

## **The Three Most Important Features of My Country's Legal System That Others Should Understand**

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### **1. Australia is a federation**

The Commonwealth of Australia is a federation created on January 1, 1901 out of the (then) six Australian colonies of the United Kingdom of Great Britain - New South Wales, Victoria, Queensland, South Australia, Western Australia and Tasmania. A number of territories also presently exist within Australia (including the mainland territories of the Northern Territory and the Australian Capital Territory) which the Commonwealth subsequently acquired and over which (formally, at least) it has exclusive jurisdiction. Some of these territories have been granted significant degrees of autonomy and self-government.

According to the terms of the Australian Constitution – a document negotiated by representatives of the six original colonies over the latter part of the 19<sup>th</sup> century, approved by referenda within those colonies and ultimately sanctioned by the Imperial British Parliament by passage of the Commonwealth of Australia Constitution Act 1900 (Imp.) - the entirety of then existing colonial legislative and associated governmental power was divided topic-wise between a newly created central and national government (the Commonwealth of Australia) and the pre-existing colonies (renamed States).

A series of legislative topics considered most appropriate for the new national government were assigned to the new Commonwealth (exclusively or concurrently), with the remainder (unspecified residual powers) left in the hands of the States. Important considerations in deciding upon the distribution of these powers at the time included the improvement of the management of external defence, immigration and international trade, the liberalisation of internal trade and commerce, and the development and better management of domestic public infrastructure. Unlike the constitutions of many other nation states, Australia's constitution was not forged in an atmosphere of highly charged political idealism. Though a vein of nationalism informed the move to bestow the new nation state with a limited degree of autonomy from Great Britain, much of the form taken by the federation was motivated by economic and other largely pragmatic concerns, reflecting the primary interests of those who directed the course of the nation-building, constitution-creating process at the time.

Following the initial distribution of powers between the Commonwealth and States at the dawn of the 20<sup>th</sup> century, the intervening years have seen a dynamic, uneasy and occasionally controversial relationship develop between the Commonwealth and States at both the political and the legal levels. Arguably, Australia's constitutional court – the High Court of Australia – has, over a series of decisions, interpreted the original division of legislative heads of powers in a manner conducive to the extension of Commonwealth power at the expense of the States (in what is commonly thought to be a “zero-sum game”). This has been claimed by federalist advocates of so-called “States rights” to involve an illegitimate conspiracy of Commonwealth appointed and ideologically centrist judges committed to undermining the ongoing viability of the federation in the service of some or other malevolent end and by their opponents to involve a sensible and flexible

fine-tuning of an anachronistic political arrangement in response to the ever-changing challenges of modernity and globalisation.

The debate about the federal division of power continues today in relation to a series of highly contentious and well-publicised legislative moves by the Commonwealth involving industrial relations and inter-state land and water management. The federal compact, born out of a vigorously negotiated inter-colonial agreement in the late 19<sup>th</sup> century, remains a locus for competing interests today. Whether it will end, as some argue (either despondently or with anticipation) with the ultimate ascendancy of the Commonwealth in a unitary state - de facto or de jure – remains to be seen. In the meantime, it makes for entertaining politics and interesting litigation.

## **2. Australia's constitution is a mix of UK and US elements and lacks a Bill of Rights**

The Commonwealth Constitution was drafted in the 1890's by representatives of the six Australian colonies and embodies an uneasy amalgam of elements of both the UK and US systems of government in what has been termed a "Washminster" system of government. From the UK, the Commonwealth has inherited a tradition of responsible government; a relatively weak separation of powers doctrine, including what might be conceived of as a predisposition or orientation towards Parliamentary sovereignty and a background anxiety about the exercise of a judicial power of legislative review; as well as an associated trust in common law and statutory (as distinct from constitutionally codified and entrenched) mechanisms for protecting basic rights. From the US, the Commonwealth has inherited a written constitution; a federal structure; a bi-cameral Parliament with a legislative and upper Senate chamber representing (formally, at least) State interests; and a supreme court with formal jurisdiction to ensure that the other limbs of government - including the Commonwealth Parliament itself - comply with the terms of the Constitution. The contradictions inherent in such a system – as well as the fascinating synergies – should be apparent to the politically informed observer. Where does one begin to list the modes and occasions of legal and political contradiction, as well as opportunity, generated by such a mongrel (no insult intended!) over its one hundred and six years?

Importantly, implicit in this feature of Australia's legal system is the fact that Australia does not have a national, constitutionally codified and entrenched bill of basic rights. This distinguishes Australia's legal system from that of many - if not, most - of the nations of the world. Notwithstanding their adoption of a range of features of the US constitution, the 19<sup>th</sup> century drafters of the Australian constitution were not minded to include a Bill of Rights (though they did debate doing so). Rather, they incorporated (expressly, at least) a narrowly restricted number of discrete civil and political rights here and there throughout the text of the document and, in true British style (at least, the Britain of that time), left the protection of the majority of basic rights to the traditions of the common law and the wisdom and benevolence of the people's national and regional Parliaments. Subsequent airings in the public sphere of the idea of introducing a constitutional Bill of Rights by means of a formal constitutional amendment (via a popular, though federally weighted, referendum process) have come to naught, the Australian people arguably content with the existing arrangements as far as their fundamental rights are concerned. The failure of

these projects hasn't deterred a number of High Court majorities and individual judges from time to time implying certain civil and political rights into the Constitution – most notably in recent times, an implied right (or freedom, more correctly) of political communication. The public debate about whether or not to codify a Bill of Rights in the Constitution continues today. Recent legislative responses to terrorism have heightened the intensity of the debate from its usual low simmer. Where things will lead in this respect is not clear.

### **3. Australia is not a republic**

The nation state that is the Commonwealth of Australia was created in 1901 by an Act of the British Parliament. Its constitution remains to this day Section 9 of that British Act. At its birth, Australia was a colony of Great Britain and it remained politically and legally subordinate to Great Britain to some degree or other until 1986, when by a further Act of the British Parliament (supplemented by a mirror Act of the Australian Parliament) the jurisdiction of Britain's Parliament, Executive and Judiciary over Australia was formally ended. Debate continues today as to whether or not (despite their formal terms) the Australia Acts of 1986 conclusively conferred legal and political sovereignty as an independent nation state on Australia or whether some further legal and political gesture is necessary.

One complicating factor here is that the Queen of Australia - who is constitutionally recognised as an element of the Commonwealth and State Parliaments, as well as the formal holder of Commonwealth and State executive power - is constitutionally and statutorily identified as the presiding monarch of Great Britain. The Australian head of state is at law the current head of state of its old colonial overlord. Some have argued that as a result of this, Australia is not quite yet a republic, either in the sense of being a fully sovereign nation subordinate to the legal or political institutions of no other, or in the sense of not being subject to the power (however limited) of an undemocratic, hereditary monarchy. Much here hinges on the actual power the monarch yields in Australia. However, the politically potent symbolic dimension of the situation should not be discounted.

Like the Bill of Rights debate, the republic debate simmers in the Australian public sphere, occasionally flaring up into a full-blown controversy. Its last eruption preceded and followed a 1999 national referendum on whether or not to formally amend the Australian constitution so as to more overtly and conclusively republicanise our governmental structures. What the failure of that most recent movement for constitutional change indicates about the Australian psyche has been a topic of rumination for lawyers, political scientists and sociologists ever since.