



MATTERS WITHIN VICTORIAN AUTHORITY POTENTIALLY NEGOTIABLE WITHIN THE VICTORIAN TREATY PROCESS

Prof Cheryl Saunders and Prof Michael Crommelin

Constitution Transformation Network of the Centre for Comparative
Constitutional Studies, Melbourne Law School

8 November 2019

This paper was produced in support of the Victorian Treaty Advancement Commission (VTAC) in November 2019. VTAC was set up to prepare for the establishment of the [First Peoples' Assembly of Victoria](#), which was inaugurated in the Victorian Parliament House on 10 December 2019. The Assembly was elected by first peoples from across the State of Victoria and will work with the Victorian Government to [prepare for treaty negotiations](#), including by establishing a negotiation framework, an independent umpire (Treaty Authority), and a fund to support Aboriginal communities during the eventual treaty negotiations.

To support the work of the Assembly, VCAT commissioned a number of papers, which will now be shared with the Assembly to inform their own work. The Constitution Transformation Network (CTN) at Melbourne Law School was requested by VCAT to develop a paper identifying the potential powers and matters that are within the jurisdiction of the State of Victoria and that are potentially negotiable within the treaty process. This paper was prepared in support of the Victorian treaty process, but may be more broadly relevant to future treaty processes around the country.

Purpose

The purpose of this paper¹ is to provide a framework for understanding the powers exercisable by the State of Victoria that may be relevant in Treaty negotiations. All aspects of the framework can be traced to the Constitution of the Commonwealth of Australia, which is overriding law in Australia. Some originated in the status of Victoria as a colony at the time of federation in 1901.

A chart showing the current allocation of all power 'in and for Victoria' is attached to the end of the paper, to assist understanding.

Background

Some background is necessary to explain the present position, in terms of both *history* and the *scheme of the Commonwealth Constitution*

History

At the time of federation, Victoria was a self-governing colony in the British Empire. Within the territory of Victoria, it had:

- its own Parliament, elected by eligible Victorian voters;
- its own executive government and public service;
- its own courts; and
- a Governor, appointed by the Queen on the advice of the British government.

Any action by Victorian institutions was subject to the Victorian Constitution. This was made by the Victorian Parliament in 1855, with Imperial approval. Victorian action also was subject to legislation made for Victoria by the then sovereign British Parliament. The system of law and government was modelled on that of Britain. This meant, amongst other things, that:

^{*1} Many thanks to Shawn Rajanayagam for very helpful research assistance in preparation for this paper.

- the common law applied;
- the Parliament was regarded as having final authority to make any law, subject to the Victorian Constitution and other Imperial restrictions; and
- the executive government relied for its position on the 'confidence' of the lower House of Parliament and was accountable to the Parliament for its actions.

The Victorian Parliament could change the Victorian Constitution, including by making parts of it more difficult to change by future Parliaments, within limits set by the British Parliament. Outside the territory of Victoria, the institutions of colonial government had limited power. They had no power to enter into binding international relations with other countries, and so lacked 'external sovereignty'.

In 1901, after a decade of negotiations, Victoria became a State of a new Australian federation, under the Commonwealth Constitution. That Constitution created a new level of central government, also called the Commonwealth. It divided power between the Commonwealth and the six States and made whatever other arrangements were considered necessary to create a federation.

The Constitution was negotiated in two Constitutional Conventions. The second of these, which met 1897-98, was elected by voters in most of the participating colonies, including Victoria. The draft Constitution eventually was approved by voters, at referendum, in each of the colonies. The draft then was sent to the United Kingdom, to be made law by an Act of the British Parliament, which gave it a status that overrode all Australian law. As a result, Victoria became subject to the Commonwealth Constitution and to all Commonwealth law validly made under it.

Australia as a whole was still a British colony at the time of federation. Both the Commonwealth and the States were still subject to British authority. This meant that they lacked both external sovereignty and complete internal sovereignty. Independence came gradually, through evolving practice, sometimes confirmed by legislation. The final legal ties with the United Kingdom were broken by the Australia Acts 1986, passed by both the British and Commonwealth Parliaments. The Commonwealth Act in turn was based on requests by the States under a procedure authorized by the Commonwealth Constitution.

As independence happened, the Commonwealth took over the powers of external sovereignty previously held by the United Kingdom in relation to Australia. This meant that only the Commonwealth could enter into treaties with other countries or take benefits on behalf of Australia under international law. It also meant that the Commonwealth could make laws with extraterritorial effect.

Independence also meant Australia as a whole gained complete internal sovereignty. British authority was gone, although the authority of the Commonwealth Constitution was preserved. The Constitution divided sovereignty, as it is understood in the common law tradition, between the Commonwealth and the States. The States remained subject to the Australia Acts.

Scheme of the Commonwealth Constitution

Against this historical background, the scheme of the Commonwealth Constitution provides the framework for the scope of Victorian authority for the purposes of Treaty negotiations.

The Commonwealth Constitution takes the existing State Constitutions and systems of government for granted. The High Court has held that it affects them indirectly in some ways (for example, by protecting

the independence and jurisdiction of State Supreme Courts). Mostly, however, the organisation of State governments is left to each State, under its own Constitution.

Most relevantly for the purposes of treaty negotiations, the Commonwealth Constitution divides legislative, executive and judicial power between the Commonwealth and the States.

The division of legislative power is done by specifying Commonwealth power and leaving unspecified power to the States. This is described as 'residual power' on the chart at the end of the paper.

A few powers are given to the Commonwealth exclusively. Customs and excise duties and Commonwealth properties are examples. In these cases, there is no available State power.

Another list of 40 powers is given to the Commonwealth on a basis that usually is described as 'concurrent'. A concurrent power can be exercised by either the Commonwealth or a State. If both exercise the same power, however, in a way that is in 'conflict', the Commonwealth law overrides any State law, so that there is no available State power for the purposes of Treaty negotiations. So, for example, the Commonwealth has concurrent power in section 51 (xviii) over 'copyrights'. Before the Commonwealth exercised this power, in 1905, State law controlled copyright within the State. Once the Commonwealth passed a Copyright Act that covered the whole field, there was no more room for State legislation.

A quick impression of the scope of Commonwealth legislative power can be gained by looking at sections 51 and 52 of the Commonwealth Constitution. This is only a rough guide, however. Many powers have been used creatively by the Commonwealth and interpreted by the High Court in ways that give them an expanded meaning and effect. Expansive use of Commonwealth power diminishes the effective scope of State power. The dotted line dividing the two columns of 'potentially available' powers on the chart is intended to show how this works.

Executive power also is divided between the Commonwealth and the States, on a basis that mirrors (but not completely) the division of legislative power. The Constitution also distributes 'original jurisdiction' for the purposes of courts between the Commonwealth and the States. Final appellate jurisdiction, however, is given to the High Court of Australia. One effect of this has been to make the common law uniform across Australia.

Scope of Victorian authority

A series of points about Victorian authority, which are relevant for Treaty negotiations, can be made in light of this background.

General

1. The Victorian Parliament has legislative power to make laws 'in and for Victoria, in all cases whatsoever', subject to the limits that derive from the Commonwealth Constitution. These limits are outlined below and shown on the chart at the end of the paper.

2. The Victorian Parliament cannot 'abdicate' its power, but it can delegate it and authorize its use in various ways.²
3. The Victorian Constitution provides a framework for a system of parliamentary responsible government under which Ministers in the Victorian government are accountable to a Parliament elected by voters across Victoria for the administration of government. If the government loses the 'confidence' of the Parliament, it loses office. The Victorian Constitution can be changed. This framework nevertheless is likely to inform treaty negotiations.
4. Victoria has no external legal sovereignty in its own right and therefore no international legal personality. This means that it cannot enter into agreements with other countries that are binding under international law. It also means that it has limited power to make laws beyond its own territorial limits.
5. Victoria can change its own Constitution, as long as it follows any special procedures for change set out in the Constitution itself. Victoria can and does protect parts of its Constitution from change in the same way as ordinary law (this is sometimes described as 'entrenchment'). There are some legal arguments about which parts of a Constitution can be protected in this way, but these do not seem to have affected what is done in practice.

The impact of the Commonwealth Constitution

6. The Commonwealth Constitution divides all Australian legislative power between the Commonwealth and the States.³ It also places a few (but not many) limits on the way powers can be exercised. Subject to the division of powers and any other limits, Victoria has full power within its own territory.

Exclusive Commonwealth power

7. Victoria has no power over matters given exclusively to the Commonwealth. These matters therefore cannot be the subject of treaty negotiations. There are only a few of them, but they could become important. The exclusive Commonwealth power to impose excise duties, for example, has been interpreted to prevent the State from imposing taxes on goods and therefore to raise revenue from sales tax. The exclusive Commonwealth power over 'Commonwealth places' covers any area acquired by the Commonwealth for public purposes including for example, airports, defence bases and Commonwealth offices. Victoria has no power to impose taxes on the Commonwealth or to make laws directed to Commonwealth officials. The main exclusive powers are listed in the first column of powers 'not available' on the chart.

² In *Cobb & Co Ltd v Kropp*, also mentioned with approval in later High Court decisions, it was said that State Parliaments could not 'assign or transfer or abrogate their powers or renounce or abdicate their responsibilities': {1967} AC 141, 157. In *Capital Duplicators Pty Ltd v Australian Capital Territory* it was said to be sufficient if a Parliament retained the power to repeal or amend the authority which it confers upon another body to make laws: (1992) 177 CLR 248, 265.

³ *Smith v Oldham* (1912) 15 CLR 355, 361, Barton J; subsequently affirmed, often with different words, in later cases. The point is not confined to legislative power: in *Davis v Commonwealth* (1988) 166 CLR 79, 93, the High Court described the 'plenitude' of legislative and executive power being divided between the Commonwealth and the States.

Concurrent legislative power

8. The much longer list of legislative powers allocated concurrently to the Commonwealth falls into two categories for present purposes.
9. Once the Commonwealth has exercised a concurrent power, the Commonwealth law overrides any inconsistent State law. If a concurrent power is fully exercised by the Commonwealth, there is, in effect, no available State power in that area for the purpose of Treaty negotiations. If the Commonwealth repealed its law, the State power would revive, but this is unlikely. The Commonwealth has fully exercised many of its concurrent powers including intellectual property, marriage and divorce and custody and guardianship of children from a marriage. Other examples are given in the chart at the end of the paper, in the third column of the matters listed as 'not available' for the purposes of Treaty negotiations.
10. If a concurrent power has not been exercised by the Commonwealth, it is available to the States. Note, however, that if it is exercised the Commonwealth law will override a State law. It is sometimes hard to work out whether a Commonwealth power can and will be used in a way that has an impact on State law, because the Commonwealth uses some of its powers in unexpected ways that can cut across areas of State law. The external affairs power, the corporations power, the taxation power and the power to provide certain 'benefits' are sometimes used with this effect. As an example, the Commonwealth has no explicit power over the environment but has passed environmental legislation that relies on the external affairs power and some other powers. Where the Commonwealth environmental legislation applies, it cuts across State environmental law.
11. The chart at the end of the paper tries to show how the relationship between Commonwealth concurrent power and State residual power works. The first column in the list of powers 'potentially available' identifies some of the key concurrent powers that have not yet been fully exercised. The dotted line between this and the next column indicates that they might be able to be exercised to affect some existing State powers presently regarded as residual. These residual State powers are listed in the second column and include education, local government, planning, agriculture, law and order, small business and many others. Future exercise of concurrent power by the Commonwealth could affect some of them in some ways, but could not cover any of these fields entirely.

Races power

12. The races power needs particular mention. The Commonwealth has concurrent power to make laws for 'the people of any race for whom it is deemed necessary to make special laws'. Since 1967, it has been clear that this includes Indigenous Australians. It is possible that the races power could be used in the future to override a treaty between a State and the Indigenous peoples of a State. It is to be hoped that the power would not be used in this way, however. If it was used in this way, there certainly would be a constitutional argument about whether such a law was valid.

Referred powers

13. Commonwealth concurrent powers also include matters 'referred' by State Parliaments. Relevantly for present purposes, Victoria has referred power over the custody, maintenance and access

arrangements for ex-nuptial children (excluding child welfare) and a few other matters, including consumer credit. A Commonwealth law exercising a referred power has the same effect as any other Commonwealth law. It is likely that references of power can be withdrawn by a State and so, presumably, withdrawn and referred again in a modified form. Any need for this would be a complication, however, in a Treaty negotiation process.

Other matters ‘withdrawn’ from the States by the Constitution

14. The Commonwealth Constitution places a few other restrictions on the exercise of powers by a State. They are unlikely to be relevant in Treaty negotiations, but they are mentioned here for reasons of completeness and listed as matters ‘withdrawn’ from the States in the second column in the chart at the end of the paper. As a result of these restrictions, a State cannot act in a way that unconstitutionally affects ‘trade, commerce and intercourse among the States’ (sec 92). It is constrained to some extent by the implied constitutional right to freedom of political communication. By virtue of being a State, Victoria also cannot legislate with extraterritorial effect in other States unless there is a sufficient connection between Victoria and the subject-matter of the legislation.

Powers legally available to Victoria: the bottom line

15. Apart from these various constitutional limitations described above, Victoria has full residual power within its own territory. The chart gives some idea of the range. A general understanding of how the powers available to Victoria are currently organized and exercised within the government can be gathered from the list of Victorian ministerial portfolios: <https://www.parliament.vic.gov.au/about/people-in-parliament/members-search/list-all-current-ministers>. These include, for example, transport, criminal law and corrections, energy and the environment, child protection, health, mental health, creative industries, gaming and liquor control, education, water, police and emergency services, racing, employment, tourism, sport, economic development, roads, fishing and boating, local government, small business, regional development, agriculture, resources, training and skills, family violence, women, youth, housing and planning.

Other practical considerations

16. There are certain other practical considerations that result from Victoria’s place as a State in the Australian federation that might have implications for Treaty negotiations. Some involve the distribution of revenue. Some involve other forms of intergovernmental co-operation.

Revenue

17. As a result of legal and political developments since federation, most major taxes are now imposed by the Commonwealth. Victoria has some tax sources of its own, which include land tax, gambling taxes, stamp duties and payroll tax. Some or all of these powers may be relevant in Treaty negotiations. Other revenues can be raised from the sale of property and from royalties. State own-source revenue is not adequate for State purposes, however. Like other States, Victoria therefore relies on the Commonwealth for additional revenue. Some of this comes in the form of general grants and some as conditional grants. The total amount of these funds is not within the State’s control.

18. General revenue grants are paid by the Commonwealth to the States without conditions. Under current arrangements, GST revenue raised by the Commonwealth is distributed between the States in accordance with equalisation principles, as general revenue. States can use these funds as they please, subject to the usual political and parliamentary accountability procedures.
19. Conditional grants from the Commonwealth affect many areas of State activity. The Victorian budget papers 2019-2020 categorise these under the broad headings of housing, community services, education, environment, health and infrastructure.⁴ Some grants have more detailed conditions attached than others. A State is not obliged to accept a conditional grant and has some capacity to negotiate the conditions. Once a grant is accepted, it is unclear whether the conditions are legally enforceable. In practice, however, the reliance of States on revenue redistribution makes it sufficiently likely that a grant will be accepted and that the State will comply with the attached conditions to suggest that conditional grants are another factor that could affect Victoria's position for the purposes of Treaty negotiations.

Intergovernmental co-operation

20. Much government activity in Australia is affected by arrangements of various kinds between levels of government. The purpose of these often is to co-ordinate their activities, where powers overlap. Health care is only one of many examples. The States have general power over health and hospitals, but the Commonwealth has power over the provision of sickness and hospital benefits and health insurance, making intergovernmental co-operation and co-ordination necessary. In theory at least, all such arrangements are consensual between the participating jurisdictions. They may be relevant, nevertheless, to Victoria's position in Treaty negotiations
21. Much, but by no means all, intergovernmental co-operation takes place under the umbrella of the Council of Australian Governments (COAG), the COAG Councils associated with it and supporting committees of officials. An idea of the range of these activities can be gleaned from the subjects of the current COAG Councils, which include Disability Reform, Transport and Infrastructure, Energy, Industry and Skills, Attorneys-General, Education, Health, Closing the Gap and Data and Digital: <https://www.coag.gov.au/coag-councils>.

Concluding comments

22. This paper provides an overview of the powers within the jurisdiction of Victoria that may be relevant to Treaty negotiations. The chart below presents the powers available for Treaty negotiations visually. As questions arise about particular powers in the course of the negotiations, it may be useful to seek more information about, for example, the scope and potential impact of Commonwealth law exercising concurrent powers and whether or not conditional grants or other forms of intergovernmental co-operation affect the power in question. The members of the Constitution Transformation Network would be pleased to help in dealing with such questions if and when that would be useful.

⁴ State of Victoria, *Statement of Finances 2019-2020*, Budget Paper No, 5, 176-179, <https://s3-ap-southeast-2.amazonaws.com/budgetfiles201920.budget.vic.gov.au/2019-20+State+Budget+-+Statement+of+Finances.pdf>

ANNEX 1: POWER IN AND FOR VICTORIA

Not available			Potentially available (short of abdication) <i>NB: may be affected by conditional grants or intergovernmental agreements</i>		Limited
Effectively Exclusive to Commonwealth	Withdrawn from States	Concurrent; overriding Commonwealth law	Concurrent; no (current) overriding Commonwealth law	Everything else (State residual power)	
Sales tax;	Impediments to interstate trade and movement;	Marriage and divorce, including children of marriage;	<u>Aspects of powers over:</u> 'Races';	Education;	All powers limited beyond State borders.
Commonwealth property;	Disproportionate burdens on political communication;	Custody etc of ex-nuptial children;	Corporations;	Hospitals;	State power over coastal waters depends on Commonwealth law
Currency;	Power to bind Commonwealth officials.	Medical insurance;	External affairs;	Agriculture;	Possible limitations on power to constitutionally entrench
Armed forces;		Aged care;	Taxation;	Water;	
International treaties;		Intellectual property;	Interstate and overseas trade;	Environment;	
Other		Quarantine;	Provision of benefits;	Land tax;	
		Some welfare payments;	Other	Gambling and motor taxes;	
		Some criminal law;		Fishing;	
		Some environmental law;		Local government;	
		Other		Housing;	
				Law and order;	
				Most criminal law;	
				Small business;	
				Regional development;	
				Forests and natural resources;	
				Child protection;	
				Training and skills;	
				Family violence;	
				Women;	
				Youth;	
				Other	