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SUBNATIONAL CONSTITUTIONALISM IN AUSTRALIA

State autonomy in a uninational federation

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3.1 Context

The Commonwealth of Australia is an integrative federation formed in 1901 through the ‘coming together’ of six mutually independent self-governing colonies under the ultimate authority of the British Parliament. 1 Prior to federation, each colony had its own constitutional statute enacted by its Parliament pursuant to authority conferred by the British Parliament. These constitutional statutes defined the legislative, executive and judicial institutions of each colony and conferred powers upon them. Although the oldest of the Australian colonies were initially established as penal settlements governed under the autocratic powers of governors appointed by the British government, by the mid-nineteenth century all but one of the colonies had become fully self-governing. This entailed the establishment of representative legislatures and executive governments responsible to those legislatures, operating in accordance with the conventions of parliamentary responsible government as understood within the British Westminster tradition. The one exception, Western Australia, attained full self-governing status in the late nineteenth century, a decade prior to the federation of the colonies in 1901.

These powers of local self-governance included a large degree of constitutional self-determination, subject only to the ultimate authority of the British Parliament and the continuing status of the colonies as parts of the British Empire. In a decisively important statute passed by the British Parliament in 1865, all representative legislatures within the Empire were given full power to amend their own constitutions subject only to such ‘manner and form’ procedural requirements as might be imposed by an Imperial statute, Order in Council or statute enacted by the colonial legislature itself. 2 This enabled the colonial legislatures to place procedural constraints on their ability to amend their own constitutions. At the time of federation, each colonial legislature was therefore in the position of a sovereign-like parliament exercising a plentitude of powers.

2 Colonial Laws Validity Act 1865 (UK), s 5.
legislative power similar in scope to that exercised by the British Parliament itself, but applying only to the governance of the colony, with limited extraterritorial effect.³

In this context, the federation of the colonies was authorized locally by statutes passed by each of the colonial parliaments. A federal convention consisting of members directly elected by the voters in five of the six colonies was held in 1897–98.⁴ Each colony was regarded as a constituent equal in the negotiating process and therefore represented by an equal number of delegates. The convention debated and drafted a constitution which was referred to the legislatures of the colonies for comment. Next the constitution was finalized by the convention and then referred to the voters in each colony for approval at a referendum. Only once the voters approved the scheme of federation was the colony committed to federation. Eventually the voters in all six colonies approved the proposed constitution and it was referred to the British Parliament for formal enactment. Although the Parliament possessed the legislative authority to determine the final content of the constitution, only minor changes concerning matters of immediate concern to the Empire as a whole were made. The Commonwealth of Australia Constitution Act 1900 (UK), which contains the Constitution of the Commonwealth of Australia, authorized the Queen to declare by proclamation that the Australian colonies would be formed as constituent states into one indissoluble federal commonwealth under the crown.

Consistent with the scheme of federation, the Commonwealth Constitution presupposes the prior existence of the six constituent states as pre-existing self-governing political communities each governed under their respective State Constitutions. The Commonwealth Constitution confirmed that each State Constitution would ‘continue’ to operate, subject to the Commonwealth Constitution, until amended in accordance with the State Constitution (section 106). It also affirmed that each State Parliament would continue to exercise the legislative powers it had prior to federation, subject only to a relatively small number of restrictions.⁵ The general principle was that each State Parliament would continue to have the power to determine the content of its own Constitution and to legislate as it deemed fit.

### 3.2 Autonomy

The transformation of the Australian colonies from penal settlements to self-governing political communities was largely a result of advocacy by the governments and peoples of the colonies themselves.⁶ The original colony of New South Wales initially encompassed almost two-thirds of the Australian continent. Only over time were separate colonies established in Van Diemen’s Land (Tasmania) in 1825, South Australia in 1836, Western Australia in 1829, and the colonies of Victoria and Queensland were carved out of the territory of New South Wales in 1851 and 1859 respectively. The colonies were transformed into self-governing political communities in gradual steps involving the establishment of local systems of courts, local legislative councils and assemblies, democratically responsible governments and, eventually, full power to amend their own constitutions and therefore determine the composition and powers of their institutions of government. These developments reflected aspirations for local self-government and constitutional self-determination that were widespread in the colonies.

Federation only occurred when the governments, legislatures and people of the colonies considered it to be in their best interests to do so, and the terms of federation were calculated to

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³ Powell v Apollo Candle Co (1885) 10 App Cas 282, 290.
⁴ The Western Australian delegates were appointment by the colonial Parliament.
⁵ For more detail, see Part 3.2 below.
⁶ Aroney (n 1), at 134–8.
ensure that each colony would continue to exercise powers of local self-government and constitutional self-determination, subject only to those limitations and restrictions that were necessary in order to establish a federal commonwealth. The colonies were therefore in a position to insist on five interlocking principles:

- the Constitution of each state would continue to operate, subject to the Commonwealth Constitution, until amended in accordance with the Constitution of the state (section 106);
- the powers of each State Parliament would continue, except to the extent that particular powers were exclusively vested in the Commonwealth Parliament or specifically withdrawn from the state (section 107);
- every existing state law, even if on topics over which the Commonwealth Parliament was given concurrent power to make laws, would continue to operate until amended by the state (section 108);
- even though state laws inconsistent with Commonwealth laws would be invalid to the extent of the inconsistency (section 109), the legislative powers of the Commonwealth Parliament were limited to specific topics (sections 51 and 52), thereby ensuring that the states would continue to be able to legislate on all other topics;
- by way of further safeguard, the Commonwealth Parliament would consist of two houses, one of which (the Senate) would be composed of an equal number of representatives of each state directly chosen by the people of each state (section 7).

The combined effect of these provisions was to guarantee to the states a very high degree of constitutional autonomy. Although it could be said that it is the Commonwealth Constitution which confirms that the constitutions of the states are to continue subject to the Commonwealth Constitution, the states arguably have a constitutional status that is more fundamental and certainly more original than the Commonwealth itself. All of this reflects the integrative nature of the Australian federation as a consensual ‘coming together’ of six mutually independent self-governing colonies.

Indeed, so important are the states to the federal design of the system as a whole, amendments to the Commonwealth Constitution can generally only occur through processes that involve, in various ways, the approval of the states. Thus, the Commonwealth Constitution as a whole can only be formally altered by a statute enacted by both houses of the Commonwealth Parliament which has received the approval of a majority of the people of the Commonwealth as a whole and a majority of the people in a majority of states (section 128, paragraphs 1–4). Moreover, changes to the rights of the people of each state to be represented in the two houses of the Commonwealth Parliament, as well as the territorial boundaries of each state, cannot be altered without the consent of the people of the affected state (section 128, paragraph 5). Likewise, the State Parliaments can confer additional legislative powers on the Commonwealth Parliament, but any Commonwealth law enacted pursuant to such powers extends only to states by whose

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7 Ibid. ch 9.
9 Section 7 of the Commonwealth constitution provides that each of the Original States is represented in the Senate by an equal number of senators, notwithstanding substantial differences in the populations of the various states. Section 24 provides that the people of the states are represented in the House of Representatives in proportion to their respective populations, subject to the right of each state to a minimum representation of five members.
Parliaments the matter is referred, or which afterwards themselves confer the power as well (section 51(xxxvii)).

The constitutional status of the Australian states is underscored when they are compared with the position of the territories. The two self-governing territories, the Australian Capital Territory and the Northern Territory, are governed under statutes enacted and controlled by the Commonwealth Parliament. The constitutional status of the other territories is even weaker, as illustrated by the recent disestablishment of representative institutions in the Territory of Norfolk Island. The Commonwealth’s power to legislate for the territories, including the power to establish their governing institutions, is plenary in nature (section 122). A Commonwealth law on any topic will overrule an inconsistent territory law, and the Commonwealth can deliberately target its legislation to overrule territory laws if it wishes.

Since federation, the constitutional autonomy of the Australian states has substantially increased in one respect, and has decreased in another important respect. The first of these changes is that the ultimate authority of the British Parliament to legislate for each Australian state, as well as for the Australian Commonwealth as a whole, was brought to an end in 1986. This was achieved in two ways. A provision of the Commonwealth Constitution authorizes the Commonwealth to exercise any power which at the time of federation could be exercised only by the British Parliament, provided this is done at the request or with the concurrence of all the State Parliaments directly concerned (section 51(xxxviii)). Pursuant to this provision, the State Parliaments enacted laws authorising the Commonwealth to enact a law that would terminate the power of the British Parliament to legislate for Australia. At the same time, following the process required by the Statute of Westminster, the Commonwealth requested the British Parliament to enact an identical statute likewise terminating the power of the British Parliament to legislate Australia.

The second way in which the constitutional autonomy of the Australian states has changed since federation concerns the practical capacity of the states to exercise their legislative, executive and judicial powers independently of the Commonwealth. Over time, the Commonwealth has pressed the scope of its laws, executive actions and judicial decisions to the outermost limits of the Constitution, and arguably beyond those limits. Moreover, these efforts to expand the powers of the Commonwealth have been largely confirmed by decisions of the High Court of Australia. These decisions have reduced the effective range of the autonomous governing powers of the states through three key mechanisms:

- a wider range of validly enacted Commonwealth laws, which prevail over inconsistent state laws to the extent of the inconsistency (section 109);
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- Commonwealth monopolization of personal and corporate income taxes, thus limiting the financial resources available to the states and making them more reliant on Commonwealth grants;18
- financial grants to states that require the states to comply with terms and conditions imposed by the Commonwealth (section 96).19

Decisions of the High Court interpreting the Constitution have also placed restrictions on the capacity of the states to determine certain matters fundamental to their respective State Constitutions, particularly in relation to the functions and procedures of their judicial institutions and measures that burden communications about political matters.20 Apart from these limitations, however, the fundamental principle remains that the State Parliaments have plenary power to enact, repeal and amend their own constitutions.

3.2.1 Scope

The power of the State Parliaments to determine the content of their own constitutions is in principle unlimited as to subject matter.21 The composition, procedures and powers of the core legislative, executive and judicial institutions of each state are determined in the first instance by the constitutional statutes of each state, as well as by particular statutes regulating other matters of constitutional importance, such as the establishment of government departments, integrity agencies, and public corporations.

The only limitations on the power of the State Parliaments to determine the content of their own constitutions are derived from the Commonwealth Constitution. Here, the general principle is that the State Constitutions continue, subject to the Commonwealth Constitution (section 106). This means that there is nothing the states can do by way of amendments to their constitutions that modify or alter the relevant effect of the Commonwealth Constitution or the exercise of constitutional powers by the legislative, executive and judicial institutions of the Commonwealth. The states cannot prevent the Commonwealth from enacting a law that is inconsistent with a state law and therefore prevails to the extent of the inconsistency (section 109). The states cannot legislate on topics that are within the exclusive power of the Commonwealth, such as the imposition of excise duties and customs duties (section 90) or the enactment of laws concerning the seat of government of the Commonwealth or Commonwealth government departments (section 52). They are also prohibited from raising or maintaining any naval or military force without the consent of the Commonwealth Parliament (section 114) and from coining money or making anything other than gold or silver legal tender in payment of debts (section 115).

The most radical indicator of the constitutional autonomy of a constituent state concerns its capacity to withdraw from the federation.22 The framers of the Australian Constitution, knowing the history of the United States and, in particular, the American Civil War, deliberately framed the Australian Constitution in a way that would foreclose the possibility of a lawful, unilateral secession by a state. This was achieved in two ways. Firstly, the preamble to the

18 South Australia v Commonwealth (1942) 65 CLR 373; Victoria v Commonwealth (1957) 99 CLR 575.
19 Victoria v Commonwealth (1926) 38 CLR 399; Deputy Federal Commissioner of Taxation v W R Moran Pty Ltd (1939) 61 CLR 735.
20 For more detail, see Parts 3.4.2 and 3.4.3 below.
21 Union Steamship Co of Australia Pty Ltd v King (1988) 166 CLR 1; Durham Holdings Pty Ltd v New South Wales (2001) 205 CLR 399.
22 See generally, Gregory Craven, Secession: The Ultimate States Right (Melbourne University Press 1986).
Constitution recorded the agreement of the people of the Australian colonies to be united in an indissoluble federal commonwealth. Although the preamble is not directly enforceable, this statement reflected the prevailing view and intention of the framers. Secondly, the Constitution was contained in a British statute which applied by paramount force in Australia and continues to bind the Commonwealth and the states after the passage of the *Australia Acts*. It is beyond the powers of the Commonwealth and the states to legislate in a manner that is inconsistent with the *Commonwealth of Australia Constitution Act* and the Constitution which it contains. The *Constitution Act* provided in covering clause 3 that the Queen had authority to declare by proclamation that the Australian colonies would be united into a federal commonwealth. Nothing in the *Constitution Act* or the Constitution expressly affirms or confers power on a state to secede unilaterally from the federation. To remove a state from the federation pursuant to the *Constitution Act* would require a formal amendment of that Act, arguably with the consent of the Commonwealth and the state concerned, and possibly with the consent of all of the states.

### 3.2.2 Procedure

The general principle is that the State Constitutions are nothing but ordinary statutes of the State Parliaments and can therefore be amended or repealed in any respect by an ordinary statute enacted by the Parliament. In the five states where the Parliament is bicameral, this means that an amendment to the Constitution must be passed by both houses of the Parliament and then receive the royal assent, which is ordinarily given by the State Governor on the advice of the Premier, Attorney General or other relevant government minister.

As mentioned, the powers of each State Parliament are limited by any ‘manner and form’ procedural requirements laid down for the enactment of laws that alter the ‘constitution, powers and procedures’ of the Parliament. The original source of such requirements was section 5 of the *Colonial Laws Validity Act 1865* (UK). This section, which affirmed the powers of colonial legislatures to establish and amend their own constitutions, distinguished between colonial legislatures generally and those that were ‘representative’ in character. Every colonial legislature, whether representative or not, was given full power to establish, abolish and reconstitute its system of courts. Each representative legislature was, in addition, given full power to make laws respecting the constitution, powers and procedures of the legislature itself. However, this latter power was also subject to any ‘manner and form’ procedural requirement that might be required by an Act of the British Parliament, Letters Patent, or an Order in Council, or by any relevant statute enacted by the colonial legislature itself.

The *Colonial Laws Validity Act* thus presupposed and affirmed the continuing power of the British Parliament to legislate for the Australian colonies and to determine, ultimately, the content of the colonial constitutions. However, it also affirmed the power of the colonial legislatures to determine the content of their constitutions. The authority of the British Parliament to legislate for the colonies continued through the period of federation and well into the twentieth century. Following the First World War, however, a landmark statement of the 1926 Imperial Conference affirmed that several of the former colonies, including Australia, had ‘Dominion’
status, meaning they were no longer directly under the authority of the British government. They were described as ‘autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown’. 27

A further important step was taken by the Statute of Westminster 1931 (UK). Section 2 provided, among other things, that no law of a Dominion would henceforth be void or inoperative on the ground that it is repugnant to the law of England or to the provisions of any existing or future British statute. Section 4 further provided that no Act of the British Parliament would henceforth apply to a Dominion unless it was expressly declared that the Dominion had requested and consented to its enactment. Neither of these developments directly affected the Australian states directly. However, it was recognized that the former colonies were now substantially independent states operating in world affairs.

When the Australia Acts were enacted in 1986, bringing the authority of the British Parliament to legislate for Australia to an end, this had profound constitutional implications. Section 1 of the Australia Acts provided that no British statute would henceforth apply to the Commonwealth, to a state or to a territory. Other provisions affirmed that each State Parliament would have power to make laws that have extraterritorial operation and would also have all of the legislative powers that the British Parliament could have exercised in relation to the state. 28 It was also provided that no law of a state would henceforth be void or inoperative on the ground that it is repugnant to the law of England or to the provisions of any existing or future British statute. Section 6 of the Australia Acts also affirmed, in terms similar to the Colonial Laws Validity Act, that any state statute dealing with ‘the constitution, powers or procedure’ of the State Parliament would be of ‘no force or effect’ unless enacted in accordance with any applicable ‘manner and form’ requirement.

One of the most common procedural requirements is that a proposed law must be approved by the people voting in a referendum. 29 Others require that proposed laws must be passed by an absolute majority or a special majority of the houses of Parliament, rather than merely by simple majority. 30 Notably, however, manner and form requirements apply only to laws respecting the ‘constitution, powers or procedures’ of the Parliament; they do not apply to other constitutional institutions such as the courts or the executive government. 31 While some State Constitutions contain manner and form requirements that apply to the executive and the courts, it is questionable whether they are constitutionally effective. 32

3.3 Status

The status of the State Constitutions and their relationship to the Commonwealth Constitution is encapsulated in section 106 of the Commonwealth Constitution, which affirms that they are to continue as at the establishment of the Commonwealth and that they are subject to the Commonwealth Constitution.

27 Inter-Imperial Relations Committee, Imperial Conference 1926, Report, Proceedings and Memoranda (1926) 2.
29 Eg, Constitution Act 1889 (WA), s 73(2); Constitution Act 1902 (NSW), s 7A and 7B; Constitution Act 1867 (Qld), s 53; Constitution Act 1975 (Vic), s 18(1B); Constitution Act 1934 (SA), s 10A.
30 Eg., Constitution Act 1889 (WA), s 73(1); Constitution Act 1975 (Vic), s 18(2), (2AA).
31 Attorney-General (NSW) v Trethowan (1931) 44 CLR 394; Attorney-General (WA) v Marquet (2003) 217 CLR 545.
32 See further, Aroney et al. (n 28), at 625–32.
There are some judicial statements suggesting that the State Constitutions derive their authority from the Commonwealth Constitution. However, these statements are difficult to reconcile with the affirmation in section 106 that the Constitutions would ‘continue’, a term which suggests that the juridical sources from which they derive their authority must have predated the establishment of the Commonwealth. As a matter of historical record, this is indeed the case: each of the State Constitutions can be traced to independent Imperial sources such as Instructions to the Colonial Governor, Letters Patent, Orders in Council and Acts of the British Parliament. Each state has a unique constitutional history and relationship with the British sources from which its governing institutions derived their authority. As noted, the cessation of the power of the British Parliament to legislate for Australia effected by the Australia Acts was premised on statutes enacted by the states and the Commonwealth. The Commonwealth, the states and the territories were treated as distinct entities with particular provisions tailored to their specific constitutional circumstances.

While each State Constitution continues until altered in accordance with the requirements contained in the State Constitution itself, each State Constitution is also subject to the Commonwealth Constitution. This not only means that it is subject to the provisions contained in the Commonwealth Constitution at the time that it came into force, but also any new provisions introduced by way of alteration to the Commonwealth Constitution. In this respect, when the people of the states agreed to be united in a federal commonwealth they committed themselves to a joint constitutional destiny that would be determined pursuant to the principles and procedures contained in the Commonwealth Constitution concerning its amendment. As noted, changes to the Commonwealth Constitution can only be made with the consent of a majority of the people of the Commonwealth and a majority of people in a majority of states (section 128). This means that people of each state have an equal voice in determining whether proposed amendments should be approved, but it also means that a minority of states can be outvoted. Notwithstanding this potential, only eight of 44 proposed amendments have been successful, and many of these failed proposals would have increased the powers of the Commonwealth at the expense of the states. In principle, state powers are therefore vulnerable to diminution through changes to Commonwealth Constitution, but it is doubtful whether the states themselves can be abolished without the consent of the people of the states. The states ‘are welded into the very structure and essence of the Commonwealth; … they are inseparable from it and as enduring and indestructible as the Commonwealth itself’.

The position of any new state admitted to the Commonwealth is slightly different from the six Original States. When establishing new states the Commonwealth may impose such terms and conditions, including the extent of representation in either house of the Parliament, as it thinks fit (section 121). Unlike the Original States, therefore, any new state will not necessarily

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34 Western Australia v Wilsmore (1981) 51 FLR 348, 351–3 (Burt CJ).
36 Australia Acts 1986, ss 1, 13, 14.
37 See further, George Williams and David Hume, People Power: The History and Future of the Referendum in Australia (UNSW Press 2010).
be entitled to equal representation in the Senate. New states can also be formed by separation from the territory of a state, but only with the consent of the State Parliament (section 124), and any alteration to the territorial limits or boundaries of a state must be approved by the voters of that state (section 123).

3.4 Content

3.4.1 Identity

Australia is a relatively homogenous federation: there are no politically significant regional concentrations of people sharing particular identities along ethnic, cultural, religious or linguistic lines. All the larger Australian cities are highly diverse and multicultural, but in all the major cities and regions, English remains the most commonly spoken language, Christianity is the most common religious affiliation, and the majority of the population has a British or European ancestry. Australia’s diversity is more subtle. This is suggested by the fact that the second and third most commonly spoken languages and the second and third most common religious affiliations vary considerably among the states and territories. Differences in population size, density and age, as well as different geographies and economies, and an underlying belief in local self-government, contribute to sometimes significantly different political environments. The fundamental features of each State Constitution are broadly very similar, but there are underlying and sometimes important differences.

Each State Constitution expressly affirms or impliedly presupposes the identity of the state as a distinct and constitutionally independent political community. Some of the State Constitutions now refer expressly to the people of the state. The Constitution of Queensland 2001 records, for example, that ‘the people of Queensland, free and equal citizens of Australia … adopt the principle of the sovereignty of the people, under the rule of law, and the system of representative and responsible government, prescribed by this Constitution’. Like most of the other State Constitutions it also acknowledges the prior occupation of Australia by indigenous peoples. The Constitution Act 1889 of Western Australia records that the two houses of the Parliament are ‘chosen directly by the people’ and requires that any proposed law that would change this must be approved by the electors at a referendum. While these are not express declarations that constituent power is vested in the people of the state, they do seem to presuppose something of this idea. However, how much of this is a genuine reflection of the constitutional reality may be doubted because, as a matter of law, it is the Parliament that has the authority to alter the State Constitution, and changes to only particular aspects of the State Constitutions must be approved referendum. Although hopes were expressed in the late nineteenth century that each State

40 There are many remote regions in the states and territories, however, where Indigenous languages are widely spoken.
41 See further, Nicholas Aroney, Scott Prasser and Alison Taylor, ‘Federal Diversity in Australia—a Counter Narrative’ in Gabrielle Appleby, Nicholas Aroney and Thomas John (eds), The Future of Australian Federalism: International and Comparative Perspectives (Cambridge University Press 2012) 272.
42 Constitution of Queensland 2001 (Qld), Preamble. Remarkably, there was no referendum to approve the inclusion of this language in the Queensland Constitution. It was simply enacted by the Queensland Parliament.
43 E.g., Constitution Act 1902 (NSW), s 2; Constitution Act 1975 (Vic), s 1A; Constitution Act 1934 (SA), s 2.
44 Constitution Act 1889 (WA), Preamble and s 73(2)(c).
Constitution might one day be submitted to the approval of the people, this has not eventuated.\textsuperscript{45}

Each state and territory has its own flag, coat of arms, and other symbols, while Australian citizenship, the national flag and the national anthem are determined at a Commonwealth level.\textsuperscript{46} A person who is a citizen of the Commonwealth has citizenship rights throughout the country. Apart from some particular grounds of exclusion, such as serving a sentence for conviction of a serious crime, all Australian citizens over 18 are entitled to enrol to vote at a Commonwealth, state and territory level, depending on their place of residence, and voting is compulsory. Each state has its own electoral laws and electoral commission.\textsuperscript{47}

The Australian State Constitutions, although they provide the essential constitutional foundations for the political institutions of each state, do not have a particularly strong symbolic value in mainstream political or popular consciousness.

\subsection*{3.4.2 Organization of powers}

The State Constitutions each establish legislative, executive and judicial institutions and confer legislative, executive and judicial power on them respectively. In all the states except Queensland, the Parliament is bicameral and consists of a Legislative Council (upper house) and Legislative Assembly (lower house). The Queensland Parliament is unicameral,\textsuperscript{48} as are the two self-governing territories. In all of the states except Tasmania, each member of the lower house represents a particular electorate in the state, and all states use a preferential voting system. In all bicameral states except Tasmania, the upper house is elected on the basis of multi-member districts and a proportional system of voting.\textsuperscript{49} Accordingly, just as the Commonwealth Senate is designed to represent the people of the states, the State Legislative Councils are, with the exception of Tasmania, designed to represent the people of the various regions of the state.\textsuperscript{50}

In some states there are special procedures for the enactment of financial bills and special procedures to avoid deadlocks between the two houses. The Tasmanian Constitution, for example, requires that financial bills must originate in the lower house and the upper house may not amend an appropriation bill.\textsuperscript{51} The Victorian Constitution provides that bills over which the two houses cannot agree may be referred to a dispute resolution committee and that persistently deadlocked bills can ultimately be approved at a joint sitting of both houses.\textsuperscript{52} The New South Wales Constitution provides that appropriation bills passed by the lower house which the upper house rejects can receive the royal assent and become law without being passed by the upper house.\textsuperscript{53}

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\bibitem{46} Flags Act 1953 (Cth); Australian Citizenship Act 2007 (Cth).
\bibitem{47} E.g., Electoral Act 1992 (Qld).
\bibitem{49} In Tasmania, the electoral composition of the upper and lower houses is the reverse of the other bicameral states.
\bibitem{51} Constitution Act 1934 (Tas), ss 37, 42.
\bibitem{52} Constitution Act 1975 (Vic), Pt II, Div 9A.
\bibitem{53} Constitution Act 1902 (NSW), s 5A.
\end{thebibliography}
The executive power of each state is vested in the Queen and exercised by a Governor appointed by the Queen on the advice of the State Premier. The Premier is appointed by the Governor on the basis of his or her ability to command the support of a majority of members of the lower house of the Parliament. Other members of the government are appointed as Ministers by the Governor on the advice of the Premier. If a Premier loses the confidence of the lower house, he or she is obliged to resign and an alternative person who has the support of the house will be appointed or a general election will be held, following which a Premier who has the support of the house will be appointed.

Each state and territory has a Supreme Court and a Court of Appeal, which preside over a system of lower district and local courts. The High Court of Australia, which is established by the Commonwealth Constitution, has jurisdiction to decide appeals from the Supreme Court of each state and territory, but in practice only gives leave to appeal in significant cases. The Commonwealth is authorized to make laws investing state courts with federal jurisdiction (section 77(iii)). When it does so, the Commonwealth must accept the state courts as it finds them, because the establishment, empowerment and appointment of state courts and judges is a matter for each state. However, state courts, being potential repositories of federal jurisdiction, must comply with the constitutional description of a ‘court’. The State Parliaments cannot confer functions on state courts incompatible with their exercise of federal judicial power because to do so could lead to a loss of public confidence in courts exercising federal jurisdiction.

The constitution of each state is not exhausted by the formal Constitution Act enacted by its legislature. There are other statutes in each state that address particular matters of constitutional significance, such as the right to access government information and the establishment of special agencies, commissions or corporations charged with responsibility to undertake functions of public importance. For example, most of the states have established permanent institutions responsible to investigate allegations of mismanagement, misconduct and corruption in government departments and agencies. However, the composition, organization, powers and functions of these bodies vary considerably among the states.

### 3.4.3 Fundamental rights and policy principles

The Australian Constitutions, both Commonwealth and state, are unusual in that they contain little or no statements or guarantees of fundamental rights. Three of the four most important protections contained in the Commonwealth Constitution apply only to the Commonwealth. The only significant Commonwealth provision that binds the states is the requirement that trade, commerce and intercourse between the states must be ‘absolutely free’ (section 92).

However, the High Court has also held that the system of representative or democratic
government established by the Commonwealth Constitution necessarily requires that communications about political matters must be not be unjustifiably burdened, and that this requirement binds both the Commonwealth and the states, as well as the territories.\footnote{Lange v Australian Broadcasting Corporation (1997) 189 CLR 520.}

The only state that provides express constitutional protection for fundamental rights is Tasmania, the Constitution of which offers limited protection to freedom of conscience and the free profession and practice of religion.\footnote{Constitution Act 1934 (Tas), s 46.} The states of Victoria and Queensland and the Australian Capital Territory have enacted human rights charters which also provide a level of protection for human rights.\footnote{Human Rights Act 2004 (ACT); Charter of Human Rights and Responsibilities Act 2006 (Vic); Human Rights Act 2019 (Qld).} These statutes do not limit the legislative powers of the State or Territory Parliament. Rather, they require that proposed laws are scrutinized by a parliamentary committee which prepares a report on whether the proposed law unjustifiably interferes with human rights. The courts are also instructed to interpret statutes in a manner that is consistent with human rights, and when this is not possible, a court may issue a statement of incompatibility. The intention is to create a dialogue between the court and the legislature over the best approach to protecting human rights and achieving other objectives.\footnote{For a critique, see James Allan, ‘The Victorian Charter of Human Rights and Responsibilities: Exegesis and Criticism’ (2006) 30 Melbourne University Law Review 906.} In these and other ways, the Australian states and territories engage in significant constitutional and regulatory experimentation.

Nonetheless in Australia generally, there remains, at least for the time being, a prevailing belief that fundamental rights are best protected through democratically elected legislatures which deliberate in the context of robust public debate. In practice, Australia’s human rights record is generally no worse, and in some respects very much better, than many countries that have constitutional guarantees of fundamental rights. Advocates for better protection of rights draw attention to significant lapses that occur from time to time, but there remains a lively debate as to whether the introduction of judicially enforced constitutional guarantees would tip the balance of power too much in favour of unelected judges and too much against democratically elected legislatures.\footnote{See further, Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone, Protecting human rights: Instruments and institutions (Oxford University Press 2003).}

This orientation to parliamentary authority in the Australian political system is also expressed in the fact that the legislative powers of the Australian Parliaments are not guided or circumscribed by directive or mandatory policy principles contained in their respective constitutions. The underlying principle is that the Parliaments have general and unfettered power to make laws within their respective spheres. The policy goals and content of laws are matters for determination by the Parliaments, recognizing that they are electorally accountable to the people.

### 3.5 Multilevel constitutionalism

Only the Commonwealth of Australia, and not the states and territories, has international personality and capacity to enter treaties with other countries. The states and territories are free to enter into agreements with political and non-political entities outside Australia, but these agreements are not in the nature of public international law treaties and have effect in Australia subject to ordinary Australian domestic law. The decision to negotiate, sign and ratify an international
treaty is a matter for the Commonwealth government alone. However, due to concerns of excessive concentration of power in the Commonwealth Executive, treaties are tabled in both houses of the Parliament and are accompanied by a national interest assessment drafted in consultation with key stakeholders, including the state and territory governments. There is also a Commonwealth–State–Territory Standing Committee on Treaties which consists of representatives of the Premier or Chief Minister of each state and territory which facilitates intergovernmental discussions about treaties that have been signed or are being negotiated by the Commonwealth.66

When the Commonwealth signs and ratifies a treaty, it does not have effect in Australian domestic law except to the extent that it is implemented by legislation.67 Under the Commonwealth Constitution, the Parliament has power to make laws with respect to ‘external affairs’ (section 51(xxix)) and this has been held to include laws implementing treaties the subject matter of which would not otherwise fall within the Commonwealth’s law-making powers.68 This does not prevent a state or territory from legislating to implement Australia’s treaty obligations, but this is usually done by the Commonwealth. Some of the cases have involved laws implementing international human rights treaties.69 The High Court has held that the Commonwealth must implement treaties in a manner that conforms to the specific obligations contained in the treaty; it does not provide authority to legislate generally on the subject matter of the treaty.70 In exercise of this power, the Commonwealth has enacted laws prohibiting discrimination on the basis of race, sex and disability and has established the Australian Human Rights Commission, which is responsible to monitor the protection of human rights in Australia and to conciliate complaints of unlawful discrimination.71 The Commonwealth has also legislated inconsistently with particular state laws that have been determined by the UN Human Rights Committee to be inconsistent with Australia’s human rights obligations, thus rendering the state law invalid to the extent of the inconsistency (section 109).72

3.6 Constitutional review

Because each State Constitution is an ordinary statute of the State Parliament, it is liable to be amended by the State Parliament by ordinary legislation unless a legally effective manner and form procedural requirement applies. The role of the courts is therefore limited to determining whether any applicable manner and form requirements have been complied with. If those requirements of not been met, then the purported amendment is not legally effective and the courts will make declarations to that effect.73 If, however, there are no relevant manner and form requirements with which the state law is inconsistent, then the state law will be fully enforced by the courts. There is no legal basis upon which the courts might review such statutes on the ground that they do not comply with the State Constitution. Nonetheless, in practice, the State

67 Brown v Lizars (1905) 2 CLR 837.
68 R v Bugess; Ex parte Henry (1936) 55 CLR 608; Commonwealth v Tasmania (1983) 158 CLR 1.
69 E.g., Koolura v Bjelke-Petersen (1982) 153 CLR 168.
71 E.g., Racial Discrimination Act 1975 (Cth); Sex Discrimination Act 1984 (Cth); Human Rights Commission Act 1986 (Cth); Disability Discrimination Act 1992 (Cth).
72 Groome v Tasmania (1996–97) 191 CLR 119.
73 Attorney-General (NSW) v Trethowan (1931) 44 CLR 394; Attorney-General (WA) v Marquet (2003) 217 CLR 545.
Constitutions are generally respected as setting out the fundamental features of the political system of each state, and are generally not amended without considerable deliberation and public debate.

The status and effect of the Commonwealth Constitution is fundamentally different. Covering clause 5 of the Commonwealth of Australia Constitution Act provides that the Act, including the Constitution of the Commonwealth contained in the Act, is ‘binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State’. The hierarchically superior status of the Commonwealth Constitution has led Australian courts, and in particular the High Court of Australia, to conclude that they have jurisdiction to determine the constitutionality of statutes enacted by the Commonwealth, State and Territory Parliaments, the including the Constitution Acts enacted by the states. Accordingly, a State Constitution and a state law cannot contain anything inconsistent with the Commonwealth Constitution or constitutionally valid Commonwealth law. Furthermore, the High Court has held that a Commonwealth law will be unconstitutional if, among other things, it unduly interferes with the capacity of a state to function as an independent government or exercise its constitutional powers. It has also been held that a state is constitutionally entitled to maintain its own independent judicial system without undue Commonwealth interference.

### 3.7 Conclusions

Several of the hypotheses developed and tested in this book are confirmed by the Australian case. Consistently with Hypothesis 1, Australia is an integrative or coming-together federation in which the constituent states have full constitutional autonomy. Australia is not a multinational state, and therefore Hypotheses 2, 3 and 4 are not directly applicable. Nonetheless, as a relatively homogenous federation, the Australian case provides indirect support for those hypotheses in three respects: the constitutional autonomy of Australia’s states is not subjected to significant central oversight, the State Constitutions do not have a particularly strong symbolic value in mainstream political or popular consciousness, and the constitutional entrenchment of regional identity is not regarded as especially important or contentious within the country. Rather, the constitutional autonomy of the states is largely taken for granted.

Consistently with Hypothesis 5, the Australian State and Territory Constitutions organize powers in generally the same way as the Commonwealth Constitution, except in relation to the legislature and the revision of the constitution. Both the Commonwealth, State and Territory Constitutions establish legislative, executive and judicial institutions along similar lines, but the Parliaments of the two self-governing territories and the state of Queensland are unicameral, and the amendment of State Constitutions can, apart from special manner and form requirements, be secured by simple enactment by the State Parliament and the Territory Constitutions can be amended by ordinary enactments of the Commonwealth Parliament.

Consistently with Hypothesis 6, there is significant experimentation among the Australian states in relation to the protection of fundamental rights and other institutional arrangements. Consistently also with Hypothesis 7, given that the identity of the states is constitutionally well established, policy principles are not a feature of state constitutional law. Consistently with Hypothesis 8, Australia has moderate representation of the states in the Commonwealth.

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Parliament (i.e., the Senate represents the people of the states, not the governments or legislatures of the states) and consequently relatively stronger protection for the autonomy of the states. Finally, also consistently with Hypothesis 9, because there is only a relatively minor degree of constitutional review occurring at a state level, the State Constitutions generally perform the central functions intended for them, but their significance in general public debate and deliberation is generally very minimal.