

# Federal Constitutional Law – 2019

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# 1. Background to the Constitution and overview of FCL

- “The Australian Constitution is a product of a particular political moment – best described as the push towards federalism – which circumscribes the framers’ choice about how to achieve these goals, gives the constitution its basic identity and structures future constitutional development.”
- Constitution originally an imperial statute through which self-governing colonies agreed to subject themselves to a new political entity – the Commonwealth
  - **Purpose:**
    - To organise and channel governmental power so that it can be harnessed for the good of the nation
    - At the same time to check governmental power, so as to preserve individual freedom
  - **Strengths:** contribution to political stability; meaning determined incrementally over time
  - **Weaknesses:** inability to adapt to post-WWII rights revolution and changing relationship of Cth and States (driven largely by economic imperatives in age of globalization)
- Almost half the provisions are devoted to the federal Parliament – suggesting that it was the establishment and effective operation of *this* political institution that was the overriding preoccupation of the framers
  - Had little to say about State powers because those were known and could be assumed – today, the Constitution’s silence on State powers reflects the diminished status of the States in the Australian political system

## Build up to federation and passing the Constitution

- Push towards federation in late 19<sup>th</sup> century due to a desire facilitate co-operation on matters of mutual interest eg: intercolonial tariffs, protectionism and military concern
- Led to series of conferences building momentum for the federalist cause
- **1895-1898:** Convention of premiers of the Australian colonies met to discuss an amended draft with added provisions re “responsible government”. After ratification by 5 colonies (excl WA), the Bill was presented to British Imp. Parliament with a request to enact
- **1900:** Before Bill was passed, imp. Government inserted the right to appeal from the High Court to the Privy council on constitutional matters concerning the limits of the powers of the Cth or States could not be curtailed by parliament --> *Commonwealth of Australia Constitution Act* was passed by British Parliament in 1901.
- **1901:** Commonwealth of Australia was officially established on 1 January 1901

## Statute of Westminster and the Australia Acts

- Although Federation in 1901 is widely regarded as Australia’s moment of “independence” from Britain, legally the Cth was a creation of the British Parliament through the *Commonwealth of Australia Constitution Act 1900 (Imp)*, which applied to Australia by paramount force, therefore Australia was still legally just a self-governing colony of the UK and there was continued uncertainty as to the applicability of British Imperial Laws to the Cth.

- **1942 (Statute of Westminster 1931)** – Adopted by the Cth in 1942, the Statute of Westminster freed the Dominions, including the Commonwealth of Australia, from imperial restrictions and removed nearly all of the British Parliament’s remaining authority to legislate over the Cth. This is when Australia truly became a de jure sovereign nation
- **Australia Act 1986:** in addition to ending the British Parliament’s power to legislate over Australian states, the Australia Act also severed the last avenues of appeal from the Australian courts to the Privy Council. As of then, the only way in which the Constitution can be amended is via the referendum mechanisms (notably s 128).

## Main features and influences

- **Federalism** – both to channel and check power (ensures federal govt is strong enough to promote interests of a nation as a whole, while allowing for regional innovation and dispersal of power between Cth and States)
- **Responsible government** – both to channel and check power (government by party enjoying majority support, and thus capable of taking nation with it, but responsible to electorate via Parliament)
- **Separation of judicial power** – at federal level, but less so at State level

American influence	UK influence
Federalism with enumerated Cth powers and residual State powers	Parliamentary sovereignty with rights protected through CL and statute
HC with power to strike down legislation for incompatibility with Constitution	Responsible government
Separation of powers (but less absolute than US system – eg s 64 provides that federal ministers must be members of Parliament)	Representative government

But two aspects of the duality of our Constitution are at odds:

1. Cth Prime Minister and Cabinet are responsible to people via need for support in House of Reps (ie representative govt)
2. But power is also constrained by Senate and State govts, over whom only relevant State electorates exert control

NB\*\* the two aspects can be theoretically reconciled by strengthening Cth powers (so that electorate disciplines the most powerful govt in country) or by strengthening State power (disciplined by regional electorates)

WW1 exerted external pressure in favour of strengthening Cth powers vis-à-vis States that has continued ever since → HC’s interpretation of Constitution since has also tended to support this trajectory.

**Key Q: whether the HC’s interpretation was influenced by these external pressures or whether strengthened Cth powers was the internal logic of the Constitution all along (or a bit of both)**