax the Commonwealth at all, although the Commonwealth may and does tax the states.

In practice, taxation has become centralized through political action that has largely been upheld by the courts. Most significantly, the Commonwealth unilaterally assumed a monopoly on income taxation during the Second World War through an interlocking series of acts, challenges to the validity of which were largely dismissed, twice, by the High Court. The Commonwealth has retained this monopoly ever since then although, as a matter of law, the states now may, if they so wish, reenter the income-tax field.[78] In the late 1990s, the states agreed to forego additional state taxes in return for Commonwealth agreement to allocate to them the proceeds of the goods-and-services tax. The states still impose some taxes, however, including property taxes, gambling taxes, payroll taxes, and some stamp duties. In the financial year 2001-02, state and local government taxation comprised 18.4 percent of total taxation revenue; Commonwealth taxation comprised 81.6 percent.[79]

Borrowing

The original constitutional design left both the Commonwealth and the states with independent borrowing authority. Even at the time of federation, however, there was concern about the level of debts incurred during the colonial period for the provision of costly infrastructure, such as railways. There was a question of whether the Commonwealth should take over state debt and whether, as a quid pro quo, state borrowing should be subject to some form of national control. Agreement to this effect was reached in 1927, when the Constitution was amended to authorize agreements between the Commonwealth and the states with respect to the debts of the states.

The first agreement established an intergovernmental ministerial council, the Loan Council, to coordinate the borrowing of all governments. It provided that, during the currency of the agreement, the Commonwealth would borrow monies for the states in accordance with Loan Council decisions. With some modifications, this scheme lasted for more than 60 years, although it became increasingly less effective as states developed new methods of financing capital works and as semigovernmental authorities that fell outside the definition of states for the purposes of the agreement raised capital for themselves. A major revision of the Financial Agreement in 1995 restored the capacity of each government to borrow on its own behalf but requires that borrowing programs be fully disclosed and subject to Loan Council surveillance. This mechanism, coupled with the political discipline now imposed by the ratings agencies at a time when fiscal restraint on the part of government is fashionable, so far has proved effective in controlling borrowing levels.

Allocation of Revenues

From the outset of federation, it was expected that the Commonwealth would have more revenues than it needed and that the states would have less as a result of exclusive Commonwealth power over the imposition of custom and excise duties. The framers of the Constitution were unable to agree on a lasting system of revenue redistribution. The Constitution, therefore, makes detailed provision for revenue redistribution only for the first ten years after federation. The only obligation beyond this period was for the Commonwealth to distribute its "surplus revenue" to the states each month on such a basis as the Commonwealth Parliament deemed "fair." This section of the Constitution has proved entirely ineffective because the Commonwealth has been able to organize its revenues to avoid leaving a "surplus."[80]

Revenue redistribution, nevertheless, takes place pursuant to Section 96 of the Constitution, which authorizes the Parliament to grant "financial assistance" to any state "on such terms and conditions as the Parliament thinks fit." The Commonwealth relies on this authority to make both general and specific-purpose payments to the states. This is the mechanism used, for example, to pay the states proceeds from the goods-and-services tax. Typically, general-revenue payments are affected by an equalization formula. The concept of fiscal equalization is long-standing. From the outset, the Constitution allowed Western Australia, as a special concession, to continue to impose customs duties, at diminishing rates, for the first ten years of federation. Payments by the Commonwealth to less affluent states began shortly after the operation of this section of the Constitution came to an end.

The present system of equalization can be traced to the 1930s, when the Commonwealth established an independent Grants Commission to advise on levels of payment to claimant states. The objective of fiscal equalization is to enable each state to provide services at standards comparable to those of other states without imposing taxes and charges at levels appreciably higher than those of other states. To this end, the Grants Commission recommends a "factor" for each state, which takes into account both its revenue capacity and its expenditure needs. The total general-revenue funds made available by the Commonwealth to the states is distributed between them in proportion to state population numbers, adjusted by the equalization factor. In 2003 three states were donors and three were recipients of fiscal equalization funds. Typically, donor states are critical of the system of fiscal equalization; however, successive attempts to impose limits on the extent of equalization through alteration of the methodology have failed.

Spending of Revenues

The Constitution requires money spent by the Commonwealth executive to be appropriated by law "for the purposes of the Commonwealth."[81] This stipulation does not limit the matters for which monies may be appropriated.[82] Expenditure is another matter, however, because it engages the executive power. The High Court has held that the Commonwealth's executive power is limited by reference to the enumerated heads of legislative powers plus additional matters peculiarly appropriate to a national government. Expenditure on scientific research is an example of such "national" power.[83]

Limits on the Commonwealth's power to spend do not affect the range of purposes for which grants can be made to the states or the conditions that may be attached to them. It is clear from the judicial interpretation of Section 96 that although the states may not be forced to accept grants, grants may be made for any purpose and subject to any conditions as long as the conditions at least do not contravene one of the few absolute limits on Commonwealth or state power.[84] It is not clear whether the conditions attached to grants are legally enforceable against a state once a grant has been accepted. In practice, the question does not arise because the threat of withholding other grants from an offending state is an effective sanction.

The High Court has held that the Commonwealth's power to spend is not affected by the prohibition against giving preference to a state in a "revenue" law.[85] The Constitution provides, however, that any Commonwealth "bounty" on the production or manufacture of goods must be imposed uniformly throughout the Commonwealth.[86]

Monetary Policy

Monetary policy is effectively assigned exclusively to the Commonwealth. "Currency, coinage and legal tender" are included in the list of Commonwealth concurrent powers. An absolute prohibition in Section 115 precludes the states from coining money. The central bank, the Reserve Bank of Australia, is not established by the Constitution but under Commonwealth legislation. There is no practice whereby the states are represented in the governing organs of the bank.

FOREIGN AFFAIRS AND DEFENCE POWERS[87]

Responsibility for foreign affairs and defence lies almost exclusively with the Commonwealth. This is the result both of constitutional design and of the manner in which Australia acquired independence. The states were effectively fully independent. The authority of the imperial power in relation to foreign affairs and defence gradually passed to the Commonwealth, and the understanding of the meaning of the Constitution was adjusted accordingly.

The governor general is the commander in chief of the armed forces[88] and acts, in this capacity, on Commonwealth government advice. The Commonwealth Parliament has power to make laws for defence,[89] and the states are precluded from maintaining any naval or military force without the Parliament's consent.[90] The Commonwealth alone possesses the international legal status to speak for Australia.[91] Commonwealth executive power extends to making and ratifying treaties, declaring war, and making peace. Effectively, there are no limits on this power. However, treaties of a legislative character require implementation by a parliament, whether Commonwealth or state, before they can be given effect in Australian law. The legislative power of the Commonwealth Parliament over external affairs enables it to implement international commitments subject to relevant restrictions on power elsewhere in the Constitution.[92] The expansion of the subjects of international treaties, coupled with judicial

recognition of the scope of this power, has had a profound effect on the federal division of powers.[93]

Formally, the Australian states have little or no authority in these matters. To the extent that state governments have executive power that might impinge on external affairs, it is subject to the exercise of Commonwealth power to the contrary. State parliaments may legislate to implement treaties, but such legislation is subject to any inconsistent Commonwealth law. In practice, nevertheless, the Australian states engage in a wide variety of arrangements with other countries or parts of countries. Such arrangements have less than formal treaty status. States also maintain offices in some overseas countries, notably the United Kingdom and the United States. The Australian states are parties to recent agreements between Australia and New Zealand, providing for the mutual recognition of standards for goods and occupations and the execution of child-protection orders. The Commonwealth also has a constitutional obligation to protect states against invasion and, "on the application of the executive government of the state, against domestic violence."[94]

The increase in the range of matters of international concern that characterized the last decades of the twentieth century led to demands for greater cooperation and consultation between the Commonwealth and the states on external affairs. In a parallel development, there has been pressure for greater involvement of the Commonwealth Parliament in decisions about treaties that traditionally were left to the executive. Following some significant procedural changes in the 1990s, pending and existing international commitments are made more transparent. International agreements are now tabled in the Parliament before Australia finally accedes to them and are scrutinized by a parliamentary committee. An intergovernmental Treaties Council has been established to consider international agreements of particular interest to the states. The states may participate in international delegations negotiating treaties on behalf of Australia by agreement with the Commonwealth. There is an understanding that state parliaments may implement treaties when the matter is predominantly of state concern.

CITIZENSHIP, VOTING, ELECTIONS, AND PARTIES

At the time the Constitution was written, there was no formal legal category of Australian citizen.[95] Rather, Australians were subjects of the monarch of the United Kingdom. To the extent that the Constitution refers to status at all, therefore, it refers to "subjects of the Queen."[96]

The Constitution confers power on the Commonwealth Parliament to make laws for "naturalisation and aliens."[97] After the Second World War, as component parts of the former British Empire moved to create separate national citizenships, the Commonwealth Parliament enacted a citizenship law, presumably relying on the naturalization power. Citizenship in this sense is purely a Commonwealth affair. The predominant means of acquiring citizenship is by birth in Australia to at least one parent who is either an Australian citizen or a permanent resident of Australia. New applications for citizenship are made to the Commonwealth and granted by the Commonwealth without consultation with the states.

There is no clear concept of dual citizenship in the sense of distinct state and Commonwealth citizenships. However, an argument for dual citizenship could be made. The people voting in states agreed to the original Constitution. Approval of the people voting in a majority of states remains necessary for constitutional change. Petitioners to the House of Representatives identify themselves as "citizens" of the states in which they reside. There is a concept of state residence that attracts both the right and the obligation to vote in state and local elections.

The Constitution establishes the institutions of Commonwealth government but makes little lasting provision for the rights to vote and to stand for election. In one view, this is because the Constitution is "facultative"; in other words, its principal purpose is to create the institutions of the state and to empower them to act. An alternative interpretation is that failure to provide for such matters reflects disagreement about what the voting requirements should be at a time when two of the six states had already extended the franchise to women although the others were reluctant to do so.

The only constitutional provision that deals with voter qualifications in a way that has substantive effect is Section 41, which prohibits the Commonwealth from preventing a person with the right to vote in a state election from voting in an election for the Commonwealth. This section was intended to protect the voting rights of women in elections of the Commonwealth Parliament immediately after federation and has been held to be transitory in effect.[98]

Section 41 aside, the scheme of the Constitution is intended to confer power on the Commonwealth Parliament to prescribe the qualifications for voters for the House and the Senate after an initial period during which, for convenience, the laws of the relevant states were used. The Parliament exercised this power in 1902, and Commonwealth law has governed these matters ever since. The power is probably not completely at large, as it seems likely that implications drawn from the Constitution now protect at least universal adult suffrage.[99] This is prescribed in the Commonwealth Electoral Act in any event, with the minimum voting age being eighteen. British subjects who are not Australian citizens but who acquired the right to vote in Australian elections before the cut-off date of 1984 still possess the right to vote in Australian elections. Voting is compulsory. Ironically, in these circumstances, citizenship education has been much neglected, although some steps to remedy this acknowledged problem were taken in 2001 in connection with the constitutional centenary.

The constitutional scheme is similar in relation to candidacy for election to the Commonwealth Parliament. State laws were initially used, but the Parliament has power to prescribe the qualifications of candidates and has done so. This power is subject to the disqualifications stipulated in Section 44. These preclude, for example, Australians who are also citizens of another country, including the United Kingdom, from standing for election to the Commonwealth Parliament.

In its original form, the Constitution made no reference to political parties. There is now one such reference, which is the result of a successful referendum in 1977. Section 15 requires that a casual vacancy in the Senate be filled by the relevant state parliament with someone from the same political party as the senator who had held the seat. This change reflects the significance of party numbers in the Senate, particularly since the introduction of proportional representation. The provision is a complicated one, having been drafted to deal with the possibility that the retiring senator had changed party allegiance in mid-term or that the appointee was not, in fact, the relevant party's preferred candidate. This section of the Constitution makes it clear that party allegiance is to be determined at the date of election and that another choice must be made if an appointee is dismissed by the party before taking up the seat.

PROTECTION OF INDIVIDUAL AND COMMUNAL RIGHTS[100]

Neither the Commonwealth nor the state constitutions include a bill or charter of rights. At the time the constitutions were written, countries under the British constitutional system were satisfied that rights could be protected adequately by other means. Unlike other comparable

countries, now including the United Kingdom itself, Australia has continued to adhere to this view. Successive attempts to introduce a national bill of rights have failed, although a bill to provide statutory protection for rights was before the Legislative Assembly of the Australian Capital Territory at the beginning of 2004, with a view to implementation by July 2004.[101] Consistent with this somewhat complacent view of the ordinary legal system's capacity adequately to protect rights, there has been no general incorporation into Australian law of international human-rights instruments to which Australia is a party. Australian law is assumed to be in compliance with them. Corrective action is possible, although not always forthcoming, if, as sometimes happens, this assumption is shown to be misplaced. In the case of some instruments, specific incorporating legislation has been passed. The Commonwealth's Racial Discrimination Act 1975 is an example. This legislation applies to both the Commonwealth and the states, although in its application to the Commonwealth, it has the force only of ordinary law.

The Australian Constitution imposes a few specific limits on the powers of the Commonwealth or of the states that have an effect akin to the protection of individual rights. In particular, Commonwealth legislation authorizing the acquisition of private property must provide for the payment of "just terms"; any trial on indictment for an offense against the laws of the Commonwealth must be by jury; Commonwealth power is restricted in the interests of freedom of religion; and neither the states nor, probably, the Commonwealth may discriminate against subjects of the queen on the basis of state residence in a way that would detract from the requirements of Section 117.[102] The High Court has tended to characterize these provisions as systematic limits on power rather than as free-standing individual rights. It is a minor distinction but a distinction nevertheless. Using this analysis, for example, the Court has held that the requirement for trial by jury is significant for the justice system as a whole and, therefore, may not be waived by an accused if it is otherwise applicable.[103]

Other limits on the powers of parliaments and governments have been drawn from the parts of the Constitution establishing the institutions of government. Thus the collective effect of sections of the Constitution establishing the institutions of representative and responsible government has been held to limit the power of either Commonwealth or state parliaments to burden "political communication."[104] For the same reason, the Constitution probably provides some protection for universal adult suffrage and for the fairness of electoral boundaries, at least for Commonwealth elections. The separation of federal judicial power under the Constitution also provides some limited protection for aspects of the judicial process. It has been held, for example, that the separation of judicial power would preclude Commonwealth legislation that had the effect of a bill of attainder.[105] Despite the similarity of the effects of these doctrines to what in other countries and systems might be described as civil and political rights, in these cases, too, the High Court has maintained the distinction between limits on power and rights.

Many of these restrictions on power are linked in some way to political participation in the institutions of government and thus apply principally to citizens. Some others apply also to noncitizens, however, depending on context. In particular, the requirement of "just terms" for the acquisition of property and the protections drawn from the separation of federal judicial power are available to all individuals affected by a relevant Commonwealth law.

CONSTITUTIONAL CHANGE

The Constitution prescribes a two-step process for change involving both the Parliament and Australian voters. Only the Australian Parliament can initiate a bill to change the Constitution. Normally, both houses of Parliament must pass such a bill. It is possible, however, in

accordance with the process prescribed by Section 128, for the governor general to put to referendum a bill that has been passed by one house twice. In practice, this deadlock mechanism operates only if the government is prepared to advise the governor general to act, which is unlikely to be the case if the house has rejected the bill. In any event, rejection of such a bill by one house of the Parliament does not augur well for the fate of the proposal in a referendum.

A bill to alter the Constitution that has been passed by the Parliament must be approved in a referendum before it becomes law. Normally, approval in a referendum requires the support of a majority of voters nationally and of a majority of voters in a majority of the states. Australians who live in the territories are counted for the first of these purposes but not for the second. Alterations that would change the representation of an original state in either house or the provisions of the Constitution relating to state boundaries must also be approved by majorities in the states concerned.

It has proved difficult to amend the Constitution through this procedure. Forty-four proposals for change have been put to the voters since federation, but only eight have passed. Of the eight successful proposals, several were very minor, and all were confined to quite specific purposes. The referendum record appears to have discouraged governments from seeking to amend the Constitution. Equally, the record of success in referendums has declined in recent decades. The last referendum to approve proposed changes was in 1977, when three out of four proposals were passed. Four others were rejected in 1988, however, with historically large majorities. Two further proposals, to add a preamble to the Constitution and to establish a republic, were rejected in 1999. Among the possible explanations for this record of constitutional change are the highly adversarial character of the process, lack of understanding of proposals for change, and the conservatism of Australian voters on constitutional issues.

Effective change in the operation of the Constitution has been achieved largely by two means. One is political action. This is facilitated by the extent to which the Constitution leaves key matters for resolution to the Australian Parliament after making initial provision for them. Political change has also been effected by cooperation between governments -- for example, through use of the Commonwealth's power to make laws on matters referred to it by a state parliament. A recent reference of power by the states to the Commonwealth, for example, enabled the latter to enact a national-corporations law. The second means by which effective constitutional change has taken place is judicial interpretation. Although the courts are relatively conservative in their interpretation of the Constitution, judicial interpretation has contributed to a significant expansion of Commonwealth power over the course of 104 years. The interpretation of the external-affairs power, for example, to enable the Australian Parliament to implement treaty commitments has given the Commonwealth broad power in relation to the environment, labour standards, and human rights.

CONCLUSION

Like most federal constitutions, the inspiration for Australia's Constitution came from a range of sources. Some of the Constitution's original features, however, were intended to suit peculiarly Australian conditions. Over the course of 103 years, moreover, it has developed in a way that has made it distinctively Australian.

In some respects, the Constitution has been remarkably successful. It brought and has peacefully kept together all parts of a geographically very large country, resisting at least one serious attempt at secession. It has functioned as the principal constituent instrument during more than a century of stable democratic government. It has been flexible enough to adapt to

dramatically changing circumstances, including transition to Australian independence. It has provided a framework for government within the limits of which Commonwealth, state, and territory communities have developed and flourished.

However, partly because of its longevity, the Constitution has become increasingly irrelevant to the structure and operation of Australian government, at least for those who regard the purpose of constitutions as being to structure power and control its abuse. In contrast with, for example, the attitude of Americans to the Constitution of the United States, the Australian Constitution attracts relatively little reverence, or even respect, from Australians. Typically, Australians claim to know very little about it. Public education is difficult because the text of the Constitution seems to have relatively little to do with the practice of government.

Australians also have a love-hate relationship with federalism. Anecdotal evidence suggests that there is a widespread view that Australia does not need a federal form of government and that a system of national, state, and local governments represents "overgovernment" in a country of 20 million people. Nevertheless, this view rarely translates into a willingness to support a referendum to increase Commonwealth power. It seems improbable, moreover, that voters in the smaller, more distant states would ever favour a change that would finally entrust all decisions of government to a single national government dominated by the most populous states on the East Coast.

In the final decade of the twentieth century, the main subject of constitutional debate in Australia was whether, when, and how to establish a republic in the sense of breaking Australia's links with the Crown. Apparently, the referendum failed largely because of the perceived deficiencies of the alternative arrangements that would have been put in place. Whether to establish a republic will likely continue to be a dominant constitutional issue in the early part of the current century not because it causes particular practical difficulty but for symbolic reasons. The debate has a federal dimension, not fully recognized in the proposal unsuccessfully put to referendum in 1999. In a future referendum, there could be questions, for example, of whether it is important for the constituent units of a federation, as well as its centre, to be involved in selection of the head of state. An alternative, possible subject of constitutional debate in the future is the constitutional protection of rights. This seems an obvious issue in a country that, alone in the common-law world, now has no systematic rights protection. Federalism complicates this debate, too. A legislative bill of rights, enacted by the Commonwealth, is likely to be more acceptable in the Australian constitutional culture but would override inconsistent state law and attract state opposition for that reason. In the face of this difficulty, for the foreseeable future, rights protection in Australia is likely to be left to the traditional mechanisms of the Parliament and the courts, developing the single Australian common law.

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[1] *Lange v. Australian Broadcasting Corporation* (1997) 145 ALR 96.
[2] *Attorney-General of the Commonwealth of Australia v. The Queen* [1957] AC 288 (PC).
[3] Brian Opeskin and Fiona Wheeler, eds, *The Australian Federal Judicial System* (Melbourne: Melbourne University Press, 2000).
[4] *McGinty v. Western Australia* (1996) 186 CLR 140.
[5] John Hirst, *The Sentimental Nation: The Making of the Australian Commonwealth* (Melbourne: Oxford University Press, 2000); Helen Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution* (Cambridge: Cambridge University Press, 1997).
[6] For a review of Australia's operation to mark the occasion of the constitutional centenary, see Robert French, Geoffrey Lindell, and Cheryl Saunders, eds, *Reflections on the Australian Constitution* (Sydney: The Federation Press, 2003).

[7]This calculation of gross domestic product is based on current purchasing power parity; see the Organization for Economic Cooperation and Development (OECD), http://www.oecd.org/dataoecd/48/5/2371372.pdf, accessed 20 April 2004.
[8]Section 95 enabled Western Australia to continue to impose customs duties after federation, on a diminishing scale, for 10 years.
[9]Appeals to the Privy Council nevertheless remained an option until they were progressively restricted, to the point of effective extinction, in 1968, 1975, and 1986.
[10]Federal Council of Australasia Act 1885 (Imp). South Australia was a member for only two years.
[11]Under Section 121, New Zealand, or any other country, may still be admitted to the Australian federation as a new state. There is an express reference to New Zealand in Section 6 of the Commonwealth of Australia Constitution Act 1900 (Imp), which now has no legal significance.
[12]Section 125.
[13]Sections 121 and 124.
[14]Alvin W. Hopper, "Territories and Commonwealth Places: The Constitutional Position," *Australian Law Journal* 73 (March 1999): 181-218.
[15]Gregory Craven, *Secession: The Ultimate States Right* (Melbourne: Melbourne University Press, 1986).
[16]Commonwealth Grants Commission Act 1973; Commonwealth Grants Commission, *Equality in Diversity: History of the Commonwealth Grants Commission* (Canberra: Australian Government Publishing Service, 1995).
[17]Section 41. The two colonies were South Australia and Western Australia.
[18]Section 127.
[19]James Bryce, *The American Commonwealth,* 1st ed. (Indianapolis: Liberty Fund, 1888); John S.F. Wright, "Anglicizing the United States Constitution: James Bryce's Contribution to Australian Federalism," *Publius: The Journal of Federalism* 31 (Fall 2001): 107-29.
[20]In Australia, unlike in the United States, however, both national and state consent were signified through a referendum, with the people directly voting both nationally and in state communities.
[21]John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (1901; reprint, Sydney: Legal Books, 1976), p. 127.
[22]Section 53.
[23]Geoffrey Sawer, *Federation Under Strain* (Melbourne: Melbourne University Press, 1977).
[24]House of Representatives Standing Committee on Legal and Constitutional Affairs, *Constitutional Change: Select Sources on Constitutional Change in Australia, 1901-1997* (Canberra: AGPS, 1997).
[25]*Lim v. Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.
[26]*Lange v. Australian Broadcasting Corporation* (1997) 145 ALR 96.
[27]Section 128.
[28]*Australian Capital Television Pty Ltd v. Commonwealth* (1992) 177 CLR 106.
[29]*Marbury v. Madison,* 5 US 137 (1803).
[30]*Lange v. Australian Broadcasting Corporation* (1997) 145 ALR 96.
[31]Section 77(iii).
[32]*Re Wakim; Ex parte McNally* (1999) 198 CLR 511 and *R. v. Hughes* (2000) 202 CLR 535.
[33]Section 51(xxxix).
[34]Section 105A.
[35]Section 120.
[36]*Amalgamated Society of Engineers v. Adelaide Steamship Co.* (1920) 28 CLR 129.
[37]Martin Painter, *Collaborative Federalism: Economic Reform in Australia in the 1990s* (Cambridge: Cambridge University Press, 1998).
[38]Under Section 51(xxxvii) of the Constitution, corporations law is now Commonwealth law, following a reference of power by the states to the Australian Parliament.
[39]Sections 7 and 124 respectively.
[40]Sections 51(ii) and 99 respectively.
[41]Section 106.
[42]Section 123.
[43]*Austin v. Commonwealth of Australia* (2003) 77 ALJR 491.
[44]*Kable v. Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
[45]*Lange v. Australian Broadcasting Corporation* (1997) 145 ALR 96.

[46]This view is expressed by Chris Tappere, "New States in Australia: The Nature and Extent of Commonwealth Power under Section 121 of the Constitution," *Federal Law Review* 17 (1987): 223 at 248-49.
[47]Section 51(xxvi).
[48]*Mabo v. Queensland (No. 2)* (1992) 175 CLR 1.
[49]*Victoria v. Commonwealth and Hayden* (1975) 134 CLR 338.
[50]Marriage and divorce were included in the list of Commonwealth powers due to the desirability of uniform laws of marriage and divorce between states; see Quick and Garran, *The Annotated Constitution*, p. 608.
[51]Section 90.
[52]Section 109.
[53]*Viskauskas v. Niland* (1983) 153 CLR 280.
[54]Sections 92 and 117 respectively.
[55]Sections 51(xxxi) and 116 respectively.
[56]*Lange v. Australian Broadcasting Corporation* (1997) 145 ALR 96.
[57]Section 101.
[58]*Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323.
[59]*Ha v. New South Wales* (1997) 189 CLR 465.
[60]*R. v. Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (HC); *sub-nom Attorney-General of the Commonwealth of Australia v. The Queen* [1957] AC 288 (PC).
[61]Section 72.
[62]For a review of the operations of the Parliament prepared for the constitutional centenary, see G. Lindell and R. Bennett, eds, *Parliament: The Vision in Hindsight* (Sydney: The Federation Press, 2001).
[63]See generally, Brian Galligan, *A Federal Republic: Australia's Constitutional System of Government* (Cambridge: Cambridge University Press, 1995).
[64]Section 24.
[65]Section 57.
[66]Section 61.
[67]Sections 75 and 76.
[68]*Federated Sawmill, Timberyard and General Woodworkers' Employees' Association (Adelaide Branch) v. Alexander* (1912) 15 CLR 308; *Leeth v. Commonwealth* (1991) 174 CLR 455; *Kable v. Director of Public Prosecutions* (1996) 189 CLR 51 per Gaudron J. at 103, per McHugh J. at 110-11.
[69]Section 118.
[70]Sections 92 and 117.
[71]*Union Steamship Co. of Australia Pty Ltd v. King* (1988) 166 CLR 1.
[72]Section 51(xxiv).
[73]Martin Painter, *Collaborative Federalism* (Melbourne: Cambridge University Press, 1998).
[74]*Hematite Petroleum Pty Ltd v. Victoria* (1982) 151 CLR 599.
[75]Title to resources within the three-mile territorial sea is vested in states by the Commonwealth Coastal Waters (State Title) Act 1980.
[76]Sections 51(ii) and 99.
[77]*Broken Hill South Ltd v. Commissioner of Taxation (NSW)* (1937) 56 CLR 337.
[78]Cheryl Saunders, "The Uniform Income Tax Cases," *Australian Constitutional Landmarks,* ed. H.P. Lee and George Winterton (Melbourne: Cambridge University Press, 2003), 62-84 at 62.
[79]Australian Bureau of Statistics, *2001-02 Taxation Revenue*, document 5506.0, 23 May 2003, p. 4.
[80]*New South Wales v. Commonwealth* (1908) 7 CLR 179.
[81]Section 81.
[82]*Victoria v. Commonwealth and Hayden* (1975) 134 CLR 338.
[83]Ibid., 397 (Mason J.).
[84]*Victoria v. Commonwealth* (1957) 99 CLR 575, per Dixon C.J. at 605-11.
[85]*Deputy Federal Commissioner of Taxation (NSW) v. W.R. Moran Pty Ltd* (1939) 61 CLR 735 (HC).
[86]Section 51(iii).
[87]See generally, Brian R. Opeskin and Donald R. Rothwell, eds, *International Law and Australian Federalism* (Melbourne, Melbourne University Press, 1997).
[88]Section 68.
[89]Section 51(vi).
[90]Section 114.

[91]*New South Wales v. Commonwealth* (1975) 135 CLR 337.
[92]Section 51(xxix).
[93]*Commonwealth v. Tasmania* (1983) 158 CLR 1.
[94]Section 119.
[95]See generally, Kim Rubenstein, *Australian Citizenship Law in Context* (Sydney: Law Book Co., 2002).
[96]Section 117.
[97]Section 51(xix).
[98]*R. v. Pearson; Ex parte Sipka* (1983) 152 CLR 254.
[99]*McGinty v. Western Australia* (1996) 186 CLR 140.
[100]See generally, George Williams, *Human Rights under the Australian Constitution* (Melbourne: Oxford University Press, 1999).
[101]Human Rights Bill 2003.
[102]The somewhat unwieldy Section 117 provides that a "subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State."
[103]*Brown v. The Queen* (1986) 160 CLR 171.
[104]*Lange v. Australian Broadcasting Corporation* (1997) 145 ALR 96.
[105]*Polyukhovich v. Commonwealth* (1991) 172 CLR 501.