

On 1st January 1901 the Commonwealth of Australia Constitution came into effect, bringing together the six self-governing colonies and establishing a federal system of government. This federal system allows for Power to be divided between states and the federal government by the Australian constitution. It also allows for separation of powers between the legislature, executive and the judiciary. It must be noted that the constitution can only be amended by referendum. The High court has the role of reviewing the constitution when there is a dispute; this involves interpretation of the constitution by the judges of the high court. These high court decisions have led to an increase in power to the federal government. Another reason that the federal government now has more power than issued to it by the constitution is due of state to federal agreements on certain laws.

The constitution is the overruling law in Australia that was passed by the British in 1900 in a statute called the Commonwealth of Australia Constitution Act 1900 (UK). This is the outline of the Commonwealth; setting out how the new federation would be established and the guidelines for the way Australians would shape their nation. The Constitution is also the outline for the lives of Australians, providing the authority for the powers by which our legislators make laws, our executive government implements them, and how our courts operate.

One essential specification of the Constitution is that of the division of powers. The Australian Constitution establishes how power is divided between the states and the federal governments. Division of power means that legislative, executive and Judiciary powers are divided between the states and the federal government.

Section 51 of the Australian Constitution establishes where the Commonwealth of Australia has jurisdiction; under the condition that States keep the same law making powers they had before federation unless these powers have been otherwise given to the federal government. Fundamentally, the Constitution presents four types of legislative power. Specific powers, exclusive powers, concurrent powers and residual powers.

The Australian Constitution establishes the Commonwealth of Australia in which “the legislative power of the Commonwealth shall be vested in a Federal Parliament” this means that the federal government has specific powers to make laws on particular issues.

Some of these powers are exclusive; that is, only the federal government possesses them. The most significant areas include defense, foreign affairs, trade and commerce, customs and excise, taxation, immigration, communication, social security and control of federal territories.

Other federal powers are concurrent – that is, both Federal and state Governments possess them. Both can legislate together on matters of health, tertiary education, banking, family law, trade, transport, law and order. As explained in section 109 of the constitution, wherever a state law conflicts with a federal law, the federal law prevails.

The states have residual powers – that is whatever is left. Even with these powers, the state may find federal actions overriding them. Generally, the states are involved in some important social areas that are not likely to be seriously affected by federal activities. The include the basic civil law of the country relating to contracts, property and civil wrongs, such as motor car accident liability; and other areas such as mercantile law, general criminal law, urban planning, road traffic, prevention of pollution,

most forms of health services, industrial and agricultural productions and regulations of trade and professions.

Another important order of the constitution is that of the separation of powers. The doctrine of the separation of powers divides the institutions of government into three branches: legislative, executive and judicial:

The legislature makes the laws and is seen as the province of parliament. It is responsible for passing Acts of Parliament. It is composed of the elected members of parliament and the Queen.

The executive puts the laws passed by the legislature into operation. That is the Prime Minister, Cabinet Ministers and Other Ministers acting with the Governor General to govern the country, set the policy agenda, propose new laws and administer existing laws. It is responsible for much delegated legislation.

The judiciary (another term for court system) interprets the laws and is handed over to our courts of law. The powers and functions of each are separate and carried out by separate personnel. This arm of government is responsible for applying the law to individual cases.

No single agency is able to exercise complete authority, each being interdependent on the other. Power thus divided should prevent autocracy (as in monarchies or dictatorships where all branches are concentrated in a single authority) or corruption arising from the opportunities that unchecked power offers. Also by not concentrating all the powers or roles of government in one person or one organ of government, it would be able to promote liberty and freedom of the individual.

There is some integration of power between the executive and the legislature since the government of the day effectively controls both; the courts have maintained their independence from government. Each arm of government has a distinctive role that cannot be performed by another arm of government.

The doctrine can be extended to enable the three branches to act as checks and balances on each other. Each branch's independence helps keep the others from exceeding their power, thus ensuring the rule of law and protecting individual rights.

Section 128 of the Constitution is one of the most important sections as it outlines the methods by which the Constitution may be amended.

Once a law to amend the Constitution has been passed by both Houses it is then to be put to the electors in each State and Territory qualified to vote for the election of the House of Representatives in the form of a referendum. A referendum is a specific question given to the entire nation to vote on, with the purpose of bringing about a change to the Constitution. Voters must vote yes or no to the question. If in a majority of States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

Very few referenda have been successfully passed and so the Australian Constitution has remained largely unchanged since 1901. Only 8 of 42 referenda have been changed in the constitution. These are:

Senate Elections (12 December 1906) made minor alterations concerning Senate elections and terms of Senators
State Debts (13 April 1910) allowed the Commonwealth takeover of State debts
State Debts (17 November 1928) formalized the position of the Loan Council
Social Services (28 September 1946) gave the Commonwealth power to provide certain social services
Aborigines (27 May 1967) gave the Commonwealth power to make original people resident in the States and to include all Aboriginal people in the national census
Casual Vacancies (21 May 1977) aimed at ensuring that a replacement Senator should be from the same party as the departing Senator
Territory Votes (21 May 1977) gave residents of the Australian Capital Territory and the Northern Territory the right to vote in constitutional referendums
Retirement of Judges (21 May 1977) provided for a retirement age for all federal judges.

<http://www.aph.gov.au/library/elect/referend/rintrod.htm>

One way of understanding why this is so, is by considering two viewpoints made by two highly knowledgeable and exceedingly recognized people in the area of Australian law. The Honorable Anthony Murray Gleeson, AC currently Chief Justice of the High Court of Australia in Canberra said “...*The reason why only 8 out of 42 referenda have been accepted is that the public, (or more accurately a sufficient number of the public to block the proposals for change), have not been persuaded of the merit of the change. A constitution is an instrument that is intended to be permanent. It shouldn't be able to be altered by a temporarily fashionable political view*” And As said by Sue Tongue, Principal Member and CEO of the Migration Review Tribunal “...*having worked on a referendum campaign, I despair of ever getting any referenda through. Unless you've got the political support of both parties (which you often don't have because political opportunism gets in the way), it's very difficult. Unless you've got a real education campaign, people just say, 'Ho hum, what are they on about? Don't let the politicians touch anything that's ours'. So they vote 'no'. It's a pretty difficult hurdle*” This generally describes the reluctances towards change held by the majority of Australians.

An example of a referendum would be the Republic referendum held on the 6th November 1999, On this day Australian electors went to the polls to vote in constitutional referenda on whether Australia should become a republic and whether to insert a preamble to the Constitution. Both proposals respectively are independent and the result of the one would not affect the other. Never the less both proposals were defeated, having failed to achieve a majority overall and a majority in any State. 5 273 024 Australians voted yes and 6 410 787 Australians voted no to a Republic. Leaving 54.87% against a republic and 45.13% for a Republic. 4 591 563 voted yes and 7 080 563 voted no to a preamble. Leaving 60.66% against a preamble and 39.34 for one. Overall, both questions were soundly defeated.

An example of constitutional reform would be the 1967 Australian Referendum and Aboriginals rights, which was supported in all of Australia, 90.77% voted 'yes' in favor of Aboriginal rights. In result to this referendum, the federal government is allowed to make laws specifically relating to Indigenous Australians, and also allowing them to be counted in the national census. This permitted the Federal Government to remove discriminatory laws in any legislation, and to set up special laws and programs for Indigenous Australians. The original constitution did not allow for specialized legislation for Aboriginals.

The High Court has authority to decide matters relating to the Australian Constitution this means that the high court has the ability to interpret the words of the constitution and decide how and where the constitution fits in to a certain case to decide the outcome of that dispute.

The high court has the ability, by the constitution to review commonwealth legislation if a constitutional dispute is brought before it. These disputes generally occur when governments or organizations breach the validity of a state or federal law, accusing that the government in question did not have the power under the constitution to make that particular law.

Such examples of the power the high court has in interpreting the constitution in order to decide constitutional disputes is the Franklin Dam case. A dispute arose between the federal government and the Tasmanian government about whether the Tasmanian government could build a dam on the Franklin River in Tasmania. The area had been listed as a heritage site under the World Heritage Conservation Act by the Commonwealth Government under its external affairs power and was bound to uphold its provisions, therefore the Tasmanian government was asked not to proceed with the construction. The Tasmanian Government believed that they had had the power to determine land use within its own boundaries and disputed the constitutional validity of the act. The case went to the High court, which was held in favor of the Commonwealth by a narrow margin of four judges to three and the planning and construction of the dam was stopped. The court agreed with the arguments put forward by the Commonwealth, but warned that the Commonwealth could not go ahead and sign treaties for the sole purpose of extending its powers and bypassing the constitution.

There has been a shift in power from the states to the commonwealth. This is mainly because of high court decisions and state to federal agreements on what each have the power to construct laws on. Because of this, the federal government has more power than it was proposed to have by those who framed the constitution.

An example of how the decision of the high court has shifted the power from the states to the commonwealth is apparent in the Franklin Dam case, the high courts final verdict predestined that the federal government can make laws about any matter on which it has signed a treaty on, even if the constitution has not specified the federal government the power to make a law in that area. Consequently giving the federal government more opportunities to gain jurisdiction power in more areas.

State and federal governments sometimes reach agreement on many issues in order for laws to be applied across Australia, in some cases the states have granted the federal parliament the power to make laws for all Australians, which it may not have been able to do under the Constitution. This has also given the federal government more jurisdictions over more matters. One example is the federal parliaments ability to make some laws regarding adoption of children and ex-nuptial children. Originally, only children who were children of a marriage came within the legislative power of the Commonwealth, thus the Family Law Act provisions only applied to those children. Ex-nuptial children were subject to different legislation about residence, contact and maintenance in each State. Under the Australian Constitution the States may, by mutual agreement with the Federal government, refer their law-making powers to the Federal Parliament.

Referendums have had little effect on the division of powers this is because of the fact that the constitution's words have rarely been changed by a referendum, Even though the division of power has changed considerably since 1901 this has been because of High court decisions and state to federal agreements and not due to any referendums.

And in conclusion, it is clear that Australia runs by a federal system of government with a constitution that allows for division and separation of powers. It is also said that the constitution has been greatly effected by the high court, as it is the judges of this court who must interpret the constitution to come to some sort of conclusion when a dispute has been put towards them. Although referendums have the ability to amend the constitution and in 8 occasions it has done so, it must be known that there have been 34 occasions where the referendum put forward to the public have been rejected. Decisions made by high court on constitutional matters have changed the division of powers, giving the federal government more jurisdictions over the state. Agreements made between states to the federal government have also led to an increase of power that the Federal governments hold. Overall, the federal government holds more jurisdiction than it was intended to have originally by those who had planned the constitution.

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