



Unit 12: Federalism v Westminster Year 9 - C & C Strand: Laws & Citizens

Topic 9.2: Federalism v Westminster

Why federalism was chosen and how power is distributed

When the British first colonised Australia, they claimed the whole of the east coast of Australia as one colony, called New South Wales. It extended westwards to about half-way across the continent. This was an unrealistic claim at the time, because the British were not able to exercise control over all this territory, at least in the beginning.

The British feared that parts of the continent would be claimed and settled by other colonial powers, such as the French, so they expanded their settlements to assert control over the continent. They established a penal settlement in what was then known as Van Diemen's Land, but it was not practical to rule it from Sydney, so it became a separate colony in 1825. It was later re-named as Tasmania.

South Australia was cut off from New South Wales and established as a planned colony of free settlers, rather than convicts, in 1836. Western Australia was also claimed by the British in 1827 and proclaimed as a separate colony in 1829. Victoria and Queensland were both separated from New South Wales in 1851 and 1859 respectively. The people who lived there wanted to govern themselves, and not to be ruled from Sydney by people who did not know them or understand their different needs.

While the British, for administrative reasons, much preferred to deal with one central government rather than a number of different colonies, this proved impossible in practice because Australia is such a large continent and its people live in different climates, with different resources, levels of prosperity, needs and interests. They wanted their own representative government to address them and lobbied hard to get it.

When federation was being debated in the 1890s, some colonies were rich and had large populations, while others had small populations and were less prosperous. They feared being out-voted and disadvantaged if they united into one country with a central government.

It was therefore essential that a federal system was chosen and there were protections for the colonies, in order for them to agree to become States. Those protections involved representation in the federal Parliament, amending the Constitution, and the distribution of powers between the Commonwealth and the States.

Representation and referendums

The key protection required by the smaller colonies was equal representation in the upper House of Parliament, known as the Senate. Each original State (i.e. a State that joined at the time of Federation) was guaranteed equal representation, regardless of its population. This was intended to protect the small States so that they could vote down any law that would disadvantage them. Each State has 12 senators, regardless of its population.

Even though the lower House, the House of Representatives, is chosen based upon electorates with roughly equal populations, there is also a guarantee in the Constitution that each original State has a minimum of 5 electorates, even if its population would not otherwise warrant it. Again, this was to ensure that the views of the people of a State are given attention, even though its population may be small.

To protect small States from being disadvantaged by constitutional change, any referendum to change the Constitution must be supported by majorities in a majority of States, in addition to an overall majority. If a referendum would diminish the proportionate representation of a State or alter its borders, a majority of that State must also approve it.



The Constitution distributes powers between the Commonwealth and the States, and any disputes about who has the power is decided by the High Court of Australia
Source: HCA

Distribution of powers

In a federal system of government, laws can be made at both the national level and at the sub-national level (i.e. by States or provinces).

One of the key things a Constitution has to do is distribute those powers among the levels of government in a way that is clear, and which ensures that citizens can know, when laws conflict, which law they must obey. There are different models that can be used.

Different models

One model involves the legislature of each level of government having the power to make laws about certain subjects that are set out in a list. There is a list of subjects for the national level and a list of subjects for the State/provincial level, and a mechanism for dealing with matters that fall within neither list.

This is essentially the system used in Canada. It gives a list of exclusive powers to provinces (such as powers in relation to prisons, hospitals, local government, education, natural resources, property and civil rights) and another list of powers to the national Parliament (including postal services, census and statistics, defence, navigation and shipping, quarantine, fisheries, currency, and criminal law). There are also some concurrent powers, over matters such as immigration and agriculture, which means both levels can legislate on the subject. If a matter does not fall within a listed power, then it comes within the 'residuary' power for the federal Parliament 'to make laws for the peace, order and good government of Canada'.

The Australian model

The people who wrote the Commonwealth Constitution in the 1890s (known as the 'framers' of the Constitution) had a vision of a small central government of limited powers dealing with national types of issues, such as foreign affairs, defence and inter-governmental matters. The States would have much greater powers and fulfil a more substantial role, dealing with matters such as health, education, land use, crime and prisons. The framers looked at the various federal examples that existed at the time, such as Canada, the United States and Switzerland.

As Canada was part of the British Empire, one would think that they would have borrowed its federal model. But the framers were worried that the Canadian model gave too much power to the national level of government. They preferred a more decentralised model of powerful States with a constrained central government. They thought that the United States model was more likely to achieve this outcome, so they adopted it instead.

This meant that the Commonwealth Parliament could only enact legislation that falls within a subject-matter listed in the Constitution. While a small number of those powers were 'exclusive' (meaning that a State couldn't legislate about that subject), most of the listed Commonwealth powers, known as 'heads of power', are 'concurrent'. This means that both the Commonwealth and the States can make laws about those subjects.

The State Parliaments, unlike the Commonwealth Parliament, retained the power to legislate about anything at all (unless the Constitution took away that power - such as the power to tax goods). The States don't need to be able to point to a listed head of power to support their laws. However, if a State and the Commonwealth both legislate about the same subject, and their laws are inconsistent, then the Commonwealth law wins and the State law is inoperative to the extent of the inconsistency.

How interpretation by courts has affected the operation of the model

In practice, the model chosen by the framers of the Constitution did not turn out the way they intended. There was a flaw in the system. There is nothing written in the Constitution that expressly reserves certain subjects for the States to legislate about exclusively.

The framers of the Constitution had assumed that subjects that had not been allocated expressly to the Commonwealth, such as education, health, agriculture and the environment, were necessarily reserved to the States. To them, the Constitution was a 'political compact' rather than a legal document, and needed to be read in the context of the underlying political compromise on which it was based. The first High Court of Australia, which was comprised of judges who had been framers of the Constitution, developed a doctrine of [reserved state powers](#), so that Commonwealth heads of power could not be interpreted in a way that trespassed on those reserved States powers.

But by mid-1920, all the judges of the first High Court had died. The High Court was now comprised of lawyers, most of whom treated the Constitution as a legal document, rather than a political compact. In the [Engineers Case](#), they overturned the doctrine of reserved State powers. They interpreted the Commonwealth's legislative powers as fully as possible, regardless of whether they trespassed on areas of traditional State responsibility. The States were left with nothing they could point to on the pages of the Constitution which protected their areas of responsibility from Commonwealth incursion. This allowed the Commonwealth to grow in power and State areas of responsibility to shrink.



Amalgamated Society of Engineers canvas banner 1890 by Kift & Smith, Ballarat. Source: Museums Victoria and ACC Exhibition, High Court of Australia

For example, in 1983 in the *Tasmanian Dam Case*, the High Court accepted that the Commonwealth Parliament can use its external affairs power in section 51(xxix) of the Constitution to make a law that prevented the Tasmanian Government from building a dam on the [Franklin River](#). The law itself had a domestic effect, interfering with the State's ability to generate hydro-electricity to power the State. But the High Court held that as long as the Commonwealth was legislating to give effect to a treaty, which was in this case a [treaty protecting world heritage sites](#), it could make laws that have a domestic effect.

As there are now so many treaties on different issues, such as the environment, human rights, industrial relations and land use, the Commonwealth's legislative power has expanded significantly, diminishing the overall power of the States. Another power that has been greatly expanded in scope, as a consequence of the [Work Choices Case](#), is the corporations power in section 51(xx).

The consequence is that the intention of the framers of the Constitution has been up-ended. Instead of a small central government of limited powers and a decentralised system of government with strong States, Australia now has a strong central government with very wide powers and weak States, and is on a trajectory of centralisation.



Topic 9.2: Lesson/ Activities One

The Fairness of Federalism and Democracy in Australia



AUSTRALIAN
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CENTRE

Time/Lesson	Learning Goal
<ul style="list-style-type: none">1 hour/ 1 Lesson	<ul style="list-style-type: none">To understand the idea of federalism and its significance in Australian federation.To evaluate and discuss the relationship between federalism and democracy.
Rationale	Success Criteria
It is important for students to understand the reasons and need for federalism in Australia and how it relates to democracy, so they can better understand how Parliament was designed, how it functions today and how this combination of federalism and democracy leads to nationhood.	Students can explain federalism and why it was (is) important for the smaller colonies (States) in Australia. Students evaluate the merits of federalism and democracy in Australia.
Teaching Reference Document	
<ul style="list-style-type: none">TRD 103: Why federalism was chosen and how power is distributed	
Tuning In	
Provide current population statistics for the states of Australia. ABS statistics here .	
ANALYSE: What percentage of the population of Australia is within each State.	
EXPLAIN: New South Wales and Victoria have well over half the population of all of Australia.	
WONDER: Imagine that the States of Australia were not States but separate colonies and there was a push for federation. Imagine that you represent a small colony, such as South Australia or Tasmania. You support the idea of federation and democracy, but you also want to protect your home. What could motivate you to be a part of a federated Australia that still enables your colony to have a say in this federation, even though most people live in NSW and Victoria? What guarantees would you seek? What would be a deal-breaker?	
Students should TIPS (Think/Ink/Pair/Share) their responses.	
Teacher Instruction	
EXPLAIN: This was the big issue facing the colonies when federating - how to ensure the voices of smaller States were heard, while also enabling a democracy, which is majoritarian.	
REVISE topic 6.1 TRDs and lessons to understand Federation, and the Constitution including the intentions of the framers.	
READ TRD: Why federation was chosen and how power is distributed.	
ANSWER Questions when reading:	
<ol style="list-style-type: none">Did the framers of the Australian Constitution want the Commonwealth or the States to be more powerful?How were the Commonwealth Parliament's powers limited? What did this mean for the States?In reality, which is more powerful - the Commonwealth or the States?Why is federalism important? Is it important for minorities to be respected and have their voices heard?	

Group Independent Learning

EXPLAIN: The smaller colonies would only sign up to Federation if they had equal Senate representation. Whereas the House of Representatives represented the people, the Senate would represent the States. This mirrored the federal system of the United States of America. Each state would have an equal number of Senators. That is why Queensland and Tasmania both currently have 12 Senators in the Senate, even though Queensland has almost 10 times the population of Tasmania.

DEBATE ONE (OR MORE) OF THE FOLLOWING:

- A federal system must have equal representation of States to be fair.
- A federal system, with a lower house representing the people and an upper house representing the States, is the fairest system.
- Equal representation of the States does not undermine democracy.
- The majority should rule and States are no longer relevant.

Wrapping It Up

QUESTION: What alternative compromises could the colonies have made that would have meant the small colonies would still be a part of federation?

Differentiation/Enrichment

EXTENSION: Select one of the case studies in the TRD. [The Engineers case](#) can be found on the ACC website as a case study. [The Tasmania Dam case study](#) can also be found on the ACC website. How important was the case for the operation of the federal system?

Assessment Strategies

Check understanding by collecting answers to the teacher instruction federalism questions and the individual case study presented in the differential/enrichment exercise.

