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**FEDERALISM AND AUSTRALIAN
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ABSTRACT

The existence of states in a federal system is commonly seen as complicating the making of foreign policy. From the states' viewpoint, however, the increasing internationalisation of economic interchange and the growing number and range of international treaty commitments are seen as threatening state sovereignty. This paper looks, first, at the objectives of foreign policy and then at the objectives of federalism in Australia. It considers how the two sets of objectives conflict with or complement each other and the mechanisms used to manage their interaction.

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Stuart Harris

Introduction

De Tocqueville's view was that a nation '... that divided its sovereignty when faced by the great military monarchies of Europe would ... by that single act ... be abdicating its power, and perhaps its existence and name' (de Tocqueville 1945, p. 172).

Today he would probably add great economic powers to the list and not limit it to Europe. Nevertheless, that statement reflects a commonly accepted view of foreign policy as a key central power of any country and an essential attribute of sovereignty, with international law and international organisations being based upon unitary conceptions of a nation. Indeed, in Australia as elsewhere federalism is often discussed in terms of infringements on the sovereignty of the states or restrictions on the central government's powers.

The growth of global interdependence has meant increasing constraints on the ability of Australian governments to take independent action on matters previously seen as essentially domestic. Some of these constraints emerge from collaborative international arrangements to which Australia adheres more or less voluntarily. Others emerge from developments in the way markets, such as the capital and technology markets, or international actors, such as transnational corporations, have changed. Because interdependence emphasises the importance of coherence and cohesion of national action, both have increased the needs for policy coordination.

From one viewpoint, the existence of state governments in a federal system is judged to complicate the formulation and implementation of foreign policy in such a context in ways not experienced by unitary states. From another perspective, the growth of international involvement and the growing range of international treaty commitments that increases the Commonwealth's power over what the states regard as their domestic interests, is seen as potentially threatening to the sovereignty of the states.

In considering how foreign policy is affected by federalism the paper starts by asking why we have a foreign policy. It then looks at what objectives are normally seen as encompassed in the term federalism and how federalism is affected by international developments. It follows with an analysis of the changes in international and domestic circumstances most relevant to the relationship between the two. The paper then considers how the two sets of objectives conflict with or complement each other and in particular the mechanisms that exist and have been used to manage the interrelationships between them.

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Similarly, adherence to obligations accepted internationally may be circumscribed by other than state governments even now—such as local fire authorities' reluctance to move to halon substitutes in fire control equipment despite Australian commitments given, endorsed by the states, under the Montreal Protocol on Measures to Reduce Ozone Depleting Substances. Municipal or other forms of local governments would presumably have a wider range of powers and responsibilities in the absence of state governments.

More fundamentally, it raises the broader issue of what we mean by a federal system itself. Federalism can be argued to be not simply a question of which legislation or authority should prevail, or how far the central government's objectives (and legislation) should override those of the states. Federalism can be seen as a system of political interdependence in which responsibilities are shared and outcomes are negotiated. Some, indeed, from Lord Acton on, have pointed to the strong links between federalism and democratic processes. Although this tends to be in terms of protecting local cultural or ethnic diversity, federalism in Australia is less about these objectives, or about political nation building, than an expression of the physical and social separation of populations, and a means by which regional interests are represented and institutionalised, seeking more direct involvement in decisions, achieving more rapid responses to regional questions and pursuing regional community aspirations against the pressures of central governments or the centres of economic power in Southeast Australia

A strong view of this, sometimes termed 'the Leviathan hypothesis' is that, as Walsh has put it 'one of the important features of federal constitutions is their role in constraining the ability of governments to use in an exploitative way the coercive powers that are necessarily given them' (1989, p. 219).

Certainly, what policies can be pursued and how they are pursued depends upon community support, or at least lack of community opposition. To a degree at least, states reflect legitimate community interests in the issues which ought to have a voice in decision-making.

Changes in the relationships

Changes are taking place in the underlying factors affecting relations between the states and the Commonwealth government in a variety of ways. These include the legal, economic and political aspects of federal relationships.

There have been important changes in legal interpretations of the constitutional position of the Commonwealth but since these have been dealt with extensively in the literature (Burmester 1989; Ravenhill 1991; Craven 1992) there is little I can or would want to add here.

In summary, three successive legal decisions—those on the Seas and Submerged Lands (1975), Koowarta (1982) and the Franklin Dam (1983) cases—have strengthened the Commonwealth government's constitutional position with respect to foreign policy-making and implementation.

An important factor associated with this development, however, was a strong political response. This emerged particularly from the result of the Franklin Dam case. The dam

the Commonwealth has the power, basically untrammelled, to speak for Australia and to deal and negotiate with other international actors (Burmester 1989, pp. 199–204).

The implementation for foreign policy commitments domestically is the major area of sensitivity in the Commonwealth–state relationship. It is the potential power over domestic issues given to the Commonwealth by the treaty-making power, and the rapidly expanding range of issues seemingly capable of falling within processes of international treaty-making, that are seen by the states as threatening to the existing federal system.

In the 1970s, resource issues tended to be central to state–Commonwealth disputes related to foreign policy, notably over export controls and controls on foreign investment, resource security and taxation (Harris 1985, pp. 70–2; Ravenhill 1991, p. 77ff). In the 1980s, disputes have tended to arise in the environmental field where the Commonwealth in recent years has sought to establish its environmental leadership credentials.

The Commonwealth maintains export controls on minerals sands to give it a say on environmental protection of sand mining, and has threatened to use export controls on woodchips for similar purposes. Its use of the World Heritage Convention has been particularly contentious with the states, not just with respect to the Franklin Dam but with the World Heritage listing of Queensland tropical rainforest, which the Queensland government tried unsuccessfully to dispute directly with UNESCO.

That environmental groups have also directed their attention increasingly at the Commonwealth level, recognising the latent powers there, has involved the Commonwealth in various state level resource development issues. This has brought it at times into sharp conflict with the state government affected. On the other hand, industry for its part often sees the states as an alternative way to press its case with the Commonwealth.

The foreign policy of Australia, like that of other countries, has been radically altered by the development of international agreements or understandings on a wide range of relatively new issues in addition to the environment. Growing interdependence and internationalisation of world markets has increased the difficulty (or the cost) for any nation of determining its own economic policy. Now few domestic policy issues have no foreign policy implications and do not lend themselves to some form or other of international agreement—health, education, Aborigines, social services, energy supplies, uranium and nuclear issues, food, technology transfer, international standards, ocean resources human rights, criminal law (hijacking, terrorism) and private law (international contracts, service of process abroad).

A question for the Australian government, as for central governments of other federal states in accepting international commitments, is the extent of their dependence upon the states for their implementation. Although in principle, the Commonwealth can use its legislative power to override state executive action if it wishes to do so, usually it will do so only if it judges state actions or lack of actions as significantly prejudicial to its foreign policy. Nevertheless, at times it has felt the need to legislate itself, as in the case of the domestic legislation supporting the South Pacific Nuclear Free Zone.

respect to foreign policy-making, changes in the international economy have important effects on state federal relationships. The global interlocking of economies and, to a degree, societies is leading to a diminished capacity in some contexts of state economic and political interest.

Given the growing influence of global forces on issues of interest to state governments, increased interest in the policies that relate to state interests should be expected. Whether it means that they have to be directly involved is a separate question.

Something close to a federal clause in the GATT was part of the overall balance that was accepted by all parties to the GATT in accepting its original formulation. In the Uruguay Round, the EC—partly as a tactical response to the pressure it is under largely from the federal states of the US, Canada and Australia—has argued that an imbalance exists between the obligations of federal and unitary states because federal states are only obliged to take ‘reasonable measures’ to achieve compliance by federal subunits. It wants this provision tightened despite, or perhaps because of, issues related to central authority in its own system, which includes federal governments at member state level.

As well as the strengthened constitutional position of the Commonwealth government with respect to foreign policy-making, changes in the international economy have themselves affected state federal relationships. The global interlocking of economies and, to a degree, societies is leading to a diminished capacity in some contexts of state economic political interest. Given the growing influence of global forces on issues of interest to the state governments, increased interest in the policies that relate to state interests should be expected. Whether it means that they have to be directly involved is a separate question.

The increasingly blurred distinction between domestic and international issues has, together with the growing concern for public participation, brought the states greater potential for involvement. Yet this has only been exercised in a limited way in practice, and probably can only be so exercised. In the case of trade, for example, the role of the states can be helpful but is normally something that has limited scope for individual state action internationally, since the gain from an individual state’s market opening and trade promotion effort might be reaped by other states. Nevertheless, the inaugural national trade strategy meeting of Commonwealth, State and Territory ministers held in November 1991 included trade as a major part of the effort to be implemented, although the primary emphasis seemed to be on investment.

In the case of investment, where states are able to offer competitive differences, and where the Commonwealth has some difficulties in going beyond broad nationwide boosting, state involvement is essential. Without individual state governments delineating clearly the conditions they offer to, or conditions they impose on, investors or producers in specific terms in their states, nationwide Commonwealth boosting may have little impact.

Finally, a further change is that, whether because of the effect of the loss of apparent control of policy that international interdependence implies, or simply as an evolution of democratic processes, there is a concern by the public to be more effectively informed and

basis, however, means that, unlike some other federal systems, the development of a limited international competence in constituent units arising from agreements concerned with cross border or related matters has not been developed.

Professional, commercial, academic and cultural ties by state government linked bodies, including sister state relationships, although often not of major substance, are nevertheless numerous. That not all the constituent diplomacy in Australia's case, however, is at the state government level is shown by the extensive development of sister city relationships, usually with comparable municipal authorities in Asian countries, particularly Japan and China.

To some extent there was an expansion in state governmental activity overseas in the 1980s in these and other fields. How much this was a response to global interdependence is less clear. The history of state representation overseas has been mixed, with a variety of causal factors having influence from time to time, ranging from clear cut commercial or legal objectives to the maintenance of offices as a means to reward (or punish) state politicians and provide convenience for visitors. Commercial reasons, however, have generally and increasingly predominated.

Important in the resurgence of interest in the 1980s was the entrepreneurial push of state labour governments in the industrial policy and export promotion field. Western Australia and Victoria in particular, but not alone, created industrial development agencies which saw a role for themselves internationally. These were generally less concerned with traditional relationships—linked to overseas posts in London—than to newer areas such as China and Japan, reflecting changing patterns of trade and, in Japan's case, investment.

Such areas were seen as having economic potential for the state involved and to require government to government links to facilitate economic exchanges. They also reflected a desire to parallel broader Commonwealth strategies to go beyond responding to foreign investment requests by seeking to attract overseas capital and technology. A particular interest was to attract foreign investment for resource development as well as to establish government to government links relevant to resource development and marketing. Consequently, local industry often saw benefit in state government activity of this kind.

The returns from these efforts have probably been limited although the, in some cases, thundering, failure of these enterprises in other respects has dwarfed consideration of the financial costs and benefits of their constituent diplomacy. It was not apparent, however, that if sensibly done these efforts need be contrary to the pursuit of the national interest—indeed they are likely to advance it—or a coherent foreign policy. Even if not sensibly done, the consequences, although sometimes irritating, will normally be minor.

A range of specific consultation and coordination mechanisms exist or have been introduced to mediate these relationships between state governments and the Commonwealth. In some contexts coordination arrangements have existed for some time between state and Commonwealth governments in relation to international affairs—a longstanding participation by the states in delegations to the UN Food and Agriculture Organisation (FAO), for example,

have also been established which should improve liaison between state and territory ministerial visits overseas and Australia's diplomatic posts.

These various mechanisms and the way they are used might be said to have reflected both the attitudes and the effectiveness of policies of 'new federalism', the initiatives first of Malcolm Fraser's government in the 1970s to decentralise policies and funding in many areas (influenced by earlier US approaches in this direction under President Nixon) and then the Hawke government's new 'new federalism' of the 1980s. These developments have mainly emerged in the context of the regular premiers' conferences and the special premiers' conferences dealing with microeconomic reform.

Among the mechanisms for managing federal relationships is, of course, parliamentary discussion and consideration, particularly in the Senate, which was developed constitutionally, following the US pattern, as a states house. There is a degree to which the existence of the Senate has provided some safeguards to the domestic interests of the states in the Commonwealth's pursuit of its foreign policy. Its existence may also have reduced pressure to have greater public or parliamentary discussion of international treaties, which in Australia do not require legislative approval before acceptance but it is not evident that discussion in the senate on treaty issues has been substantial in the past.

The constraints that Senate consideration might offer have probably become more important since the increased acceptance of the fact that governments with majorities in the lower house will commonly not have majorities in the Senate. This tends to mean that for legislation generally, including any legislation needed to implement international obligations under the treaty powers of the Commonwealth, a more negotiated outcome is necessary. In this sense the emergence of a cooperative federalism process can be looked at in part as a recognition by the Commonwealth of the reality of shared powers.

At the same time, there seems to have been a general acceptance by the states as well as by the Commonwealth that, for whatever reason, the responses that Australia was making to the changes occurring internationally were too slow and that the persistence of short-term conflicts over the use of the shared responsibilities and powers was a major factor. Perhaps also a third factor, reflecting Duchacek's conclusion that '... uniformity needs diversity to be effective ...' (1987, p. 351), was important. This would reflect an acceptance by the Commonwealth that reliance on familiarity with local possibilities and local limitations, and on local pride in participation and responsibility, could increase policy efficiency and effectiveness.

Specific suggestions for managing the relationships between Commonwealth and state governments have included proposals for a Treaties Council, comparable to that in the Federal Republic of Germany, for constitutional change to limit the powers of the Commonwealth to legislate to implement treaty obligations, as well as for greater parliamentary scrutiny of treaties and their implications. None of these suggestions, even though gaining a degree of support at the 1984 constitutional convention, has been acted upon. In the case of the proposed constitutional amendment, this may be in part because of the poor record of achieving

smaller direct international role for the states but towards a greater involvement in cooperative participation. The traditional arguments supporting the need for a nation to speak with one voice in its international dealings remain strong, although it is more difficult, conceptually and practically, now that the dividing line between domestic and foreign policy has become blurred. However, despite occasional anomalies and minor exceptions from time to time, there is no general sense in which the present Australian state governments seek to differ from that, although there will undoubtedly be continuing and at times heated arguments about the way the Commonwealth makes use of its powers to be involved in domestic issues in response to what develops internationally. Nevertheless, while speaking with one voice remains critical, to achieve the objectives of federalism, cooperation and coordination with the states on what that one voice should be saying on national issues is important.

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