

CHAPTER 2

THE CONSTITUTIONAL FOUNDATIONS OF AUSTRALIA'S POLITICAL SYSTEM

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KEY QUESTIONS:

- What is a constitution?
- How can we classify political constitutions?
- What are the key features of the Australian Constitution?
- Does the Australian Constitution affect business?



INTRODUCTION

In 1992, American political scientist Frances Fukuyama proclaimed 'the end of history', because with the collapse of **communism**, Western-style **liberal democracy** was the only credible form of political organisation (Fukuyama 1992). While many people disagree with the 'end of history' argument, Fukuyama is right that in the early 21st century nearly every country claims to have some form of democracy. Even China, with its strong communist traditions, is embracing market capitalism and forms of democratic participation (He 1996). Despite this strong trend towards democratic systems of government, it is important to remember that even in the present era of globalisation, significant variations in national political systems remain. In short, the rules of the political game vary from country to country because of a host of historical, cultural and economic reasons. This chapter begins our examination of the foundations of the Australian political system and explains how the Australian **Constitution** influences national politics and society.

We begin with a general discussion of the importance and characteristics of political constitutions in democratic systems of government before looking at the key features of the Australian Constitution. Special emphasis is then given to the present day implications of Australia's constitutional system. The chapter argues that although there are some shortcomings in Australia's constitutional system and there is, inevitably, debate about such a politically important document, overall the Constitution has provided a robust foundation for the Australian political system over the twentieth century.

WHAT IS A CONSTITUTION?

A **constitution** establishes the fundamental principles and rules under which a country or state (or any organisation) is governed. Constitutions typically describe the structure of government (parliament, electoral systems, courts), establish limits on the power of government and, in some cases, outline the fundamental political and legal rights of citizens (Ward & Stewart 2006, 19; Heywood 2002, 292). It is important to recognise that a constitution is a set of fundamental laws which set out the terms on which an elected government can act. Unlike *ordinary* laws, which can be amended by parliament, a constitution is designed to be an enduring framework that can't be altered to suit the government of the day (Fenna 2001, 27). In keeping with **liberal democratic** thought (discussed in Chapter 1) constitutions are often designed to limit the power of governments and to protect the rights of minority groups (Heywood 2002, 44; Maddox 2005, 62). Despite these common characteristics, in practice the constitutional basis of political systems around the world varies considerably; some constitutions very clearly define political processes and rights, while others are not even written down. In many less democratic countries the courts are not sufficiently independent to prevent government from acting **unconstitutionally** (Maddox 2005, 64).

TYPES OF CONSTITUTIONS

While the specifics of constitutions vary from country to country, there are two broad approaches to expressing the fundamental laws of a Country. The United Kingdom is widely regarded as being the home of modern Constitutional government, yet surprisingly there is no single written, or **codified**, Constitution in the United Kingdom (Heywood 2002, 292). Instead the British Constitution is comprised of **conventions**, or the established traditions and practices of Government, the **common law** and Acts of Parliament. While such a system has generally served the United Kingdom well and provides a flexible basis for government, critics argue that it gives the Parliament and the Prime Minister too much power (Graham & Prosser 1988).

In contrast, many countries have followed the American tradition and attempted to systematically document their constitutional structures and

principles. While these codified constitutions might reduce political and legal ambiguity, it is impossible to write down a truly comprehensive constitution. Some critics argue that codified constitutions often become outdated, do little to reduce political uncertainty and are still the subject of fierce legal disputes (Holloway 2001).

Beyond countries with either **codified** or **conventional** constitutions, the constitutional basis of many political systems is a combination of a basic constitutional document and a number of associated conventions and traditions. Such systems are described by political scientists as **hybrid** constitutions (Summers 2002, Ch. 1; Maddox 2005, 69; See Table 1 below). Australia’s constitution falls into this category because while Australia’s written constitution (*The Commonwealth of Australia Constitution Act 1900*) does describe important **political institutions** and practices, other fundamentally important features of the Australian political system are scarcely mentioned (Ward & Stewart 2006, 22-23). To understand why this is the case and how it affects the Australian political system, we first need to consider the challenges facing Australia’s political leaders when they were drafting the Commonwealth Constitution in the late 1890s.

Table 1
Examples of different constitutional systems

Conventional Constitution	Codified Constitution	Hybrid Constitution
United Kingdom	United States	Australia
Saudi Arabia	Japan	New Zealand
Israel	Germany	China

THE ORIGINS OF THE AUSTRALIAN CONSTITUTION

To understand the key features of a country’s constitution, we need to consider the context in which it was created, and this is certainly true of the Australian constitution. The overriding objective of the ‘founding fathers’ (and they were all men!) of the Australian Constitution was to achieve an agreement under which the six existing Australian Colonies would come together to form a new nation. Given this context, the written Constitution tends to focus on two aspects of the Australian political system. Firstly it outlines the institutions of the new

Commonwealth Government, including the structure of Parliament and the High Court of Australia. Secondly, the Constitution divides political powers between the colonies (which already existed and had to approve of the new arrangements) and the new Commonwealth Government. The Australian Constitution does *not* describe in detail key political institutions and **actors** such as the **cabinet**, the **prime minister**, or **political parties**, nor does it outline the fundamental political rights of Australian citizens.

To understand these omissions, it is important to remember that at the time of Federation (1901) Australia already had six functioning democracies in each of the **colonies** which had inherited their political institutions and practices from the United Kingdom. Given the British tradition of conventional constitutions, it was assumed that British political practices would continue to be upheld in the new Federal Parliament (Singleton.2006, Ch. 2). Beyond this faith in British democratic traditions, the drafters of the Australian Constitution were pragmatic and sought to produce a document that described the minimum number of institutions and allocated as few powers as possible to the new Commonwealth Government. The hope was that by leaving as many issues as possible unresolved then it would maximise the chances of all the Colonies agreeing to the new constitution.

HOW THE AUSTRALIAN CONSTITUTION FUNCTIONS

After winning the support of a majority of voters in each of the Colonies, *The Commonwealth of Australia Constitution Act* was passed by the British Parliament on the 9th of July 1900, establishing the Commonwealth of Australia on January 1st 1901. This document establishes a number of key Commonwealth institutions. For example, Chapter One establishes the Federal Parliament (described in chapter 4 in the text), including the role of the **Governor General** and the all-important power of the Federal Parliament with respect to the States (discussed in Chapter 3). Other important aspects of Australia's political system described in the Constitution are the role of the **High Court**, the procedures for changing the Constitution and the Commonwealth's role with respect to finance and banking (Ward & Stewart 2006, 21-26).

Foundations of Australian Politics

Given Australia's political stability and economic prosperity over the century since Federation, it is reasonable to argue that the Constitution has served as a sound basis for Australian society. However, as we shall see below, many critics have identified shortcomings with this cornerstone of the Australian system of government and increasingly there are calls to reform aspects of our Constitution so that it can meet the challenges of the 21st Century (Saunders 1988).

'Washminster' mutation

One of the enduring concerns with Australia's political system is the inherent tension between the codified and conventional dimensions of the Constitution. Critics argue that the hybrid nature of the Australian system leads to contradictions and confusion (Maddox 2005, 69). Perhaps the most famous example of this was the dismissal of the Whitlam Government in 1975 by then Governor General, Sir John Kerr. The events of November 11th were constitutionally significant because although the written (codified) Constitution implies that the Governor General as Head of State has the authority to dissolve parliament and dismiss the Whitlam Government, the convention was that the unelected Governor General would only act on the advice of the Prime Minister (Kelly 1998). A second example of these tensions, which shows the significant and ongoing impact of the Constitution on Australian politics, concerns the powers and roles of the two houses of the Federal Parliament. Here the written Constitution draws on the American (or Washington) tradition of an upper house of Parliament (the Senate) which protects State's rights and can block and amend legislation from the lower house (House of Representatives). However, in practice, the Australian parliament has tended to follow the British tradition in which the lower house is regarded as being more legitimate and having a **'mandate'** to have its legislation passed by the Senate (Parkin & Summers 2006, 55-56). These tensions have led some analysts to unfavourably describe Australia's Constitutional System as a dysfunctional combination of the Washington (American) and Westminster (British) system of government, or what Thompson (1980) described as the 'Washminster mutation'.

The problem of change

A second major criticism of the Australian Constitution is that it is too difficult to change. Clearly if a constitution is designed to constrain government and protect the rights of citizens, special procedures are

needed to effect constitutional change. In many countries (such as the United States and Germany) a constitutional amendment requires the support of a specified majority in Parliament to ensure that the proposed change has broad political support (Edling 2003). The Australian Constitution (as outlined in Section 128) sets out a slightly different procedure in that it formally requires that a proposal be endorsed by a majority in Federal Parliament *and* by a majority of voters in a majority of states at a direct **referendum**. In practice it has been very difficult to change the constitution using the process outlined in Section 128, with only eight of 44 proposals to change the Australian Constitution since 1906 being successful (Bennett 2003). Despite these difficulties, the way in which the Constitution shapes Australian society has actually evolved in the century since Federation.

How can the Constitution change without a successful constitutional referendum? To understand how the Constitution affects Australian society, it is important to consider the role of the **High Court of Australia**. We have already mentioned the fact that the Constitution is a minimalist document and is deliberately vague on many important issues. When there is a legal dispute about the meaning of the Constitution, the High Court must interpret the Constitution and decide whether it applies to the issue in question. It is through this process that the Constitution has evolved, as Australian politics and society have changed over the past one hundred years (Patapan 2006). While the High Court has generally been successful in applying the Constitution to new and ever-changing issues, as we shall see in our discussion of **federalism** in Chapter 3, there is criticism that the High Court has been forced to become too political. That is, that unelected judges are making critical decisions about the role and responsibilities of Australian Government, rather than the Australian people themselves (Patapan 2006, 171).

THE CONSTITUTION AND BUSINESS

The Constitution is the foundation stone of the Australian system of government and, as such, is of considerable interest to political analysts and lawyers. What impact does the Australian Constitution (or any constitution for that matter) have on business or the broader community? As we shall see below in our discussion of federalism, the Constitution often determines which level of government can make

political decisions and thus influences the entire political system. In addition to shaping the political environment, the Constitution can fundamentally influence the power of business and how it engages in the political process. An ongoing example of this is provided by the constitutional disputes over the ‘**corporations power**’ in the Constitution.

Section 51 of the Australian Constitution sets out **concurrent** powers, or areas in which both State and Commonwealth government may make laws, although section 109 of the Constitution states that the Commonwealth law will prevail to the extent of any inconsistency between State and Commonwealth legislation. The corporations power is set out in sub-section 20 of Section 51 and gives the Commonwealth power to make laws with respect to ‘foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth’. While this law may seem quite clear, as businesses and commercial practices have become more complex it has been the subject of many legal disputes over who can regulate business (Ward & Stewart 2006, 50-51). Indeed it appears certain that there will be another round of Constitutional battles relating to the corporations power to determine whether the Commonwealth government has the power to override existing State industrial laws and introduce new, more flexible, regulations. This issue, which will have fundamental consequences for Australian business, will be influenced by the Constitution and the way in which it is interpreted by the High Court (ACCI 2006). While the corporations power is important, arguably the main impact of the Australian Constitution is the way in which it establishes the basis of Australian **federalism**. This is the focus of the next chapter.

CONCLUSION

This chapter has outlined the Constitutional basis of modern political systems as well as describing the key features of Australia’s Constitution. As with all countries, Australia’s Constitution was the product of a historical compromise and is, as a result, a unique blend of the British Westminster tradition and American federalism, combined in a way that reflects the specific political concerns of Australia’s founding fathers. While there are calls to reform Australia’s constitution from a number of fronts, overall it has served as an effective basis for Australia’s political system over the 20th Century.

This, combined with a general reluctance in the Australian community to fundamentally alter the Constitution, leads to the conclusion that the Constitution will continue to evolve gradually in response to the political challenges of the 21st Century.

Sample pages



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