AUSTRALIA

Experts

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I. GENERAL QUESTIONS

1. How is the federation formally called (regional, federal state, other…)?

Australia is a federation, comprising 6 states and a number of territories, and is formally known as the Commonwealth of Australia.

2. Since when has the power been decentralized in your federation? Was the decentralization established in its origins or in a later time?

Australia has been a federation since it was formed as a nation state in 1901, under the Commonwealth Constitution. Prior to 1901, Australia comprised 6 separate self-governing British colonies (which later became the Original States).

3. Has decentralization been formally abandoned or practically inoperative in any historical phase?

No. Although there has been a trend towards greater centralisation of power since federation, decentralisation has never been formally abandoned or practically inoperative. The trend towards centralisation of power is detailed further below under distribution of powers, taxation and spending.

It should also be noted that one of Australia's two major political parties, the Australian Labor Party, was for most of the 20th century opposed to federalism and favoured abolition of the states, with the vesting of full legislative powers in a unitary central government. Although they obviously never succeeded in implementing their platform of complete centralisation of power, it is interesting to note that one side of politics professed the abandonment of federalism as their aim for the first 7-8 decades of federation. (For more detail refer to Brian Galligan, *A Federal Republic*, Cambridge University Press 1995.)

4. Which are the deep reasons in the adoption of a politically decentralized system?

It seems to have been almost inevitable that Australia would adopt a politically decentralised federation when Australia was first formed as a nation, given that the federal constitution was essentially a carefully negotiated agreement between the six well-established self-governing colonies that did not want to relinquish too much power to a new central government – an agreement which preserved the colonies as the six Original Australian States. The colonies decided to form a federation for a number of reasons, including a desire for a unified national voice in matters such as defence and immigration, the achievement of economic union and the hope for economic growth, as well as less tangible feelings of incipient national unity.

5. Could you point out the main phases of the system and the main characteristics?

Australia was settled by the British in 1788 and a number of colonies were formed over the ensuing 100 years. Federation was tentatively discussed from about the 1850s, and serious discussion and drafting of a possible federal constitution began in earnest in the 1890s. The Constitution was essentially drafted at two constitutional conventions in 1891 and 1897-98. The second convention agreed on a draft constitution, which was approved by referendums in all six colonies, and was enacted by the imperial parliament (Britain). The Constitution came into effect on 1 January, 1901.

In terms of phases, government in the first 10-20 years of federation was relatively decentralised, and has become increasingly centralised since then. The Constitution has undergone very little formal change

(although there have been some important shifts in interpretation), and generally the Australian federation can be said to have been fairly stable and successful in its first 100 years.

The Australian federation is based on a unique mixture of parliamentary responsible government, which we adopted from Britain, and a federal system of government with a powerful Senate, which drew extensively on the Constitution of the United States. The Australian Constitution deals almost exclusively with the systems through which governance is to take place, and does not deal with matters such as, for example, rights and freedoms. The Constitution also builds upon and assumes a pre-existing common law. It is a relatively brief and minimalist document, and leaves discretion to the federal parliament on a number of matters that might normally be detailed in a constitution, such as the voting system for the House of Representatives and the qualifications of voters.

Both the Commonwealth and the states have their own executive, legislative and judicial institutions, and the Constitution divides powers between these two levels of government. The Constitution establishes a bicameral federal parliament with a lower house twice the size of the Senate, in which seats are divided between states based on population (with single member electorates and preferential voting); and a Senate in which each state is equally represented, regardless of population (with a proportional representation voting system, using each state as a single electorate). Members of the government must be Members of Parliament, with those who have the confidence of the lower house forming government (in effect, the party or coalition of parties that holds the majority of seats in the lower house). A Governor-General representing the Queen (but effectively chosen by the Prime Minister) acts as a largely non-executive Head of State, formally exercising power on government advice.

The Commonwealth Constitution divides judicial power between the Commonwealth and the states and contemplates two distinct court hierarchies, united at the apex by the High Court of Australia. The High Court has original jurisdiction to hear all disputes concerning the Constitution, as well as all matters between state governments, and cases in which the Commonwealth is a party.

The Australian system is characterised by a separation of powers, not explicitly stated in the Constitution but found by the High Court to be implied in the Constitution. The separation between executive and legislative power is relatively weak, given the system of parliamentary responsible government, but separation between the judiciary and the other branches of government is strict.

State institutions tend largely to mirror those of the Commonwealth government, although one state, Queensland, has a unicameral parliament. The Queen is represented by a Governor in each state, who is effectively appointed by and acts on the advice of the respective state government.

6. How many territories or main territorial communities compose the federation? Do they all have the same nature (for instance, states) or do they have different nature and position (for example, states, federal capital, colonial lands, communities with a specific regime of autonomy)?

Australia consists of six Original States, two self-governing mainland territories and some external territories. Each of the states has equal constitutional status. Despite the substantial differences in population size, all Original States are represented equally in the Senate (*Constitution*, s.7) and guaranteed minimum representation in the House of Representatives (s.24). The Commonwealth is constitutionally precluded from discriminating between states in its taxation laws or from giving preference to particular states in laws of trade, commerce or revenue (ss. 51(ii) and 99).

The two mainland territories are the Northern Territory, which was formerly part of the state of South Australia but which was ceded to the Commonwealth after the first decade of federation; and the Australian Capital Territory, which is carved out of the state of New South Wales and is the seat of the

federal government. These territories govern themselves through their own elected institutions, but although they are treated as virtually equivalent to the states, there are constitutional differences in their status and operation. Unlike the states, which have their own Constitutions, the territories' self-government acts are Acts of the Commonwealth Parliament and can be amended by that Parliament. The Commonwealth Parliament can override territory legislation, even within areas of territory responsibility. The territories are not guaranteed any Senate representation (although each territory has two Senators by virtue of an Act of Parliament made pursuant to s.122 of the *Constitution*) and do not enjoy the protection of sections of the Constitution that relate to states.

The Constitution provides for the possibility of a territory being established as a new state, but no new states have been created since federation. In the late 1990s, residents of the Northern Territory voted on whether to seek statehood, but the vote was defeated. It is likely that the push for Northern Territory statehood will be revived at some stage, and may be successful.

7. Do they have singular features (for historical, linguistic, geographical, political, legal or economical reasons)? Do these singular features have political or legal consequences? In other words, how have the differences between the main territorial communities been approached from the perspective of uniformity/diversity or asimmetry/simmetry?

The Australian states and territories are relatively homogenous. Throughout Australia, the dominant ethnicity is Anglo-Celtic, the dominant language English, and the predominant religion Christianity. There is also an indigenous population of Aboriginal and Torres Strait Islander peoples, and considerable ethnic diversity as a result of immigration. However there are no sizeable and regionally-concentrated ethnic or linguistic groups around which state borders are based, or which might demand separate state representation. Indeed an abiding criticism of critics of Australian federalism is 'that it has no point since there are no strong regional diversities such as language and culture to appease or represent'.[i]

The enormous geographic size of Australia is one of the main justifications for the federal system of government. Those states, such as Western Australia and Tasmania, which are particularly geographically isolated from the large east coast states and the centre of government, feel an especially strong need for some measure of decentralised self-governance. The geographic isolation of Western Australia has had some political consequences in the past: the Constitution includes some concessions to Western Australia, which was a reluctant participant in federation from the outset; and Western Australia threatened to secede from the federation in the 1930s – the people of Western Australia even voted in favour of leaving the Commonwealth – but this was averted in part by changes to federal financial arrangements which appeased Western Australia, and in part because of uncertainty as to how to go about secession (there is no provision in the Constitution for states to leave the federation).

As mentioned above, there is a large degree of symmetry between the states in terms of constitutional status. There is however significant asymmetry in terms of natural resources and material wealth, which is discussed in section VIII in relation to fiscal equalisation.

II. CONSTITUTIONAL LAW

1. Do you have a written Federal Constitution? What is the procedure for its elaboration, ratification and amendment? To what extent can states participate in the process of elaboration, ratification, or constitutional amendment? Which have been the most important amendments or the main constitutional phases until now?

Australia has a written Constitution, which came into effect in 1901. The Constitution was approved by voters in referendums in all Australian colonies (now states) and was then passed by the British Parliament.

The procedure for amending the Constitution is set out in the final section of the Constitution, s.128. This section provides for a referendum procedure, whereby the Constitution can only be amended by a referendum approved by a majority of voters and a majority of states. It was inspired largely by referendum procedures in the Swiss Constitution. Under section 128, a proposal for constitutional change must be passed by both houses of the federal Parliament, or by the same house twice with a three-month interval in between. The proposal is then put to a referendum. The Constitution then provides: if 'in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law' the change will be approved. Special provisions apply to changes that would alter the minimum representation of a state in either house of parliament or alter the boundaries of a state.

Forty-four constitution alteration bills have been put to referendum since federation and only eight have passed. Most of the changes to the text of the Constitution that have been passed have been reasonably minor changes, on topics such as the retirement age of federal judges, and the replacement of Senators when a casual vacancy occurs. A successful referendum in 1967 resulted in the repeal of section 127 which had excluded Aboriginal people from the 'reckoning of the number of people of the Commonwealth or a State' (this was relevant to the distribution of electorates based upon population) and the amendment of section 51(xxvi) to extend the race power to cover Aboriginal people. The thirty-six failed proposals for change include proposals that would have vested additional legislative powers in the federal government, provisions dealing with local government, and a proposal to establish a republic – replacing the Queen with a President as Head of State.

Because it has proven so difficult to amend the text of the Constitution via the section 128 referendum procedure, other means have been found to achieve effective constitutional change. Such means include: intergovernmental cooperation whereby states may refer legislative powers to the Commonwealth; judicial interpretation of the Constitution, which has for example significantly expanded the scope of some Commonwealth legislative powers, and provided protection for some individual rights that are not explicitly mentioned in the Constitution; as well as legislation which has a profound effect on the system of government although it is not formally part of the Constitution. The best example of such legislation is the *Australia Act* 1986 (Cth), which provides that Britain can no longer make laws for any part of Australia; that no appeal lies from any Australian court to the Privy Council and that the High Court of Australia is therefore the ultimate court of appeal for all Australian cases, and which generally cut all legal ties between the United Kingdom and the states of Australia.

In terms of formal amendments to the text of the Constitution in accordance with section 128, the states participate in the process only in so far as the approval must be passed by a majority of voters in a majority of states – but the state governments do not play any formal role in the process.

For more detail on this point, refer to: James Crawford, 'Amendment of the Constitution' in Greg Craven (ed), *Australian Federation – Towards the Second Century*, Melbourne University Press 1992; and Chapter 5, 'the referendum process' in Galligan, above.

2. **Do you have any complementary constitutional federal rules? If so, which are the most important? Are "constitutional conventions", namely, unwritten binding agreements or rules of conduct, recognized in your system? Could you mention the most important?**

It is impossible to gain an accurate picture of the Australian constitutional system merely from the text of the Constitution, as there are a number of other instruments, as well as unwritten constitutional conventions that need to be taken into account.

The most important conventions are those governing the exercise of executive power. On the face of the Constitution, the Governor-General as the Queen's representative appears to wield considerable power, and no mention of the Prime Minister is made in the Constitution (although there are some references to Ministers). In practice, the Governor-General is obliged to act on the advice of the elected government in almost all cases. This "advice" is always accepted by the Governor-General, although he or she may request more information or a brief delay before he or she proceeds to act on the advice. This function has been described as 'the right to be consulted, the right to encourage, the right to warn'. Contrary to the wording of section 64 of the Constitution for example, the Governor-General has almost no discretion in making government appointments – in fact, according to conventional practice, the party with a majority in the lower house forms government and the Governor-General appoints the leader of that party as Prime Minister. The Prime Minister then advises the Governor-General on who will be appointed Ministers, and they are duly appointed. For more detail on constitutional conventions, see Cheryl Saunders and Ewart Smith, *A Paper Prepared for Standing Committee D Identifying the Conventions Associated with the Commonwealth Constitution*, 1980.

In addition to the powers of the Governor-General that are exercised only on advice, the Governor-General also has some 'reserve powers'. There is some disagreement about the circumstances in which reserve powers can be exercised and what precisely they are, but it can generally be said that the powers to appoint a Prime Minister, to dismiss a Prime Minister and to dissolve the House of Representatives may *sometimes* (under particular circumstances) be exercised by the Governor-General without or against advice. In 1975 the Governor-General, purporting to act in accordance with his reserve powers, dismissed a Prime Minister who had the confidence of the lower house because the Senate was refusing to pass important financial legislation, and called a new election. This incident, known as the 'constitutional crisis', was viewed by many commentators as an improper exercise of power by the Governor-General, and certainly highlighted the tension caused by Australia's hybrid system of responsible government and federalism with a strong Senate. For more detail on the 'constitutional crisis' refer to Colin Howard and Cheryl Saunders, 'The blocking of supply and the dismissal of the government', in G Evans (ed), *Labor and the Constitution*, Heinemann 1977, pp 251-301.

There was considerable debate in the lead up to the 1999 republic referendum about whether the powers of an Australian President should be the same as those of the Governor-General, and if so, whether some attempt should be made to codify those powers and the manner in which they are to be exercised, or whether the Constitution should remain rather opaque on the issue of executive power and continue to rely on unwritten conventions. The model eventually put to the referendum, would have inserted the following in the Constitution: 'The President shall act on the advice of the Federal Executive Council, the Prime Minister or another Minister of State; but the President may exercise a power that was a reserve power of the Governor-General in accordance with the constitutional conventions relating to the exercise of that power.'[ii] This approach represented a compromise between full codification, and making no reference to practice whatsoever. However the referendum failed.

As alluded to briefly above, also significant for an understanding of Australia's Constitutional system are: the *Statute of Westminster* 1931, the *Australia Act* 1986, legislation detailing the electoral system and establishing important government bodies and agencies, and legislation implementing international conventions to which Australia is a party and which impose limitations on legislative and executive power, such as the *Racial Discrimination Act* 1975 (Cth) which implements the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination into Australian domestic law; as well as some important common law principles and significant court decisions regarding

interpretation of the Constitution. For more detail on the way in which the High Court of Australia has shaped the operation of the Constitution, refer to Leslie Zines, *The High Court and the Constitution* (4th edition), Butterworths 1997.

3. Are there any written state constitutions? What is the procedure for its elaboration, ratification and amendment? To what extent can the federation intervene in these procedures? Could any federal organism provisionally suspend some of their provisions? Are state constitutions bound by federal rules other than the Federal Constitution? If so, which are they?

All states in Australia have their own written constitutions, which take the form of acts of the tate parliaments, although each of these constitutions has its origins in the old British acts of parliament that constituted the constitutions of the colonies (as the states were known prior to federation).

The federal Constitution provides, in section 106: 'The constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth… until altered in accordance with the Constitution of the State.' As this section makes clear, state constitutions are subject to, and cannot contradict, the Commonwealth Constitution. So for example state constitutions cannot validly ascribe to state legislatures powers to coin money or impose duties of customs and excise, as this would contravene the Commonwealth Constitution. State constitutions are probably also subject to Commonwealth legislation enacted under section 51.

Procedures for altering state constitutions vary between states, but all of them contain some parts that can be amended simply by an act of parliament, and do not require a referendum.[iii] In Victoria and Tasmania the whole of the constitution can be changed without referendums, but special procedures and special majorities are required to alter certain parts. Due to the relative ease of changing state constitutions, they have generally been changed more frequently than the Commonwealth Constitution, although most of the changes have been minor. The most significant changes have been the abolition of the upper house of the Queensland Parliament in 1922, and changes to the New South Wales upper house from being unelected to being directly elected.[iv] The federal government cannot directly intervene in the procedures for amending state constitutions, but could (in theory) indirectly affect certain matters via Commonwealth legislation. However because most of the subjects covered in state constitutions, such as the composition of state legislatures, state courts and the like, do not fall within Commonwealth legislative power, the federal government would need to change the Commonwealth Constitution before it could effectively interfere with state constitutions. Both scenarios are politically extremely unlikely. The only federal organism that could suspend or declare invalid provisions within state Constitutions is the High Court of Australia, which is the ultimate court of appeal for all matters: concerning state and federal laws, and the interpretation of state constitutions as well as the Commonwealth Constitution.

John Waugh has written that despite the fact that state constitutions are merely acts of state parliaments, derived from older British Acts of parliament, by virtue of sections 106 and 107 of the Constitution and some recent decisions of the High Court there is some (inconclusive) support 'for the proposition that the Australian Constitution is the source of state legislative power, if not also the basis of the state constitutions themselves'.[v]

For more information on state constitutions, refer to R. D. Lumb, *The Constitutions of the Australian States* (5th ed), University of Queensland Press 1991; and John Waugh, *The Rules*, Melbourne University Press 1996.

III. CONTENTS OF THE FEDERAL CONSTITUTION

1. Does the federal constitution expressly recognize federalism or political decentralization as a constitutional principle or value?

The federal Constitution makes a number of express references to the federation and the federal system of government. The Constitution itself is contained in section 9 of a British Act of Parliament (*The Commonwealth of Australia Constitution Act* 1900), and the preamble to that Act and the 8 sections which precede section 9 are known as the Preamble and the covering clauses to the Constitution. The Preamble begins with a reference to the decision of the colonies to form a federation under the new Constitution: 'Whereas the people of New South Wales, Victoria, South Australia, Queensland and Tasmania… have agreed to unite in one indissoluble Federal Commonwealth…'. Covering clause 3 which authorises the Queen to bring the Commonwealth of Australia into effect and to appoint a Governor-General also refers to the people of the various colonies being 'united in a Federal Commonwealth'.

The provisions of the Constitution establishing the various institutions of government also make explicit and implicit references to the federal system. Section 1 of the Constitution provides 'the legislative power of the Commonwealth shall be vested in a Federal Parliament…' and section 62 establishes the Federal Executive Council which is the body, comprised of government ministers and parliamentary secretaries, that provides 'advice' to the Governor-General. The composition of the Senate also clearly reflects the federal nature of the system, with states having equal representation regardless of population.

Chapter 3 of the Constitution deals with the federal judicature, and Chapter 5 deals with the states – providing further examples of the clear recognition of federalism.

Section 51 which lists the legislative powers of the federal government is also an expression of political decentralisation, as it is implicit that states have concurrent power to legislate on all listed matters that are not deemed to be exclusive, and have residual power to legislate on all matters not vested in the federal parliament.

2. Does the federal constitution design a map of the territorial organization? In other words, does the Federal Constitution identify or enumerate the territories and/or the communities that conform the federation?

The Constitution defines 'Original States' as being the six states that federated in 1901, although references to Western Australia are somewhat cryptic as it was not clear at the time the Constitution was drafted whether Western Australia would ultimately agree to participate in the federation. The Constitution also provides for the possibility that new states can be created and admitted to the federation on such conditions as the federal parliament thinks fit (section 121 – this means new states might not have the same status and representation as Original States), and that states may cede territories to the Commonwealth government, which might then obtain representation in federal parliament as the parliament sees fit (section 122).

3. Does the federal constitution enshrine the autonomy of the states? If so, in which way?

The institutions of state government are created by the state constitutions, and these constitutions continued after federation by virtue of section 106, although they are subject to the federal Constitution. There is no constitutional provision which absolutely enshrines the autonomy of the states, although the states are largely autonomous from the Commonwealth, and with a few exceptions, there is no obvious framework of principle with which state institutions must comply. Section 107 provides that upon

federation states retain all legislative powers they previously had that are not explicitly removed from them by the federal Constitution, and section 108 provides that state laws continue to be valid subject to the federal Constitution. State Governors are appointed by the Queen on the advice of state governments, with no involvement on the part of the federal government.

One exception to the autonomy of the states is that the potential for state courts to exercise federal jurisdiction has been held by the High Court to inhibit the states from structuring or empowering their courts in a way that would be incompatible with their position as component parts of the Australian judicature. The High Court also has a profound effect on the operation of government at the state level. Most obviously, it can declare state laws and state constitutions to be contrary to the Commonwealth Constitution. It also declares the common law of Australia, and develops it consistently with the Commonwealth Constitution. Finally, as mentioned above, it is the final court of appeal in all cases.

Judicial doctrine prevents the use of federal power so as to threaten the continued existence of the states or their capacity to function.

4. Does the federal constitution recognize states or main territorial communities the capacity to federate among them? If so, can they establish links or celebrate conventions among them without the participation of the federation?

No, the federal constitution does not recognise the capacity of states or territories to federate amongst themselves.

5. Does the federal constitution fully define the whole system of decentralization, or is this system thought to be developed to a great extent by future federal provisions? If so, which are they?

The federal Constitution does not fully define the whole system of decentralisation. The Constitution does set out a limited number of exclusive federal legislative powers, and a list of legislative powers that are to be held concurrently with the states, and all powers not referred to continue to reside with state legislatures. The list of concurrent powers necessarily leaves decentralisation somewhat open, as it does not dictate whether in practice it will be the federal government, state governments or both who choose to legislate on the matters in which they both hold legislative power. The ambiguity and later interpretation of some provisions dealing with legislative power is another factor affecting decentralisation or centralisation in practice. Decentralisation to the third tier of government, local government, is not mentioned in the federal constitution at all, and is discussed below in part VI.

6. Does the federal constitution allow the exercise of the right to self-determination or the separation of states or other territories?

The Constitution does not allow the reasonably autonomous states to exercise the right to complete self-determination, as they are subject to the Commonwealth Constitution and to some federal laws. States do not have economic self-determination, as their taxing powers are constrained by the Constitution, and in reality they are further constrained by federal tax regimes and conditional grants.

The Constitution does not provide a facility for secession of states from the federation, and the reference in the Preamble to the 'indissoluble Federal Commonwealth' suggests that it is not to be contemplated. It would presumably be possible in theory for a State to secede via a national referendum to alter the Constitution – although this would have to be initiated by the federal Parliament in accordance with section 128.

Territories can be surrendered by states to the Commonwealth government, under section 122 of the Constitution, and the federal government thereafter has the power to make laws for such territories. As mentioned above, South Australia gave a large part of its territory to the Commonwealth, this land now being known as the Northern Territory. Section 125 of the Constitution deals specifically with the issue of the Australian Capital Territory, which was carved out of the state of New South Wales.

IV. INSTITUTIONAL ISSUES

1. **Do states participate in the election, appointment or cessation of the federation's chief? Is there any other relationship between this figure and states or main territorial communities? Which one?**

The Head of State of the federation is the Queen, represented by the Governor-General. The Governor-General is appointed by the Queen on the advice of the Prime Minister, so is effectively chosen by the Prime Minister. The states do not play a role in this selection process. The Governor-General performs a largely ceremonial role at a federal level, and does not have any direct relationship with the states.

The Head of Government is the Prime Minister, who is selected as leader by his or her party and then appointed by the Governor-General upon his or her party attaining a majority in the lower house of the federal parliament. The states do not play any direct role in this appointment process, except in so far as voters in every state choose their lower house representatives for federal parliament, which in turn will choose the Prime Minister.

The states each have their own Governor and their own Premier, and the federal government plays no role in their selection and appointment.

2. **Is there any Senate or second legislative assembly that represents the states? If so, does it exercise its representative role effectively? Why? What functions does the Constitution attribute to this legislative assembly? How are states represented in this chamber? Do they have the same kind of representation on the basis of the number of votes or seats? Does any state have a special position in this chamber (for instance, exclusive initiative or veto prerogatives, etc.)? How representatives are organized in this second chamber, according to their territorial origin or to their political groups?**

The federal parliament comprises two houses: the House of Representatives, or lower house, and the Senate, or upper house. The Senate is designed to represent the states.

The Senate consists of a minimum of six senators for each of the Original States; the number may be increased, and presently is twelve, but the equal representation of the Original States must be maintained.

The self-governing status of the two mainland territories has made some small difference to the scheme. These territories are represented in both houses of the Parliament, but pursuant to Commonwealth legislation rather than by constitutional right. Territory representatives are not subject to many of the constitutional requirements that apply to representatives from the states, including the rules that Senators have fixed six year terms, that in general half the Senate faces election every three years and that the total numbers of the Members of the House is linked to the size of the Senate.

The Senate has almost co-equal powers with the House of Representatives. The exceptions are that it may not initiate bills imposing taxation or appropriating monies and that it may not amend taxation or key appropriation bills. In addition, the Constitution provides a procedure for breaking deadlocks between the Senate and the House in relation to both ordinary legislation and constitution alteration bills which, after

an extended process, ultimately gives the edge to the House of Representatives (section 57). Nevertheless, it is a relatively powerful chamber. Unlike the United States Senate, however, it has no special, additional constitutional powers of its own.

Senators have generally voted in accordance with party allegiances since federation. In other words, they do not vote on state lines or with a view to state issues. This does not mean that the Senate is irrelevant to Australian federalism, however. At the very least, its composition ensures that there are more members from the smaller states in the Commonwealth Parliament than there would otherwise have been. This means that the smaller states have a larger voice than they otherwise would have had in the respective party rooms and that there is a larger pool of Members from the smaller states on which to draw in selecting the ministry and constituting parliamentary committees.

In other respects also, the Senate has had a profound effect on the operation of the Commonwealth government. Whereas the House is composed of Members elected for maximum three year terms from single member constituencies through a system of preferential voting, the Senate consists of an equal number of members from each state, half of whom are elected for fixed six year terms every three years, through a system of proportional representation, using each state as a single electorate. Typically, representation of parties in the Senate is very different from that in the House and it is unusual for either the government or the opposition parties to have a majority of seats. As a result, governments cannot assume that their legislation will be enacted and government action tends to be subjected to more severe scrutiny in the Senate than in the House.

3. Do states have legislative initiative over federal subject matters? Is their consent required for the enactment of certain federal acts? In other words, do they have a veto? If so, what kind of veto?

The states do not have any power of veto over valid federal legislation. States can however challenge federal legislation before the courts on the grounds that it is beyond the legislative powers of the federal government.

Is there any neutral judicial court (Constitutional Court, Supreme Court, etc.) that protects the allocation of powers between the federation and the states? Do states participate in the process of designation of its members? How do you assess the influence of this court upon the current system of political decentralization? Broadly speaking, could you tell whether its case law has been most favorable to the interests of the federation or the states? Are there any subject matters or historical phases in which this phenomenon occurred? Can ordinary lower courts interfere in conflicts of powers between the federation and the states?

Questions of competency may be raised in any court, whether federal or state, by governments, or by private parties with a sufficient interest to meet the Australian requirements of standing. If a constitutional issue is raised, Commonwealth legislation requires notice to be given to the Attorneys General of all Australian jurisdictions to enable them to decide whether to intervene and whether to seek removal of the case to the High Court. Cases in which a significant constitutional question is raised are likely to begin in the High Court, in its original jurisdiction, or to be removed that court. In any event, the High Court is likely to deal with such matters finally, on appeal. The courts play a significant role in enforcing the limits of the Commonwealth Constitution against both levels of government. In recent years, it is possible to point to cases that have invalidated both Commonwealth and state legislation on constitutional grounds.

State governments appoint judges to their own state courts, but do not have any constitutionally-protected role in designating members of the High Court. Legislation now requires the federal government to

consult with the states in making judicial appointments to the High Court, but this does not always work effectively in practice and the process continues to be dominated by the federal government.

The High Court has tended, broadly speaking, to be more favourable to the interests of the federal government than the states. Court decisions in certain areas, such as the broad interpretation of some heads of federal legislative power, have tended to have a centralising effect on the operation of the federation. Although in the very early years of the federation the High Court took a stance that was more protective of states, the trend towards greater federal power began around 1920.

4. **Which legal mechanisms do the federation and the states have to protect their powers? Are they recognized only against legislative acts, or against regulations and administrative decisions or omissions as well? Could you tell whether the safeguards and procedural position of the federation and the states are symmetrical? In other words, can the federation challenge state acts before a court? And vice-versa? Has the federation a veto against state legislative acts, regulations or decisions? And the states against the federation? Can a state bring a conflict of powers against another state before a court? In each state, which is the legitimate organism – legislative, executive, etc.- to bring judicial actions to protect state powers? Can local entities or municipalities bring judicial actions to protect their autonomy against federal or state acts o rules? Are there any other institutions or individuals legitimate to challenge federal or state legislative acts, regulations, rules or decisions on the basis of a conflict of powers?**

If the normal political and administrative processes, including discussion and negotiation, do not succeed in avoiding or resolving jurisdictional conflicts, the legal mechanism for protection of powers is litigation. Courts may declare state or federal legislation to be wholly or party constitutionally invalid, and may also review administrative actions under a legislatively established system of administrative law. There is substantial symmetry between the states and the federal government in terms of their capacity to challenge legislation. Neither the states nor the federal government has a "veto" against legislation of the other, in the sense of being able to veto it before it is passed or comes into effect, but can seek to have the legislation declared invalid on constitutional grounds.

States may bring legal action against other states before the courts, although such disputes would usually concern matters such as freedom of interstate trade (section 92) or freedom from discrimination on the basis of state residence (section 117) rather than conflict of powers. Individual citizens can also challenge legislation or executive acts, state and federal, provided they can satisfy the 'standing' requirement of having a special interest in the matter of which they complain which makes them more particularly affected than is the public generally. States can challenge the constitutional validity of Commonwealth legislation even if such legislation has not yet come into effect, and whether or not any state law or direct state interest is affected. The High Court has original jurisdiction in such matters, but they may also be initiated in lower courts.

Local governments can take legal action to challenge federal or state legislative acts if they can establish standing, but in view of the powers of state parliaments to change the structure, functions and powers of local government via legislation and/or constitutional amendment, and the fact that there are no entrenched constitutional protections for local government (except in Queensland, where the constitution prevents abolition of local government without a referendum), successful challenges would be rare.

5. **Who is in charge of the official appointment of the main state authorities (the chief of the state, government, parliament or legislative assembly, judicial power of the state, etc.)? Does the federation intervene in the process of appointment?**

The chief of each state is a largely non-executive Governor representing the Queen, who is appointed by the Queen but chosen by the Premier of the state. The party with the confidence of the lower house of parliament forms the government of the state, with the leader of that party in the lower house being appointed Premier by the Governor. State court hierarchies are established under state constitutions. Judges in the state courts are appointed by the state Governor, following the advice of the state government. The federation has no power to intervene in any of these appointments.

6. **Does the judicial power follow the allocation of powers? In other words, are there federal and state courts with jurisdiction to solve federal and state cases respectively? Regarding state courts, is the appointment of judges, magistrates and administrative staff a state power? Do states enjoy legislative power to regulate these issues? Is there any body of self-government of the judicial power? If so, which is its composition? What functions does it have? Who is responsible for the provision of material resources to the administration of justice (federation or states)? Which are the criteria for the allocation of resources? Can federal courts review state court's decisions? In what circumstances?**

The Commonwealth Constitution divides judicial power between the Commonwealth and the states and contemplates two distinct court hierarchies, united at the apex by the High Court. Federal judicial power includes matters arising under the Commonwealth Constitution and under federal laws, matters involving parties or government in different jurisdictions and matters in which the Commonwealth is a party. This jurisdiction may be conferred on either federal or state courts. In the first half century of federation, the Commonwealth made extensive use of state courts. Since the 1970s, however, the federal court system has been progressively developed to the point where there is now a clear federal court hierarchy, comprising a Federal Magistrates Court, a specialist Family Court, and the Federal Court of Australia, below the High Court itself.

The role of the High Court as the final court of appeal gives it significant authority in state matters. The High Court is the final arbiter on issues arising under state constitutions; it finally interprets state legislation; it declares and develops the Australian common law. Decisions of the High Court are binding in all state systems. This has a homogenising effect that tends to increase the persuasive value of state judicial decisions for each other.

State courts have always been entitled to exercise federal jurisdiction. But in order to eliminate jurisdictional disputes about which state ought to hear a matter, and disputes about whether cases concerning state jurisdiction could be heard in federal courts, the Commonwealth and the states and territories came together in 1987 and agreed to a scheme whereby the Supreme Court of each state and territory vested its entire jurisdiction in the Supreme Court in each of the other states and territories, and in the Federal Court and the Family Court; and the federal courts vested their jurisdiction in each other, as well as in each of the state and territory Supreme Courts. This was known as the cross-vesting of jurisdiction scheme. After 12 years of this scheme working effectively to eliminate jurisdictional disputes and multiplicity of proceedings, the High Court held in 1999 that Chapter III of the Constitution implicitly prohibited the vesting of state judicial power in federal courts. Although the vesting of state jurisdiction in federal courts is therefore invalid, the rest of the scheme still operates.

State governments have the power to appoint judges, magistrates and administrative staff to their own state courts. States are also responsible for allocating resources to the administration of justice within their jurisdiction (the federal government allocates resources to federal courts) although the existence of vertical fiscal imbalance and the practice of the federal government making conditional grants to the states means that the federal government may from time to time have some influence over this allocation of resources. Even though state courts can exercise federal jurisdiction, the Commonwealth has limited capacity to influence the composition of the state courts for this purpose.

There is no body of self-government of the judicial power, other than the existence of judicial independence. Judicial power is established in the federal and state constitutions. Judges in various courts sometimes make decisions concerning the nature and extent of judicial power. Jurisdiction of various courts is conferred in part by legislation. There are at least three bodies in Australia concerned with judicial power and judicial administration, although they are not vested with any powers in relation to governing judicial power: the Australian Institute of Judicial Administration (AIJA) which is an incorporated institute affiliated with the University of Melbourne as a research and educational institute; It is funded by the Standing Committee of Attorneys-General (a committee comprised of the attorneys general from each state and territory and the Commonwealth) and also from subscription income from its membership. The principal objectives of the AIJA include research into judicial administration and the development and conduct of educational programmes for judicial officers, court administrators and members of the legal profession in relation to court administration and judicial systems. Another body is the Judicial Conference of Australia Incorporated, a non-profit association of judges from all jurisdictions which aims to ensure the maintenance of a strong and independent judiciary, to achieve a better public understanding of the role of the judiciary, to ensure that courts are accessible, and to maintain, promote and improve the quality of the judicial system in Australia. There is also a Council of Chief Justices comprised of the chief justices of all superior courts in Australia, which meets regularly to consider strategic issues. These bodies interact to some extent – for example the AIJA published a Guide to Judicial Conduct for the Council of Chief Justices.

Federal courts can review the decisions of state courts in matters where state courts were exercising federal jurisdiction and the matter is then appealed to a federal court. The High Court of Australia is the ultimate court of appeal for all matters.

7. Are there others mechanisms for state participation in federal institutions or functions? Do states participate or are represented in relatively autonomous federal organisms, regarding, for instance, citizen's rights or intervention in the economy (independent agencies with regulative, financial and arbitration powers, etc.)?

Most federal institutions and functions are run and performed by the federal government and federal bureaucracy, but states have some input in many of them, usually through intergovernmental bodies such as the Council of Australian Governments, the Premiers' Conferences, the Standing Committee of Attorneys General and other Ministerial Councils. For Example the Commonwealth Grants Commission is a federal government body which advises the Commonwealth government in response to specific terms of reference on matters concerning allocation of Commonwealth revenue assistance to states and territories. These terms of reference are usually decided in negotiations between the Commonwealth and the States, through meetings of treasurers. Essentially most institutions are either state or federal, but there is a reasonably high degree of cooperation between state and federal governments and opportunity for input into their respective fields through the system of intergovernmental meetings and ministerial councils.

8. Can states freely convoke a referendum regarding political or legal measures? Are there any constraints? In other words, does the federation have any power over this field?

In those state constitutions that provide for referendums, the state parliament can convoke a referendum on a relevant state constitutional matter. Referendum procedure for Commonwealth constitutional matters was outlined above (part II, question 1.). States cannot directly convoke a referendum regarding the Commonwealth Constitution, although they may be able to press for changes through intergovernmental meetings.

On issues that do not affect the constitution, advisory referendums (also called plebiscites) may be held. Federal, state and territory governments have held advisory referendums of various issues to gauge public opinion. A state government may convoke an advisory referendum, or a constitutional referendum if provided for in its constitution and with sufficient parliamentary support, and the federal government cannot intervene – except in so far as the federal government could contest a change made by a state as a result of a referendum if such change contravened the Commonwealth Constitution.

9. Is there any pro-state provision concerning symbolic issues (flags, protocol, languages, etc.)?

The Commonwealth Constitution provides that the Commonwealth shall not give preferential treatment to any state in the regulation of trade, commerce or revenue; that states shall retain their constitutions; and that no one shall be discriminated against on the basis of state residence. However there are no Constitutional provisions concerning symbolic pro-state issues such as flags, languages or the like.

V. THE ALLOCATION OF POWERS

1. Is the system of allocation of powers mainly enshrined in the Federal Constitution? Is it secured by the Federal Constitution?

Yes, the system of allocation of powers is mainly enshrined in the federal Constitution. The Commonwealth Constitution enumerates the powers of the federal legislature and the federal judiciary. Federal executive powers have been defined by judicial interpretation, by analogy with federal legislative powers. Subject to the Commonwealth Constitution, the Australian states have plenary powers under their respective state constitutions.

Whilst the allocation of powers is enshrined in the Constitution, there are significant High Court decisions concerning the way in which certain legislative powers are to be interpreted, and on the capacity of the federal Parliament to 'cover the field' on a matter of concurrent legislative power and thereby exclude the states from legislating on a matter, that are important to the operation of the distribution of powers.

2. Which is the basic design of the system (a list of federal powers, a list of state powers, a double list, other solutions)?

The federal government only has power to legislate on matters expressly listed in the Constitution as being federal legislative powers. Most of these powers are listed in section 51 of the Constitution. A handful of these matters are expressly exclusive federal powers, but most are held concurrently with the states. State legislative powers are not listed in the Constitution, but they have residual power to legislate on all matters that are not deemed by the Constitution to be the exclusive preserve of the federal legislature. States may also be excluded from legislating in an area of concurrent power of the Commonwealth Parliament 'covers the field' and thus leaves no room for the states.

3. Is there any constitutional provision concerning residual powers, namely, "new" subject matters, not allocated either to the federation or to the states by constitutional law? If so, where are allocated the residual powers (federal or state level)? Is it actually effective? Are there any rules or principles that presume that the power is vested in a certain level of governance?

There is no constitutional provision dealing with the allocation of power over "new" subject matters. However there is some flexibility in the powers expressly allocated, either exclusively or concurrently, to the federal legislature. The High Court has held that the federal Parliament has power to legislate on matters 'incidental' to making the grant of a particular power effective. Under section 51(xxxix) the federal Parliament also has power to make laws with the respect to 'Matters incidental to the execution of

any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth'. Some powers have been interpreted in a manner that enables them to keep up with the times, so, for example, the federal power to legislate with respect to 'Postal, telegraphic, telephonic and other like services' has been interpreted to include radio and television broadcasting. Any "new" matter that was the subject of a treaty that Australia wished to implement would, on the basis of the current approach of the High Court, fall within the federal power to legislate with respect to external affairs. The external affairs power has, for example, been used as the basis for Commonwealth legislation on human rights and the environment – matters that do not appear in the enumerated list of Commonwealth powers.

Any new subject matters that could not be impliedly ascribed to the federal Parliament by one of the means outlined above, would fall exclusively within the residual legislative powers of the states. If the federal parliament wished to claim exclusive or concurrent legislative power over such a new matter and could not do so via the methods outlined above, it could seek to add the new power to its list of powers via a referendum to alter the Constitution (this has twice been successfully done) or could request that the states refer their power to the Commonwealth pursuant to section 51(xxxvii) of the Constitution.

4. Is there any rule that gives preference to federal law in case of conflict with state law? If so, has it been actually applied?

Section 109 of the Constitution provides: 'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'. This provision has been applied in a number of instances. The High Court has tended, since the 1920s, to interpret section 109 broadly, with the effect of centralising power and excluding states from legislating in a number of areas of concurrent power. Thus a state law might be deemed to be inconsistent with a federal law for the purposes of s.109 if, although the laws are in no ways contradictory or conflicting, the Court deems the federal Parliament to have intended to cover the whole legislative field – thereby preventing another legislature, the state, from intruding into that field.

The provision that inconsistent state laws will be invalid 'to the extent of the inconsistency' has been interpreted by the High Court to mean that if the inconsistency ceases to exist, because, for example, the relevant federal law is repealed or sufficiently amended, the state law once again becomes operative.

5. Are there other general rules? Which are they?

Not applicable. See answers 1-4 above.

6. Does the Constitution allow making more flexible the allocation of powers by mechanisms other than constitutional amendment? In other words, can the federation, by itself, transfer or delegate powers to states? Through which mechanisms? What role did all those mechanisms play on the evolution of the federation? How have the decisions regarding the material, economic and human resources to be transferred as a consequence of a transfer or delegation of powers been taken?

Section 51(xxxvii) ('the reference power') referred to in answer 3 above, provides for some flexibility in the allocation of powers by enabling states to refer legislative powers to the Commonwealth. This provision has been used by the states on occasion, usually in fulfilment of an intergovernmental agreement on the implementation of a national scheme on a matter over which the Commonwealth does not have legislative power, or does not have sufficiently wide legislative power. If only some states make a reference, the Commonwealth law can apply only in those states.

The states can legislate on any matter not expressed by the Constitution to be the exclusive preserve of the Commonwealth.

7. Has any subject matter been fully attributed to just one of the territorial levels of governance – federal or state-?

Yes, a number of subject matters are fully attributed to just one level of governance. Any matter that is not listed as a Commonwealth head of legislative power in the Constitution, and which cannot be deemed to be a head of Commonwealth power by virtue of one of the flexible mechanisms outlined in answer to question 3 above, are residual and exclusive state powers.

By express provision in the Constitution, the Commonwealth has exclusive legislative power with respect to raising naval and military forces (sections 51(vi) and 114), currency (sections 51(xii) and 115), the seat of Commonwealth government, the Commonwealth public service and Commonwealth public places (section 52), the imposition of duties of customs and excise and the grant of bounties (section 90). A number of other matters have been left exclusively to the Commonwealth even though concurrent legislative power exists. Family law is one example of a concurrent power that is covered by the Commonwealth (with some reference of power from the states to the Commonwealth). Family law is a field that was almost exclusively dealt with by the states until the Commonwealth first chose to exercise its concurrent legislative power in 1959, and then more broadly in 1975.

8. Is the technique of "shared" powers recognized (both federation and states have legislative powers, although federal law takes precedence over state law in case of conflict)?

Yes. Refer to answers 2 and 4 above.

9. Are there any subject matters in which legislative power is exclusively attributed to the federation, while executive power is attributed to the states? If so, is the regulative power regarded as legislative or executive power? Can federal legislation determine state administrative organization and practice?

No. Executive powers tend to follow legislative powers. In any event, there are very few exclusive Commonwealth powers – see answer to question 7 above. Federal legislation cannot determine state administrative organisation and practice.

10. Are there any subject matters in which the federation can establish principles or basis for the state legislation? If so, has the federation made an extensive use of this power? Is there any mechanism to correct that situation?

The federal government could effectively establish principles or the basis for state legislation on any matter over which the states and the federal government hold concurrent legislative power, simply by enacting federal legislation which the states, by virtue of section 109, would be unable to contradict. As mentioned above, the federal government can go even further and seek to cover a whole legislative field, thereby preventing the states from exercising their concurrent power.

The federal government has also found ways in which to influence state governments in areas that do not fall within Commonwealth legislative powers, either by attaching conditions to grants of financial assistance to the states – thereby dictating state policy – or by making creative use of Commonwealth powers to achieve desired outcomes in matters not directly related to the power. For example, in a bid to protect the environment of Fraser Island in the state of Queensland, the federal government effectively prevented the mining of Fraser Island by passing a law, under its trade and commerce power, to prohibit

export of minerals extracted from the island. The High Court upheld the validity of the Commonwealth legislation, notwithstanding that the clear motive of the legislation was environmental protection, not regulation of trade and commerce. There are a number of examples of this sort of approach by the Commonwealth to control state action.

11. Does the federation have an own administrative organization on the state territory? How strong is that administration? In which fields does it act? Can the state administration exercise any federal power delegated by the federation? If so, are state administrative bodies hierarchically dependent of the federal administration? What mechanisms of review are reserved to the federation to secure that states correctly enforce federal law?

The Australian federal government has its seat in the capital city of Canberra in the Australian Capital Territory (ACT). The federal parliament, government ministers, and the High Court of Australia all sit in Canberra, as do the Commonwealth government departments. Many Commonwealth government departments have state offices or branches, and therefore it can be said that there is some federal administration located on state territory. Branches of the Australian Taxation Office, the Department of Immigration, Multicultural and Indigenous Affairs, and the Department of Education, Science and Training are examples of Commonwealth departments that have offices in every state. These are also examples of departments that need to have direct contact with the public users of their services throughout Australia.

The federal and state governments generally administer their own laws and policies without direct interference in administrative organisation by the other level of government. In view of the large number of matters on which power is concurrent, this results in considerable duplication and overlap of functions and administration. There is also a complex system of intergovernmental arrangements, including some cooperative legislative schemes, in which the division between federal and state power and administration may become somewhat blurred. There have been challenges to the constitutional validity of a number of intergovernmental schemes, but the High Court has generally supported cooperative arrangements. Yet whilst 'there is no constitutional impediment to cooperation … the principle will not supply power that does not otherwise exist'.[vi]

Some constitutionally prescribed examples of the administration of federal laws by the states, are the use of state prisons for federal prisoners (section 120) and the vesting of federal jurisdiction in state courts (discussed in more detail above) whereby the Commonwealth must take the state courts as it finds them.

12. What are the general limits of state powers?

The general limits of state legislative powers are that a state cannot legislate on matters that are exclusive Commonwealth powers; in areas of concurrent power it cannot validly pass laws that are inconsistent with Commonwealth laws (section 109); and a state cannot legislate to affect or limit Commonwealth prerogatives or Commonwealth property. When a state legislates on matters relating to a state constitution, or the powers and procedures of state parliaments, it must comply with certain manner and form requirements.

States do have the power to legislate extraterritorially, but there must generally be some connection, even if it is merely a remote connection, between the enacting state and the extraterritorial things or events on which the law seeks to have effect.

Naturally states cannot pass legislation that is contrary to the Commonwealth Constitution, which means not only that it cannot legislate in area of exclusive Commonwealth power, but must also comply with, for example, section 92 (freedom of interstate trade), section 117 (freedom from discrimination on the basis of

state residence) and other implied guarantees such as the freedom of political communication and the independence and separation of the federal judicial power. The High Court has also said in passing that whether state legislative power 'is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law … is another question which we need to explore'.[vii]

Aside from these limitations, states have plenary powers.

13. In your opinion, what are the most important federal powers?

The most important federal powers are its taxation powers including the exclusive power to tax goods (sections 51(ii) and 90); the external affairs power which has been expansively interpreted to permit the Commonwealth to legislate to give effect to an international convention, whatever the subject matter (section 51(xxix)); and powers relating to social security, immigration and defence. Other powers that have proven to be useful, in part because they have been given a broad interpretation, are the corporations power (section 51(xx), on which the Commonwealth bases most trade practices legislation, some industrial relations legislation and provisions regulating the structure of companies under the corporations law), the industrial relations power (section 51(xxxv), which is limited and complex, but useful) and the trade and commerce power (section 51(i), under which the Commonwealth has power over all trade and commerce except trade carried on entirely within a particular state). Family law is another important area of Commonwealth power which, although constitutionally concurrent, is in practice the exclusive domain of the Commonwealth.

14. In your opinion, what are the most important state powers?

The most important state powers are those over criminal law, property and planning, health, and education. Other significant state legislative powers include those relating to utilities and infrastructure, the environment, resources (including forests and logging), local government, business and trade, agriculture, gambling, trades and professions, and medical and scientific procedures.

15. Have any of these federal or state powers been extensively interpreted?

Yes, a number of concurrent and exclusive powers have been the subject of litigation and have been extensively interpreted by the High Court. Refer to answers 3, 4, 10, 12 and 13 above, and for more detail refer to: Brian Galligan, *A Federal Republic*, Oxford University Press 1995, Chapter 7 'the High Court and the Constitution'; Sir Robert Menzies, *Central Power in the Australian Commonwealth*, University Press of Virginia 1967; and Leslie Zines, *The High Court and the Constitution* (4th ed), Butterworths 1997.

16. Does the Constitution provide the transfer of sovereign powers to regional or international organizations? Does it address this issue in the domestic legal system, taking into account the decentralized structure of the federation? Does it give the states the right to ratify international treaties or agreements? If so, in which conditions? How is the international responsibility of the federation addressed?

When the Australian federation was formed in 1901, Australia was still a British colony, and did not have the power to enter into treaties – hence the reference in section 51(xxix) to 'external affairs', rather than to foreign and diplomatic relations, although it should be noted that Australia had the power to conduct its own relationship with its Pacific neighbours despite its colonial status (section 51(xxx)). Australia achieved full international status as an independent nation gradually over the first decades of federation, with the *Statute of Westminster* in 1931 marking the legal maturity of Australia and legitimating Australia's power to enter into treaties.[viii] It is nowhere expressly provided that the Commonwealth has

exclusive power to enter into treaties, but this is generally assumed to be the case given that the states lack international legal status and are therefore believed to lack any independent treaty-making capacity. 'Putting aside trade agreements, this effectively gives the Commonwealth exclusive power to represent the nation in international affairs'.[ix]

The Constitution does not expressly provide for the transfer of sovereign powers to regional or international organisations, given that, as mentioned above, Australia was a colony that relied on Britain for its foreign policy when the federation was first established. Australia does participate in a regional group called APEC, but this is quite a weak and diffuse body. There is no regional bloc similar to the EU or NAFTA that Australia could join, and so this question is of little relevance to Australia for the time being.[x]

VI. LOCAL AND MUNICIPAL GOVERNMENT

1. **Does the Federal Constitution recognize local or municipal autonomy? And the state Constitutions? If so, which term is it used to refer this autonomy? What substantially follows from this constitutional recognition?**

The federal Constitution makes no reference to local government or municipal autonomy. Referendums to amend the Constitution to include a reference to local government were held in 1974 and 1988 and both were unsuccessful. Local government is covered in, and given limited protection in, state constitutions. However states retain the power to change their constitutional provisions dealing with local government, and so have the power to change the powers, composition and boundaries of local government more or less as they please. Queensland cannot abolish local government without a referendum.[xi]

2. **Are the local representatives democratically elected by the people of the municipality or local entity? If not, which is the method for the election?**

Local governments are democratically elected by the people of each local government area. However there is no entrenched constitutional protection for such democratic elections, and in the state of Victoria in the 1990s radical changes were made to local government, including the amalgamation of local areas, the appointment of manager/administrators and the suspension of elections in some areas for certain periods.

3. **Are local entities under federal or state control? If so, are these controls limitated to issues of legality or do they also cover issues of opportunity? Can municipalities or other local entities challenge federal or state law or other decisions, on the grounds that they violate their autonomy? Before which bodies or courts?**

Local government is under state control, such control extending to all aspects of local government. Local government entities could challenge state government executive decisions in the state courts on the grounds that they violate the level autonomy afforded to local government via the relevant state constitution or state legislation, but the state government can readily avoid such disputes simply by changing the rules that relate to local government. Because federal government does not have power to legislate with respect to local government (directly) and local government is a state matter, local governments could not challenge federal law or federal decisions on the grounds that they violate local government autonomy, but could potentially challenge the federal government on the grounds that it has legislated beyond its constitutional powers (for example if the federal parliament passed a law that indirectly affected the operation of local government, but which was not clearly enacted under a head of Commonwealth power).

4. **Is the design of the local government (kind of local entities, organization, powers, human resources, etc.) under federal or state power? What local subject matters or functions are allocated to the federation and the states? Can the federation establish direct bilateral relationships with municipalities or other local entities? Can the federation intervene upon their activities by exercising federal powers concerning a particular sector or through its spending power?**

The design of local government is under state power. State governments have the power to determine the composition, structure, powers and functions of local government. The federal government can and does establish direct relationships with local government, and has a National Office of Local Government (NOLG) within the federal Department of Transport and Regional Services. The NOLG is responsible for administration of the untied Financial Assistance Grants from federal to local government, and for the administration of grants funded under the Local Government Incentive Programme designed to encourage the contribution of local government to areas of federal policy priority. The federal government can also make specific purpose payments and provide direct programme funding to local government. Federal government funding for local government is partly paid directly to local government, and partly through the states. The federal government cannot intervene directly upon local government activities or statutory powers, but has considerable influence by virtue of its spending power. Local government also receives funding from the states.

5. **Are there "city-states" in your system? According to which provision? Is their regime equivalent to the states' one? Apart from these city-states, are there any municipalities with a particular autonomous regime? Which ones? Which is the basis for the recognition of this regime?**

No. There are local governments that represent large, urban populations (such as the Brisbane City Council in the capital city of the state of Queensland) and the Australian Capital Territory which was created for the purpose of housing the seat of the federal government in the city of Canberra, but there are no city-states.

6. **Can states create "intermediate" local entities between municipalities and states? Are there any intermediate local entities in your system? Do they exist only in some states or in the whole territory of the federation? Are states free to establish their territorial limits? What powers do they have? To what extent are they dependent on the states? What is the system for the election or appointment of the chiefs of their governmental bodies? Can the federation intervene in the organization, powers or financing of these intermediate local entities? How? For which purposes?**

The plenary powers of the states mean that they could create intermediate local entities between local governments and the states, however intermediate government is not a feature of the Australian system. Local governments do however vary enormously in geographic size and population, as well as revenue. Local governments also form partnerships amongst themselves known as ‘Regional Organisations of Councils’ (ROCs). ROCs are voluntary groups that collaborate on matters of common interest, and generally engage in activities such as research, regional strategies, resource sharing, advocacy for the region, and facilitating the development and implementation of programmes of central governments. Each state also has an association of local governments, formed by local governments themselves, and the peak body for local government in Australia is the Australian Local Government Association, which has a representative on the Council of Australian Governments and other intergovernmental (federal-state) Ministerial Councils. The Australian Local Government Association is a federation of the local government associations in each of the six states and two mainland territories and seeks to represent the

interests of local government in dealings with the Commonwealth government and national forums. Each state government has a Department and a Minister responsible for local government.

7. **How are local powers determined? Can local governments provide services or perform federal or state powers? If so, which legal mechanisms coordinate their collaboration (delegation, assignment, etc.)? In which subject matters can this form of collaboration exist? Are local governments obliged to cooperate? Do they have a right to receive financial funds from the federation or the state that asks for the collaboration?**

Local powers are determined by state governments, usually in legislation enacted pursuant to recognition of local government in state constitutions. There are significant differences in the roles and responsibilities of councils in different states, but some functions and services that are commonly provided by local government include:'-construction and maintenance of key infrastructure including roads and bridges, drainage, waste management; -regulation of local communities (for example, inspection, licensing and regulation of food premises and animal noise control); -environmental management and planning; and-provision of services such as care of the elderly and recreational facilities.'[xii]

Local governments provide a number of services and exercise powers vested in them by state governments. Although local governments do not perform or exercise federal powers, they can contribute to the implementation of federal policies in certain areas, and may be encouraged to do so through funding incentives and in intergovernmental forums. All levels of government cooperate and collaborate on some matters through the various departments, councils and associations mentioned above.

8. **Do local governments have normative or regulatory power? Which other general powers do they have? What powers are lacking?**

Local governments have power to make local laws with respect to any function or power vested in local government by the relevant state government, and the power to raise revenue, usually through service charges for waste disposal and the like, through license or permit fees, and through fines for infringement of local laws (such as parking fines). Local government laws cannot be inconsistent with any state or federal Act or regulation. State legislation prescribes procedures for making local government laws, sets out the parameters of what local laws may do and cover, and usually provides a mechanism for disputing the validity of a local law.

VII. INTERGOVERNMENTAL RELATIONS

1. **Does a principle of collaboration or constitutional loyalty among the different political and administrative authorities exist in your federation? If so, where is recognized (constitutional law, convention)? Which is its content and what consequences follow from this principle? To what extent is there a hierarchy among the different administrations?**

No formal principle of collaboration or constitutional loyalty exists among the different political and administrative authorities in the Australian federation, except in so far as constitutional government and adherence to constitutional principles is ingrained, and the Commonwealth Constitution provides for some degree of intergovernmental cooperation.[xiii]

If Australia is viewed as a dual federation with two spheres of government, each with a complete set of governing institutions and corresponding allocations of power, it could be said to be non-hierarchical. Certainly in areas in which the states have exclusive legislative power the states might not be viewed as being lower in the hierarchy of government than the Commonwealth. However when one takes into account the supremacy of Commonwealth legislation in cases of inconsistency; the broad interpretation of

Commonwealth powers that has resulted in increasing centralisation, and the ability of the Commonwealth to exert influence over exclusive state areas through conditional revenue grants, the Australian federation does appear to comprise a hierarchy with the Commonwealth government at the apex.

2. **Does the Federal Constitution establish a system of intergovernmental relations between the federation and the states? If so, through which mechanisms? Are these mechanisms established in other constitutional or legislative provisions? To what extent are institutional practices or conventions important on this matter? Generally, which is the importance of intergovernmental relations for the dynamics of the system? To what extent do they allow to make more flexible the formal allocation of powers?**

The use of state prisons for federal prisoners (s.120), the ability of states to refer legislative powers to the Commonwealth (s.51(xxxvii)), vesting of federal jurisdiction in state courts, and provisions for intergovernmental financial arrangements (ss.94, 96, 105 and 105A) are examples of provisions for cooperative federalism within the Constitution.

While there is a vast network of intergovernmental ministerial councils, with one partial exception, none is specifically authorised by the Constitution. The exception is the Australian Loan Council, through which government borrowing is coordinated in Australia and which is established by an intergovernmental agreement authorised by section 105A of the Commonwealth Constitution.

Other intergovernmental ministerial councils are established by legislation, by exchange of letters at the Heads of Government level, or by informal agreement between levels of government. Many of these Ministerial Councils were established or consolidated in the early 1990s as part of the federal Labor government's "New Federalism". The Commonwealth-State Relations Secretariat within the Department of Prime Minister and Cabinet publishes a Compendium of Commonwealth-State Ministerial Councils which provides basic information on these intergovernmental bodies such as their objectives, meeting schedules and contact details. Parallel to the network of Ministerial Councils there is a system of intergovernmental senior officials' meetings, where a great deal of detailed work on intergovernmental schemes and negotiations is carried out.

Ministerial councils vary in their effectiveness (for reasons including politics and frequency or infrequency of meetings) but are generally an important mechanism for intergovernmental dialogue and cooperation, and a means by which to involve all levels of government in the formation of national policy in appropriate areas. Ministerial councils have often proven to be an effective mechanism for negotiation and collaboration between levels of government on matters including the effective exercise of concurrent powers, and reference of powers by the states to enable consistent national legislative schemes in some areas. However improved intergovernmental relations have not removed the tensions caused by quite severe vertical fiscal imbalance. There are also concerns about lack of transparency of intergovernmental forums and lack of government accountability for intergovernmental policies and decisions. See the answer in part X, question 3, below for more detail.

New Zealand also participates in federal-state ministerial councils and Australian intergovernmental agreements, almost as if it were another state of Australia.[xiv]

3. **Are there organisms to coordinate the horizontal collaboration among states? Does the federation participate in these organisms? Is an authorization required for their creation? How the states are represented? Are they important for the system?**

There is no constitutional prohibition on compacts between states. While vertical cooperation is the norm, agreements are sometimes made between the states alone, without giving rise to particular problems.

One example of horizontal cooperation among the states is the establishment of the Australian Mutual Recognition Scheme, which enabled the mobility of labour between states and removed non-tariff barriers to trade in goods across state borders, thus giving effect to the federal idea of a truly national market for goods and services. Mutual recognition involved horizontal cooperation between states, but was ultimately agreed to and detailed in a vertical intergovernmental body, the Special Premiers' Conference (now known as the Council of Australian Governments or COAG) which includes the Prime Minister and a representative of local governments as well as state Premiers, and implemented through both state and Commonwealth legislation.

4. **Which role do local governments play in the system of intergovernmental relations? In which organisms of collaboration do they participate?**

Local governments are represented in intergovernmental forums, the most important of which are the ministerial councils. Local government is represented in ministerial councils by the President of the Australian Local Government Association. The most significant councils for local government are the Council of Australian Governments, which comprises the heads of federal, state and territory governments and the ALGA representative; and the Local Government and Planning Ministers' Council which comprises a representative of the federal government, each state and territory minister responsible for local government, and the ALGA representative. The ALGA is also fully represented on the Australian Transport Council, the Online Council, and the Regional Development Council. In most other ministerial councils the ALGA has observer status only.

The Broad Protocols for the Operation of Ministerial Councils, determined by COAG, provide that 'except for matters where membership is explicitly set out by statute or agreement, it is up to individual Ministerial Councils to decide whether the Australian Local Government Association should be a member or attend proceedings'. Principle 1 of the General Principles for the Operation of Ministerial Councils states 'Membership by local government and New Zealand… should not intrude on the central functions of the development and coordination of policy, problem-solving and joint action by jurisdictions within the Federation. However, such membership may often be desirable to facilitate consultation and national policy development'.

5. **Do different governments or administrations usually participate in organisms or entities with legal entity (public or private: consortiums, associations, foundations, private societies, etc.)? Is this joint collaboration usual for developing public works, managing services, or financing of activities? Which legal regime is applicable?**

Not extensively. Most public work, service management and financing of government activities is coordinated through government departments and intergovernmental meetings. There are some 'Government Business Enterprises' and other semi-government authorities and public/private consortiums established for purposes such as major infrastructure projects or the provision of public utilities, but these tend to involve either state or federal government, and rarely if ever involve joint collaboration between levels of government.

VIII.TAXATION

1. **What is the level of state autonomy regarding incomes? Can they establish taxes? If so, are there any constraints? In other words, can they make use of the same kind of taxes (official prices, rates, extra charges, etc.) that the federation establishes? Can they use both direct and indirect taxation? Can they establish taxes over subject matters already charged by the federation?**

In theory states have power to impose any tax, other than duties of customs and excise which is an exclusive Commonwealth power under section 90 of the Constitution. The High Court has interpreted duties of customs and excise to include any tax on goods – which prevents states not only from taxing goods, but also from imposing any taxes on natural resources within their own territory or in the offshore areas adjacent to the state, to the extent to which such taxes can be characterised as imposed on the production of the resource. On the other hand, state ownership of these resources within their own borders and within the three mile territorial sea, entitles them to collect royalties in relation to their use. States and therefore, local government cannot tax the Commonwealth at all, although the Commonwealth can and does tax the states (but may not tax so as to discriminate between states or parts of states or give preference to states or parts of states).

Although general taxation authority is allocated to both the states and the Commonwealth, in practice taxation has become centralised through political action. States have the power to impose income tax, but effectively cannot do so because the Commonwealth has not left the states any tax room. The Commonwealth assumed a monopoly of income taxation during World War II, through an interlocking series of Acts, and has retained the monopoly ever since.

In the late 1990s, the states agreed to forego additional state taxes, in return for Commonwealth agreement to allocate to them the proceeds of the goods and services tax (GST). The states still impose some taxes, however, including property taxes, gambling taxes, payroll taxes and stamp duties.

2. Can states ask for credit or issue public debit within the state or federation without the authorization of the federation? Can they do this abroad? If the federation has the power to authorize these operations, which are the legal basis that regulate this?

The original constitutional design left both the Commonwealth and the states with independent borrowing authority. Even at the time of federation, however, there was concern about the level of debts incurred during the colonial period in the provision of costly infrastructure, such as railways. From the outset, there was a question whether the Commonwealth should take over state debt and whether, as a quid pro quo, state borrowing should be subject to some form of national control. Agreement to this effect was finally reached in 1927, when the Commonwealth Constitution was amended to authorise agreements between the Commonwealth and the states with respect to the debts of the states.

The first Agreement established an intergovernmental ministerial council, the Loan Council, to coordinate the borrowing of all Australian governments. It provided that, during the currency of the agreement, the Commonwealth would borrow monies for the states, in accordance with Loan Council decisions. With some modifications, this scheme lasted for more than sixty years, although it became increasingly less effective as states developed new methods of financing capital works and semi governmental authorities that fell outside the definition of states for the purposes of the agreement pursued their own loan raisings. A major revision of the Financial Agreement now has restored the capacity of each government to borrow on its own behalf, but requires borrowing programs to be fully disclosed and subject to Loan Council surveillance. This mechanism, coupled with the political discipline imposed by the ratings agencies at a time when fiscal restraint on the part of government is fashionable, so far has proved effective in controlling borrowing levels. The Loan Council comprises the Commonwealth Treasurer as Chairman, and State and Territory Treasurers.

According to the Commonwealth's Budget Paper No.3 (2002-2003), 'the present Loan Council arrangements operate on a voluntary basis and emphasise transparency of public sector financing rather than adherence to strict borrowing limits'. Therefore, states can now borrow on their own behalf, both within the federation and abroad, but must disclose their debts to the Loan Council. Since the 1994-5 financial agreement the States' ability to issue securities in their own names has been recognised.

3. To what extent are state incomes important in contrast to the transfers that the states receive from the federation? How are these transfers regulated?

Australia is marked by extreme vertical fiscal imbalance. That is, the states' expenditure responsibilities far outweigh the revenue they raise through state taxes. Transfers from the federal government to the states (enabled by section 96 of the Constitution) are therefore extremely important, and fall into a number of different categories.

Since the new Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations that was completed in June 1999, one of the most important transfers from the Commonwealth to the states is revenue from the goods and services tax (GST). The states receive all GST revenue, and they also meet the Commonwealth's GST collection costs. The GST rate and the GST base cannot be changed without the agreement of all state and territory governments as well as the Commonwealth. Because of these arrangements, there is some discussion about whether the GST should properly be categorised as a federal tax or a state tax. If it is regarded for all intents and purposes as a state tax, then it can be said to have reduced vertical fiscal imbalance somewhat.

GST revenue is distributed amongst the states on the basis of Horizontal Fiscal Equalisation principles – for equity reasons – but each state has a Guaranteed Minimum Amount (GMA) for the transition period. The GMA includes a component that compensates the states for revenue forgone as a result of the state taxes that were abolished as part of the GST deal. If, on the basis of HFE distribution, the GST given to any state falls below its GMA, the Commonwealth makes up that shortfall with a general revenue assistance payment known as Budget Balancing Assistance (BBA). Both GST revenue allocations and BBA are untied grants – they are not required to spent in a specific way. 'A State or Territory's share of the pool will be based on its population share, adjusted by a relativity factor which embodies per capita financial needs based on recommendations of the Commonwealth Grants Commission'.[xv]

The Commonwealth Grants Commission (CGC) is an independent statutory body that assesses the relative positions of states in accordance with its terms of reference. The Commission's advice is based on the principle of fiscal equalisation which states that 'each State should be given the capacity to provide the average standard of State-type public services, assuming it does so at an average level of operational efficiency and makes an average effort to raise revenue from its own sources'.[xvi]

In addition to GST revenue and other untied general revenue assistance, states also receive Specific Purpose Payments (SPPs) from the Commonwealth, which, as the name suggests, are tied to a specific purpose. SPPs, like general revenue grants, are also made pursuant to section 96 of the Constitution, and can be divided into three categories: payments 'to' the states, payments 'through' the states (to be passed on to local government or other bodies), and SPPs made direct to local government. SPPs have conditions attached to them by the federal government, and are often referred to as 'tied' grants. SPPs are negotiated between the Commonwealth and the states, and set out in agreements. There is an HFE component in the calculation of some SPPs.

Following a decision of the High Court in 1996 that invalidated a number of state taxes, the Commonwealth introduced 'mirror' taxes to ensure the states would not be disadvantaged by the decision. These taxes are collected by the states on behalf of the Commonwealth, and although they are credited to the Commonwealth, they are automatically passed back to the states.

4. Do states participate in federal taxes? If so, in which taxes and to what extent do they participate? When states participate in federal taxes, do they have any kind of normative power (for instance, power to fix deductions, exemptions, discounts, etc.)?

Yes. See answer 3 above. In cases such as the federal government imposing GST which is then distributed entirely to the states, no state has a unilateral power to determine rules associated with the tax, but they may have input through the relevant intergovernmental forum, and the essential elements of the tax, such as rate and base, cannot be changed by the federal government without the agreement of the states.

5. Do states receive direct transfers or funds from the federation? What criteria are used to determine the amount of these transfers? Do states participate in the determination of the amount of transfers? If so, through which mechanisms?

Yes. See answer to 3 above. States participate in determining the terms of reference for the Commonwealth Grants Commission, and participate in discussions and negotiations about transfers in Ministerial Councils – in particular, the Ministerial Council for Commonwealth-State Financial Relations – as well as intergovernmental meetings of senior government officials. States also participate in the review every 5 years of the CGC methodology for determining the relative position of the states for the purpose of HFE. The Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations is the result of Commonwealth consultation with and negotiation with the states, as are other earlier financial agreements.

6. Can the federation intervene in what the transferred funds will be allocated to? If so, in which subject matters? To what extent? Generically or specifically? Can the federation determine their management or procedure? In general, how has the federal spending power determined state powers? What is its percentage with regard to state incomes? How does this system work regarding other federal and state transfers to local governments?

Yes, as mentioned in answer to question 3, above, a large proportion of the funds transferred from the federal government to the states is in the form of SPPs, which are tied to a specific purpose. SPPs are usually subject to conditions that reflect the policy objectives of the federal government, or national policy objectives agreed between the federal government and the states. 'Such conditions may include:
-general policy requirements on States (for example, the provision of free public hospital access for Medicare patients as a condition of receiving Health Care Grants);
-a requirement that a payment be expended for a specific purpose (for example, housing assistance for homeless people);
-meeting broad Commonwealth-State national objectives covering principles and programme delivery mechanisms (for example, the Commonwealth-State Housing Agreement); and
-conditions on joint expenditure programmes, including project approval, matching funding arrangements and performance information.'[xvii]
Other examples of conditional grants, or SPPs, include payments to states for participation in the Cooperative National Censorship Scheme, and funds for essential vaccines for Immunisation under the Public Health Outcome Funding Agreements.

Section 96 of the Constitution gives the Commonwealth the power to grant financial assistance to the states "on such terms and conditions as the Parliament thinks fit". This provision has been broadly interpreted by the High Court, and as such there are virtually no limits on the conditions that may be attached to grants of financial assistance, beyond the requirements of the Constitution. In practice the purposes of SPPs, the detail of the conditions attached and the proportion of tied to untied funding vary from time to time.[xviii] It can be said that, overall, the Commonwealth's ability to make payments to the states for specific purposes and on certain conditions, combined with the limited tax base of the states and their consequent reliance on Commonwealth funding, has enabled the Commonwealth to exert significant influence over areas that would otherwise be areas of exclusive state power and responsibility. States are therefore somewhat constrained in their ability to formulate their own policy priorities in important state

areas such as health and education. Funding from the federal government (including GST revenue) makes up approximately 45% of the states' income.

For information of local government funding refer to Part VI, question 4, above.

7. What follows from the principle of "tax solidarity" among states? In other words, what kind of economic contributions do the states make to the federation? How does this system work, on the basis of which criteria?

The states receive funding from the Commonwealth according to principles of fiscal equalisation – see answer to 3 above. In assessing relativities and applying HFE principles, the CGC only takes into account factors that are beyond a state's control. The Commonwealth's Budget Paper No.3 (2002-2003) states that 'HFE gives practical effect to Australians' concerns about equity and substance to the Federation by giving each State a more equal capacity to provide their citizens with access to essential services (such as health and education) at a standard that is not lower than other States'.

8. Can the federation unilaterally compensate the debts that states owe to the federation (for example, reducing federal transfers)? If so, in which fields do this power exist? Do states have any safeguards (right of audience, judicial actions, etc.)?

States tend to borrow funds from the financial markets, not from the federal government, and so this issue does not really arise in the Australian context. The federal government can reduce federal grants to the states for political reasons (for example if the conditions attached to specific purpose payments are not met) and makes complicated adjustments and deductions in calculating the revenue to be granted to each state, but this is not related to state debt.

9. Who is in charge of the management, liquidation and collection of taxes? Can local governments collect taxes on behalf or by order of the federation or the state where they are located? To what extent and in which fields is this method used? To what extent is it relevant?

Taxes are imposed, collected and redistributed by all levels of government. Generally speaking, local governments determine, impose and collect their own charges and rates on certain services and utilities, and their revenue is greatly supplemented by funding from state and federal governments. State governments generally collect state taxes through their own government departments coordinated by State Revenue Offices, and receive significant supplementary funding from the Commonwealth. The federal government generally collects federal taxes through the Australian Taxation Office. Some exceptions to this straightforward arrangement are mentioned in answer to question 3, above.

10. What is the percentage of public spending in which each level of government –federal, state and local- incurs? How would these percentages change excluding the spending on defense, education, health, pensions and administration of justice? How many civil servants or administrative officials have each level of territorial government? Which are the figures excluding the above-mentioned fields?

Total tax revenue collected in Australia in 2000-2001 was $213,766 million, representing 31.8% of Australia's GDP. Commonwealth government taxation revenue, including taxes received from other levels of government and Commonwealth public corporations, comprised 81.9% of taxation revenue from all levels of government. State and local government taxation revenue, including taxes received from other levels of government and taxes on public corporations, comprised 18.1% of total taxation revenue. State and local governments are responsible for approximately 70% of total government spending, and the Commonwealth for approximately 30%. State and local governments (combined) therefore rely on the

Commonwealth for approximately 45% of their income (the percentage is higher for local government). Local governments combined spend around 14 billion dollars each year.

Total public sector employment in the December quarter 2002, including those employed in public transport, public education (teachers) and public health, was 1,368,000. Of that total, approximately 445,00 are employed in government administration (all levels) and 23,000 in defence. Total federal public sector employment is 241,800. Total state public sector employment (including teachers, nurses in public hospitals etc) is 956,200 people. Local Governments employ approximately 170,000 people.[xix]

11. To what extent are the relationships between levels of governance regarding the tax system satisfactory? Which elements are more satisfactory? Which elements are less satisfactory? At present, is there any trend that should be noticed?

Relationships between levels of governance regarding the tax system seem to function adequately, although they are unsatisfactory in a number of respects. If one favours decentralisation over centralisation, then the level of policy influence the federal government is able to exert in state matters via conditional grants that are necessitated by vertical fiscal imbalance, is unsatisfactory. Regardless of one's preference on the degree of centralisation, it is unsatisfactory in terms of democratic accountability for such a level of fiscal imbalance and redistribution of revenue to occur, that there is a large discrepancy between taxes raised and revenue spending decisions by each level of government. An emerging trend seems to be greater cooperation between state and federal governments, and some effort to redress the problem of vertical fiscal imbalance, as indicated by the recent GST arrangements. Those who are critical of federal influence through SPPs might however also point to the fact that SPPs relative to untied assistance as a proportion of federal funding to the states has remained high (around 40%).

12. Can the federation establish the maximum or specified levels of state indebtedness or budgetary deficit? Can the federation establish the maximum wage of public officials (federal, state, local, etc.)?

Since changes to the Financial Agreement and Loan Council arrangements, the federal government can no longer impose limits on state borrowing or indebtedness, but rather all levels of government disclose relevant information to the Loan Council and subject their position to the scrutiny of the Loan Council on a voluntary basis. Levels of state indebtedness are effectively kept in check by the ratings agencies on which the states rely in securing loans. See further, answer to question 2, above.

The federal government could establish the maximum wage for federal public officials, but would have difficulty establishing the maximum wage of public officials as state and local government levels, except by using its financial dominance to negotiate such an outcome. Although the Commonwealth power under section 51(xxxv) has been interpreted to give the federal government reasonably broad powers in industrial relations, and the High Court has said that Commonwealth legislation can apply to state governments, it is unlikely that legislation that purported to set an absolute maximum wage for all state public servants would be valid, as the court has also said that very senior state public servants (and some others) are an exception to this notion and cannot be subject to conditions imposed by the Commonwealth.

State governments could set maximum wages for local government officials, but the federal government could not.

13. Are there coordination mechanisms among the different levels of governance? If so, are there institutions with a political nature (for instance, an assembly of territorial representation – Senate-, governmental institutions -councils of prime ministers-, etc.)? Are there mechanisms of technical coordination? (i.e., deductions in quotes of subcentral taxes in central taxes, etc.).

Yes, there are coordination mechanisms among different levels of governance. The Ministerial Council on Commonwealth-State Financial Relations, the Loan Council, the Commonwealth Grants Commission (which works closely with state treasuries in gathering information) and coordination between the Australian Taxation Office and the State Revenue Offices are the main examples. Intergovernmental meetings of senior officials and ongoing communication and coordination between the Federal Treasury and state treasury and finance departments provide another level of such mechanisms. Details provided in earlier answers above.

IX. LANGUAGES

Not applicable.

X. GLOBAL ASSESSMENT AND ADDITIONAL COMMENTS

1. At present, how is the level of political decentralization generally assessed? What is your assessment?

The Australian federation is at present relatively highly centralised. Although the states do have significant areas of responsibility, the existence of vertical fiscal imbalance and the practice of conditional grants enable the federal government to exert considerable influence over state policy and service delivery. Decisions of the High Court in interpreting the Constitution have increased centralisation.

2. What are the main historical claims by states? To what extent are they satisfied?

The main historical claims by states are for greater autonomy, for more consultation on decisions and policies made by the Commonwealth, for reform of the Senate to achieve greater responsiveness of the Senate to state concerns, and for the elimination or reduction of vertical fiscal imbalance by giving states a greater share of the tax base, or via a more appropriate division of legislative powers or both. The desire for greater consultation has been largely met by the development of a system of ministerial councils, although these meet infrequently. Recent changes to Commonwealth-State financial relations have made some concessions to states, and gone some way to reducing vertical fiscal imbalance. But overall, the claims of states have mostly not been satisfied.

3. What are the risks and main opportunities for the development and consolidation of the system of political decentralization?

Increasing intergovernmental cooperation constitutes both a risk and an opportunity for the Australian federation and the system of decentralisation. On the one hand, increasing consultation between levels of government and cooperative agreements achieved through ministerial councils appear to make federalism work more smoothly, and to restore some power and influence to the states. However the move from consensus decision-making to majority voting in these intergovernmental forums, as well as the lack of accountability and transparency in intergovernmental arrangements, are risks or threats to effective decentralised government. 'Grants from one sphere of government to another break the nexus between taxing and spending on which government responsibility to parliament in part depends and which in any event enhances accountability. The role of Ministerial Councils in committing governments and parliament to action and in on-going policy-making pursuant to intergovernmental schemes detracts further from the accountability of governments to parliaments and voters in a way that has been termed executive federalism… [T]here has been no general move to tailor intergovernmental schemes in a way that makes them as consistent as possible with traditional constitutional principles'.[xx]

One risk to the development of the system of political decentralisation is the ongoing trend towards enlargement of Commonwealth powers, and the continuation of the Commonwealth's financial power and the influence it can therefore exert over the states. However a countervailing opportunity might arise from increasing globalisation and the effect that it has on weakening the power and autonomy of the federal government, thereby enhancing the relative position of the states.

The Australian Labor Party, which was previously a major threat to federalism with its centralist policy of abolishing the states, is now reconciled with federalism, and so there remains no major domestic threat to federalism's ongoing existence.[xxi]

According to Brian Galligan, 'the main challenges for Australia in the next century are likely to come from global rather than domestic sources'.[xxii]

4. What are the main trends of development? Which is the likelihood of them coming true?

The growth of international law, and its increasing acceptance and significance, is one trend that is having a discernible effect on Australian federalism. The power of the federal executive government to enter treaties on behalf of Australia (thereby considerably expanding its own legislative powers under section 51(xxix)) and the range of international institutions and laws to which we are now subject (which in a sense, and conversely, diminishes the sovereign power of the federal government) is significant. International law has had an impact on Australian domestic law in a number of ways, and states have become included to an extent in matters of international treaty making, via the Treaties Council.

In relation to globalisation more generally, Australian expert Brian Galligan believes that the impact of globalisation on Australian federalism has been 'partly to reinforce centralist tendencies, partly to stimulate cooperative federalist arrangements and the reform of intergovernmental relations, and partly to stimulate economic competitiveness between states'.[xxiii] Galligan believes one important effect of globalisation has been the reduction in the ability of the federal government to effectively control the domestic economy. He predicts that 'fiscal centralism is likely to remain the hallmark of Australian federalism, but with increasing devolution of revenues and program management to the states'.[xxiv]

There is now widespread acceptance of federalism, and it has generally proven to be robust, flexible and effective. This is likely to continue to be the case, even as globalisation and international law bring about changes in the Australian federation.

5. Generally, would you say that the system is becoming more centralized, decentralized or that it is in a relative equilibrium?

The Australian federation has become increasingly centralised over the first 100 years, but appears at the moment to have reached some degree of equilibrium. As set out above, there are forces pulling in both directions at the moment, that tend to balance each other out. 'While the Commonwealth is reluctant to surrender its dominant role, the states retain significant economic jurisdiction and, therefore, are essential partners in intergovernmental policy and management'.[xxv] Recent developments in relation to GST revenue and increasing involvement of the states in national policy making through intergovernmental cooperation might perhaps tip the balance in the direction of a slight diminution in centralisation.

Whether this equilibrium or slight diminution in centralisation is maintained depends in part on the personalities and priorities of successive federal leaders. Bob Hawke, who was Labor Prime Minister from 1983 to 1991, made efforts to increase the effectiveness of federal arrangements and streamline intergovernmental arrangements. His successor Keating (1991-1996) was unashamedly centralist in his

approach to intergovernmental relations. Australia's current Prime Minister, John Howard, is working within the established framework of ministerial councils and entered into the GST deal with the states, but otherwise has not devoted much attention to federalism. It will also depend to some degree on forces that are beyond the control of the Australia federal and state governments, such as the various effects of globalisation.

6. Would you like to add any additional comment about the political decentralization of the federation that was not mentioned in the Questionnaire? Would you like to make any suggestion about the structure or the contents of it?

No.

7. Would you mind listing particularly remarkable literature -on the basis its prestige, depth, clarity, approach-, which allows to achieve a better knowledge of your federal system?

Recommended relevant literature:

Books:

Brian Galligan, *A Federal Republic: Australia's Constitutional System of Government*, Cambridge University Press 1995.

Jeremy Moon and Campbell Sharman (eds), *Australian Politics and Government: The Commonwealth, the states and the territories*, Cambridge University Press 2003.

Martin Painter, Collaborative Federalism, Cambridge University Press 2001.

Cheryl Saunders, 'Constitutional and Legal Aspects of Intergovernmental Relations in Australia' in Galligan, Hughes and Wlash (eds), *Intergovernmental Relations and Public Policy*, Allen & Unwin 1991.

Greg Craven (ed), *Australian Federation: Towards the Second Century*, Melbourne University Press 1992.

Leslie Zines, *The High Court and the Constitution*, (4th edition) Butterworths 1997.

Journal Articles:

Cheryl Saunders, 'Collaborative Federalism' (2002) 61 *Australian Journal of Public Administration* 69.

Brian Galligan, 'Australian Federalism: A Prospective Assessment' (2002) 32 *Publius: the Journal of Federalism* 147.

Cheryl Saunders, 'A New Direction for Intergovernmental Arrangements' (2001) 12 *Public Law Review* 274.

Cheryl Saunders, 'Federal Fiscal Reform and the GST' (2000) 11 *Public Law Review* 99.

Cheryl Saunders, 'Towards a Theory for Section 96' (1987) 16 *Melbourne University Law Review* 1.

Endnotes

[i] Brian Galligan, *A Federal Republic*, Cambridge University Press 1995, p 54.
[ii] See section 59, *Constitution Alteration (Establishment of a Republic) Bill* 1999 (Cth).
[iii] John Waugh, *The Rules*, Melbourne University Press 1996, p 20.
[iv] Ibid, 21.
[v] John Waugh, 'State Constitutions', in Blackshield, Coper and Williams (eds), *The Oxford Companion to the High Court of Australia*, Oxford University Press 2001.
[vi] Cheryl Saunders, 'Commonwealth-state relations' in Blackshield, Coper and Williams (eds), *The Oxford Companion to the High Court of Australia*, Oxford University Press 2001.
[vii] *Union Steamship Co v King* (1988) 166 CLR 1 at 14, quoted in J Goldsworthy, 'Powers' in Blackshield et al, ibid, 548.
[viii] See Hilary Charlesworth, 'International Law' in Blackshield et al, ibid, 348.
[ix] Ibid, 348-9.
[x] See further Brian Galligan, 'Australian Federalism: A Prospective Assessment', (2002) 32 *Publius – The Journal of Federalism* 147.
[xi] John Waugh, above n iii, 18.
[xii] *Local Government National Report 2000-2001*, National Office of Local Government, Chapter 2, p 8.
[xiii] Justice Deane in *R v Duncan; Ex parte Australian Iron & Steel* (1983) 158 CLR 535 suggested that cooperation was a 'positive objective of the Constitution'.
[xiv] See Galligan, above n x, 152.
[xv] Commonwealth of Australia, Budget Paper No.3 (2002-2003) Federal Financial Relations, p 18, available at Hwww.budget.gov.auH
[xvi] Commonwealth Grants Commission website: Hwww.cgc.gov.auH
[xvii] Budget Paper No.3, above n xv, Chapter 3 pp23-4. See also Appendix B.
[xviii] Cheryl Saunders, 'Fiscal Federalism – A General and Unholy Scramble', in Greg Craven (ed), *Australian Federation*, Melbourne University Press 1992.
[xix] Statistics obtained from the Australian Bureau of Statistics: Hwww.abs.gov.auH (catalogue number 6248.0) and the Australian Local Government Association: Hwww.alga.com.auH
[xx] Cheryl Saunders, 'Collaborative Federalism', (2002) 61 *Australian Journal of Public Administration* 69, at 73-74.
[xxi] See further Brian Galligan, above, n x.
[xxii] Ibid, 148.
[xxiii] Ibid, 149.
[xxiv] Ibid, 153.
[xxv] Ibid, 154.