As in any federation, the structure and operation of the institutions of government in Australia affect and are affected by the federal character of the polity. Three themes run through the following account of this relationship and assist us in understanding the particular form taken by Australian federal democracy.

The first theme concerns the underlying institutional dualism of Australia’s system of government. Both the national sphere of government, the Commonwealth, and the six constituent units (or states) have an almost complete set of government institutions, through which each is accountable to its own voters for its own actions. Inevitably, shared rule makes its mark on this formal institutional structure. Most notably, the second chamber of the Commonwealth Parliament, the Senate, operates as a federal house, at least to the extent that it represents the people of all states equally. In addition, the High Court of Australia provides a court of final appeal from state as well as federal courts. Even so, dualism remains a significant feature of the system, affecting both the creation of new institutions and the adaptation of old ones and complicating the conduct of intergovernmental cooperation.

The second theme concerns the nature of the institutions that have been established in each sphere. The representative institutions of both the Commonwealth and the states take the form of parliamentary responsible government. Typically, this is a system of government that tends to concentrate power, encouraging an attitude towards governing that is antithetical to the acceptance of power-sharing normally required by federalism, aggravating the tension between majoritarian democracy and federalism.

The third theme concerns the manner in which the Australian federation now operates in practice. Despite its formal institutional structure, Australia’s system of government has for some time been characterized by an extensive and complex range of intergovernmental cooperative arrangements affecting most aspects of government and penetrating deep into the operation of the institutions themselves. Cooperation is facilitated both by the executive control of the various legislatures, which is a hallmark of many parliamentary systems, and by the relatively small number of Australian states. The degree of reliance on intergovernmental cooperation brings another dynamic to the system of government, necessitating negotiation between governments in intergovernmental forums and giving the states a voice of a different kind in national policy making. At the same time, however, such intergovernmental cooperation cuts across traditional mechanisms for ensuring the accountability of governments through their own legislatures and other institutional arrangements. In recent years, doubts about the constitutional validity of certain forms of cooperation have been raised by decisions of the High Court, leading to some changes in the design of intergovernmental arrangements that have eased, without eliminating, the accountability problem.

The structure and operation of federal democracy in Australia is in large part the product of history and circumstance. The Australian federation brought together six colonial polities that already had parliamentary systems. Dualism was a natural response to this, although it is also consistent with the vertical federal division of powers, in which each government is responsible for both making and implementing laws within its area of constitutional authority. Over time, the complexity of government made coordinate federalism unsustainable; the text of the Constitution, however, has proved largely resistant to change. Commonwealth power has been expanded through judicial interpretation. Otherwise, however, the changes that have occurred in the practice of federalism have been informal, taking place through unilateral government action or
through intergovernmental cooperation, creating some tension with the formal institutional structure and, in some cases, with the constitutional text.

History

From the end of the eighteenth century, six British colonies were established around the coast of the Australian continent and on the island of Tasmania. During the course of the nineteenth century, the colonies successively achieved self-government, under their own constitutions and with their own governing institutions, which broadly followed the British tradition. Before the end of the century each colony thus had its own bicameral legislature, from which an executive government was drawn in accordance with the principles and practices of parliamentary government; a governor, representing the crown, who acted as local head of state but also performed functions on behalf of the still sovereign imperial power; and a court system, culminating within each colony in a supreme court, from which appeals went to the Privy Council in London.

As the colonies moved towards self-government, parallel consideration was given to a form of union that would bring the colonies together for some purposes. At first, the process was desultory; by the last decade of the nineteenth century, however, it had become more serious, driven by considerations of economic development, defence, and immigration policy. Two constitutional conventions were held, in 1891 and 1897-98, respectively, in which representatives of the colonies agreed on a draft federal constitution, which was eventually approved at referendum and enacted by the British Parliament. Federation took effect on 1 January 1901, with the six colonies being the original, constituent states. The states retained their own constitutions and governing institutions, subject to the overriding Constitution of the Commonwealth of Australia.

That Constitution had essentially two purposes: to create the framework for a federal system of government and to establish the institutions of government for the Commonwealth. Commonwealth institutions were also, for the most part, modelled along the lines of British parliamentary government, although with a somewhat more democratic cast. Thus, the Constitution provided for a bicameral parliament, both houses of which are elected; an executive government drawn from and depending on the confidence of the House of Representatives; a governor general, representing the Queen and performing locally the functions of a head of state; and a federal judicature, including the High Court of Australia as a final local court of appeal in matters of state as well as federal jurisdiction.

In other respects, however, the framers of the Australian Constitution drew inspiration from the Constitution of the United States. The Australian Constitution divides legislative, executive, and judicial powers between the Commonwealth and the states much in the manner of the United States instrument. It established a senate as a powerful federal legislative chamber in which the original states are equally represented, though this aspect of the combination of federalism and responsible government caused the framers some apprehension. The terms and structure of the first three chapters of the Constitution, dealing with the legislature, the executive, and the judicature respectively, followed the Constitution of the United States so closely that, ultimately, they were held to create a constitutional separation of powers, albeit one that is peculiarly Australian: weak between the legislature and the executive but strong with regard to the judiciary.

The procedure for changing the Constitution, by contrast, was loosely modelled on that of Switzerland. A proposal for constitutional change must first be passed by the Commonwealth Parliament and then approved at referendum by a national majority and by majorities in a majority of the states. Use of the referendum in this way broadly mirrors the process by which the Constitution was adopted in the first place. It has proved relatively difficult, however, to secure change by this means. Only eight referenda to change the Constitution have been accepted.
over a period of more than 100 years, and at least half of those changes have been relatively minor. The very substantial changes that have in fact taken place in the operation of Australian federalism over this period are thus attributable to political practice, including intergovernmental cooperation and judicial interpretation, rather than to alteration of the text of the Constitution.

The land and the people

Australia had an estimated population of 20.3 million in June 2005, spread over a landmass of 7.7 million square kilometres. The country is prosperous, with a GDP of US$30,480 per capita in 2004. The Australian mainland, plus the island of Tasmania, is divided into the original six states and two self-governing mainland territories, which, in public policy (if not in constitutional terms) are generally treated as state equivalents. One of these, the Northern Territory, may eventually be admitted to statehood. The other, the Australian Capital Territory, is the seat of the Commonwealth government.

The constitutional treatment of the original states is essentially symmetrical, although in reality the states vary significantly in many ways. New South Wales is the most populous, with 6.8 million people; Western Australia is geographically huge, with a land area of 2.5 million square kilometres; Tasmania is an island with a population of only 485,000 and a land area of 68,400 square kilometres; wealth and natural resources are distributed unequally among the states and territories. Despite differences in capacity, however, each jurisdiction has sufficient land territory, population, and economic potential to function as a mini-government in its own right and as an effective partner in the federation.

European settlement from the end of the eighteenth century displaced and diminished the pre-existing Aboriginal population. In the 2001 census indigenous Australians constituted only 2.4 percent of the population. While they are dispersed throughout the country, they are proportionately more numerous in the north, and especially in the Northern Territory, where they constitute 29 percent of the total population.

The original settler population was predominantly Anglo-Celtic, but subsequent waves of immigration from countries in central and eastern Europe, Asia, Africa, and the Middle East made the population significantly more diverse, particularly in the major urban centres in the southeast. The dominant culture remains Anglo-Celtic, however, and the assumed common language is English. Most relevantly for present purposes, the composition of the population does not provide a rationale for the boundaries or even the existence of the federated units. Although it is possible to detect some cultural differences between states, these are minor by comparison with federations elsewhere.

If anything, the relative homogeneity of Australia’s population affects the dynamic of federalism in another way. In reality, many Australians have multiple ties of loyalty: to their city, state or territory, and country. In law, Australians have citizenship ties to both spheres of government, through participation in both democratic processes. A sense of belonging at the subnational level may also be reinforced by the federalization of many institutions, including the legal and other professions, trade unions, and political parties. Generally, however, regional ties are weakening — a phenomenon that is accentuated by the homogeneity and the mobility of the population, fuelling questions in some quarters about whether federalism in its current form is the most appropriate system of government for the country.

THE COMMONWEALTH LEGISLATURE

General
The constitution and operation of the Commonwealth Parliament is influenced by the tension between majoritarian democracy, delivered through a system of responsible government based in the House of Representatives, and federalism, centred largely, although not wholly, in the Senate.

The Parliament performs the traditional role of a legislature in a common-law parliamentary system. It enacts legislation, generally on the initiative of the government; initiates proposals for constitutional change; authorizes taxation and expenditure; constitutes the government and holds it to account; and plays a constitutional role in the removal of judges. These functions are necessarily modified by the fact of federalism: that is, the law-making power is exercised only within areas of Commonwealth competence; Parliament authorizes only Commonwealth taxation and expenditure (which includes, significantly, general and conditional payments to the states); and the scrutiny function of Parliament extends only to the Commonwealth government and administration, including some intergovernmental bodies set up under Commonwealth auspices. There is no constitutional requirement for parliamentary involvement in areas that lie solely within the responsibility of the executive branch, including the appointment of judges and other public officers and the making and ratifying of treaties. Within the last decade, nevertheless, a process has been established to enable Parliament to contribute to the treaty-making process through a joint standing committee on treaties.

As in most parliamentary systems in which one house, at least, is controlled by the executive branch of government, opinion varies about the extent to which Parliament can and should deliberate on proposed legislation and the performance of government. It is extremely rare for the majority in the chamber of the House of Representatives to act in a manner contrary to the wishes of the government (although the government-party room may be more lively), and, in the Senate, non-government majorities have been the norm since the introduction of proportional representation in 1949. A parliamentary committee system in both houses now offers parliamentarians a greater role in policy development, often with government approval.

Australia has a strong two-party system, which tends to be the product of constituency-based elections to a Westminster-style parliament. There are also some smaller political parties, which typically win seats in the Senate but not in the House, although independent members of the House are occasionally elected. The parties are national parties but are organized along federal lines. There is some movement of politicians between Commonwealth, state, and local government; more usually, however, an aspiring politician seeks election in a particular sphere and remains there until voluntary or forced retirement. Under Commonwealth law, voting is compulsory for both houses of the Commonwealth Parliament.

House of Representatives

The House of Representatives is constituted largely by reference to population numbers and is the chamber upon whose confidence the government principally depends. It has the sole power to initiate and amend taxation and key appropriation bills. Invariably, the prime minister, the treasurer, and a majority of ministers are members of the House, although in practice some ministers are always drawn from the Senate as well. Each House of Representatives is elected for three years but may be dissolved earlier by the governor general, who, for this purpose, almost always acts on the prime minister’s advice. In practice, elections for the House are usually synchronized with the tri-yearly elections for half the Senate; on three occasions a proposal to amend the Constitution to require these elections to be held at the same time has been rejected. There is a long-running debate concerning whether to extend the term of the House to four years. This would make simultaneous elections a rarity, however, unless the terms of senators were shortened to four years or lengthened to eight, both of which are regarded as unpalatable. For the moment, change seems unlikely.

The Constitution requires the number of members of the House to equal “as nearly as practicable” twice the number of senators, in a measure designed to maintain the numerical
strength of senators in Parliament vis-à-vis the members of the House. As there are presently 12 senators for each of the six original states, approximately 144 members of the House are elected from the states, from single-member constituencies, through a system of preferential voting. Despite its national character, federalism has some impact on the composition of the House. Apart from the “nexus” requirement to which attention has already been drawn, this total number of members of the House is allocated between the states in proportion to their respective population numbers, before constituency boundaries are drawn; no electorate may straddle a state border; each original state is guaranteed at least five members in the House, regardless of population; and in the absence of valid electoral boundaries, the total number of members to which a state is entitled must be elected from the state as a single electorate. Alteration of the Constitution to change the proportionate representation of a state in either House requires passage at referendum by majorities in all states concerned.

Senate

The constitution and powers of the Senate are the result of a compromise at the time of federation between the more populous states of New South Wales and Victoria and the four smaller states. Like the House, the Senate is directly elected, in a deliberate departure from U.S. practice before 1913, pursuant to which U.S. Senate members were selected by state legislatures. In other respects, however, the Senate is obviously constituted as a federal chamber. All original states are entitled to an equal number of senators, regardless of population size. Initially, each had six, but the number has now doubled to 12, thanks to the nexus between the sizes of the two houses. The states have a constitutional role in determining the time and place of Senate elections, issuing writs for Senate elections, and filling casual Senate vacancies. Voting procedures in the Senate confer on the president of the Senate a deliberative vote to ensure that each state maintains the equality of its voting strength.

The Senate is a powerful chamber, thanks again to pressure from the smaller states. With the exception of taxation and key appropriation bills, which the Senate can reject but not initiate or amend, it has equal power with the House of Representatives in relation to all proposed laws. On one famous occasion in 1975 the Senate’s power to block budget bills led to the governor general’s dismissing a government that had a majority in the House of Representatives. While the events of 1975 were extraordinary and are unlikely to be repeated they have modified for Australia the assumption that a government with the confidence of the House of Representatives is secure until the next election.

The Senate was also designed as a chamber of review. This role is reflected in the relatively long, fixed, six-year term of senators and in the system of rotating membership, under which one-half of the senators for each state face election every three years. The review role of the Senate has been further enhanced by various aspects of the electoral arrangements. Each state is a single electorate for the purposes of Senate elections, although this could be altered by legislation if the government in Parliament so chose. Since 1949 senators have been elected on the basis of a form of proportional representation. The combined result of these features is that, usually, neither of the major parties (i.e., the Labour party and the Liberal party) has a Senate majority, so that the balance of power is held by minor parties or independent senators. The unusual sometimes happens, however. The half-Senate elections held in October 2004 gave the government a Senate majority for at least three years from July 2005.

The composition of the Senate is key to the performance of both its constitutional roles. Its federal role is achieved through the equal representation of the original states, which increases the number of members of the Commonwealth Parliament from the smaller states, thus giving them a greater voice in national issues and providing a larger pool of small-state parliamentarians from which committee members and ministers can be drawn. Given direct election to the Senate, however, it is unrealistic to expect it to provide more substantive protection either for
federal principles or for the interests of individual states. The review role of the Senate, by contrast, depends on whether the party affiliation of a majority of senators enables them to take a position independently of the government in relation to proposed legislation and scrutiny of executive action.

Over the course of the twentieth century the Senate assumed an increasingly national, as opposed to federal, character. Typically, senators vote on party lines. In practice, the states normally exercise their authority to determine the time and place of Senate elections in accordance with a timetable prescribed by the Commonwealth to enable elections for the two houses of the Commonwealth Parliament to be held at the same time. After the introduction of proportional representation, a further practice developed whereby states would exercise their power to fill casual Senate vacancies by appointing a member of the same political party as that of the retiring senator. When this practice broke down, in the heady constitutional atmosphere of 1975, the Constitution was amended to formalize it. Even the character of the Senate as a body exclusively made up of senators for the states changed in 1975, when Commonwealth legislation made provision for the election of senators from the territories on terms and conditions controlled by Commonwealth law rather than by the constitutional framework of the Senate. The validity of the legislation was challenged, but the challenge was twice dismissed by the High Court in a decision that preferred representation to federal principle.

Unlike the U.S. Constitution, the Australian Constitution provides a formal procedure to resolve deadlocks over legislation between the two houses. This procedure is a minor victory for majoritarian democracy. The actual procedure, however, recognizes the legitimate role of both houses and is designed to allow time for reflection in each. In brief, it comes into play when the Senate has twice rejected bills passed by the House, within prescribed time intervals. The procedure involves a double dissolution of both houses, followed by an election and a joint sitting of the members of both houses if the deadlock persists. This mechanism is too slow to resolve deadlocks over general appropriation bills that are needed to authorize ongoing government expenditures. In effect, therefore, there is no specific procedure for resolving deadlocks of this kind. It is also cumbersome and costly, financially and politically, as a means for resolving deadlocks over bills of other kinds. As a result, the deadlock mechanism tends to be used for tactical political purposes, when it suits a government to have an election and, thus, the prospect of dissolving the whole Senate is attractive, rather than for dealing with disputes over particular legislative measures. A proposal to simplify the procedure, to make it more likely that the will of the House of Representatives would prevail, was the subject of consultation in 2004; however, the proposal met a spectrum of reactions, from opposition to indifference, and was subsequently abandoned.

A variation of the deadlock procedure for ordinary bills allows constitution alteration bills that have been rejected by one House twice, consistently with prescribed time intervals, to be put to referendum by the governor general. In this, as in most other matters, the governor general is expected to act on government advice, making it unlikely that this procedure can be used for proposals accepted by the Senate but rejected by the House. This deadlock mechanism has also proven to be relatively unimportant, if only because a proposed alteration of the Constitution that is rejected by either house is unlikely to attract the broad support necessary for approval by the voters at referendum.

**THE COMMONWEALTH EXECUTIVE**

**General**

Parliamentary responsible government, as it applies in Australia, has two dimensions. The first dimension concerns the selection and operation of the government itself. The political party or coalition of parties with a majority in the House of Representatives forms the government, which thereafter depends on the continued confidence of the House (and the self-restraint of the Senate)
to remain in office. The second dimension concerns the constitutional monarchy. The Constitution confers the executive power of the Commonwealth on the Queen but makes it “exercisable” by the governor general. In practice, both the Queen and the governor general act on the advice of the government, which in turn draws its legitimacy from the support of the House of Representatives. In highly exceptional circumstances, the monarch or her representative may be able to act without advice, exercising discretionary or “reserve” powers, the very existence of which is contested and controversial.

These aspects of the Australian Constitution are notoriously opaque. The text of the Constitution reflects the formal, outer, institutional shell of constitutional monarchy. The real operations of the executive branch of government, including the institutions of prime minister and cabinet, depend on unwritten conventions and practices that modify and amplify the written text.

The Commonwealth executive develops and implements policy, administers the ongoing business of government, and generally exercises the “executive power of the Commonwealth.” The concept of executive power itself is largely informed by common-law principles, as developed within the context of the Australian Constitution. It includes, for example, the authority to sign and ratify treaties, to declare war and to make peace, to appoint judges and other public officers, to enter into contracts and to spend money, and to make agreements with other Australian governments. Policies that involve action of a legislative character (e.g., tax reform, telecommunications regulation, search of private premises, and censorship) require implementation by Parliament. The constitutional doctrine of separation of powers prevents the executive branch from exercising powers that are judicial in character.

The executive power of the Commonwealth is also limited by the federal division of power, which assumes that some executive powers fall within the authority of the states. The Constitution provides little guidance with regard to the lines of this division. It has been held, however, that the executive power of the Commonwealth is co-extensive with the subjects of Commonwealth legislative power and also includes power “deduced from the existence and character of the Commonwealth as a national government.”

Constitution of the political executive

The political executive comprises up to 30 ministers of state, assisted by up to 12 parliamentary secretaries, and headed by a prime minister. Typically, only the senior ministers are members of cabinet, which is the principal deliberative body, although other ministers may participate in cabinet discussions on matters relevant to their portfolio responsibilities. All ministers must be members of one or other house of the Commonwealth Parliament within three months of their appointment. Appointment of a minister who is not already a member is almost unheard of.

A new government is formed after each election. The governor general appoints as prime minister the parliamentary leader of the party that is able to form a majority in the House of Representatives and appoints the ministers on the advice of the prime minister. There is no constitutional or legislative requirement for considerations of federalism to be taken into account in allocating ministerial portfolios, but in practice it is customary for each state to have at least one minister in cabinet. There are no other constitutional rules for the selection of the executive, although each political party has rules of its own.

Head of State

Formally, Queen Elizabeth II is Australia’s head of state, under complex arrangements that reflect the evolutionary process by which Australia achieved independence over the course of the twentieth century. In relation to Australia, the Queen carries the style and title of Queen of Australia. She is represented in the Commonwealth sphere by a governor general, whom she appoints on the advice of the Australian prime minister, for a period that usually lasts about five
years and who now, invariably, is an Australian. All the functions of head of state are exercised by the governor general rather than by the Queen, and many of these are conferred on the her/him directly by the Constitution. The governor general also carries out a range of ceremonial, civic, and community functions. A former governor general, seeking “a touch of healing” in the wake of the dismissal of the government in 1975, suggested that the office involved “interpreting the nation to itself” -- a view that has been endorsed by his successors. Government “advice” to the governor general is conveyed either by the prime minister or a line minister or, more usually, at a meeting of the Federal Executive Council by two or three ministers or parliamentary secretaries.

The institution of the monarchy may have more significance for federalism than would appear to be the case at first sight. The Queen is a figurehead, owned by no single Australian jurisdiction. She is represented in Australia by a governor general and six state governors in an arrangement that reflects both unity and diversity. As representatives of the same monarch, state governors are regularly commissioned to play the role of governor general if the latter is unavailable. On the other hand, the various representatives of the Queen do not have a subordinate relationship to each other. Actions by the Queen or her representatives in the various jurisdictions are clearly distinguished, using the terminology of “the Queen in right of” the jurisdiction in question.

These features of the present system present a minor challenge for the design of an Australian republic. The proposal to establish a republic that was unsuccessfully put to referendum in 1999 made no provision for state involvement in choosing the president and stipulated that, as a default position, the most senior state governor would act as president if the office was temporarily vacant. This was consistent with the then prevailing view that the republican model should make as few changes as possible to existing arrangements. It did not recognize, or at least acknowledge, the relevance of any federal considerations to the design of the new office of president. There are presently no signs that federalism will be a factor in designing the office if and when another attempt is made to sever Australia’s links to the Crown. It might, however, be a useful addition to a debate that has long since become polarized between two extreme options for selecting a president: by direct popular vote or by prime ministerial appointment. The failure to perceive that there is a federalist dimension to the office of national president in an Australian republic itself offers insight into attitudes about institutional design in the contemporary Australian federation.

Administration

In contrast to Germany, Austria, and, to a lesser extent, Switzerland, the assumptions on which the design of the Australian federation is based are that each jurisdiction will administer its own policies and legislation and that ministers will be responsible to the parliaments from which they are drawn for the conduct of government.

The Commonwealth therefore has a complete bureaucracy, which is at least co-extensive with Commonwealth legislative responsibilities under the Constitution. In a few cases, of which tertiary education is an example, a Commonwealth agency administers direct Commonwealth spending in areas that are not obviously within Commonwealth legislative power. In addition, other Commonwealth departments and agencies correspond to areas that are principally the responsibility of the states, including education, housing, and health, reflecting the extent to which the exercise of these state functions now depends on conditional grants from the Commonwealth, the administration of which require policy development and supervision. Overlapping responsibilities and shared interests of this kind mean that, even though each jurisdiction has its own administration, there is considerable interaction between them.

Each Commonwealth department of state is headed by a minister who is drawn from Parliament and is responsible to Parliament for the administration of his or her “portfolio.” Traditionally, departmental officers were apolitical and were shielded from the political process
by the doctrine of individual ministerial responsibility. There has been some erosion of this traditional model in recent decades, however, in Australia as elsewhere.\textsuperscript{72} The most senior ranks of the bureaucracy now frequently change with a change of government. Ministers have offices of their own, which include political advisers responsible to them alone, through whom much of the regular interaction with the department is conducted. Ministers are now less likely to accept political responsibility for administrative errors, unless they are personally involved in some way. Other mechanisms for accountability have emerged. Thus both ministers and public officials appear before parliamentary committees, including Senate estimates committees, which examine the proposed spending estimates for government departments. All Commonwealth departments and statutory bodies also prepare annual reports that are tabled in Parliament after being presented to ministers.

For the first 25 years after federation, the Commonwealth government was based in Melbourne, pending a move to a national capital. While the administration is now concentrated in the Australian Commonwealth Territory that territory is relatively small and is a considerable distance from all states except New South Wales, in which it is located. Many departments have a presence in some or all states because their responsibilities require sustained contact with the public. Political pressure ensures that capital spending by the Commonwealth takes place more or less equitably around the country.

Other institutions

In addition to the departments of state, each jurisdiction has a range of regulatory, supervisory, and other agencies. For present purposes, these other Commonwealth institutions may be categorized as follows.

First, there is a range of statutory authorities - with a greater degree of management and/or financial autonomy than is typically found in a department - created to administer particular Commonwealth programs. Bodies of this kind include the Australian Trade Commission, the Australian Broadcasting Corporation, and the Health Insurance Commission. Their structure and operation do not necessarily reflect the federal character of the polity in any way.

A second group of institutions plays a role in relation to federalism itself. One has constitutional status: the Interstate Commission (ISC), which is designed as part of the framers’ original conception of constitutionally protected freedom of interstate trade.\textsuperscript{73} Ironically, the ISC never played a significant role in the development of Australian federalism and is no longer in operation. On the other hand, the Commonwealth Grants Commission (CGC) is a major federal institution. The CGC is an independent statutory body that advises the Commonwealth on the allocation of general-revenue funds among states in accordance with the principle of fiscal equalization.\textsuperscript{74} Members of the CGC are appointed in consultation with the states, which also participate in regular reviews of the methodology employed by the commission.

Institutions in the third category are intergovernmental in character. Typically, they are established by the Commonwealth to perform advisory or regulatory functions. An example of the former is the National Competition Council (NCC), which oversees implementation of the national competition policy and which is responsible to the Council of Australian Governments (COAG).\textsuperscript{75} Regulatory bodies of this kind exercise powers derived from the states as well as from the Commonwealth, either directly (through the conferral of authority by state parliaments) or indirectly (through a reference of state power to the Commonwealth Parliament), using the distinctively Australian procedure found in section 51(\textsuperscript{xxxvii}) of the Constitution.\textsuperscript{76} The Australian Securities and Investment Commission (ASIC) is perhaps the most famous example. As with ASIC, in relation to such bodies, an intergovernmental agreement may provide for state involvement in appointments and aspects of the operation of the legislation,\textsuperscript{77} although the Commonwealth government and Parliament generally assume primary responsibility for them.
Further consideration of bodies of this kind is postponed until the later section on intergovernmental institutions.

The Federal Judicature

The Australian judicature has the usual characteristics of a common law judicature. General courts deal with questions about the lawfulness of government action as well as with disputes between private parties and criminal prosecutions. Given the status of the Constitution as fundamental law, the judiciary may also find acts of either the Commonwealth or a state parliament to be invalid on constitutional grounds.

Chapter III of the Constitution provides for the establishment of a specifically federal court system. The independence of the federal courts is protected by the constitutional separation of powers, which has been held to prohibit federal courts from exercising non-judicial power and to prohibit bodies other than courts from exercising federal judicial power. The original justification for this strict understanding of the separation of judicial power was the need for an independent court system to apply the Constitution impartially between the spheres of government in a federation.

Consistent with the Australian model for the federal division of power, jurisdiction is divided between the Commonwealth and the states. Federal jurisdiction encompasses disputes that arise under Commonwealth laws and, in that sense, is co-extensive with legislative power. In addition, it includes matters arising under, or involving the interpretation of, the Australian Constitution; suits against the Commonwealth or its officers; interstate disputes; and other matters considered by the framers to have national significance.

The federal and state court systems are integrated to a much greater degree than are the other two branches. Two features are particularly important in this regard. First, the High Court is the final court of appeal from federal and state courts as well as, potentially, a court of first instance in relation to all areas of original federal jurisdiction. Even though leave is now required to appeal to the High Court, the effect of this arrangement is that the High Court can declare the common law for the whole of Australia. The notion that there is a single Australian common law, although diverse statutory regimes, has a homogenising effect in Australian federalism.

It should be noted, nevertheless, that as far as the Constitution is concerned, the High Court is a federal court, to which appointments are made by the Commonwealth executive branch. Since 1978 the Commonwealth has been required to consult with state attorneys-general in making High Court appointments - a somewhat loose obligation that may not require much more than an exchange of views. There is no practice of ensuring that justices of the High Court are drawn from different states. In 2005 all of the seven justices came from the eastern states and a majority of four came from New South Wales.

The capacity of the Commonwealth Parliament to confer federal jurisdiction on state courts contributes further to the integration of the Australian judiciary. This device was used extensively in the decades following federation. By the 1970s, however, the Commonwealth began seriously to develop its own court hierarchy to adjudicate disputes under key Commonwealth statutes as well as disputes involving the Commonwealth itself. By 2005 the federal court hierarchy was complete, comprising the general Federal Court of Australia, the federal magistracy, and the specialist Family Court. Federal courts have registries in each state and self-governing territory. While their members may sit in different parts of the country, in general federal judges are drawn from the state in which most of their work takes place.

The development of the federal court system reflects the symbiotic relationship of common law courts with the other branches of government and is consistent with dualist assumptions. From the perspective of litigants involved in disputes raising questions in both federal and state jurisdiction, however, the development was inconvenient. In 1987, therefore, a cooperative statutory scheme was enacted, whereby the Commonwealth, all states, and the two
self-governing territories conferred enough of their jurisdiction on the superior courts in all parts of Australia to enable such courts to dispose of the whole of a dispute brought before them. In so far as this “cross-vesting” scheme involved the conferral of state jurisdiction on federal courts, it was held invalid by the High Court in 1999 on the grounds that it breached the constitutional separation of powers and that the Commonwealth Parliament lacked the power to consent to such a conferral. This finding prompted further questions about Commonwealth power to consent to the conferral of state authority on other Commonwealth bodies – questions that are not yet fully resolved.

INSTITUTIONAL ARRANGEMENTS IN THE STATES

General

The Australian Constitution was superimposed on the governing systems of the colonies. Its immediate impact was limited because the Constitution said relatively little about the institutions of government of the states. Over time, however, the significance of federation for state institutions has become increasingly apparent. In a variety of ways described below, the authority of state institutions is eroded to a greater degree by intergovernmental activity than by activities of the Commonwealth. In addition, the Australian Constitution has proved to have greater significance for state institutions than might initially have been perceived.

Several examples may be given. Section 106 of the Constitution was designed to preserve state constitutions but, in doing so, raised a question - still unanswered - about whether it is now the source of authority for the constitutions of the states. The reference in the Constitution to the supreme courts of the states, in the context of conferring broad appellate jurisdiction on the High Court, raises an inference that the Constitution requires the states to have such courts. The role of state courts in the partly integrated judicature has led to the conclusion that there are constitutional limits on the extent to which the states can treat their own courts in ways that are “incompatible” with their national role. The constitutional freedom of political communication, implied from the establishment of Commonwealth representative institutions, protects criticism of state as well as commonwealth institutions.

The Constitution refers to other state institutions as well. State parliaments fill casual Senate vacancies, for example, and state governors issue writs for Senate elections. It is not clear what, if any, constraints such references impose on state institutional design. That the states retain very considerable discretion, however, is undoubted. It has been held that the implied constitutional constraints on unfair Commonwealth electoral boundaries (such as they are) have no impact on unfair state electoral boundaries. Both Commonwealth and state institutions also enjoy some implied constitutional protection from each other, rationalized by reference to federal principle.

State legislatures

The role of the legislatures in the states and territories and their relations with the executive branch are broadly the same as in the Commonwealth sphere. Constitutionally, these legislatures have the same powers as does any common-law parliament in relation to law making, taxation, and appropriation, and they have the same responsibility to form a government and to hold it to account. In practice, their role is diminished in various ways by intergovernmental arrangements. Thus, on average, about one-half of the revenue spent by state governments comes as transfers from the Commonwealth rather than as taxes raised under the authority of state parliaments (although much of it is subject to appropriation by state parliaments before it is spent). Schemes to secure uniformity of legislation and administration also affect the power and authority of state parliaments.
The legislatures in all states except Queensland are bicameral.\textsuperscript{93} The more recently established legislatures of the Northern Territory and the Australian Capital Territory are unicameral as well. In colonial times, the second legislative chamber was a conservative check on the more democratically elected chambers.\textsuperscript{94} The second chamber was either appointed\textsuperscript{95} or elected on a restrictive property franchise.\textsuperscript{96} Over the course of the twentieth century the struggle over the undemocratic character of these second chambers, called legislative councils, led to unicameralism in Queensland and constitutional entrenchment of the council in other states, where supporters of bicameralism prevailed. In these states legislative council reform has been an ongoing project. Some councils have lost their authority over money bills.\textsuperscript{97} All have an electoral system that is acceptably democratic. Four states now use a system of proportional representation for election to the legislative council.\textsuperscript{98} State assemblies, by contrast, are typically elected on the basis of a preferential voting system, which is more likely to produce a clear majority to form a government.

The reason usually advanced for the retention of the legislative councils is their potential to perform a more deliberative review role in a parliamentary system that otherwise involves a considerable fusion of legislative and executive power.\textsuperscript{99} The effectiveness of the council for this purpose varies between jurisdictions, however, with the traditions of the legislature and with the patterns of party representation in the other house. In Queensland, where problems of government corruption that culminated in the 1980s were attributed in part to the absence of bicameralism, a series of investigatory commissions was established instead, which may in fact be more effective.\textsuperscript{100}

The institutional arrangements for state legislatures are independent of the Commonwealth and of each other. States experiment with different constitutional forms and emulate experiments of others that are regarded as successful. Thus, for example, in the last decades of the twentieth century, the terms of the assembly in four states changed from the traditional Australian flexible three-year term to fixed or partly fixed four-year terms.\textsuperscript{101} Other states, and even the Commonwealth, may eventually follow suit.

Elections are not synchronized between jurisdictions. States choose their own electoral systems, and each state administers its own electoral arrangements, generally through its own independent electoral commission. As in the Commonwealth, voting is compulsory, although again, this is a choice that has been made by each state. There is a degree of interdependence in relation to electoral registration, and only two states now maintain an electoral roll separate from the Commonwealth roll.\textsuperscript{102}

State Executive Branches

The executive branch in the states performs broadly the same constitutional role vis-à-vis the other branches as does the Commonwealth executive, and it is structured in broadly the same way. Following an election, the parliamentary leader of the party or coalition of parties with a majority in the lower house is appointed premier and forms a government. Ministers are members of Parliament, and the government is responsible to Parliament, in accordance with the familiar rules of cabinet government. As in the Commonwealth, state constitutions are remarkably opaque in relation to this aspect of the system, in consequence, probably, of its origin in British constitutionalism, where these rules rest almost entirely on convention. The powers and structure of the executive branch in the states derive from a variety of sources: state constitutions, legislation, conventions, and the common law.

The two mainland territories have a similar executive structure, with minor variations reflecting their constitutional status and the relative modernity of their self-government legislation.\textsuperscript{103} The head of government in each of the territories is the chief minister rather than the premier, and formal executive power is held in the Northern Territory by an administrator,
appointed by the governor general. There is no equivalent of governor or administrator in the Australian Capital Territory.

In theory, during its term of office a state government has the right and responsibility to carry out policies on the basis of which it was elected and generally to manage the affairs of the state. In practice, the pervasive nature of intergovernmental relations changes the picture considerably. Many state programs are at least partly funded by Commonwealth grants, on conditions prescribed by the Commonwealth that are often the result of negotiation between the respective governments. As a rough estimate, 30 percent of the time of any state minister is likely to be spent on aspects of intergovernmental relations. Decisions taken in intergovernmental ministerial meetings, sometimes by majority vote, influence the action taken by individual state governments. The impact on smaller states is greater still, to the extent that larger states, with greater policy-making capacity, dominate intergovernmental decision making. Party affiliation also affects these processes, however. Ministers from governments of the same political persuasion may join forces across jurisdictional lines to produce particular policy outcomes. This is not invariably the case, however. In the early 1990s, for example, a spectacularly effective alliance between Labor prime minister Robert Hawke and conservative premier Nick Greiner of New South Wales led to major structural economic change in Australia through decisions made collectively by the heads of Australian government.

The states also operate in accordance with the principles of constitutional monarchy. A governor, representing the Queen, is the formal head of the state. The governor is appointed by the Queen on the advice of the state premier, with no involvement of either the Commonwealth government or the governor general. Executive power is formally vested in the governor, who acts on the advice of the government of the state, except in the exercise of the discretionary reserve powers, the extent and existence of which are as contentious in the state as in the Commonwealth sphere. If and when the debate on an Australian republic revives, it will be necessary to decide whether the link with the Crown will be removed by one national constitutional change (over the validity of which there may be some constitutional dispute) or by each jurisdiction, employing its own processes of constitutional change. Ironically, it is not possible for a state to sever its links with the Crown unilaterally because a probably accidental provision in the Australia Acts, 1986, formalizing the independence of the states from the United Kingdom, appears to entrench the position of the governor as a representative of the Queen, unless altered by all the Australian governments acting collectively. In any event, the detail of the institutional arrangements to be put in place in each state under a republic would likely be a matter for the states themselves.

State Administration

As in the Commonwealth sphere, each state has its own departments and other agencies to administer state legislation and government policies and programs. Each department and agency comes within the portfolio of a minister, drawn from Parliament and accountable to Parliament for the administration of his or her area of responsibility.

As in the Commonwealth sphere, the picture is no longer quite so neat. Some state legislation is administered centrally, for the purposes of an intergovernmental scheme. State administrations also carry out a range of their functions in accordance with the conditions attached to Commonwealth grants. More rarely, a state administration may act on behalf of the Commonwealth if an intergovernmental arrangement involves the conferral of Commonwealth power on state bodies. One instance of this is constitutionally mandated; under section 120 of the Constitution, the Commonwealth may use state prisons for federal prisoners. Intergovernmental arrangements may mandate coordination of administration across jurisdictions. Policing is a current, topical example. Even in the absence of formal cooperative arrangements,
officials often act collaboratively across jurisdictional boundaries as a natural consequence of having comparable responsibilities in neighbouring jurisdictions.

As in other contexts, these arrangements present some challenges to principles and practices of government developed originally in the context of unitary systems. They may affect the application of the principles of administrative law, the comprehensiveness of audit procedures, or the standards of scrutiny of delegated legislation by parliamentary committees. Unusual questions of public policy sometimes are raised. One, from the early 1990s, concerned the use of state prisons for federal prisoners. Should rules about, say, release on parole be applied to all prisoners in the same jail even if, as a result, federal prisoners who are punished for similar offences, but held in prisons of different states, will be subject to different regimes? The question has been resolved in favour of equity between federal prisoners; in a federal system, however, there may be no perfect answer.

State judicatures

The point has already been made that state courts are part of an at least partially integrated Australian judicature, with the High Court of Australia at the apex. Subject to these features of the Commonwealth Constitution, however, and to the limited implications that may be drawn from them, the state constitution and operation of the courts of each state are matters for the state concerned.

Thus the framework for a state judicature is set by the constitution and legislation of the state. There is no constitutional separation of judicial power in the state sphere of the kind that operates federally. States thus have greater freedom to mix judicial and non-judicial power in their courts and to confer at least some state judicial power on bodies that may not be courts. Within each state there is a hierarchy of courts, from a magistrates court at the lowest level to a supreme court (which, in some states, has a distinct appellate division) at the highest. These are typical common-law courts, with a tradition of independence, protected by constitutional rules governing tenure and remuneration and by constitutional convention. Judicial appointments are made by the governor-in-council of each state, and the removal of a judge is a matter for state institutions, acting in accordance with legally prescribed requirements.

State courts exercise state jurisdiction, which constitutionally cannot be conferred on federal courts. State jurisdiction extends to matters in which state governments themselves are parties. State courts also exercise federal jurisdiction, conferred on them by the Commonwealth Parliament. The general rule is that the Commonwealth cannot dictate how this jurisdiction is exercised but must take state courts as it finds them. Appeals from state courts exercising federal jurisdiction lie to federal rather than to other state courts, with the High Court as the final appellate court, if leave can be secured.

LOCAL GOVERNMENT

The states dominate the structure and functions of local government. Each state parliament prescribes the framework for local government within the state. Typically, each local government area has an elected council, a mayor who may be drawn from the council or elected directly, and a local administration. The administration is subject to direction by the council, but both must act within parameters set by the state. Each state has a minister and a department with responsibility for local government. Elected councils are the norm, but there are modern instances of the administration of local areas by officials appointed by the state government, either to carry out a restructuring of local government or to deal with instances of alleged corruption or maladministration.

Local authorities can make local laws on matters vested in them by state legislation. Typically, however, their powers are more limited than are those in other federations. Common
examples are parks and gardens, local roads, traffic and parking, waste disposal, and a limited range of social services. Local authorities also raise some revenue of their own, through property rates, service charges, licence fees of various kinds, and fines. Otherwise, however, local government relies on transfers from the other spheres of government, including general and conditional funds from the Commonwealth, paid directly to local government or indirectly, through the state.

There were 721 local government bodies in Australia in June 2004, varying considerably in geographic and population size and in capacity. There is an association of local governments in each state and a peak Australian local government association, which, effectively, is a federation of the state and territory associations.

The Australian Constitution makes no reference to local government. Referenda to include local government in the Constitution failed in 1974 and 1988, and there are no signs of change, although local government continues to press for Commonwealth constitutional recognition. All state constitutions now provide some protection for local government, although in general terms that could easily be changed in most states.

The Commonwealth has no direct constitutional relationship with local government; nevertheless, important links exist. The Commonwealth provides some general and conditional financial assistance. The Commonwealth Department of Transport and Regional Services administers programs relevant to local government and provides support for the Local Government and Planning Ministers Council (LGPMC). The Australian Council of Local Government Associations is represented on the Council of Australian Governments (COAG) and on some other ministerial councils, including the LGPMC.

INTERGOVERNMENTAL RELATIONS

Intergovernmental relations affect almost every aspect of government in Australia. There are relatively few signs of this in the Constitution, which assumes that the institutional arrangements for the respective spheres of government are, for the most part, distinct. In fact, however, as earlier parts of this chapter show, collective decision making within the executive branches of government is extensive; it readily triggers collective legislative action; and there is a network of formal and informal connections across jurisdictional lines for purposes that range from mutual support and information exchange to the conduct of joint programs. Key national initiatives have been put in place by this means, including the national competition policy. The somewhat convoluted arrangements whereby the proceeds of the Commonwealth’s goods and services tax are paid to the states are supervised through intergovernmental procedures.

Two groups of specifically intergovernmental institutions require particular mention here. The first group is the ministerial councils. At the peak of this network is the Council of Australian Governments (COAG), which is made up of the heads of Australian governments. In addition, there are at least 34 other major councils that deal with specific functions and that are made up of the responsible ministers from all participating jurisdictions. Depending on its subject matter, a council may have other participants as well, with full member or observer status. Typically, such additional members come from the Australian Local Government Association (ALGA), New Zealand, or Papua New Guinea. Each ministerial council is supported by a standing committee of officers, usually comprising heads of the relevant departments; other working groups may be associated with particular councils as well. Each council has a secretariat, usually but not always based in a Commonwealth department and rarely dedicated to the work of the ministerial council alone.

Ministerial councils carry out a range of functions pursuant to formal intergovernmental agreements as well as in accordance with their own, often self-crafted, terms of reference. Thus, for example, a council may approve proposals for amendments to uniform-scheme legislation, agree on appointments to a joint administrative body, contribute to a national standard-setting
process, play a role in setting national standards, or direct programs of collaboration in research. Most decisions require consensus, although some councils use weighted majority-voting procedures, generally or for particular purposes.

The ministerial council network developed in an ad hoc fashion over the course of the twentieth century. In recent decades, efforts have been made to provide a more formal structure. Guidelines developed from the 1990s, during a peak period of economic reform in which ministerial councils were heavily involved, consolidated some councils and sought to provide a framework for holding and conducting meetings. At least notionally, there is now a hierarchy of councils, in the sense that matters may be referred by a functional ministerial council to COAG for final endorsement, or by COAG to the relevant ministerial council for development and advice. For all this, however, individual councils retain considerable autonomy in their structure and operations. Most have low public visibility and are only lightly exposed to parliamentary or media scrutiny.

The second, specifically intergovernmental, institution is the joint administrator or regulator, typically established for the purposes of an intergovernmental scheme for which uniform administration is also deemed necessary. One model, which became increasingly popular in the latter decades of the twentieth century, involved an agreement by all participating governments that their legislatures would pass laws to adopt a template law enacted by a host jurisdiction (usually the Commonwealth), as amended from time to time, and that the host would also establish a regulator, upon which the other jurisdictions would confer power to administer their legislation. To ensure absolute uniformity, these arrangements sometimes went further and conferred the authority of all jurisdictions on ancillary institutions of the host jurisdiction as well, including the prosecutor, the attorney-general, and the ombudsman.

At the turn of the twentieth century decisions of the High Court cast doubt on the constitutional validity of some arrangements that confer state authority on Commonwealth bodies. Those doubts are not yet resolved, and template schemes are now used more cautiously. In some cases, including corporations regulation, governments have abandoned use of this format altogether, turning instead to references of power by the states to the Commonwealth to enable the latter to unilaterally enact the necessary legislation. A reference may be accompanied by the familiar trappings of intergovernmental cooperation: an intergovernmental agreement supervised by a ministerial council. Otherwise, however, the procedure is consistent with the dualist assumptions of the Australian federal constitutional system. An exercise of referred power by the Commonwealth has all the characteristics of Commonwealth law and is executed by Commonwealth administrators. Legal disputes arise in Commonwealth jurisdiction and are dealt with accordingly.

ANALYSIS AND CONCLUSIONS

Constitutional Framework

A framework for the basic structure of government is provided in the Australian Constitution and in the constitutions of the respective states. From an institutional point of view, however, it is skeletal. In relation to the executive branch, the focus of the constitutions is on the representatives of the Crown, who hold formal executive power. Ministers and cabinets are barely mentioned, if they are mentioned at all, and the key principles of responsible government are left largely to constitutional convention. Typically, the constitutions deal with the legislatures in greater detail, establishing the houses and providing a framework for their composition and powers and the relations between them. Even here, however, important questions about citizenship, the franchise, the electoral system, the distribution of electoral boundaries, and the conduct of elections are left almost entirely to legislation enacted by the parliaments themselves.
The constitutional framework for the federal judicature strikes a better balance between providing protection for matters of important principle and enshrining unnecessary detail. By contrast, however, the framework for state court systems is slight, leaving all or most rules of a constitutional character to legislation. Finally, to pick up a recurrent theme of this chapter, the institutions and practices of intergovernmental relations, which are so significant to the current operation of Australian federalism and which also affect the operation of representative institutions, receive almost no recognition in the constitutions at all.

The flexibility that this approach offers has had many advantages in Australian circumstances. It enabled Australia to move from quasi-colonial status to independence without formal constitutional change. It enabled steady and perceptible progress in the quality of electoral democracy, through experimentation with new democratic forms. Within the vacuum left by the constitutions, it enabled the institutions and practices of intergovernmental relations to emerge and to evolve into today’s highly developed system. The perceived value of flexibility tends to be heightened by consideration of the resistance of the Australian Constitution to formal change.

The Australian approach has disadvantages as well, however. It limits the protection that a constitution can provide for the core features of a system of government upon which democratic institutions depend. The spare constitutional framework for government, which bears increasingly less resemblance to the way in which the system actually works, makes both the Constitution and the system itself more difficult to understand, with accompanying problems for accountability and public engagement. The problems created by intergovernmental arrangements for traditional accountability mechanisms could be eased by a constitution that recognizes the reality of cooperation and makes specific provision for it.

Finally, there are at least two respects in which the evolution of institutions, upon which Australia generally relies, has run up against the text of the aging Australian Constitution. First, the slow march to Australian independence cannot be consummated by removing the Crown as the last symbol of former colonial status without constitutional change. Change is difficult, however, and not least because Australians are unfamiliar with and apparently resistant to the deliberate, major restructuring of institutions. Second, constitutional limits have manifested themselves within the context of intergovernmental cooperative schemes, when the High Court struck down legislation conferring state jurisdiction on federal courts and cast doubt on the validity of the conferral of some other forms of state authority on Commonwealth bodies. Those decisions were much criticized, both for their outcomes and for depending on a particular conception of federalism that was coordinate rather than cooperative in character. They nevertheless forced a change of direction in intergovernmental relations, the full implications of which are not yet clear.

The Interaction between Federalism and Representative Institutions

The Australian system of government combines parliamentary government in the common-law tradition with federalism. Over a period of more than 100 years, each has shaped the other in a variety of ways, some of which are distinctively Australian, others of which are familiar in other federations as well.

Culturally, parliamentary responsible government and federalism are at odds with one another. The former facilitates the concentration of power in the parliamentary group with majority support and values efficiency; the latter requires sharing and, ideally, negotiation and compromise. It is possible to understand the story of Australian federal democracy as a tussle between these two, in which the attitudes associated with parliamentary government often appear dominant even when the institutions themselves are constrained by the reality of federalism.

Parliamentary institutions have an impact of another kind on federalism in Australia, attributable to the fusion of legislative and executive power that is a characteristic of parliamentary government with a strong two-party system, in the absence of a second chamber
with independent views. Bicameralism is significant in Australian constitutional design, but with the possible and variable exception of the Australian Senate itself, second chambers do not substantially detract from the capacity of governments to achieve their legislative programs. This feature of the Australian system of government, coupled with the relatively small number of constituent units of the federation, has fuelled particular forms of intergovernmental cooperation, leading to an advanced degree of executive federalism. The purpose of many of these arrangements is to extend or at least to simulate the effect of Commonwealth power. To this extent, they have contributed to the uniformity of law and administration in Australia, but in a manner that requires ongoing negotiation between all Australian governments, creating a new dynamic.

Conversely, federalism has affected the institutions of government in a variety of ways. The division of power for federal purposes has necessarily placed legal limitations on the powers of all institutions. In the Commonwealth sphere, the separation of judicial power was also originally justified by reference to federalism. As earlier parts of this chapter show, the composition of most of the institutions of federal government has been affected in law or practice by the fact of federalism, and the extensive powers of the Senate have caused modification of the principles of responsible government as well. Intergovernmental arrangements are not only facilitated by parliamentary institutions but also have a reciprocal impact on them, strengthening the executive branch at the expense of both legislatures and courts, particularly in the state sphere.

Likely directions for the future include the following. First, intergovernmental activity will continue and, probably, expand. Use of the reference power may become increasingly common, thereby diminishing (but only to a degree) concerns about the transparency and accountability of intergovernmental activity. An alteration of the Constitution may be attempted in order to underpin the capacity of the states to confer power and jurisdiction upon Commonwealth authorities and courts.

Second, government control of the Senate from July 2005, for the first time in more than 25 years, is likely to result in a bolder use of Commonwealth power, with longer-term implications for the respective functions of the Commonwealth and the states, some of which are also likely to be tested in the courts. At the same time, this period of unaccustomed harmony between the House and the Senate may diminish pressure for constitutional and legislative change to the Senate, as threatened from time to time by governments impatient with the difficulty of securing enactment of their policies.

The third development concerns rights protection. Unusually in the world of the twenty-first century, the Australian Constitution has no bill of rights, and only a few of its provisions can be regarded as protecting particular rights. In 2004, however, the ACT enacted a human rights act of its own, broadly following the model of the Human Rights Act, 1998 (UK). Towards the end of 2005, Victoria announced its intention to follow suit. There is some speculation that, in time, other states and, perhaps, even the Commonwealth may do so as well. Individual state initiatives of this kind highlight the degree of state autonomy in the design of their own institutions and demonstrate the way in which federalism can foster innovation in institutional design.

A final development of potential significance concerns statehood for the Northern Territory. Another movement for statehood is under way, aimed at the thirtieth anniversary of self-government for the territory in 2008. If it succeeds, the Northern Territory will become the first new Australian state. The terms and conditions upon which it is admitted to statehood will test Australia’s commitment to symmetry, which the Constitution guarantees only for the original states. A more contemporary state constitution for the Northern Territory could also act as a catalyst for debate on further reform of the aging constitutions of the existing states.
Notes
1 For further details of the history of the establishment and constitutional development of the Australian colonies, see Helen Irving, ed., The Centenary Companion to Australian Federation (Melbourne: Cambridge University Press, 1999).
2 Western Australia was the last colony to do so, in 1889.
3 The debate began as early as 1846. See Irving, Centenary Companion, viii.
5 Australian Constitution, sec. 106.
6 Quick and Garran, Annotated Constitution, 166.
8 Australian Constitution, sec. 128.
10 Ibid.
14 The constitutional position of the territories differs from that of the states in many ways that cannot be covered in detail in this chapter.
19 See, for example, Prime Minister John Howard: “If we had our time again, we might have organised ourselves differently … but they are only thoughts,” in “Reflections on Australian Federalism,” address to the Menzies Research Centre, 11 April 2005, at <http://www.pm.gov.au/news/speeches/speech1320.html>, viewed 23 May 2005.
20 At the same time, the government undertook to table (most) treaties in Parliament before ratification. For details, see the JSCOT Web page at <http://www.aph.gov.au/house/committee/jsct/>, viewed 23 May 2005. A complementary procedure also provides for consultation on treaties with the states, through the Treaties Council. For a history of the developments leading to these changes, see Anne Twomey, “International Law and the Executive,” in International Law and Australian Federalism, ed. Brian R. Opeskin and Donald R. Rothwell (Melbourne: Melbourne University Press, 1997), 69-95.
22 Commonwealth Electoral Act, 1918, sec. 245. The compulsion attaches to attendance at a polling booth: the act of voting itself remains secret.
23 Australian Constitution, sec. 53.
24 Ibid., sec. 28.
26 Ibid.
27 Australian Constitution, sec. 24.
28 Ibid.
29 Australian Constitution, sec. 29.
30 Ibid., sec. 24.
31 Australian Constitution, sec. 29.
32 Australian Constitution, sec. 128.
33 Quick and Garran, Annotated Constitution, 418-419.
34 Australian Constitution, sec. 7. Alteration of this provision also requires special majorities, pursuant to section 128.
35 Australian Constitution, sec. 9.
36 Ibid., sec. 12.
37 Ibid., sec. 15.
38 Ibid., sec. 23. In some legislative chambers in which one of the elected representatives is chosen to preside over the chamber, that person exercises only a casting vote in the event that votes would otherwise be evenly divided. The president of the Senate, however, may exercise his or her vote in the manner of all other senators and is therefore said to have a “deliberative” vote rather than just a “casting” vote.
39 Ibid., sec. 53.
41 Australian Constitution, secs. 7 and 13.
42 Australian Constitution, sec. 7.
44 Under section 13 of the Constitution, the composition of the Senate does not change after an election until the following 1 July. The October 2004 election, however, gave the government a majority of one seat in the new Senate.
47 See now Australian Constitution section 15.
50 Australian Constitution, sec. 57.
53 Australian Constitution, sec. 128.
54 Ibid., sec. 61.
55 These powers arguably include the power to refuse an early dissolution to a prime minister who has lost the confidence of the House of Representatives, at least in circumstances under which another government may be able to be formed; power to dismiss a prime minister who has lost the confidence of the House of Representatives and refuses to resign or, following the events of 1975, is unable to secure supply from the Senate; and appointment of a prime minister after an election when there is no clear majority in the House of Representatives.
56 Australian Constitution, sec. 61.
59 Ministers of State Act, 1952 (Cth) sec. 4.
61 Australian Constitution, sec. 64.
62 The exception is John Gorton, who became prime minister in January 1968 while still a senator and who remained prime minister in February 1968 while contesting a seat in the House of Representatives and was thus not a member of Parliament at all.
64 There is a rather silly, possibly tactical, dispute about whether the position of head of state is held instead by the governor general or, perhaps, by both the governor general and the Queen. The Constitution does not use the term: the formal role assigned to the Queen by the Constitution, however, involves functions exercised elsewhere by a non-executive head of state.
68 Deputies are appointed under section 126 of the Constitution and an administrator is appointed under section 4.
69 Constitution Alteration (Establishment of Republic) Bill 1999.
73 Australian Constitution, secs. 101-104.
76 The paragraph confers power on the Commonwealth to make laws with respect to any “matters referred to the Parliament … by the Parliament … of any State … but so that the law shall extend only to States by whose Parliament the matter is referred, or which afterwards adopt the law.”
78 R v. Kirby; ex parte Boilermakers' Society of Australia (1956) 94 CLR 254.
79 Attorney-General of the Commonwealth v. The Queen (1957) 95 CLR 529, 540.
80 See generally Australian Constitution, secs. 75 and 76.
82 High Court of Australia Act, 1979, sec. 6.
83 Australian Constitution, sec. 77(iii).
85 Re Wakim; ex parte McNally (1999) 73 ALJR 839.
87 For an analysis of the range of views, see Anne Twomey The Constitution of New South Wales (Leichhardt, NSW: Federation Press, 2004), chap. 15.
88 Kable v. DPP (1996) 189 CLR 1.
91 McGinty v. Western Australia (1996) 186 CLR 140.
The Parliament of Queensland became unicameral in 1922.

See, for example, the description of the expected roles of the two houses by the Legislative Council of Tasmania during the drafting of the original Tasmanian Constitution: “Tasmanian Parliament”<http://www.parliament.tas.gov.au/tpl/backg/Parliament.htm>, viewed 4 March 2005.

In New South Wales, Queensland, and Western Australia members of the Legislative Council were appointed by the governor on the advice of government, although in Western Australia the Legislative Council became an elected body within three years of the Constitution Act, 1890.

Tasmania, Victoria, and South Australia restricted the franchise to men of at least 21 years of age who had net assets or income above a prescribed level, usually around 50 pounds sterling. The Constitution Act, 1855 (Tas), sec. vi, for example, restricted the franchise for electing legislative councillors to men 21 or over with net assets of at least 50 pounds sterling, university graduates, and medical practitioners.

The NSW Legislative Council has not had the power to block supply since 1932. The power of the Victorian Legislative Council to block supply was removed in 2003.

Western Australia (1967), South Australia (1973), New South Wales (1975), and Victoria (2003). The remaining state, Tasmania, uses proportional representation for its lower house and a single-member electorate single transferable vote system for its upper house.


For example, aspects of the Competition Code that depend on state constitutional power are administered by the Australian Competition and Consumer Commission (ACCC) and other Commonwealth officers on behalf of the states: see Competition Policy Reform Act, 1995 (Vic), secs. 19, 27, 32.

For example, pursuant to the Housing Assistance Act, 1996 (Cth).


Crimes Act, 1914, pt. 1B, div. 4.

Kable v. DPP (1996) 189 CLR 1.

Re Wakim; ex parte McNally (1999) 73 ALJR 839.

See the discussion in Fardon v. Attorney-General (Qld) (2004) 78 ALJR 1519, 1528-1530, per McHugh J.


123 For example, Ministerial Council for Corporations.
124 For example, Ministerial Council on the Australian National Training Authority.
125 For example, Australia New Zealand Food Regulation Ministerial Council.
126 For example, Australia New Zealand Food Regulation Ministerial Council.
127 For example, Australia New Zealand Crime Prevention Ministerial Forum.
128 Painter, Collaborative Federalism, 103-120; see Department of the Prime Minister and Cabinet, Ministerial Councils, sec. 1.
129 Ibid.
132 See, for example, Corporations (Commonwealth Powers) Act 2001 (Vic).
133 Corporations Agreement 2002.
135 A requirement that property be acquired under Commonwealth law on “just terms” in section 51(0xxi); a (somewhat flawed) guarantee of trial by jury in section 80; some protection for freedom of religion in the Commonwealth sphere in section 116; and a prohibition against discrimination on grounds of state residence in section 117.
137 Speech by Chief Minister Clare Martin, 2003.