"DEMOCRACY, CONSTITUTIONS & DEALING WITH THE WORLD"

2021 Melbourne Forum on Constitution Building in Asia and the Pacific

Session 4: Subnational engagement in international relations – Australia as a case study

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1. *What forms of sub-national government exist in your country? Are they symmetrically organised or is there an element of asymmetry?*

Australia is a federation of six states, each formerly a self-governing colony of the British empire, together with two self-governing territories created since federation in 1901. The Commonwealth (federal) Constitution allocates some legislative powers to the Commonwealth Government, while the states retain plenary legislative power and function largely as autonomous governments, subject to certain limits in the Commonwealth Constitution. The territories each have their own legislature and have been given a large measure of self-government, but remain ultimately subject to Commonwealth government control.

The federation is symmetrical. The Constitution does not distinguish between the states, and each state has equal representation in the Senate (twelve senators for each state). Each territory elects two senators. There are differences in the representation of the states and territories in the House of Representatives, but this is due to the uneven distribution of the population between the states and territories.

Australia also has sub-national governments in the form of local governments, of which there are currently 537 nationwide. Local governments are not contemplated by the Commonwealth Constitution. They are created and governed by state legislation, including state constitutions. Local government responsibilities differ between states and territories but generally include the provision of services such as infrastructure and building services, planning and development approvals, health and community services, and the provision of cultural and recreation facilities.

2. *Do any of the sub-national units engage in international arrangements of any kind? If so, with what partners and in what areas? If not, do you think it would be helpful for them to be able to do so?*

State, territory, and local governments have no power under the Commonwealth Constitution to enter into treaties. The High Court of Australia has made clear that the sole power to enter into treaties rests with the Commonwealth government.

However, the capacity of state, territory, and local governments to enter into arrangements of lesser legal status is somewhat unsettled, and some have doubted their ability to do so. Nonetheless, in practice state, territory, and local governments do enter into many arrangements of various kinds with foreign national and sub-national governments. These relate to a wide range of matters including trade and investment, infrastructure, tourism, education, cultural opportunities, agriculture,

environmental management, and science and technology. States with large export markets, particularly resource export markets, have been especially active in seeking cooperation with foreign governments. Many of these arrangements are not legally binding, and take the form of memoranda of understanding or agreements to cooperate in the exchange of information and expertise. States, territories, and local governments also enter into a large number of sister-state or sister-city arrangements.

The states also have a longstanding practice of maintaining diplomatic representation in the United Kingdom in the form of Agents-General. States have also appointed representatives to a number of other countries, primarily as a way of attracting trade opportunities and investment in the state, and to promote tourism.

The arrangements entered into by state, territory, and local governments generally relate to matters within their areas of expertise and domestic constitutional competence, and are not usually a source of conflict with the Commonwealth government. There have been examples of the states entering into arrangements and adopting positions that challenge the Commonwealth government's foreign policy, but these have been relatively limited.[1]

3. Are there ways in which sub-national jurisdictions are involved in decision-making by the centre about international arrangements? If not, should there be?

Prior to the 1980s, there was no formalised process for consultation between the Commonwealth and state and territory governments on treaties, although some consultation did happen in practice. In 1977, a series of proposals were made for guidelines on the consultation process, and in 1982 the Commonwealth, states and territories adopted the Principles and Procedures for Commonwealth-State Consultation on Treaties.[2] The Principles have since been revised several times, the most recent revision occurring in 1996. They require the Commonwealth to provide information about treaty discussions of importance to the states and territories, to consult states and territories on the appropriate mode of implementation of treaties, and to include state and territory representatives in delegations to international conferences where appropriate.

In 1991, the Premiers' Conference created the Commonwealth-State-Territory Standing Committee on Treaties ('SCOT'). The SCOT is made up of officials from Commonwealth, state, and territory government departments, and is meant to meet twice yearly to identify treaty negotiations of significance to the states and to ensure that states and territories are provided with adequate information about those treaties. In 1995, a Commonwealth parliamentary committee recommended replacing the SCOT with a Treaties Council, to formalise the treaty consultation process and enhance the role of the states and territories. The recommendation followed submissions from the states and territories about a lack of transparency and the provision of insufficient information in the consultation process. The parliamentary committee also recommended that the Treaties Council be made up of elected representatives rather than departmental officials, to enhance its authority and political accountability.

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[1] Daniel Hurst (2021) "Federal government tears up Victoria's Belt and Road agreements with China", *The Guardian,* 22 April, https://www.theguardian.com/australia-news/2021/apr/21/federal-government-tears-up-victorias-belt-and-road-agreements-with-china.

[2] https://www.dpac.tas.gov.au/__data/assets/pdf_file/0009/228987/Treaties_-_Policy_and_Procedures_Manual.pdf; https://arp.nsw.gov.au/assets/ars/attachments/Principles-and-Procedures-for-Commonwealth-State-Consultation-on-Treaties.pdf.

In accordance with the report's recommendation, a Treaties Council was established in 1996 as an adjunct to the Council of Australian Governments (contrary to the recommendation, the SCOT was not abolished). However, the Treaties Council has met only once, in 1997. A number of other proposals made in the 1990s to enhance the involvement of the states in the treaty-making process, including recommendations made in a report authored by the Victorian state Parliament,[3] were never adopted by either the Commonwealth or the state and territory governments.

States and territories have some additional involvement in the treaty-making process through their representation in the Commonwealth Parliament. Following the 1995 parliamentary committee report mentioned above, requirements for increased parliamentary oversight of the treaty-making process were introduced into the Commonwealth Parliament, including the creation of a Joint Standing Committee on Treaties to review and report on treaties prior to their ratification.[4]

4. Are sub-national governments recognised as having any international legal personality? If they engage in international arrangements is the approval of national institutions required, positively or negatively? Is there any debate about these arrangements?

Australian states, territories and local governments have no international legal personality and are not permitted to enter into treaties. As discussed earlier, they do enter into arrangements of lesser status with foreign governments. Until recently, there has been no formal process for Commonwealth oversight of such arrangements, and no requirement for Commonwealth approval prior to entry.

However, in 2020 the Commonwealth Parliament passed the *Australia's Foreign Relations (State and Territory Arrangements) Act 2020* (Cth),[5] which gave the Commonwealth government significant powers to manage arrangements between sub-national governments and foreign governments. The legislation requires state, territory, and local governments (and public universities) to notify the Commonwealth Minister for Foreign Affairs and Trade before they enter into — and, in certain circumstances, before they commence negotiating — an arrangement with a foreign national or foreign sub-national government. The legislation applies to any written arrangement, whatever its subject-matter, and whether or not it is legally binding. The Minister has various powers under the legislation to approve or prohibit arrangements, and to declare arrangements already in effect to be no longer in operation, if satisfied that the arrangements would adversely affect Australia's foreign relations or would be inconsistent with Australia's foreign policy.

The justification provided for the legislation by the Commonwealth Government has been a need to ensure that Australia 'speaks with one voice' on matters of foreign affairs and foreign policy in the face of a complex global environment. The legislation passed with bipartisan support, and sub-national governments have not openly contested its general purpose. However, some have raised concerns that the broad nature of the Minister's discretion, the lack of any review rights, and the administrative burden that the scheme creates for local governments in particular, will have a chilling effect on their ability to engage with foreign governments at all.[6] Although the legislation does not provide for any

[3] https://www.parliament.vic.gov.au/papers/govpub/VPARL1996-98No57.pdf
[4] https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties
[5] https://www.legislation.gov.au/Details/C2020A00116
[6] Stephen Dziedzic (2020) "The Federal Government's new foreign relations laws have passed Parliament. Here's what that means", *ABC News*, 8 December, https://www.abc.net.au/news/2020-12-08/what-are-the-governments-new-foreign-relations-laws-about/12947590; Narelle Morris (2020) "Why unis are worried about a federal power to cancel their foreign 'arrangements'", *The Conversation,* 10 September, https://theconversation.com/why-unis-are-worried-about-a-federal-power-to-cancel-their-foreign-arrangements-145689.

formal processes of consultation between the Commonwealth and sub-national governments, the Department of Foreign Affairs and Trade has dedicated resources to engagement with sub-national governments about their obligations under the legislation.

To date, the Minister has declared four arrangements to be not in operation under the legislation.[7] The most publicised of these were two Memoranda of Understanding between the Victorian state government and the Chinese government with respect to the latter's Belt and Road Initiative, in respect of which the Minister made declarations in April 2021.[8] Details of all arrangements of which the Minister has been notified are made available on a public register, which currently lists 1,348 arrangements.[9]

5. How is the position of sub-national governments in international relations and other arrangements reflected in the Constitution?

The Commonwealth Constitution does not expressly provide for or prohibit the involvement of sub-national governments in Australia's international relations. It also contains no express power for the Commonwealth Government to conduct international relations or enter into treaties because, at the time of Federation, the imperial British Government retained the power to determine foreign policy on behalf of Australia. As Australia moved towards independent nationhood and responsibility for Australia's international relations was devolved from the imperial government to the Commonwealth, existing constitutional provisions were interpreted to give effect to the change. The executive power of the Commonwealth (s 61 of the Constitution) is now considered the source of the Commonwealth's power to enter into treaties, an interpretation that operates to the exclusion of any equivalent power for the states and territories.

The Commonwealth also has the power to legislate with respect to external affairs (s 51(xxix) of the Constitution). This provision has been interpreted more expansively over time and now clearly extends to allow the Commonwealth to enact legislation giving effect to Australia's international obligations (see *Commonwealth v Tasmania* (1983) 158 CLR 1). As the states retain plenary legislative powers, they are still able to legislate to implement Australia's international obligations, and have frequently done so, most commonly in consultation and cooperation with the Commonwealth.

The more expansive interpretation of the external affairs power allows the Commonwealth government to assume international obligations without needing to obtain the agreement of all states and territories to implement them. At the time of the decision in *Commonwealth v Tasmania*, it was thought that this approach would allow Australia to engage more freely with international law and international affairs by avoiding the potential for the Commonwealth's initiative to be vetoed by uncooperative states. However, conversely in some cases, states and territories have gone further than the Commonwealth in implementing Australia's international obligations, such as in relation to some of Australia's human rights obligations.[10]

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[7] Tim Callanan (2021) "What is China's Belt and Road Initiative and what were the four deals the federal government tore up?", *ABC News*, 22 April, https://www.abc.net.au/news/2021-04-22/what-was-in-victoria-belt-and-road-deal-with-china/100086224.

[8] Above n.1.

[9] https://www.foreignarrangements.gov.au/

[10] Zak Vidor Staub (undated) "Human Rights Acts around Australia", UNSW: Sydney, https://www.humanrights.unsw.edu.au/news/human-rights-acts-around-australia#:~:text=Current%20status%3A%20has%20a%20Human,territory%20to%20enact%20such%20protections.

6. *Have sub-national governments in your country adopted policies in relation to climate change? If so, please elaborate. Have these steps been taken unilaterally, in collaboration with other governments in your country, or in response to external pressure?*

All Australian states and territories have adopted policies in relation to climate change, and each of these is generally more ambitious than the Commonwealth government's own climate policy. The Commonwealth government has not yet committed to a net-zero emissions target, and has an emissions reduction target of 26–28% from 2005 levels by 2030. In contrast, all Australian states and territories have set targets of net-zero emissions by 2050. Most states and territories have also set interim emissions reductions targets, which vary in ambition. By 2030 Queensland aims to reduce emissions by 30%, Victoria by 45-50%, NSW by 50%, South Australia by at least 50%, and the Australian Capital Territory by 65-75%. Tasmania has already achieved net-zero emissions several times in recent years.

Each state and territory has released a policy or plan to achieve these targets, many of them with mechanisms for review on a rolling basis and the possibility of adopting more ambitious targets. Some jurisdictions, such as Tasmania and South Australia, have legislated targets. The *Climate Change Act 2017* (Vic)[11] made Victoria the first jurisdiction to legislate a net-zero emissions target, and creates a framework for policy development and reporting on progress towards the target. The policies adopted by each state and territory to address climate change vary depending on the characteristics of the jurisdiction in question. Many promote substantial investment in renewable energy generation, including subsidising the construction of new generators, creating renewable energy zones, and setting renewable energy targets. They also variously promote investment in clean technologies, create electric vehicle policies, and include strategies to address emissions from transport, buildings, agriculture, and waste.

For the most part, these steps have been taken unilaterally. In the past, there has been co-operation between the Commonwealth and state and territory governments on the implementation of Australia's international environmental obligations. For example, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)[12] was enacted following agreement between governments on the allocation of roles and responsibilities for environmental protection. There has been no similarly coordinated national approach to climate change policy. Most of the state and territory plans and policies refer to Australia's international climate change commitments. However, their primary impetus is described not as a desire to help achieve those commitments specifically, but to mitigate the effects of climate change on the particular state or territory in question, and to secure the economic benefits that doing so might entail for their constituencies. A number of them refer to an absence of national action on climate change as context for their own policies.

Many local governments have also developed policies to address climate change, including setting operational or community-wide emissions reduction targets of their own. More than 100 Australian local governments have declared a climate emergency.[13] In some jurisdictions, there has been collaboration between state or territory governments and local governments on climate change policy. For example, local governments in Victoria can submit voluntary emissions reductions pledges under the *Climate Change Act 2017* (Vic). Local governments have also engaged in collaboration with

[11] https://www.climatechange.vic.gov.au/legislation/climate-change-act-2017
[12] https://www.legislation.gov.au/Details/C2016C00777
[13] Claire Moodie (2021) "The councils leading the charge on climate change to reach net zero emissions by 2030", *ABC* News, 22 August, https://www.abc.net.au/news/2021-08-22/councils-are-going-green-but-will-households-pay-the-price/100384046.

one another on climate change policy. State, territory, and local governments are also participants in global networks of sub-national governments committed to action on climate change, such as the C40[14] and the Under2 coalition.[15]

7. Are there other aspects of the experience of your country with the engagement of sub-national governments in international activity that might throw light on the matters for consideration in this theme?

Recent developments, most notably the *Australia's Foreign Relations (State and Territory Arrangements) Act 2020* (AFR Act), might highlight the ways in which political and geopolitical factors can influence the law and practice of the international engagement of sub-national governments. The *AFR Act* was introduced in the context of heightened political focus on issues of national security and foreign interference, which heavily influenced political and expert debate about the legislation. There are other ways in which such factors have shaped Australia's experience of sub-national international engagement: for example, its geographic isolation, the proximity of its northern states and territories to regional powers such as Indonesia, and the economic dependence of some states on foreign markets for their resource exports. Given a relative lack of constitutional doctrine on the subject, such factors have arguably been as important as legal considerations in determining the development of practices of sub-national engagement.

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[14] https://www.c40.org.
[15] https://www.theclimategroup.org/under2-coalition.