

Australia: A quiet revolution in the balance of power

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Despite very few formal constitutional changes over the past century, significant revisions effectively have been made to the distribution of powers and responsibilities in the Australian federation. The national sphere of government, or Commonwealth, has gradually acquired more powers at the expense of the states in order to meet the changing role and responsibilities of government. Australia's federal system thus has evolved, not so much through deliberate amendment, but as a result of judicial interpretation of the Constitution and deft political manoeuvring.

Australia is simultaneously one of the youngest democracies and one of the oldest federations. In 1901, the six Australian colonies united in "one indissoluble Federal Commonwealth under the Crown of the United Kingdom." That decision was the result of deliberation, compromise, and debate over the needs and aspirations of the community – though notably it excluded any consultation with the indigenous people. In the century since federation, there has been a quiet revolution in the balance of powers and responsibilities between the centre and the states. Today, Australia is one of the more centralized federal systems in the world.

The drafting of the Australian Constitution was a project in comparative constitutional law and politics. The framers, brought up on a diet of responsible government modelled on the Westminster system, had to find a means to accommodate the benefits of union and the need of the colonies for autonomy. To the system of responsible government they grafted a federal structure. Inspiration for Australian federalism can most obviously be found in the United States. Many of the framers had visited the U.S. and had studied American constitutional law. Ironically, the framers chose the American model of federation over the Canadian system, because they were concerned about the latter's perceived centralizing federalism. History would show their perceptions to be incorrect.

The framers opted for a concurrent system of powers and responsibilities, following the example of the United States Constitution. They provided in their Constitution a list of areas over which the Commonwealth could make concurrent laws with the states, including taxation, the regulation of certain types of corporations, immigration and marriage, and divorce. In granting to the Commonwealth Parliament a defined list of powers, the framers left the residue to the states, as a matter of law. Thus areas such as criminal law, the control of land and health care remain with the states under the Constitution and ensure a continuing and significant role for them. The powers that are expressly allocated to the Commonwealth consist of the minimum deemed necessary to create a nation in Australia in 1901.

The Constitution allows for the Commonwealth to have exclusive powers over defence, duties of customs and excise, currency, and what are considered "Commonwealth places," such as the seat of government in Canberra. Further, when laws of the Commonwealth and the states deal with the same subject matter, such as the regulation of corporations, the Commonwealth law will prevail to the extent of any inconsistencies.

This basic scheme, established in 1901, has been resistant to formal change. Constitutional change requires endorsement by the people at referendum. Over the century there have been 44 referendums proposed, only eight of which have been successful, notably the granting of Commonwealth legislative power over indigenous Australians in 1967. Most recently, Australians rejected the attempt to sever ties with the British monarchy and establish Australia as a republic. The cause of this resistance has exercised the minds of political scientists and would-be reformers. Ultimately, it appears that constitutional reform is dependent on two factors: bipartisan political support and no perceived increase in the power of the Commonwealth. However, even these elements have not always assured success.

Despite the small number of formal amendments made to it, the Australian federal system has been transformed significantly, largely due to interpretations of the Constitution by the High Court. The Court, established in 1903, is a court of appeal from the Supreme Court of each state and other federal courts and is the interpreter of the Constitution. Its role as final arbiter of Australian law was initially overshadowed by the opportunity for appeals to the British Privy Council. The option to appeal to Britain was ended in a series of legislative actions starting in the 1960s and ending in 1986.

The High Court has been a prime innovator in Australian federalism. The first few decades of Australian federalism witnessed an attempt by the Court to maintain the federal balance that existed at the union of the colonies. Soon, though, the Court dramatically changed tack and in 1920 permitted the Commonwealth to exercise its legislative powers without the implied restriction of the previous decades. This, together with changes in the political landscape after the Second World War, allowed the Commonwealth to emerge as the significant actor within Australian federalism.

As a result of constitutional interpretation and deft political manoeuvring, the Commonwealth has come to dominate the Australian federation. Control of direct and indirect taxation has allowed it to use its financial muscle to force the compliance of the states, even when it lacks direct legislative capacity. Today, education, health, and law and order are dominated, in varying degrees, by the Commonwealth's policy agenda. Moreover, Commonwealth power in relation to the making and implementation of international treaties effectively has extended its power further, as the numbers and range of such treaties have increased. This has proved controversial in many areas such as environmental protection, human rights, and industrial relations.

Since its inception, Australian federalism has consistently attempted to draw clear legal lines of power and responsibilities between the Commonwealth and the states. Even though the lines have gradually shifted, through a combination of cooperation, litigation, and history, the Australian federation has proved a relatively successful system of governance.