



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

Topic 9.2: Federalism v Westminster

Federalism - When is Discrimination Against States or Their Residents Prohibited?

There is no general anti-discrimination provision in the Constitution, but there are some provisions that prohibit discrimination against the States, or parts of States.

Financial discrimination

Section 51(ii) of the Constitution gives the Commonwealth Parliament power to make laws with respect to 'taxation; but so as not to discriminate between States or parts of States'. This means that when the Commonwealth imposes a tax, such as the goods and services tax ('GST'), it must apply it at the same rate and to the same types of goods and services, across the country.

If the Commonwealth Parliament decided that New South Wales was rich and Tasmania was poor, so that it imposed a 15% GST in New South Wales and a 5% GST in Tasmania, this would most likely be held by a court to be invalid.

What if the Commonwealth Parliament tried to get around this by imposing an equal GST tax of 10% across all States, but refunding all the GST paid by Tasmanians, while taking GST amounts paid by the people of New South Wales and giving them to other States? This would have a practical effect similar to taxing in a discriminatory way. Would it be invalid?

The High Court has decided that grants to the States under section 96 of the Constitution can be discriminatory, because the provision was intended to allow help to be given to the States that need it. The Court recognised in the *Moran* Case that 'equal' laws may produce 'very unequal results in different parts of Australia'. Section 96 provides a 'means for adjusting such inequalities in accordance with the judgement of Parliament'.



Parliament House, Canberra
Source: IStock

Chief Justice Latham said that there is 'no general prohibition in the Constitution of some vague thing called "discrimination".' He concluded that discrimination can be 'just or unjust' and that a 'wise differentiation based upon relevant circumstances' is necessary.

But if the discrimination was part of a deliberate scheme to undermine the non-discrimination provision in section 51(ii) and to tax unequally, and if there was no clear justification for the different treatment of the State, then it might be vulnerable to challenge.

Trade discrimination

Section 99 of the Constitution says that the Commonwealth shall not enact a law about trade, commerce or revenue which gives preference to one State or a part of it over another State or any part of it. 'Preference' has been interpreted by the High Court as meaning 'partiality' (i.e. a form of favouritism or prejudice), rather than lack of uniform treatment. Laws can treat States differently, to accommodate their different circumstances (i.e. treating them fairly), without amounting to a 'preference'.

Section 102 of the Constitution also permits the Commonwealth Parliament to legislate so as to forbid any preference or discrimination by a State with respect to railways, if the preference or discrimination is 'undue and unreasonable, or unjust to any State'. But this provision relies on the Interstate Commission judging what is undue, unreasonable and unjust. It is not operable now, because the Interstate Commission does not presently exist.

In addition, section 92 of the Constitution requires that trade and commerce among the States shall be 'absolutely free'. This has been interpreted by the High Court as meaning that neither the States nor the Commonwealth can enact laws that discriminate against interstate trade and commerce in a way that is 'protectionist' (i.e. gives protection to jobs or industries in a State from interstate competition). The Commonwealth and States therefore need to be careful in enacting laws about trade, so they do not discriminate in this way.

Discrimination affecting the residents of States

While the Commonwealth Constitution is miserly in the rights that it gives, a small remnant of US civil rights can be found in section 117. Originally the draft provision contained an 'equal protection' clause, drawn from the US 14th amendment. But its scope was later cut down in the 1898 Constitutional Convention due to concerns about the imprecision of terms such as 'due process' and 'equal protection'.

Edmund Barton did not want to insert in the Constitution 'any words about the meaning of which we are not quite sure' which might be interpreted in an unintended fashion by a future court. The draft provision was therefore limited so that it now only deals with discrimination against people because of the State they live in.

Section 117 of the Constitution prevents a 'subject of the Queen' (i.e. an Australian citizen) who is resident in State A from being subject to 'any disability or discrimination' imposed by State B, which would not be equally applicable to that person if he or she was a resident in State B. Curiously, it doesn't make the discriminatory law invalid. Instead, it gives a person an immunity from the application of the law.

The test the High Court applies is to look at the actual situation of the out-of-State resident who is making the complaint, and compare it to the position he or she would be in if they were a resident of the State. Would the fact of being a resident of the other State effectively remove the disability or discrimination under that State's law, or reduce its effect so that it is no longer of any significance? In assessing the disability or discrimination, the Court looks to substance rather than form, and will include indirect discrimination.

For example, a Queensland law that prevented a barrister from being admitted to practice in Queensland because he or she did not live in Queensland and did not intend to practice principally in Queensland, was held to breach section 117, with the consequence that the barrister was immune from that law and could be admitted to practice in Queensland.

But section 117 does not apply to every right given by a State to its residents. Some rights are intimately connected with residence in the State - such as voting in State elections. For example, it would be wrong for a Queenslander to argue that a law preventing him or her from voting in Tasmanian elections because he or she was not a Tasmanian resident was discriminatory and breached section 117. A right to vote can legitimately be tied to where you live.

States may also provide welfare payments (eg first home owner grants) to their own residents, because they come from money raised from the State's tax-payers. For example, if Victorians pay a high car registration fee, which goes into a fund to compensate them on a no-fault basis for car crash injuries, then someone from interstate who is injured in a car accident in Victoria cannot also claim compensation from that fund, as he or she has not contributed to it. A law saying that only those who have contributed can receive compensation from the fund is not a law that discriminates against people because they are a resident of another State.





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Finances - How do financial relations between the Commonwealth and the States work?

One of the drivers for federation was anger by those who lived near colonial borders, especially along the Murray River, about having to pay taxes on goods as they crossed the border. People who lived in the south of New South Wales received most of their goods from Melbourne, but had to pay tax on them when they crossed the Murray. They advocated for a federal system under which the States could not impose taxes on goods and there would be free trade among the States. This was reflected in the Constitution that was drafted. Section 92 requires free trade and commerce among the States and section 90 says that only the Commonwealth can impose taxes on goods that are produced or manufactured in Australia (called 'excise duties') or goods imported into Australia (called 'custom duties').

How the Constitution was intended to deal with federal-state financial relations

As excise and customs duties were the main source of tax revenue prior to federation, the effect of section 90 was that the Commonwealth would end up with most of the tax revenue (i.e. money raised from taxes), but few spending responsibilities, and the States would end up with little tax revenue and the most expensive spending responsibilities (eg schools, hospitals, prisons, etc).

So section 87 was inserted in the Constitution to restrict the Commonwealth to spending only a quarter of its revenue from duties of customs and excise, with the rest going to the States. But this was only made compulsory for a period of 10 years, because the framers of the Constitution found it hard to predict how financial matters would change after that.

The High Court of Australia
Source: HCA



Section 94 of the Constitution required the Commonwealth's surplus money to go to the States, but the Commonwealth soon found a way to avoid paying the money, by allocating annually all surplus money into special funds for future spending. This means that there has been no 'surplus' to pass on to the States since 1908.

The consequence was that the States were left with little revenue and great spending responsibilities (known as 'vertical fiscal imbalance'). The States filled that gap by starting to tax income instead. This proved to be a productive tax (i.e. they raised lots of money). Later the Commonwealth joined in, with its own low income tax. But during World War II, the Commonwealth took over income tax from the States, promising to give it back after the war. It broke its promise and kept on imposing income tax, leaving no economic room for the States to come back into taxing income. The consequence is that the States are reliant for almost half their revenue upon grants from the Commonwealth.

Tax revenue and the GST

For a while the States were able to raise money by claiming they were charging for the privilege of selling cigarettes, alcohol and petrol (rather than taxing those things as 'goods'). But in the 1990s, the High Court decided that in reality, the States were taxing the goods (i.e. the cigarettes, alcohol and petrol), which breached section 90 of the Constitution.

The Commonwealth then took over those taxes, and eventually applied a broad-based goods and services tax ('GST') in 1999, with the proceeds (after deducting the cost of collection) going to the States. In exchange, the States were required to remove some of their less efficient taxes. Overall, the States received a portion of what they needed to provide the services for which they are responsible, but not all of it.

The GST revenue is 'untied'. This means that States and Territories are responsible for how they spend it. The GST collected within a State is not necessarily returned to that State by the Commonwealth. Instead, the GST revenue is distributed amongst the States and Territories in accordance with the principle of 'horizontal fiscal equalisation'. This means that every State and Territory receives a GST allocation calculated so that it could provide the same average standard of services and infrastructure, as long as it made the average effort to raise its own revenue and operated at the average level of efficiency.

The idea here is that all Australians deserve a certain standard of hospitals, schools and other services, regardless of where they live. But the States and Territories can't be lazy and rely on this payment – they have to make their own efforts to raise revenue and operate in an efficient manner, or they will be penalised.

In practice, the poorer States and Territories (South Australia, Tasmania, the ACT and the Northern Territory) are generally supported by tax collected in New South Wales and Victoria. Queensland and Western Australia are sometimes recipients and sometimes contributors, depending upon their economic circumstances (eg a mining boom). Western Australia also entered into a deal with the Commonwealth to get a greater share of GST revenue.

Grants to the States

The Commonwealth can make grants to the States under section 96 of the Constitution, and tie to them any conditions that it wants (known as 'tied grants'). They can be conditions that relate to the purpose of the grant (eg how it is spent) or completely different things. In this way, the Commonwealth is often able to control State policies over which it has no legislative power. For example, it can give a State millions to upgrade its main cricket oval, on the condition that the State change its industrial relations system.

Sometimes a State says no to the grant because it finds the condition unacceptable. For example, NSW refused a grant that was conditional upon closing down the medically supervised drug injecting room in Kings Cross, because the room was established as the outcome of a 'Drugs Summit' with significant community and expert participation and was an important policy of the government. But mostly the States have to accept Commonwealth conditions in order to get the money, because they need it to provide essential services.

The States complain that the system of tied grants is administratively very costly. As the Commonwealth chooses particular projects to fund, some things end up being over-funded, others are under-funded, and some get lost in between.

Because funding is for fixed periods, there is no long-term certainty, making it too risky to invest in well-trained permanent staff and expensive equipment to do the job properly. Attempts at reform are difficult and often fail.

The current structure of federal financial relations

There is an Intergovernmental Agreement on Federal Financial Relations, which was entered into by all Australian jurisdictions in July 2011. Its objectives include improving the well-being

of all Australians through collaborative working arrangements, enhanced public accountability, reduced administration and compliance overheads and stronger incentives to implement economic and social reforms. It is overseen by the Council on Federal Financial Relations, comprised of Commonwealth Treasurers, which reports to the National Cabinet. It provides for a variety of grants and national agreements.





Topic 9.2: Lesson/ Activities Three

Federalism - discrimination
v support



AUSTRALIAN
CONSTITUTION
CENTRE

Time/Lesson	Learning Goal
<ul style="list-style-type: none">1 hour/ 1 Lesson	To understand that the Constitution prohibits some forms of discrimination against States and their residents, but allows for different treatment in appropriate cases.
Rationale	Success Criteria
Students will better understand the federal system if they can draw distinctions between discrimination and differential treatment for an appropriate reason.	Students can <u>explain</u> when federalism prohibits discrimination and when it allows for different treatment.
Teaching Reference Document	
<ul style="list-style-type: none">TRD 107: When is discrimination against States or their residents prohibited?TRD 108: Finances - How do financial relations between the Commonwealth and the States work?	
Tuning In	
<ul style="list-style-type: none">WATCH: Video on US 14th amendment https://www.youtube.com/watch?v=KoC8Qj1DGEoEXPLAIN: Section 117 of the Australian Constitution picks up a small aspect of the US 14th amendment by giving citizens an immunity against laws of a State that discriminate against them based upon their residence in another State. Originally the draft of this provision included other aspects of the 14th amendment, such as a guarantee of 'due process of law' and the 'equal protection of the laws'. But these phrases were deleted before the Constitution was finally approved.	
Teacher Instruction	
<ul style="list-style-type: none">READ: TRD 107: When is discrimination against States or their residents prohibited?ANSWER Questions when reading:<ol style="list-style-type: none">Why did the framers of the Constitution delete references to 'due process of law' and 'equal protection of the laws' from the draft Constitution?Why is there a prohibition against discriminating against States when imposing taxes, but no prohibition against discrimination in giving grants to States?READ: TRD 108: Finances - How do financial relations between the Commonwealth and the States work?ANSWER Questions when reading:<ol style="list-style-type: none">Why is GST revenue distributed among the States according to need, rather than on the basis of population or where the money is collected?In a federal system, is it important that all States be able to provide services to the public at the same standard as long as they put in the same effort? Is it fair that some States financially support others?	

Group Independent Learning

RESEARCH: Ask students to research the US 14th amendment and how it has been used in the United States. Students write a report comparing the US position to that in Australia, considering the following questions. Were the framers of the Australian Constitution correct when they concluded that the words 'due process' and 'equal protection' were not precise and could result in unexpected interpretations in the future? What might have happened in Australia if these words had been left in the Constitution? Would we have more constitutional rights? Would the courts have become politicised in deciding upon the scope of rights implied from these terms? Would there have been a shift of power from Parliament (which in Australia is the main source of power to determine rights) to the courts? Do you think this would have been a good thing?

Wrapping It Up

EXPLAIN: In a federal system, fairness sometimes requires equal treatment, but in some cases different treatment is needed to ensure that everyone can receive the same standard of services and rights.

Differentiation/Enrichment

EXTENSION: Students examine the case study of same-sex marriage. In the United States it was a court decision that determined a right to marriage by same-sex couples. In Australia, it was determined by legislation, after consultation of the people by a plebiscite in the form of a postal survey. Which process was more democratic? Which process is more likely to satisfy the people that it represents the will of the majority? Compare the two different processes and the pros and cons of each approach.

Assessment Strategies

Assess the written report and answers to questions.

